Fictitious invoice with charging of VAT – consequences for tax and accounting

[Translation of the article *Skenfaktura med momsdebitering – konsekvenser för skatt och redovisning*, by Björn Forssén, published in original in *Tidningen Balans fördjupning* (The Periodical Balans: Advanced articles) 2023, pp. 1–9. Translation into English by the author of this article, Björn Forssén.]

In the article the lawyer Björn Forssén accounts for the consequences for issuers as well as for receivers of a fictitious invoice with a VAT charge, that is "false VAT".

When an enterprise issues a fictitious invoice with an amount that is falsely denoted as VAT it leads to consequences for both tax liability and accounting. Although the VAT is to be seen as false it causes a liability of payment for the person issuing the invoice. If the receiver of the invoice erroneously accounts the false VAT as input tax it can lead to the receiver becoming responsible for tax fraud and also for book-keeping crime. The author also notes that the issuer of the invoice can be responsible to mention the false VAT in the annual report, if the amount is substantial.

1 Introduction

Article 203 of the EU's VAT Directive (2006/112/EC) states that *VAT shall be payable by any person who enters the VAT on an invoice*. The rule was introduced on 1 January, 2008 in the VAT act, *mervärdesskattelagen (1994:200)*, abbreviated GML, by SFS 2007:1376.[1] This led to the introduction of Ch. 1 sec. 1 third para and sec. 2 e of the GML with the consequence that anyone who has falsely charged value-added tax (VAT) in an invoice is liable to payment (Sw., *betalningsskyldig*) to the State for the amount, despite it does not constitute VAT according to the GML. Such an amount, which I denote a false VAT, shall be accounted in the order that applies for accounting of output tax for a tax liable.[2] If the amount is not corresponding to a delivery of goods or a supply of a service, it shall be accounted for the accounting period during which the invoice was issued.[3] The liability of payment to the State for the false VAT remains until the accounting period during which the enterprise has issued a credit note, if the SKV does not waive the demand for a credit note due to special reasons (Sw., *särskilda skäl*).[4] The invoicing rules in Ch. 11 of the GML do not stipulate any time limit for the issuing of an invoice,[5] and thus neither for the issuing of a credit note (that is for a credit invoice).

[1] The GML was replaced on 1 July, 2023 by the VAT act, *mervärdesskattelagen (2023:200)*, abbreviated ML, which does not change the problems in the article.

[2] See Ch. 13 kap. sec. 27 first sen. of the GML.

[3] See Ch. 13 sec. 27 second sen. of the GML.

[4] See Ch 13 sec. 28 and Ch. 11 sec. 10 of the GML.

[5] See prop. 2003/04:26, *Nya faktureringsregler när det gäller mervärdesskatt* (New invoicing rules regarding VAT) pp. 42, 48 and 84.

There are various cases of false VAT according to the preparatory works to the reform of 2008, where the following examples of different examples of erroneously charged VAT in the present meaning are stated:

- a tax liable charging VAT on a from VAT exempted goods or service,
- a tax liable charging VAT on a payment which does not constitute consideration for goods or a service,
- someone who is not tax liable charging VAT on goods or a service,
- a tax liable charging VAT with an erroneous tax rate,
- a tax liable charging VAT in a situation where the acquirer is who is tax liable for the VAT, so-called reverse charge,
- a tax liable charging VAT on exempted transaction of goods transported to another EU Member State (intra-Community – nowadays intra-Union – transaction) or on export of goods to a third country,
- a person who is not tax liable due to him not fulfilling the demands on taxable person (Sw., *yrkesmässig verksamhet* – nowadays *beskattningsbar person*) has by mistake charged VAT on a transaction and
- a person *committing tax fraud by issuing invoices with VAT which is not corresponding to any real transaction (fictitious transactions)*.[6]

In this article I am setting out from that an enterprise issuing an invoice and falsely enter an amount therein as VAT, since it is a matter of a fictitious transaction, that is the latter of the cases mentioned above. The questions that I am treating are what consequences the falsely charged VAT can cause for the enterprise besides the liability of payment to the State for the amount and for the receiver of the invoice and if, and in that case how, the issuer shall account for the false VAT.

