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Legal certainty in cases on VAT and connected questions in Sweden

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1 Introduction

In this article, I come back to the reform of the value-added-tax (the VAT) which was carried out in Sweden on 1 July, 2023 by *mervärdesskattelagen (2023:200*, the VAT act, abbreviated ML).[1] Previously, I mentioned that Ch. 6 sec. 7 of the ML (*1994:200*, abbreviated GML)[2] had been altered by ML Ch. 5 sec. 3 and sec. 27, so that the rule nowadays better corresponds with the nearest corresponding rules in the EU's VAT Directive (2006/112/EC),[3] that is the articles 14(2)(c) and 28. In relation to the general VAT rules of the legislation, it constituted one of the special rules on who is tax liable (nowadays liable for payment) in certain cases.[4] Like in Forssén 2024a and Forssén 2024b, I call the special rule in question a special 'VAT commission rule', since it in practice has been considered applying not only in cases of commission trading in a civil law sense, according to the tax authority (Sw., *Skatteverket*, abbreviated SKV).[5]

In a perspective of legal certainty, the problem is that the SKV in one of its standpoints has made an addition meaning that the SKV considers that its perception of current law still would be correct concerning the special 'VAT commission rule' also after the introduction of the ML on 1 July, 2023. I argue for the opposite viewpoint and in Forssén 2024b I mention consequences in the form of lost tax revenues for the State regarding trade in computers and mobile phones. It depends on the SKV allowing above all big international enterprises not to be taxed for VAT purposes for royalty on software and instead trying to get the VAT for both

[1] See Björn Forssén, *Momsreformen i Sverige – flera minus än plus beträffande implementeringen av bestämmelserna i EU:s mervärdesskattedirektiv* (A proposal for a great tax reform in Sweden which also is a preparation for an EU tax), JFT 1–2/2024, pp. 48–82 (Forssén 2024a). See also Björn Forssén, *Synpunkter på vissa regler i förslaget till en ny mervärdesskattelag i Sverige – SOU 2020:31* (Viewpoints on certain rules in the proposal to a new VAT act – SOU 2020:31), JFT 3/2020, pp. 388–399 (Forssén 2020a). Forssén 2020a and Forssén 2024a are available on my website, www.forssen.com.

[2] The rule was to be found also in the predecessor to GML Ch. 6 sec. 7, i.e. in first para of item 3 of the instructions to sec. 2 of the VAT act, *lag (1968:430) om mervärdeskatt*.

[3] EU, the European Union or the Union. The VAT Directive, complete title: COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax.

[4] See Forssén 2024a, p. 64. See also Björn Forssén, *Mellanmän och frågor om karusellhandel respektive vinstmarginalbeskattning – en jämförelse av gamla och nya mervärdesskattelagen i Sverige* (Middlemen and questions about carrousel trading and profit margin taxation – a comparison of the old and the new VAT act in Sweden), JFT 4/2024 pp. 294–329, 294 (Forssén 2024b). Forssén 2024b is also available on www.forssen.com.

[5] See Forssén 2024a, pp. 64, 66 and 67 and Forssén 2024b, pp. 294 and 295.

hardware and software from a middleman whose taxable amount should only consist of the commission from such a mandator.

Another circumstance that I have mentioned previously concerns that the SKV in its standpoints regarding staffing within health care and social care has disregarded the perception of the Court of Justice of the EU (CJEU) on current law regarding the matter of the value-added taxation.[6] I have stated that the SKV has a history of disregarding in its standpoints that the CJEU in that respect has emphasized the importance of determining who is a tax subject, before the question on the tax object is treated.[7] By its standpoints, the SKV has contributed to unclearness for the appliers when the SKV did not regard the EU law in the field of VAT.[8] Moreover, I come back to my judgment in Forssén 2019a of the problem with regard to the Finnish Supreme Administrative Court's case-law and the Finnish tax authority's detailed instructions.

At the review of the two described cases, which I call the main cases in this article, I use the expressions actual current law and current law in a true sense respectively considering what is deemed applying with respect of VAT. Thereby, I consider that an actual current law can exist by the SKV – in the form of administrative practice – or by the district administrative courts and the administrative courts of appeal. In other words, by an actual current I mean such a current law that is not following already by interpretation of the rule in question, and which is neither expressed regarding it in the form of case-law from the Swedish Supreme Administrative . Court (*svenska högsta förvaltningsdomstolen* – here abbreviated HFD) or the CJEU, whereas this is the case regarding what I call current law in a true sense.[9] Thereby, the CJEU is the utmost interpreter of the EU law.[10]

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[6] See the CJEU-verdict C-594/13 ("go fair" Zeitarbeit), ECLI:EU:C:2015:164, items 23 and 24.

[7] See *Moms och bemanning inom vård och omsorg – den finska och svenska mervärdesskattelagen i förhållande till EU-rätten* (VAT and staffing within health and care – the Finnish and Swedish VAT act in relationship to the EU law), JFT 4/2019 pp. 240–253 (Forssén 2019a). See also Björn Forssén*, Bemanningsföretagens momsstatus inom vård och omsorg* (The staffing enterprises' VAT status within health and care), Svensk Skattetidning (Swedish Tax Journal) 1/2017 pp. 15–25 (Forssén 2017). Forssén 2017 and Forssén 2019a are available on www.forssen.com.

[8] See the SKV's standpoint of 2018-10-25, *Uthyrning av vårdpersonal, mervärdesskatt* (Hiring out of health care personnel, value-added tax), dnr 202 398355-18/111, and the SKV's standpoint of 2018-10-25, *Social omsorg, mervärdeskatt* (Social care, value-added tax), dnr 202 398382-18/111). See the SKV's website (www.skatteverket.se), under *Rättslig vägledning* (Legal guidance) – visited 2025-07-14).

[9] See Björn Forssén, *Ord och kontext i EU-skatterätten – En analys av svensk moms i ett law and language-perspektiv: Tredje upplagan* (Words and context in the EU tax law: An analysis of Swedish VAT in a law and language-perspective Third edition), self-published 2019, Forssén 2019b, section 1.4 (*Språkliga frågor* – Language questions). In Forssén 2019b, I use the expressions *faktisk gällande rätt* (actual current law) and *gällande rätt i egentlig mening* (current law in a true sense) respectively in the following sections: 1.3.2, 2.5, 3.1, 3.3.1, 3.3.3.1, 3.3.4, 3.11.3, 3.11.5, 5.1.1, 5.1.3, 5.1.11, 5.2.1, 5.2.3, 5.2.8.1 and 5.2.8.3. Forssén 2019b is available on www.forssen.com, and in a printed version at Kungliga biblioteket i Stockholm (the National Library of Sweden) and at the Lund University Library.

[10] That the CJEU is the utmost interpreter of the EU law follows by the highest court in a Member State being supposed to obtain a preliminary ruling from the CJEU concerning an interpretation question that the national court cannot determine. See article 267 third para of the Treaty on the Functioning of the European Union (here abbreviated TFEU).

In both the main cases a legal uncertainty exists for the individual, that is for the tax subject in the capacity of an entrepreneur. Concerning the importance of the ML having replaced the GML on 1 July, 2023, the SKV has regarding the question of the existence of a special 'VAT commission rule' only made in that for the question interesting standpoint of 2020-09-25 an addition,[11] where the SKV notes that the ML does not mean any alteration of the SKV's legal judgment.[12] No analysis is presented regarding whether the rule still shall be considered constituting a special rule with an application exceeding cases of commission trading in a civil law sense. Concerning the question about VAT exemption regarding staffing within health care and social care, the SKV did neither make any analysis of how its standpoints have been affected by the introduction of the ML. The standpoint of 2018-10-25 regarding social care had actually been replaced on 2021-06-17, but only so that social care services regulated in civil law legislation could be comprised by the exemption.[13] This does not affect the question about value-added taxation of staffing enterprises and the importance of determining who is a tax subject, before the question about the tax object is treated. What contributes to the legal uncertainty for the individual is that the SKV only briefly stated in an addition of 2023-05-31 that the standpoint of 2021-06-17 shall remain, since the SKV without any analysis stated that its legal judgment is not affected of the ML replacing the GML. In the same way, the SKV only stated in an addition of 2023-06-01 that the standpoint of 2018-10-25 about hiring out of health care personnel shall remain, since the SKV considers that its legal judgment remains unchanged also in that respect after the introduction of the ML.[14]

In the following, I am going through how I deem that the SKV, by lacking analysis of the importance for the deduction question and the tax subject question of the ML having replaced the GML, has contributed to perceptions about the existence of an actual current law concerning the main cases regarding middlemen and staffing within health and care respectively. Perceptions about the existence of an actual current law deviating from the VAT Directive means that the legal certainty is undermined for the entrepreneur in cases on VAT and connected questions in Sweden.