2 Consequences according to the GML of issuing of fictitious invoice with false VAT

Of the preparatory works to the reform in 2008 follow that the legislator deemed that it followed already by Ch. 8 sec. 2 first para of the GML that a falsely charged VAT does not constitute input tax, since the amount falsely denoted as VAT in a received fictitious invoice does not constitute VAT according to the GML, but is what I call a false VAT. By the liability to pay such a false VAT being stipulated in a separate rule, Ch. 1 sec. 2 e of the GML, the legislator emphasized that for the person falsely charging the VAT shall that measure not lead to anything else than a liability of payment.[7]

Thus, the issuing of the fictitious invoice leads to a liability to pay to the State for the enterprise which has issued it regarding the therein as VAT falsely denoted amount. Since it is not a matter of tax liability according to the GML for the issuer, the reciprocity principle is not fulfilled for the receiver, which thereby is not allowed to deduct the amount as an input tax.[8]

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[6] See prop. 2007/08:25, *Förlängd redovisningsperiod och vissa andra mervärdesskattefrågor* (Extended accounting period and certain other VAT issues) p. 91.

[7] See prop. 2007/08:25 p. 90.

[8] See Ch. 8 sec. 2 first and second paras and sec. 3 first para of the GML and article 167 of the VAT Directive.

3 Entering in the book-keeping of false VAT in a fictitious invoice

In that in the present article hypothetical example it is not a matter about real business transactions having occurred, but an issued invoice has been drawn up for the sake of appearances. According to the main rule in the GML a liability of accounting occurs when a business transaction, through which tax liability has occurred, has been booked or should have been booked according to Generally Accepted Accounting Principles (GAAP), Sw., *god redovisningssed*,[9] and the tax liability presupposes according to Ch. 1 sec. 1 first para no. 1 of the GML that a transaction of taxable goods or services has been made within the country by a taxable person, that is in principle by an entrepreneur. According to the main rule on invoicing liability in the GML shall each taxable person secure that an invoice is issued by the taxable person himself (or in his name and on his behalf by the purchaser or a third person), for an transaction of goods or services which is made to another taxable person,[10] that is although if the tax liability according to the GML does not occur. The rules on invoicing liability in the GML constitute special legislation in relation to the Book-keeping Act, *bokföringslagen (1999:1078)*, abbreviated BFL, as general legislation on accounting liability for a person required to maintain accounting records (Sw., *bokföringsskyldig*) regarding the person's business transactions. Of the general rules on definitions of certain concepts in the Annual Accounts Act, *årsredovisningslagen (1995:1554)*, abbreviated ÅRL, it follows by Ch. 1 sec. 3 first para no. 3 that with net sales (Sw., *nettoomsättning*) is meant in the ÅRL: income from sold goods and services made which are included in the enterprise's normal activity with deduction for discount given, *VAT and other tax which is directly connected to the transaction*. Thus, all in all is my judgment that without an underlying business transaction no transaction according to the GML occurs, and thereby neither any tax liability, accounting liability or invoicing liability according to the GML.

According to Ch. 1 sec. 2 first para no. 7 of the BFL business transaction means *all changes in dimension and composition of an enterprise's wealth which depends on the enterprise's economic relations with the surrounding world, like cash received and paid, claims and debts emerged and own contributions to and withdrawals from the activity of money, goods or something else*. A fictitious invoice shall in my opinion not be booked in the current recording, since it is not corresponding to any business transaction that affects the course, economic result or balance of the business. However, the enterprise which has issued the invoice is liable of payment to the State for the false VAT entered therein. The question is how that amount shall be accounted (besides in a special tax return).

According to Ch. 3 sec. 1 of the ÅRL shall the balance sheet in summary account for the enterprise's total assets, allocations and debts and equity on the balance sheet day. Since the false VAT in question does not constitute tax, it shall not be accounted for as any tax debt in the balance sheet or as postponed tax in a note in the annual report.[11] It does neither constitute any contingent liability (Sw., *eventualförpliktelse*) or any commitment which is comprised by the rules in the ÅRL about off-balance sheet items. Although a commitment does not

[9] See Ch. 13 sec. 6 no. 1 of the GML and prop. 1993/94:99, *om ny mervärdesskattelag* (about a new VAT act) p. 234.

[10] See Ch. 11 sec. 1 first para of the GML.