2 Lacks in the analysis by the SKV of the tax subject question causes legal uncertainty

2.1 Legal uncertainty exists by the SKV's addition in standpoint regarding the question about the special intermediation rule and commission trading

The central question in Forssén 2024b concerned whether Swedish VAT law has contained what I call a 'rubber rule'. If so, it means according to the SKV that the concept commissioner (or commission trading) was expanded to comprise also *comparable representatives*. The result of this was that the middleman would be deemed an ordinary retailer according to the

[11] "Nytt: 2023-05-31" ('News: 2023-05-31').

[12] See the SKV's standpoint of 2020-09-25, *Förmedling av tjänster i eget eller i annans namn, mervärdesskatt* (Intermediation of services in one's own or somebody else's name, value-added tax), dnr 8-314934, section 3.2. See https://www4.skatteverket.se/rattsligvagledning/384806.html?date=2020-09-25 (visited 2025-07-14). See also Forssén 2024b, p. 300.

[13] See the SKV's standpoint of 2021-06-17, *Social omsorg, mervärdesskatt* (Social care, value-added tax), dnr 8-1057054, section 4.1.1. See https://www4.skatteverket.se/rattsligvagledning/392818.html?date=2021-06-17 (visited 2025-07-14).

[14] See the SKV's website www.skatteverket.se, under *Rättslig vägledning* (Legal guidance) – visited 2025-07-14).

general VAT rules. Thereby, the tax assessment basis for instance for an ordinary agent, which consists of a commission from the mandator, would instead be constituted of the whole sales price to customer. According to the SKV, such a special 'VAT commission rule' existed in older Swedish VAT law, namely in GML Ch. 6 sec. 7 and in its predecessor, first para of item 3 of the instructions to sec. 2 of the VAT act of 1968.[15]

Here, I express GML Ch. 6 sec. 7, which the SKV thus has claimed constitutes a special 'VAT commission rule' and articles 14(2)(c) and 28 of the VAT Directive respectively:[16]

> *GML Ch. 6 sec. 7* (in my translation)
>
> *If anyone acting in his own name mediate goods or services on behalf of another person and receives the payment for the goods or services shall at the judgment of the tax liability for the transaction of goods or services, this be deemed made by himself as well as by his mandator*.
>
> *Article 14(2)(c) of the VAT Directive*
>
> 2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:
>
> (c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.
>
> *Article 28 of the VAT Directive*
>
> Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.

By the ML replacing the GML, I stated that the special intermediation rule of GML Ch. 6 sec. 7 was altered, so that it nowadays consists of two rules, ML Ch. 5 sec. 3 second para no. 3 and sec. 27.[17] These correspond in principle both the mandatory rules in question of the VAT Directive, that is article 14(2)(c) and article 28. The two rules in the ML have the following wordings:[18]

> *ML 5 kap. 3 § andra stycket 3* (in my translation)
>
> *With supply of goods shall also be meant transfer of goods in pursuance of a commission agreement on purchase or sale*.

[15] See Forssén 2024b, pp. 326 and 327.

[16] See Forssén 2024b, p. 295.

[17] See Forssén 2024b.

[18] See Forssén 2024b, pp. 295 and 296.

ML 5 kap. 27 § (in my translation)

If a taxable person in his own name but on behalf of another person takes part in a supply of services, the taxable person himself shall be deemed acquiring and supplying these services.

I noted that the criterion about the middleman *receiving the payment for the goods or services*, which existed in GML Ch. 6 sec. 7 as well as in the VAT act of 1968, has not been transferred to ML Ch. 5 sec. 3 second para no. 3 and sec. 27. Furthermore, I noted that the expression *in his own name*, which existed in GML Ch. 6 sec. 7 as well as in the predecessor of the VAT act of 1968, has not been transferred from GML Ch. 6 sec. 7 to ML Ch. 5 sec. 3 second para no. 3, which is in compliance with article 14(2)(c) of the VAT Directive, where that expression does not exist concerning intermediary situations constituting commission trading of goods. Instead, the expression *in his own name* is to be found in article 28 of the VAT Directive concerning middleman situations regarding supply of services, and it has been retained also in ML Ch. 5 sec. 27. Thereby, a correct implementation nowadays exists in the Swedish VAT legislation of the directive rules regarding intermediary situations concerning commission trading of goods and supply of services respectively.[19] Setting out from the SKV's standpoint of 2020-09-25, with the addition of 2023-05-31, it is unclear if the SKV still considers this after the ML having replaced the GML.[20]

I concluded that it may be deemed clarified by the VAT reform of 2023 that it no longer exists such a special 'VAT commission rule' that the SKV has asserted, if a suchlike at all can be deemed having existed in the Swedish VAT law. By the introduction of ML Ch. 5 sec. 3 second para no. 3 current law has been altered in the present respect. There is no longer any 'rubber rule' entailing that an ordinary agent could be tax liable (nowadays liable for payment) for the whole sales price of goods or services to customer, instead of only regarding the commission that the agent receives from the mandator only because the agent (the middleman) receives the payment from the customer and it is not possible to identify the mandator in the invoice issued by the agent to the customer. In my opinion, it is nowadays requested that a commission trading in a civil law sense exists for a middleman to be compared for VAT purposes with an ordinary retailer.[21]

The alteration by ML Ch. 5 sec. 3 second para no. 3 of what is considered as commission trading with respect of VAT shows in itself that the SKV's perception about the scope of GML Ch. 6 sec. 7 and of its predecessor in the VAT act of 1968 obviously was not complying with law. Thus, the SKV's perception and the actual application of law were only based on the preparatory works. The SKV has, to support its standpoint that the concept commissioner is broadened due to the 'VAT commission rule' to comprise also *comparable representatives*, asserted that it in the preparatory works of the VAT act of 1968 was stated that the expression *in his own name* would regard *commissioners and comparable representatives*.[22] That the

[19] See Forssén 2024b, p. 296.

[20] See Forssén 2024b, sections 2, 3 and 9.

[21] See Forssén 2024b, sections 2, 3, 7 and 9.

[22] See prop. 1968:100 (*Kungl. Majt:s proposition till riksdagen med förslag till förordning om mervärdeskatt, m.m.* – the Government's bill to the Parliament with proposal for a regulation on VAT, etc.), p. 121. See also Forssén 2024b, sections 2 and 9 and Björn Forssén, *'Momskaruseller' och ändringen av den särskilda förmedlingsregeln genom nya mervärdesskattelagen* ('VAT carrousels' and the alteration of the special

SKV's standpoint thereby was not based on the VAT act and the material taxation rule was in conflict with the constitutional principle of legality for taxation measures.[23]

With regard to the risk that other administrative authorities, like the Economic Crime Authority (Sw., *Ekobrottsmyndigheten*, abbreviated EBM), and the first and second instances of the administrative courts respectively apply an actual current law based on the SKV's perception in the question about the existence of a special 'VAT commission rule', and not on an analysis of the material taxation rule itself, the SKV contributes to a continued legal uncertainty by the SKV in its addition of 2023-05-31 to its standpoint of 2020-09-25 merely notes that the ML does not cause any change of the SKV's legal judgment.[24] Above all for an agent, the present situation is not foreseeable, where he or she cannot rely on the letter of the act and the wording of the directive rules in question. With its addition to the standpoint in question, the SKV may namely be perceived continuously asserting that for instance an ordinary agent can be comprised by a special 'VAT commission rule' being considered a special rule – a 'rubber rule' – making the agent comparable for VAT purposes with a trader, by commission trading with respect of VAT being possible to expand in addition to cases of commission trading in a civil law sense. I repeat from Forssén 2024b that the question arising is whether the SKV puts forward its addition and at the same time regards that the legislator in its proposal of 17 February, 2022 made to the Council on Legislation for consideration abandoned the perception in SOU 2020:31 (*En ny mervärdesskattelag* – A new VAT act) meaning that GML Ch. 6 sec. 7 would get an exact correspondence in the ML.[25] In my opinion, the circumstance that this was not realized speaks in itself for the ML having altered current law so that no such special 'VAT commission rule' asserted by the SKV exists anymore in Swedish VAT law, if it at all has existed according to current law in a true sense. The described lack of foreseeability that the SKV's standpoint, with the mentioned addition of 2023-05-31, meant thus a great legal uncertainty for the individual with respect of VAT and it might lead to difficult consequences in the form of raised value-added taxation with resulting tax proceedings and criminal law proceedings.

2.2 The SKV's standpoints have contributed to legal uncertainty concerning the VAT question about staffing within health care and social care

2.2.1 The SKV has contributed to the legal uncertainty with its history of unclear standpoints

Concerning the question about VAT and staffing within health care and social care there is in practice legal uncertainty, which is due to the SKV, as mentioned, having a history of disregarding in its standpoints that the CJEU in that respect has emphasized the importance of

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intermediation rule by the new VAT act), *Dagens Juridik* (Today's Law) of 2024-05-16 (Forssén 2024c). Forssén 2024c is available on Today's Law's website, www.dagensjuridik.se, and on www.forssen.com.

[23] Compare the principle no tax without an act (*nullum tributumj sine lege*), which is expressed by the principle of legality for taxation measures according to Ch. 8 sec. 2 first para no. 2 of *regeringsformen (1974:152)*, the 1974 Instrument of Government, abbreviated RF. See also Forssén 2024b, sections 2 and 9.

[24] See the SKV's standpoint of 2020-09-25, *Förmedling av tjänster i eget eller i annans namn, mervärdesskatt* (Intermediation of services in one's own or somebody else's name, value-added tax), dnr 8-314934, section 3.2. See https://www4.skatteverket.se/rattsligvagledning/384806.html?date=2020-09-25 (visited 2025-07-14). See also Forssén 2024b, p. 300.

[25] See Forssén 2024b, p. 301.

determining who is a tax subject, before the question on the tax object is treated.[26] As also mentioned, I refer to my judgment in Forssén 2019a of the problem with regard to the Finnish Supreme Administrative Court's case-law and of the Finnish tax authority's detailed instructions.

The SKV has contributed to the unclearness for the appliers by in its standpoints not fully regarding the EU law in the field of VAT. Not even when the CJEU by its verdict on 12 March, 2015 in the case "go fair" Zeitarbeit clarified that the tax subject as well as the tax object must be judged to decide whether staffing within health care and social care shall be charged with VAT did the SKV regard this in its standpoints on the question of 2015-12-10 (dnr 131 656823-15/111) and 2016-03-31 (dnr 131 156230-16/111).[27] Thereby, the standpoints have not been in compliance of current law in a true sense, since the CJEU, as mentioned, is the utmost interpreter of the EU law. Instead, an actual current law has been established more or less on the market by bigger enterprises dominating it in the fields in question and the smaller not having anything else to do than following so that they will not be driven out of competition, where hospitals and other institutions in both fields choose the supplier not levying VAT on staffing. It conflicts with the EU law, since the VAT Directive shall, with regard to the result supposed to be achieved with the directive, be binding for Sweden as a Member State of the EU,[28] and the directive rules thus to their content shall be implemented in the national Swedish VAT legislation. It is also established by the harmonisation demand in TFEU article 113 that such a distortion of the competition shall not occur on the internal market insofar that the consumers choose deliverers of goods or suppliers of services due to differences in the national rules in the field of indirect taxes (that is concerning VAT, excise duties and customs).

In Forssén 2017 and Forssén 2019a, I have, as mentioned, mentioned the EU-case "go fair" Zeitarbeit and I stated that the CJEU by above all the items 23–25 in its verdict emphasizes that a judgment whether an enterprise within the fields of health care and social care shall charge VAT on its services shall be made in two steps, that is the tax subject question concerning whether the person in question constitutes a taxable person as well as the question whether the tax object is exempted from VAT must be regarded in that respect. It is not sufficient to establish that the personnel hired out is fully qualified within the fields in question or can present some other fulfilled demand on authorization, but it is the enterprise, the taxable person himself or herself, who must take a health care or social care responsibility in relation to patient and user. Otherwise, the exemption from VAT is not applicable and the enterprise's supply of personnel constitutes a staffing service which shall be charged with VAT in an invoice to the hospital or the institution that hires for instance a doctor, nurse, psychologist or sociologist from the enterprise.

The HFD considered in an advance ruling on 7 June, 2018 (case no, 7270-17) that the staffing enterprises hiring out of health care personnel is not exempted from VAT. In the same way as

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[26] See the CJEU's preliminary ruling on 12 March, 2025 in the EU-case "go fair" Zeitarbeit.

[27] See the SKV's standpoints of 2015-12-10, *Uthyrning av personal till erkänd aktör av social karaktär, mervärdesskatt* (Hiring out of personnel to an acknowledged supplier of social character, value-added tax), dnr 131 656823-15/111, and of 2016-03-31*, Uthyrning av personal till erkänd aktör av social karaktär, mervärdesskatt* (Hiring out of personnel to an acknowledged supplier of social character, value-added tax), dnr 131 156230-16/111.

[28] This follows by TFEU article 288 third para (main clause).

I stated in Forssén 2017, the HFD made its judgment setting out from the EU-case ”go fair” Zeitarbeit and emphasized that the hired out persons did not themselves carry out an economic activity but were employed. The relevant services that the enterprise at which they were employed supplied were the services that the enterprise rendered the health care institution, that is hiring out of personnel. For the judgment, it was lacking importance that the personnel hired out were health care personnel and that the institution that hired the personnel was an acknowledged health care institution according to the exemption rule in article 132(1) of the directive. The staffing enterprise would charge VAT on the hiring out of personnel to the health care institution.[29]

It is, as mentioned, first after the HFD’s advance ruling of 2018 that the SKV has altered its viewpoint. With reference to the EU-case ”go fair” Zeitarbeit and HFD 2018 ref. 41, the SKV changed its viewpoint according to its standpoints of 2018-10-25. Those means that inter alia the standpoint of 2016-03-31 was revoked on 1 July, 2019.[30] The SKV’s both standpoints of 2018 are complying with the case ”go fair” Zeitarbeit, since the SKV nowadays regards that the judgment of the exemption from VAT shall apply to the taxable person – the staffing enterprise – and not the personnel of the enterprise. It is, as mentioned, not sufficient that the staffing enterprise is hiring out for instance a fully qualified doctor or nurse for exemption from VAT to apply as for a health care service, but for exemption from VAT it is requested that the staffing enterprise also takes a health care responsibility. In my opinion, the SKV’s unclearness concerning the CJEU’s perception has however led to the existence of an actual current law in Sweden.

2.2.2 VAT and staffing within health care and social care – a comparison with Finland and Denmark

As far as my experience goes, perceptions exist by practicians that the SKV’s previous generous attitude concerning the application of exemption from VAT regarding staffing within health care and social service would have support in Finnish VAT law. Therefore, I mentioned in Forssén 2019a whether a different treatment exist about the present question between Sweden and Finland. I went through whether the Finnish tax authority can be considered applying the exemptions from VAT according to *mervärdesskattelagen 30.12.1993/1501*, the Finnish VAT act (abbreviated FML) in an opposite way compared with Sweden concerning the staffing enterprises and the relation to the EU-case ”go fair” Zeitarbeit.

I judged the problem setting out from the Finnish Supreme Administrative Court’s case-law and the Finnish tax authority’s detailed instructions in the respects mentioned. In the tax authority’s detailed instructions, I could discern a discrepancy in the present respect between Finland and Sweden. The Supreme Administrative Court is not reasoning like the CJEU in the case ”go fair” Zeitarbeit, when it is a matter of what the tax subject, the staffing enterprise, does, before the tax object is treated, but the court just refers in HFD 2016:101 to the EU-case and states that hiring out of personnel for social care services is not comprised by the

[29] See Forssén 2019a, pp. 242 and 243.