[11] See Ch. 5 sec. 36 of the ÅRL about that a big enterprise shall inform in a note in the annual report regarding postponed tax.

constitute an off-balance sheet item, it can, however, be appropriate to mention in a note or in the administration report.[12]

I consider that an enterprise which has issued a fictitious invoice with a false VAT therein is liable to account for the amount in question in a note in the annual report, if it is of importance for the judgment of the *balance* of the business, which I deem that it is – at least concerning not insignificant suchlike amounts – due to the liability of payment to the State affecting the liquidity of the enterprise and the prudence concept meaning that the enterprise must not be overvalued in the accounting. In Ch. 5 of the ÅRL it is stated what shall be entered in notes in the annual report. Concerning the demand of notes for smaller and bigger enterprises is in my opinion what is stated regarding so-called contingent liabilities (Sw., *eventualförpliktelser*) in Ch. 5 sec. 15 of the ÅRL of interest in the present context. There it is stipulated that if an enterprise has guarantee commitments, economic commitments or contingent liabilities which shall not be entered in the balance sheet (contingent liabilities), it shall inform about the sum of those. Regardless of whether a false VAT has been paid or not to the State, *the liability of payment* remains only until a credit note has been issued by the enterprise, why I consider that it constitutes a contingent liability. The amount shall not be accounted for in the current recording,[13] but I deem that a remaining liability of payment should be mentioned in a note in the enterprise's annual report.

4 Criminal law consequences about false VAT in a fictitious invoice

The Tax Fraud Act, *skattebrottslagen (1971:69)*, abbreviated SBL, was altered on 1 July, 1996, by SFS 1996:658, so that the effect crime *skattebedrägeri* nowadays constitutes a risk crime, called *skattebrott* (both expressions read tax fraud in English). This means that the criminal cases can be decided without awaiting legally binding decisions in the tax courts. However, what is erroneous information must – regardless of the construction otherwise – still be decided with guidance of the tax rules, so that the connection between the criminal tax case and the taxation question will not be broken.[14] The tax fraud is described as follows in sec. 2 of the SBL:

He or she who in another way than orally with intent gives an erroneous information to an authority or omits to submit a tax return, a statement for control purposes or another prescribed information to an authority, and thereby causing a risk of tax being withheld the public or wrongly counted in or reimbursed to himself or herself or someone else, is sentenced for tax fraud to prison for two years at the most.

Thus, it shall be a matter of an *erroneous information* in writing given with *intent* in a tax return etc. and that a *risk* shall emerge for *tax* (Sw., *skatt*) to be withheld from the State or wrongly counted in or reimbursed to the person filing the tax return etc. Thereby, the tax fraud concerns wrongly or omitted accounting of tax, that is it constitutes an accounting crime, why no payment crime in itself exists concerning the tax account system (Sw., *skattekontosystemet*), which was introduced on 1 November, 1997, whereby the so-called

[12] See prop. 1998/99:130, *Ny bokföringslag m.m.* (New book-keeping act etc.) Part 1, p. 303.

[13] Then the result must not be undervalued for income tax purposes, I consider that the amount shall neither be written off.

[14] See prop. 1995/96:170 p. 91.

collection crime (Sw., *uppbördsbrottet*) was abolished regarding tax deduction at source (Sw., *källskatteavdrag*).[15]

If an enterprise, for example a natural person (sole proprietorship) or a legal person like a limited company (Sw., *aktiebolag*), has issued an invoice wherein an amount falsely is denoted as VAT, the amount shall as a false VAT be accounted for in a special tax return (Ch. 26 sec. 7 of the SFL) and not as a real VAT in a VAT return (Ch. 26 sec. 21 of the SFL). That the amount denoted falsely as VAT is not VAT according to the GML may be meaning that the issuer of the invoice has not committed a crime regarding *skatt* (tax), that is tax fraud according to sec. 2 of the SBL. For that it would take a clarification in the SBL meaning that with *skatt* (tax) is also meant an amount falsely denoted as VAT in an invoice. In Ch. 3 sec. 12 of the SFL it is stipulated that *what is said about VAT* also applies to amounts falsely denoted as VAT in an invoice and that *what is said about tax liable according to the VAT act also applies to a person who is liable to pay such an* amount. However, it is according to Ch. 3 sec. 1 first para first sen. of the SBL only a matter of the usage of certain terms and expressions in the SFL itself. An amount which is regarded here may thereby be deemed as *skatt* (tax) only concerning the procedure for its accounting, not materially according to the GML. To determine what is *skatt* (tax) materially by a procedure rule in the SFL is in conflict with the principle of legality for taxation measures in Ch. 8 sec. 2 first para no. 2 of the 1974 Instrument of Government, *regeringsformen (1974:152)*, abbreviated RF. Thus, a natural person who carries out activity under a sole proprietorship or as a representative of a limited company, and who is issuing an invoice with a false VAT, should thereby not be deemed committing tax fraud according to the SBL, since an erroneous information regarding *skatt* (tax) which shall be accounted for in a VAT return do not come up. Tax surcharge (Sw., *skattetillägg*), which by the way also is considered a criminal charge,[16] can neither be imposed on false VAT, since the sanction tax surcharge is imposed on *skatter* (taxes) which are comprised by the SFL,[17] and an amount in the form of a false VAT is not *skatt* (tax) in a material respect. The only consequence is procedural and regards the liability of payment, that is the sole proprietorship, or the limited company shall account for an amount that constitutes a false VAT in a special tax return and pay it.