[30] The SKV’s standpoint of 2018-10-25, *Social omsorg, mervärdesskatt* (Social care, value-added tax), dnr 202 398382-18/111, replaced on 1 July, 2019 not only the standpoint of 2016-03-31, but also the SKV’s standpoint of 2013-07-05, *Social omsorg, mervärdesskatt* (Social care, value-added tax), dnr 131 340930-13/111.

exemption from taxation for social care services.[31] The tax authority follows in its detailed instructions the Supreme Administrative Court's judgment that hiring out of personnel within the field of social care is not comprised by exemption, but does not mention the problem for hiring out of personnel within health care. Thereby, I consider that the Finnish tax authority – unlike what the SKV states in the standpoints of 2018-10-25 on both the fields in question – is not fully following the CJEU's case-law, since the CJEU's judgment of the question about VAT on staffing is decisive for both the fields in question – i.e., health care *and* social care – according to the items 23–25 in "go fair" Zeitarbeit.[32] The Finnish tax authority's detailed instructions of 2019-04-01 for transfer of manpower within health care have not been altered in the new detailed instructions of 2025-02-04, but the tax authority still refers to the Supreme Administrative Court's decisions HFD 2013:39 and HFD 2017:192, that is the tax authority omits to mention thar the CJEU in the case "go fair" Zeitarbeit emphasizes the importance of determining who is a tax subject, before the question on the tax object is treated.[33]

The different treatment may have its explanation in a structural difference between the GML and the FML insofar as the GML stipulated the exemptions from VAT regarding health care and social care in a joint rule (Ch. 3 sec. 4), whereas the determination of VAT free services of health care and social care was stipulated in separate rules in FML sec. 34 (health care) and sec. 37 (social care) respectively. Thereby, the FML was in the present respect closer to the VAT Directive, where the tax object question also is regulated in separate rules.[34] However, nowadays the Swedish VAT legislation has the same structure as the VAT Directive by the ML having replaced the GML and exemption from VAT for health care and social care respectively is treated in different rules.[35] With regard to the history of unclear standpoints on the matter of VAT and staffing in the fields in question, the SKV should have made more in connection with the VAT reform of 2023 than just briefly on 2023-05-31 add to the standpoint about social care of 2021-06-17 (which replaced the standpoint of 2018-10-25 on the same question) that the standpoint shall remain, since the SKV considered that its legal judgment was not affected by the ML replacing the GML. For the same reason, I consider that the SKV should have made a deeper analysis than just note in an addition of 2023-06-01, with the same brief justification, that the standpoint of 2018-10-25 regarding hiring out of

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[31] See the Finnish Supreme Administrative Court's decision 28.6.2016/2827; HFD 2016:101. See also Forssén 2019a, p. 246.

[32] See the tax authority's detailed instructions of 2019-04-01, *Momsbeskattning av hälso- och sjukvården* (Value-added taxation of health care), dnr A97/200/2018 and of 2019-04-02, *Momsbeskattning av socialvårdstjänster* (Value-added taxation of social care services), dnr VH/352/00.01.00/2019. See https://www.vero.fi/sv/Detaljerade_skatteanvisningar/anvisningar/48270/momsbeskattning-av-halso--och-sjukvarden/ and https://www.vero.fi/sv/Detaljerade_skatteanvisningar/anvisningar/48131/momsbeskattning_av_socialvardstjanster/. In the previously mentioned detailed instructions, the tax authority refers in sections 2.2 and 3.3 to the Finnish Supreme Administrative Court's decisions HFD 2017:192 and HFD 2013:39. See also Forssén 2019a, pp. 244, 246, 249 and 250.

[33] See the tax authority's detailed instructions of 2025-02-04, dnr VH/8016/00.01.00/2024, section 3.3 with reference to section 2.2. See https://www.vero.fi/sv/Detaljerade_skatteanvisningar/anvisningar/48270/mervardesbeskattning-av-halso-och-sjukvard/.

[34] See concerning exemption for health care and social care respectively: articles 132(1)(b) and (c) and 132(1)(g) and (h) respectively. See also Forssén 2019a, p. 249.

[35] In ML Ch. 10 sec:s 6–13 regard health care (and dental care), whereas Ch. 10 sec. 14 regards social care.

personnel shall remain also after the introduction of the ML. Thus, I consider that if it nowadays exist perceptions amongst practicians deviating from the CJEU's case-law according to the case "go fair" Zeitarbeit and which can constitute an actual current law that is due to a lingering influence also after the introduction of the ML of the history with the SKV by its standpoints from the time before the HFD's advance ruling HFD 2018 ref. 41, that is from the time before the SKV changed its viewpoint in the standpoints of 2018-10-25, creating a scope for big enterprises in the fields in question to assert a line in Sweden which was not asserted for instance by the same enterprises in their activities in the EU Member State Denmark.

In the last-mentioned respect, my experience is that bigger enterprises within the staffing business in the fields of health care and social care have had rather definite perceptions that such hiring out of personnel would be exempt from VAT. What has been especially interesting in that respect is that such enterprises have accepted opposite judgments in other Member States like Denmark despite that they have asserted the standpoint that particularly in Sweden it would exist exemption from VAT for hiring out of personnel within health care and social care. Since it, in my opinion, during the years after the SKV changing its viewpoint in the standpoints of 2018-10-25 has existed amongst practicians the perception that the previously more generous application would still apply, now with support of Finnish VAT law, it is urgent that the Finnish tax authority fully adapts its detailed instruction to the CJEU's perception in the case "go fair" Zeitarbeit, so that the tax authority also in its detailed instructions concerning hiring out of personnel within health care and social care clarifies that the CJEU's case-law applies. The Finnish tax authority has replaced its detailed instructions of 2019-04-02, Value-added taxation of social care services, on 2023-01-02 and again on 2024-01-02 and repeats therein that transfer of manpower within social care is not exempted from VAT.[36] However, the Finnish tax authority omits, as mentioned, also in the detailed instructions of 2025-02-04 which have replaced the detailed instructions of 2019-04-01 concerning transfer of manpower within health care to mention the CJEU's emphasizing in the case "go fair" Zeitarbeit of the importance to determine who is a tax subject, before the question on the tax object is treated. By the way, the Finnish Central Tax Board's (*Centralskattenämndens*) advance ruling given on 2021-12-14, CSN:2021/46, may also be mentioned, where the Central Tax Board referred to the CJEU's reasoning in the case "go fair" Zeitarbeit and judged that supply of professional social care personnel between companies in a group did not constitute social care according to FML sec. 37 and sec. 38, when purchasing company produced the social care services. The Finnish Supreme Administrative Court did not alter the Central Tax Board´s advance ruling.[37]

[36] See the tax authority's detailed instructions: of 2019-04-02, *Momsbeskattning av socialvårdstjänster* (Value-added taxation of social care services), section 9.2 (*Uthyrning av arbetskraft för socialvårdstjänster* – Hiring out of personnel for social care services); of 2023-01-02, dnr VH/5237/00.01.00/2022, section 9.1 (*Överlåtelse av arbetskraft för socialvårdstjänster* – Transfer of manpower for social care services); and of 2024-01-02, dnr VH/5932/00.01.00/2023, avsnitt 9.1 (*Överlåtelse av arbetskraft för socialvårdstjänster* – Transfer of manpower for social care services). Regarding the instructions in 2023 and 2024, see: https://www.vero.fi/syventavat-vero-ohjeet/ohje-hakusivu/48131/sosiaalihuoltopalvelujen-arvonlis%C3%A4verotus2; and https://www.vero.fi/sv/Detaljerade_skatteanvisningar/anvisningar/48131/momsbeskattning-av-socialvardstjanster2/.

[37] See HFD H3580 9.12.2022 (https://www.vero.fi/sv/Detaljerade_skatteanvisningar/centralskattenamndens-forhandsavgoranden/106729/csn0462021/).

My suggestion to the Finnish tax authority is aiming to accomplish a neutral application of the VAT issue between bigger and smaller staffing enterprises in Sweden. In other words, it is a matter of prevent giving big dominating enterprises in the fields of health care and social care in Sweden any comparative support to pursue their opinion about VAT free services, whereby the smaller enterprises with lesser procedural muscles are forced to follow the big enterprises to avoid being driven out of competition. The smaller enterprises within the fields in question are thereby put in a very precarious situation where the legal certainty of the application of the rules in the fields in question is concerned, regarding staffing. Furthermore, the situation counteracts the basic idea of a competition and consumption neutral VAT according to TFEU article 113 on the internal market for small enterprises as well as for the consumers of health care and social care, if the consumers in those fields have to choose suppliers of services due to differences of application of the VAT rules by enterprises forming parts of chains of transaction up to the consumer in the fields in question.

3 Parallel current law in Sweden in both the main cases - consequences

3.1 The two main cases in this article in relation to SOU 2023:49 and SOU 2024:31

An undesired parallel current law in Sweden compared with the EU law in the field of VAT in both the described cases regarding middlemen and staffing within health care and social care respectively as a result of the SKV's lack of analysis of the tax subject question in the standpoints after the introduction of the ML leads to uncertainty for the individual, since the foreseeability of taxation decisions is lost by the development of an actual current law in that respect. The consequences for the individual, that is the tax subject in the capacity of an entrepreneur will be very far-reaching and serious by such decisions from the SKV. Before I go further with a review of the consequences, I am setting in this section the two main cases of the development of an undesired actual current law which conflicts with the EU law in the field in relation to the investigation *Åtgärder mot mervärdesskattebedrägerier* (Measures against VAT frauds).[38]

A few years ago, I started writing on what became a series of articles which concern issues regarding VAT frauds of so-called carrousel type (carrousel trading). This subject was also mentioned in SOU 2023:49 and SOU 2024:32. The longer of the articles in my series during the period of 2021–2025 are published in the JFT and in the periodical for Swedish Institute of Authorized Accountants (*Föreningen Auktoriserade Revisorer – FAR*), *Tidningen Balans* (The Periodical Balans) and in one case in *Svensk Skattetidning* (Swedish Tax Journal).[39] I have commented SOU 2023:49 and SOU 2024:32 respectively in The Periodical Balans (*fördjupning* – Advanced articles) on 2024-05-06 and on 2025-05-15 respectively.[40] Forssén

[38] The investigation has submitted to the Government the partly report *Skyddet för EU:s finansiella intressen Ändringar och kompletteringar i svensk rätt (SOU 2023:49)*, The Protection of the EU's financial interests Alterations and completions in Swedish law (SOU 2023:49), and the final report *Åtgärder mot mervärdesskattebedrägerier (SOU 2024:32)*, Measures against VAT frauds (SOU 2024:32). The investigation was supposed to lead to legislation on 1 July, 2025 but this has not been the case.

[39] For interested researchers or for ideas at essay-writing, I refer to https://www.forssen.com/forskning/f13/, where it is stated which of my articles that constitutes the series.

[40] See Björn Forssén, *Aktuell utredning löser inte problemet med momsbedrägerier* (Current official report does not solve the problem with VAT frauds), published on www.tidningenbalans.se/Fördjupning 2024-05-06, Forssén 2024d, and Björn Forssén, *Frågor med anledning av slutbetänkandet Åtgärder mot mervärdesskattebedrägerier* (Questions on account of the final report Measures against VAT frauds), published

2024b was published on 2024-11-01 and in June 2024 the Swedish Bar Association (*Sveriges advokatsamfund*) had appointed me author in a working team to make a draft of considerations to the Department of Finance over SOU 2024:32. The proposal was approved and the Swedish Bar Association's considerations of 2024-11-15 over SOU 2024:32 were submitted to the Department of Finance.[41]

In Forssén 2024b and in the Bar Association's considerations over SOU 2024:32, the perception is mentioned which the Advocate General in stated in the opinion for a judgment to the CJEU, regarding a case of so-called *missing trader* where carrousel trading was concerned.[42] Iner alia, the Advocate General mentioned in the opinion for a judgment to the CJEU in the joint cases C-131/13, C-163/13 och C-164/13 that *missing trader* is a case of carrousel trading where the fraud quite simply consists of a trader disappearing. The receiver of an invoice makes a deduction for charged input tax, but any output tax is not accounted for by the vendor, or it is made at a low amount and for example the goods in question are put into circulation again.[43] The Advocate General stated that there are several various types of goods that can be used at VAT frauds by such carrousel trading. According to the Advocate General, the fraudsters often prefer goods like '*computer components or mobile phones*',[44] since those have a high value per unit and are easy to transport. Moreover, the Advocate General stated that it is not a matter of normal chains of transactions, but of activities organized solely for a tax fraud to be carried out but that it also occurs that ordinary businesses are used, with or without their knowledge, and that some traders may not even be aware that they are participating in a fraud and may be acting in good faith (bona fide). According to the Advocate General, "it is only the missing trader who commits fraud per se by failing to pay the tax due to the tax authorities". The Advocate General admitted that the VAT system is fairly complex, but that a complete neutrality of tax benefits it, whereas "the other side of the coin is that the complexity of the system makes it easier to perpetrate fraud using its own mechanisms".[45]

Concerning the first main case, that is the issue about the special 'VAT commission rule', I mention in the following the consequences of an actual current law which is not in compliance with the EU law in the field partly for the State, partly for the individual. Before I started the article series on carrousel trading, I had already on 2001-11-14 given a lecture on

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on www.tidningenbalans.se/Fördjupning 2025-05-15, Forssén 2025a. Forssén 2024d and Forssén 2025a are also available on www.forssen.com.

[41] *Sveriges advokatsamfunds remissvar av 2024-11-15 till Finansdepartementet över SOU 2024:32*, The Swedish Bar Association's considerations of 2024-11-15 to the Department of Finance over the Government's report Measures against VAT frauds (SOU 2024:32), is to be found on the Bar Association's website (https://www.advokatsamfundet.se/) with No. R-2024/1201. I have translated R-2024/1201 into English: see https://forssen.com/forskning/f13/.

[42] See the CJEU's joint cases C-131/13, C-163/13 and C-164/13 (Schoenimport "Italmoda" Mariano Previti, ECLI:EU:C:2014:2455) and the Advocate General's opinion for a judgment (ECLI:EU:C:2014:2217).

[43] See items 32–34 of the Advocate General's opinion for a judgment in the joint cases C-131/13, C-163/13 and C-164/13. See also Forssén 2024b, p. 313.

[44] See the Swedish language version, '*datorer eller mobiltelefoner*', which means *computers or mobile phones*'.

[45] See items 31–37 of the Advocate General's opinion for a judgment in the joint cases C-131/13, C-163/13 and C-164/13. See also Forssén 2024b, pp. 313 and 314.

the subject at Swedish Law Meeting.[46] Thereby, I mentioned inter alia the special 'VAT commission rule', that is GML Ch. 6 sec. 7.[47] For the individual, that is the tax subject, the matter of bad faith (mala fide) or good faith is central in the investigations and cases carried out by the SKV or the EBM on the theme of carrousel trading. In my opinion, the question about a continued actual current law meaning that the special 'VAT commission rule' still could expand the concept tax liability (nowadays liability of payment) to comprise also middleman situations which are not constituting commission trading in a civil law sense is decisive concerning the legal certainty for inter alia ordinary agents, since an application of such a special rule normally means an unexpected raise of the taxable amount.

Concerning the other main case in this article, that is the question about VAT and staffing within the fields of health care and social care, I bring up that the SKV can make an unforeseen decision against a real property owner on deregistration from voluntary taxation as a consequence of the SKV applying exemption from VAT regarding a tenant of premises, when the tenant previously had deemed his or her activity to be comprised of the general rules on taxation of goods and services. In this case, the SKV may have based its judgment that the tenant's activity is exempted from VAT without making a thorough examination of how the big enterprises' perception about a continued generous treatment of the staffing enterprises within the fields of health care and social care may have had an influence in that respect, that is an actual current law would thereby exist for the question about the scope of the exemption.

3.2 The problems with an actual current law regarding the two main cases is procedural

That such an actual current law that I am stating constitutes a problem in Sweden exist at all in for instance the two main cases which I am bringing up in this article has to a large extent its explanation due to the academics not giving useful influences on the legislator. In a series of articles during 2020–2023 published in the JFT and The Periodical Balans, I reviewed all theses in Sweden during 1994–2020 on the subject indirect taxes (i.e. in the first place VAT, excise duties and customs), where twelve of fourteen concerned VAT. A common denominator for my criticism of the VAT research was just that the researchers pass over the tax subject question to instead directly treat the object question.[48] Besides my two theses,[49] there is only one Swedish thesis in VAT law that concerns the tax subject question. It is *Mervärdesbeskattning vid obestånd* (Value-added taxation at insolvency) by Jesper Öberg,

[46] Björn Forssén, Lecture at Svensk Juriststämma (Swedish Law Meeting) 2001-11-14 (Stockholmsmässan i Älvsjö), *Moms och omsättningsbegreppet. Karusellen hos skatte- och ekobrottsmyndigheten (SKM och EBM)* – VAT and the transaction concept. The carrousel by the tax and economic crime authorities (abbreviated SKM and EBM). Arranger VJS. The memo of the lecture is available on https://www.forssen.com/forskning/f13/. (Forssén 2001).