However, tax fraud can come up for an entrepreneur who has received the invoice and tries to exercise right of deduction for the falsely charged VAT in a VAT return, since the enterprise lacks right of deduction like for input tax regarding the amount in question, according to Ch. 8 sec:s 2 and 3 of the GML. In such a case can criminal law responsibility, be of interest also for he or she who has issued the invoice with the false VAT, namely according to Ch. 23 sec. 4 of the BrB for complicity in the tax fraud that the receiver of the invoice can be deemed to have committed by trying to make a deduction of the amount. That situation can be subject of

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[15] See prop. 1996/97:100, *Ett nytt system för skattebetalningar, m.m.* (A new system for tax payment etc.) Part 1 p. 450; the [Swedish] tax payment act, *skattebetalningslagen (1997:483)*, which was replaced on 1 January, 2012 by the Taxation Procedure Act, *skatteförfarandelagen (2011:1244)*, abbreviated SFL.

[16] The Swedish tax surcharge is according to the European Court of Justice comparable with *a criminal charge* according to article 6 of the European Convention. See the European Court of Justice's verdicts on 23 July, 2002: Janosevic v. Sweden, Application no. 34619/97, item 71; and Västberga Taxi Aktiebolag and Vulic v. Sweden, Application no. 36985/97, item 82. Thereby, the legislator confirmed that tax surcharge is to be considered a sanction comparable with a criminal charge according to the European Convention. See prop. 2002/03:106, *Administrativa avgifter på skatte- och tullområdet, m.m.* (Administrative charges in the fields of tax and customs etc.) p. 245.

[17] See Ch. 49 sec. 2 of the SFL.

investigations by the tax authority (Sw., *Skatteverket*, abbreviated SKV) and the Economic Crime Authority (Sw., *Ekobrottsmyndigheten*, abbreviated EBM) in cases regarding VAT frauds of so-called carrousel type, where a fictitious enterprise exists in a chain of enterprises, whereby such an enterprise is called a missing trader (or goalkeeper company or front enterprise), that is it issues an invoice with a false VAT and the receiver of the invoice tries to exercise right of deduction for the amount by noting it as input tax in a VAT return to the SKV. By the receiver of the invoice in the hypothetical example knowing or should have known that the information of VAT was false, it is a matter of a case of abusive practice that can lead to criminal law responsibility for both the issuer and the receiver of the invoice.[18]

The CJEU considers taken by itself that the right of deduction for input tax cannot be denied anyone for acquisitions made for the purpose of making taxable transactions, only because someone before or after in the chain of delivery has made a with regard of VAT fraudulent transaction which the person in question did not know about and neither could have known about.[19] However, it is so in the present hypothetical example that the receiver of the invoice has not received goods or services and thus he or she knew or should have known that the invoice received was drawn up for the sake of appearances, why he or she gave erroneous information in the VAT return to the SKV, by therein noting the amount in the invoice received as an input tax, which he or she thus is not entitled to deduct. In such a case can responsibility for tax fraud come up or tax surcharge be imposed.[20]