[47] See Forssén 2001, p. 7. See also Forssén 2024b, p. 313.

[48] For interested researchers or for ideas at essay-writing, I refer to https://www.forssen.com/forskning/f10/, where it is stated which of my articles during 2020–2023 that mention the theses in Sweden on the subject of indirect taxes during the period of 1994–2020.

[49] See Björn Forssén, *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen* (Tax liability for VAT – an analysis of Ch. 4 sec. 1 of the ML), Jure Förlag AB 2011 (Forssén 2011), licentiate dissertation, and Björn Forssén, *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 (Forssén 2013), doctor's thesis. Forssén 2011 and Forssén 2013 are available in the data base DiVA (www.divaportal.org) and on www.forssen.com.

but there the EU law is sparsely treated with the motivation that *the EC's legislations only give the frames and must be filled out by national rules*, whereby he noted that any correspondence to those for the examination central rules on bankruptcy in the GML did not exist in the then VAT directives.[50]

In this article, I by and large leave out the question about the influence of the research on the legislator's work with the VAT legislation. Instead, I focus on the procedural question in the present context. In that respect, it is my experience that the existence of an actual current law is expressed by the application in itself of the rules in both the main cases of this article, that is when they are treated in the taxation procedure at the SKV and in the tax cases, which are started in the district administrative court. The loss of interpretations expressing a perception of current law in a true sense open for application of an actual current law. That entails a risk of the development of a parallel current law in Sweden which is not in compliance with the EU law in the field.

In the following, I come back to the Swedish system with leave to appeal in the HFD being criticized by Denmark as a circumstance which can lead precisely to the development of a parallel current law compared with the EU law in the field of VAT. The situation causes not only an unexpected decision by the SKV of a raise of VAT which can be decided after a tax audit and leads to the tax case, if the enterprise appeals the decision to the district administrative court. In addition, there will usually also come up matters on stay of payment, payment hedge and personal liability of payment (if the raise of the VAT concerns for example a limited company) and a criminal case about in the first place tax fraud against natural persons carrying out activities under sole proprietorship or partners in a limited company etc., whereby prosecutors also can call for trading prohibition and enterprise fine. Thus, for both the main cases in this article the problems with the existence of an actual current law by the SKV and at the first and second instances of the general courts and the administrative courts is in the first place procedural.

Concerning the consequences for the individual of a parallel current law based on an actual current law in both the main cases, I limit myself to the procedural problems regarding VAT and tax surcharge and criminal law responsibility. The situation becomes especially complex and problematic for procedural purposes, when the SKV can be considered developing an actual current law which is not complying with the EU law in the field of VAT regarding a continued application of the special 'VAT commission rule' also after the introduction of the ML. Concerning carrousel trading, the SKV namely makes by and large as a matter of routine reports to the EBM about suspicion of tax fraud against entrepreneurs and, if it is a matter of legal persons, against their owners. If the preliminary investigation is not closed a prosecutor decides on prosecution by issuing writs against those suspected and then a case is started at the district court on tax fraud regarding VAT fraud of carrousel type, whereby the decision to bring charges normally also comprise book-keeping crime. Furthermore, such a decision on prosecution is not seldom combined with charges on commercial money laundering, either at the same time as the preliminary investigation on tax fraud is started or before a decision on prosecution.

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[50] See Jesper Öberg, *Mervärdesbeskattning vid obestånd Andra upplagan* (Value-added taxation at insolvency Second edition), Norstedts Juridik AB 2001. (Öberg 2001), s. 19. The thesis is from 2000. I refer to the published book: Öberg 2001. See also Björn Forssén, *Momsforskningen i Sverige – metodfrågor* (The VAT research in Sweden – method questions), JFT 6/2020, pp. 716–757, 733 and 738 (Forssén 2020b). Forssén 2020b is available on www.forssen.com.

3.3 Regarding cases of application of the special 'VAT commission rule'

3.3.1 Liquid consequences for the State and the individual of decisions causing false VAT

There are many different versions of the phenomenon VAT frauds by carrousel trading, but as a common denominator it is about frivolous enterprises taking measures with their VAT returns so that the State in the end loses money, by the VAT on goods or services in a chain of enterprises will not be passed on to a consumer as tax carrier. This conflicts with the EU law in the field of VAT, since article 1(2) of the VAT Directive inter alia means that VAT is "a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged".[51] Moreover, it is stated that "the he common system of VAT shall be applied up to and including the retail trade stage".[52] The VAT principle in article 1(2) also means that right of deduction of input tax levied in a received invoice arise for an enterprise that is a purchaser of goods or services when such deductible VAT becomes liable of payment as output tax by the selling enterprise (the reciprocity principle).[53] Unless those circumstances according to article 1(2) are fulfilled regarding a tax named VAT it is not VAT in the meaning of the EU law.[54]

An often-occurring example of VAT frauds of so-called carrousel type is, as mentioned, a case of *missing trader*. This means that it in a chain of enterprises exists a fictitious enterprise, which in the investigations by the SKV – and the EBM – is called a *missing trader* (or goalkeeper company or front enterprise). This means that an enterprise issues an invoice with what I, as also mentioned, call a false VAT.

In an article, I have accounted for the consequences for issuers as well as receivers of fictitious invoices with an amount falsely denoted as VAT.[55] The implementation of article 203 of the VAT Directive in the GML, by SFS 2007:1376, leads inter alia for that case of falsely charged VAT to the issuer having a special liability for payment of such an amount, that is for a false VAT, as long as a credit invoice of the amount is not issued. If a credit invoice regarding the false VAT is not issued the amount shall namely not be altered.[56] By the preparatory works to the reform of 2008 it follows that the legislator considered that it

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[51] See article 1(2) first para of the VAT Directive.

[52] Jämför artikel 1.2 tredje stycket i mervärdesskattedirektivet.

[53] The reciprocity principle follows by article 1(2) second para and article 167 of the VAT Directive.

[54] See Björn Forssén, *Momsbedrägerier genom karusellhandel – erfarenheter i Sverige avseende mervärdesskatt, redovisning och straffrätt i förhållande till EU-rätten* (VAT fraud by carousel trading – experiences in Sweden regarding VAT, accounting and criminal law in relation to the EU law), JFT 4–6/2023, pp. 344–378, 344, 345 and 346 (Forssén 2023a).

[55] See Björn Forssén, *Skenfaktura med momsdebitering – konsekvenser för skatt och redovisning* (Fictitious invoice with charging of VAT – consequences for tax and accounting), *Tidningen Balans fördjupning* (The Periodical Balans Advanced articles) 2023, pp. 1-9, published on www.tidningenbalans.se/Fördjupning 2023-06-13, Forssén 2023b. Forssén 2023b is also available on www.forssen.com.

[56] See ML Ch. 7 sec. 50 first para, which corresponds with previously GML Ch. 13 sec. 28 first para. See also Forssén 2025a.

followed already by GML Ch. 8 sec. 2 first para that a falsely charged VAT does not constitute input tax, since the amount falsely denoted as VAT in a received fictitious invoice did not constitute VAT according to the GML, but what I call false VAT. By the liability of payment for such a false VAT being regulated in a separate rule, GML Ch. 1 sec. 2(e), the legislator emphasized that the measure meaning a false charge of VAT shall not lead to anything else than a special liability of payment for the amount in question for the enterprise issuing the invoice.[57] Since it is no longer a matter of tax liability (nowadays liability of payment) for a ”real VAT” for the issuer the reciprocity principle is not fulfilled according to the articles 1(2) and 167 of the VAT Directive why the receiver of the invoice is not allowed to deduct the amount in question as an input tax.[58] In the context, it may be mentioned that fictitious transactions constituted one of a number of examples that the legislator stated at the reform in 2008 of such false charging of VAT in an invoice which is regarded now.[59]

By the VAT reform of 2023, I consider, as mentioned, that it no longer exists any ‘rubber rule’ that would entail that an ordinary agent can be deemed liable for payment of VAT on the whole sales price of goods or services to customer, instead of only regarding the commission that the agent receives from the mandator. Nowadays, it is requested, as also mentioned, that a commission trading in a civil law sense exists for a middleman like for instance an agent shall be compared for VAT purposes with an ordinary retailer. Here, I refer to Forssén 2024b and the question there about carrousel trading and composite transactions consisting of an electronic product – for instance a computer or a mobile phone – constituting goods and at the same time a service in the form of a licence regarding the operating system for the product.[60]

The software that exists in the computer or the mobile phone consists of an operating system. It is not owned by the trader, but of another enterprise on the market for such the products. It is often a big international enterprise that owns the licence for the operating system also after the consumer has purchased the computer or the mobile phone from the trader, that is usually from a retailer with an ordinary shop for electronical products. Thus, the sale of a computer is not only of importance for the transaction of the goods in question. Each computer comprises an OEM-licence whose supply normally shall be treated by itself with respect of VAT – like a supply of services,[61] and the same applies for the mobile phones.

As far as my experience goes, the SKV (and the EBM) usually do not mention any other taxable amount for VAT than that of the trader in their investigations concerning VAT frauds by carrousel trading with electronic products like computers and mobile phones. Thereby, the SKV is not treating whether the State loses VAT revenues due to the VAT not being accounted for by the big international enterprises owning the software in such products.

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[57] See prop. 2007/08:25, *Förlängd redovisningsperiod och vissa andra mervärdesskattefrågor* (Extended accounting period and certain other VAT issues), p. 90. GML Ch. 1 sec. 1 third para and sec. 2 e § are corresponded by ML Ch. 16 sec. 23. GML Ch. 8 sec. 2 first para is corresponded by ML Ch. 13 sec. 4 nos. 1 and 2. See also Forssén 2023b, p. 3.

[58] See Forssén 2023b, p. 3.

[59] See prop. 2007/08:25 , p. 91, where fictitious transactions are mentioned as the eighth of the examples in question.

[60] See Forssén 2024b, section 6.

[61] OEM, *Original Equipment Manufacturer*.

Thus, the SKV and the EBM should in their investigations of carrousel trading also consider whether big international enterprises correctly account for VAT on the taxable amounts regarding licences for operating systems in for example computers or mobile phones. Before that question has been the subject of an empirical examination, I consider it is pointless to refer the State's loss of VAT revenues in cases of suspected carrousel trading to wholesalers or retailers. The problem concerning whether the SKV (and the EBM) are considering that taxable amounts regarding licences for operating systems should be determined for the big international enterprises owning the systems is decisive to avoid an erroneous taxation of wholesalers and retailers that only sells for instance the mobile phone the final customer, the consumer. Concerning the problems about the phenomenon of carrousel trading, I focus on the special 'VAT commission rule' being invoked by the SKV (and the EBM) to justify above all that middlemen like wholesalers shall be charged with VAT on a taxable amount corresponding with the full amount received from the next wholesaler in a chain of transactions or from the retailer, if the retailer is the next enterprise in the chain.[62] To correctly investigate a *missing trader* suspected of making a fictitious transaction in the chain under the impression of having a role as a wholesaler in that respect, I therefore suggest that the SKV (and the EBM) in their investigations on suspected carrousel trading divide for instance a computer or a mobile phone into goods and services respectively. The sale that the wholesaler makes should not be investigated setting out from the pre-condition that it is a matter of a product regarded only as goods, whereby the question on a taxable amount for VAT regarding the licence of the operating system is left out by the SKV (and the EBM).

By the SKV's attitude to the element of big international enterprises in the investigations, the State loses tax revenues, since a middleman that only has an income of commission does not have economy enough to pay a demand from the SKV as if VAT should have been accounted for on the whole gross amount received from the customer. Thus, the State cannot enforce a demand against a middleman that should have been directed to the owners of the operating systems regarding the VAT on royalty for their licences of the systems. The situation for the middleman is one of legal uncertainty, if that person is declared bankrupt due to the SKV's demand and lacks means to go further with a tax case on the matter. Furthermore, in my experience the receivers in bankruptcy do not assist the debtor by sanctioning that the debtor issues a credit invoice so that at least a falsely charged VAT can be excluded from collection. If a credit invoice regarding the false VAT is issued would, as mentioned, the amount in question be altered.

3.3.2 Especially about criminal law responsibility in connection with false VAT

3.3.2.1 Invoice with false VAT – liability of payment the only consequence for the issuer

By the preparatory works to the reform of 2008 it follows, as mentioned, that the legislator considered that a falsely charged VAT does not lead to anything else than a special liability of payment for the amount in question for the enterprise having issued the invoice. This applies if only the issuer's responsibility is concerned, since it does not exist any payment crime for instance regarding accounted but not paid VAT. It does not exist any payment crime in itself concerning the tax account system which was introduced on 1 November, 1997 by

[62] I stated this already in the lecture of 2001 (see Forssén 2001).

skattebetalningslagen (1997:483, the tax payment act).[63] Thereby, the tax fraud according to *skattebrottslagen (1971:69*, the tax fraud act, here abbreviated SBL) regards false or unaccounted tax, that is it constitutes an accounting crime. Since any payment crime does not exist in the Swedish penal (criminal) legislation, cannot someone who in the capacity of real or fictitious vendor of goods or services be sentenced for tax fraud only because he or she has not paid a real or false VAT to the State.[64] The failed payment is not in itself sufficient for penal criminal law responsibility existing, but the situation will be another depending on what measures for instance a receiver of an invoice with a falsely charged VAT take for accounting purposes with such a false VAT.

If the receiver of the invoice knew or should have known that the information of VAT in the received invoice was false, but still tries to exercise right of deduction by submitting the amount of a false VAT in a VAT return to the SKV as if it constituted input tax it is in my opinion a matter of a case of abusive practice which can cause criminal law responsibility both for the issuer and the receiver of the invoice.[65]

In Forssén 2023a, I developed especially the question whether issuing of an invoice with false VAT can cause criminal law responsibility.[66] Here, I refer to the following from that review. If an enterprise, for example a natural person (sole proprietorship) or a legal person like a limited company has issued an invoice wherein an amount falsely is denoted as VAT the amount – the false VAT – shall be accounted for in a special tax return,[67] whereas real VAT shall be accounted for in a VAT return.[68] That the as VAT falsely denoted amount constitutes a false VAT does not mean that the issuer of the invoice hast committed a crime regarding skatt (tax), that is tax fraud according to SBL sec. 2. For that it would take a clarification in the SBL meaning that with *skatt* (tax) is also meant an amount falsely denoted as value-added tax (VAT) in an invoice. In SFL Ch. 3 sec. 12 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 SFL Ch. 3 sec. 1 first para first sen. only a matter of the usage of certain terms and expressions in the SFL itself why an amount which constitutes a false VAT thereby may be deemed as *skatt* (tax) only concerning the procedure for its accounting, not materially. To determine what is *skatt* (tax) materially by a procedure rule in the SFL is in conflicts, in my opinion, with the principle of legality for taxation measures in RF Ch. 8 sec. 2 first para no. 2.[69]

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[63] See prop. 1996/97:100, *Ett nytt system för skattebetalningar, m.m.* (A new system for tax payments, etc.) Part 1, p. 450. See also Forssén 2023a, p. 361. Inter alia the tax payment was replaced on 1 January, 2012 by *skatteförfarandelagen (2011:1244*, i.e. the taxation procedure act, here abbreviated SFL).

[64] See Forssén 2023a, p. 365.

[65] See Forssén 2023a, p. 345.

[66] See Forssén 2023a, pp. 361–365 (section 5.4 ”*Faktura med oäkta moms och straffrättsligt ansvar*” – Invoice with false VAT and criminal law responsibility).

[67] See SFL Ch. 26 sec. 7.

[68] See SFL Ch. 26 sec. 21.

[69] See Forssén 2023a, pp. 361 and 362.