If the receiver of the invoice has booked the false VAT as input tax, he or she can also be responsible for book-keeping crime according to Ch. 11 sec. 5 first para of the BrB due to erroneous information as well in his or her book-keeping, if the other suppositions for such responsibility are fulfilled, that is if the accounting measure is made with intent or by carelessness and means that the balance of the business cannot be judged on the whole.[21]

Although a natural person carrying out an activity under sole proprietorship or as a representative of a limited company cannot be deemed committing tax fraud for the issuing itself of the fictitious invoice with a false VAT, he or she can be responsible for book-keeping

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[18] In Forssén 2022, ”Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704”, VAT frauds of so-called carrousel type and NJA 2018 p. 704, I state that despite that the Supreme Court of Sweden (Sw., *Högsta domstolen*, abbreviated HD) confirmed the verdict of conviction by the majority of the Svea Court of appeal, it is not clear that abusive practice *in itself* means that criminal law responsibility exists. The senior judge of appeal, who was dissentient and wanted to acquit the defendant, stated inter alia that the Court of Justice of the EU (CJEU) in the case C-255/02 Halifax et al. (ECLI:EU:C:2006:121), item 93, expressed that *the relationship that it is concluded that an abusive practice exists does not need to lead to any measure of sanction, which would demand a clear and unequivocal support in law, but instead reimbursement liability since the deduction has become unjustifiably*. I also noted that the senior judge of appeal moreover stated that the criminal law principle of legality according to Ch. 1 sec. 1 of the BrB functions as a guarantee of legal certainty, by it raising a demand on the legislation meaning that the individual must be able to foresee when he or she can be subject of criminal law intervention. See Forssén 2022, pp. 123–125.

[19] See the Joint cases C-354/03, C-355/03 and C-484/03 Optigen et al. (ECLI:EU:C:2006:16), item 55. See also Forssén 2022 p. 121.

[20] The prosecutor may, however, not prosecute a natural person if the SKV has decided to impose tax surcharge on him or her (sec. 13 b of the SBL). Tax surcharge may not be imposed if the preliminary investigation already is going on against him or her regarding the SBL (Ch. 49 sec. 10 a of the SFL).

[21] See also regarding inter alia the prerequisite false document at *coarse* book-keeping crime in Ch. 11 sec. 5 second para of the BrB.

crime regarding the annual report according to Ch. 11 sec. 5 first para of the BrB.[22] In my opinion, this can be the case if the liability of payment to the State for the false VAT is not mentioned in a note in the enterprise's annual report, as I am stating should be made in the nearest preceding section, that is if the contingent liability that the liability of payment means demands such an information for the balance of the business being possible to judge on the whole. By the way, the circumstances in the present case should typically be like that the prerequisites intent or carelessness are fulfilled.[23]

5 Question about VAT registration due to issued fictitious invoice with false VAT

The sole proprietorship or the limited company are not liable to register to VAT due to the issuing of the fictitious invoice, since the amount therein falsely denoted as VAT is not comprised by tax liability according to the GML. This follows by the liability of registration according to Ch. 7 sec. 1 first para no. 3 of the SFL only applying to *a person tax liable according to the VAT* act. If liability of payment applies for such an amount, it means in itself, as mentioned above, only that the amount shall be accounted for in a special tax return and not in a VAT return. It is only he or she who shall account for real VAT in VAT returns who shall register to VAT. The only consequence of an amount being falsely entered as VAT in an invoice issued is the liability of payment of the amount to the State, and it shall be fulfilled in a special tax return but does not remain if a credit note of the amount is issued.[24]

6 Question about a representative's liability for false VAT in a fictitious invoice

In case the fictitious invoice with a false VAT has been issued by a legal person, like a limited company according to above, I deem furthermore that a representative's liability according to the main rule in Ch. 59 sec. 13 of the SFL cannot apply to the representative who has issued the invoice. The legislator states in the preparatory works to the SFL that tax according to Ch. 59 of the SFL *is tax if the main responsibility regards tax*.[25] However, an amount falsely denoted as VAT is, as mentioned above, not a real VAT, why the main responsibility of the legal person which has issued the invoice does not regard *skatt* (tax) in a material respect, that is according to the GML. Since legislation must not be made in the preparatory work itself, it is in my opinion not possible to impose the representative of the legal person a liability of payment according to Ch. 59 sec. 13 of the SFL, if the false VAT is not paid by the legal person. By the way, it would be in conflict with that it in the preparatory works of the reform in 2008 on the introduction in the GML of the liability of payment in question is stated that *a falsely charged VAT shall not lead to something else than a liability of payment for the person*

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[22] According to Ch. 6 sec. 1 first para no. 1 of the BFL, limited companies shall always finish the current recording with an annual report, whereas a natural person (sole proprietorship) shall do so only on conditions according to item 6 of the rule.

[23] See also regarding inter alia the prerequisite false document at *coarse* book-keeping crime in Ch. 11 sec. 5 second para of the BrB.

[24] The VAT registration number is important for the SKV's control activity, why I in various contexts has pointed out that the SKV should develop its registration control activity. For example, I mention in my doctor's thesis, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier* (Tax and payment liability to VAT in joint ventures and shipping partnerships), Örebro Studies in Law 4 2013, p. 76 (Forssén 2013), that the EU had abandoned that as many enterprises as possible should be comprised by the VAT system to instead recommend restraint and a priority of registration control and questions about collection of VAT.

[25] See prop. 2010/11:165, *Skatteförfarandet* (the taxation procedure) Part 2, p. 905.

having charged the tax,[26] that is for the legal person. In my opinion, this should be regarded in the present context at the interpretation of the scope of the representative's liability according to Ch. 59 sec. 13 of the SFL. Thus, in my opinion it is not of interest to judge the subjective prerequisites in Ch. 59 sec. 13 of the SFL, intent or coarse carelessness, since it still is a matter of responsibility for a *skatt* (tax) regarding the underlying tax matter or case by the company.

However, it is more likely that the representative of a limited company who receives a fictitious invoice might be imposed a personal liability of payment in the form of representative's responsibility according to the special rule on such responsibility in Ch. 59 sec. 14 of the SFL regarding a too high accounting of excess input tax. If the representative has given erroneous information in a VAT return for the company, by accounting for the false VAT of a received fictitious invoice as an input tax, and what has been in effect accounted as input tax exceeds accounted output tax in the VAT return, with the result that a too high excess input tax has been accounted for, can the SKV, in my opinion, sue the representative before the administrative court (Sw., *förvaltningsrätten*) for liability of payment for such an amount, whereby also the subjective prerequisites for responsibility, intent or coarse carelessness, shall be tried.

7 False VAT in a fictitious invoice issued of an enterprise being declared bankrupt

By Ch. 6 sec. 3 of the GML it follows that if a tax liable has been declared bankrupt the bankrupt's estate is tax liable for a transaction in the activity after the decision on bankruptcy. For the time before the decision on bankruptcy the debtor (Sw., *gäldenären*) is tax liable. If that person has issued a fictitious invoice with a false VAT, a liability of payment to the State for the amount in question exists, as mentioned above, but it does not remain, as also mentioned above, if a credit note of the amount has been issued.

The receiver in bankruptcy has the authority to pursue claims concerning the debtor's VAT accounting, and according to the handbook of the Enforcement Authority (Sw., *Kronofogden*) it should be done if it can lead to the bankrupt's estate getting back VAT from the SKV. However, it is noted therein that there is no reason for the receiver in bankruptcy to take measures for the debtor's VAT debt becoming lower, but it can be justified for a representative of a legal person in bankruptcy, because he or she is running a risk of personal liability of payment.[27] If the debtor is for example a limited company, it is thus in line with what I state in the nearest preceding section about that a representative's responsibility for a false VAT cannot be imposed the representative of a receiving company, and that it is in the latterly mentioned representative's interest to act for a representative of the company in bankruptcy, in consultation with the receiver in bankruptcy, issuing a credit note, whereby I repeat that there is no time limit for such a measure.

8 Conclusions

In section 1, I state that the questions I am aiming to answer in this article are what the consequences are by an enterprise issuing an invoice and falsely denote an amount therein as

[26] See prop. 2007/08:25, p. 90.

[27] See *Handbok Konkurstillsyn* (Handbook on supervision in bankruptcy), Edition 6 (2022), section 2.17.5 (www.kronofogden.se).

VAT, since the invoice does not correspond to any real transaction, but it is a matter of a fictitious transaction. I conclude in section 1 that it in 2008, by virtue of article 203 of the VAT Directive, was introduced a special liability of payment to the State in the GML (Ch. 1 sec. 1 third para and sec. 2 e) for such amounts, which I denote false VAT, concerning inter alia falsely charged VAT in invoices for fictitious transaction. In sections 2 and 4–7, I have concluded what the consequences are, besides liability of payment to the State for the false VAT for the enterprise issuing the fictitious invoice, for that enterprise and for the receiver of the invoice, and in section 3 I conclude whether, and if so how, the issuer shall book the false VAT. I account here in summary for these conclusions of mine section by section.

In section 2, I conclude that the consequences *according to the GML* of issuing a fictitious invoice with false VAT is a liability of payment to the State for the amount in question for the enterprise having issued the invoice, and since the issuer is not tax liable like for a real VAT the receiver of the invoice is lacking a right of deduction as for input tax for the amount in question.

In section 3, I state that a fictitious invoice shall not be accounted for in the current recording, since it does not correspond to a real business transaction but conclude that the false VAT should be mentioned by the issuer in a note in the annual report, since the liability of payment to the State only remains until a credit note has been issued. I deem that such a liability constitutes a contingent liability which demands information in a note in the annual report, if the amount is not insignificant, since it affects the liquidity of the enterprise and the enterprise's balance must not be overvalued in the accounting.

In section 4, I make the following conclusions regarding the criminal law consequences which can occur regarding false VAT in a fictitious invoice:

- A natural person carrying out an activity under sole proprietorship or as a representative of a limited company, and who is issuing an invoice with a false VAT, should be considered committing tax fraud according to sec. 2 of the SBL. This because no erroneous information regarding *skatt* (tax) comes up thereby. That false VAT does not constitute tax according to the GML, that is materially, also means that tax surcharge can neither be imposed on the amount in question. The only consequence for the sole proprietorship or the limited company is procedural and means according to the SFL that the liability of payment shall be fulfilled by the false VAT being accounted for in a special tax return and be paid.

- Moreover, I state that tax fraud – and/or tax surcharge – can, however, come up for the receiver of the fictitious invoice, if that person has given an erroneous information in a VAT return by therein entering the false VAT as input tax, which is wrong since right of deduction is lacking regarding the amount due to the issuer not being tax liable for it, but only liable of payment according to the GML. I also state that in such a case can the issuer be imposed criminal law responsibility for complicity in tax fraud.

- Furthermore, I state on the theme of book-keeping crime according to Ch. 11 sec. 5 of the BrB partly that if the receiver of the invoice has booked the false VAT as input tax, he or she can incur a criminal law responsibility due to an erroneous information in the book-keeping, partly that a natural person carrying out activity under sole proprietorship or who is a representative of a limited company can be deemed incurring criminal law responsibility, if the liability of payment for the contingent

> liability as the liability of payment to the State for the false VAT constitutes is not mentioned in a note in the enterprise's annual report and the balance of the business thereby cannot be judged on the whole.

In section 5, I state, concerning the question about VAT registration due to an issued fictitious invoice with false VAT, that such a liability in itself does not exist for someone who shall fulfil liability of payment for the amount to the State in a special tax return. It is only a person who shall account for real VAT in VAT returns who shall register to VAT.

In section 6, I conclude concerning the question on a representative's responsibility regarding false VAT in a fictitious invoice, that such a responsibility, according to the main rule thereof in Ch. 59 sec. 13 of the SFL, cannot apply to the representative of a legal person, for example a limited company, which has issued the invoice, since the main responsibility by the legal person does not regard *skatt* (tax). The legislator states in the preparatory works to the SFL that tax according to Ch. 59 of the SFL *is tax if the main responsibility regards tax*, but an amount falsely denoted as VAT is not a real VAT, why the main responsibility by the legal person issuing the invoice does not regard *skatt* (tax) materially according to the GML. Since legislation must not be made in the preparatory works, it is not possible to impose the representative of the legal person a personal liability of payment in the form of representative's responsibility according to the special rule on such responsibility in Ch. 59 sec. 14 of the SFL regarding a too high accounting of excess input tax, if the representative has given erroneous in a VAT return for the company, by accounting the false VAT in the fictitious invoice received as an input tax. This causes in the case that the debtor is a legal person, for example a limited company, which has been declared bankrupt, that I in section 7 conclude that it is in the interest of the representative of a company receiving a fictitious invoice to act for the company in bankruptcy issuing a credit note.

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