Thus, I consider that 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 not be deemed committing tax fraud according to SBL sec. 2, since an erroneous information regarding *skatt* (tax) which shall be accounted for in a VAT return do not come up in such a case. Tax surcharge can neither be imposed on false VAT, since the sanction tax surcharge is imposed on *skatter* (taxes) which are comprised by the SFL.[70] Thus, the only consequence for the issuer of a falsely charged VAT is procedural and regards the liability to pay the amount in question as long as a credit note is not issued.[71]

3.3.2.2 Invoice with false VAT – criminal law responsibility for issuer and receiver if deduction is claimed

However, tax fraud can come up according to SBL sec. 2 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, as mentioned, lacks right of deduction like for input tax regarding the amount in question. Then, criminal law responsibility may come up also for him or her who has issued the invoice with the false VAT. This follows by he or she can be punished according to Ch. 23 sec. 4 of *brottsbalken (1962:700*, the Penal Code, here abbreviated BrB) for complicity in the tax fraud that the receiver of the invoice can be deemed to have committed by trying to claim right of deduction for the amount. That situation can be subject of investigations by the SKV and the EBM in connection with cases regarding VAT frauds by carrousel fraud, where a *missing trader* exists in a chain of enterprises. If the receiver of the invoice knew or should have known that the information on VAT in the invoice was false it is thereby 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.[72]

3.3.2.3 Invoice with false VAT – abusive practice does not necessarily cause criminal law responsibility in itself

Here, I disregard questions about book-keeping crime that the issuer and receiver of the invoice with false VAT may have committed according to BrB Ch. 11 sec. 5 first para due to erroneous information being submitted in the book-keeping or the annual report. Instead, I reiterate my statement in an article from 2022, where I commented a verdict by the Supreme Court of Sweden (*svenska högsta domstolen* – here abbreviated HD), NJA 2018 p. 704.[73] Although the HD in NJA 2018 p. 704 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. This with regard to the senior judge of appeal, who was dissentient and wanted to acquit the defendant, inter alia stated that the CJEU in a case 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*

[70] See SFL Ch. 49 sec. 2. See also Forssén 2023a, p. 362.

[71] See Forssén 2023a, p. 362.

[72] See Forssén 2023a, p. 362.

[73] See Björn Forssén, *Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704* (VAT frauds of so-called carrousel type and NJA 2018 p. 704), *Svensk Skattetidning* (Swedish Tax Journal) 2/2022 pp. 118–130, 125 (Forssén 2022). See also Forssén 2023a, p. 344. Also Forssén 2022 is available on www.forssen.com.

instead reimbursement liability since the deduction has become unjustifiable.[74] I also noted, the senior judge of appeal furthermore stated that the criminal law principle of legality according to BrB Ch. 1 sec. 1 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.[75]

Stig von Bahr, formerly judge in the HFD and the CJEU, wrote an article as a complement to Forssén 2022 and stated inter alia that *the reader of BF's article* (i.e. my article*) may get the impression that both abusive practice and frauds can cause criminal law sanctions*.[76] Stig von Bahr was given the opportunity to consider in his manuscript that I in Forssén 2022 stated that it *is not clear that abusive practice in itself means the existence of criminal law responsibility*. However, the nuance of what my expression *in itself* (Sw., *i sig*) means was not regarded in von Bahr 2022. Thus, the reader gets the impression that Stig von Bahr goes further than I, by him rather categorically dismissing my warning for abusive practice on the theme of criminal sanctions.

In my opinion, NJA 2018 p. 704 means, with regard to the statements by the senior judge of appeal, that it is not clear that abusive practice *in itself* means that criminal law responsibility exists, but this *can* be the case. For me, it is not far-fetched that it can exist various criminal law questions in a case of abusive practice, like the mentioned situation regarding exercise of right of deduction for false VAT charged in an invoice or above all at suspicion of commercial money laundering. In the following, I come back to prosecution where suspicion on VAT fraud of carrousel type is combined with prosecution for suspicion of commercial money laundering. However, therefore I am going through, as mentioned, the other main case of actual current law in this article, that is the question whether it can exist regarding VAT and staffing within the fields of health care and social care.

3.4 Regarding cases of VAT and staffing within the fields of health care and social care

In the preparatory works to the above-mentioned reform of 2008, the legislator gave a problem description as motivation of the introduction of a special liability of payment for falsely charged VAT in an invoice by implementation in the GML of article 21(1)(d) of the Sixth VAT Directive (77/388/EEC) – nowadays article 203 of the VAT Directive. The motivation was based on the consequences of the HFD's verdict in the case RÅ 2005 ref. 81. The circumstances in the case were that a limited company had falsely charged VAT for letting of premises despite that tax liability did not exist since the company had not been voluntarily registered to VAT for letting of premises. The company had charged VAT for time before a decision on voluntary registration. The SKV considered that a reimbursement of falsely charged VAT presupposed that the company issued a credit invoice to the tenant. However, the HFD concluded that the GML had no regulation on procedure at falsely charged

[74] See the CJEU's joint cases C-255/02 Halifax et al. (ECLI:EU:C:2006:121), item 93. See also Forssén 2023a, pp. 362 and 363.

[75] See Forssén 2023a, pp. 362 and 363.

[76] See Stig von Bahr, *Mer om missbruk och momsbedrägeri* (More about abuse and VAT frauds), Svensk Skattetidning (Swedish Tax Journal) 6/2022, pp. 498–504, 499 (von Bahr 2022). BF, Björn Forssén (my note). See also Forssén 2023a, p. 364.

VAT and paid tax and deemed therefore that the VAT would be paid back to the company without demand to issue a credit invoice.[77]

Thus, the mentioned directive rule was implemented in the GML on 1 January, 2008, by SFS 2007:1376. In the preparatory works the legislator stated that a falsely charged VAT in an invoice can be false on various grounds and gave eight examples, where, as mentioned, eighth consisted of a person committing tax fraud by issuing invoices with VAT that is not corresponding with any real transaction (fictitious transactions). Two of the other examples of different situations of falsely charged VAT that the legislator stated concerned that a tax liable charges VAT for exempted goods or services and that someone who is not tax liable charges VAT on goods or services. In the latter respect it can be a matter of such a situation that was treated in RÅ 2005 ref. 81, that is that a real property owner not VAT registered according to the rules on voluntary tax liability (nowadays voluntary taxation)[78] for letting of premises still charges VAT on the rent for premises.[79] Then, it applies since 2008 that the issuer of the rental invoice is liable for payment for the amount falsely denoted as VAT and this applies as long as the issuer is not issuing a credit invoice.

I problemize the problem further and set in the context the existence after the introduction of the ML of an actual current law which means that the SKV continue to apply the previously more generous application of exemption for staffing within the fields of health care and social care. For a real property owner applying voluntary taxation for letting of premises this cause considerable negative economic consequences, if the SKV thereby considers that a tenant of premises shall be deemed having a VAT free staffing activity. In its turn, this leads to the SKV deciding to refuse the real property owner deduction for input tax on acquisitions of goods and services to the premises, since the SKV thereby considers that the real property owner lacks right of deduction for input tac in that part of the letting activity.

Since voluntary taxation can be applied also for subletting and third hand rental,[80] the described negative consequences of loss of right of deduction of input tax can comprise more links than only regarding the real property owner. However, my main point is that also in this main case in the present article an actual current law leads to effects which are inconsistent with what is meant by VAT according to the EU law, that is according to article 1(2) of the VAT Directive. This shows that if the SKV – deliberately or unawares – accepts as an actual current law a perception by the big staffing enterprises within the fields of health care and social care, meaning that the previously more generous judgment of exemption from value-added taxation for hiring out of personnel would apply, it is not based on a thorough examination by the SKV of the influence that the big enterprises may have had in that respect.

For this other main case of the question about the existence of an actual current law it may of course also exist consequences regarding the levying of tax surcharge and criminal law

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[77] See prop. 2007/08:25, pp. 84 and 85.

[78] The prerequisites for voluntary taxation of letting of real property are to be found in ML Ch. 12 sec:s 5–13, and the prerequisites for voluntary tax liability for certain letting of real property were to be found in GML Ch. 9 sec:s 2 and 3. In the VAT Directive the rule on voluntary taxation for leasing out of and letting of immovable property is to be found in article 137(1)(d) which is facultative.

[79] See prop. 2007/08:25, p. 91 regarding the examples 1 and 3 on falsely charged VAT in an invoice.

[80] See ML Ch. 12 sec. 7 no. 2.

responsibility. However, this case does not apply to questions on VAT fraud of carrousel type. Since the first main case concerns cases of suspicion of such fraud and contains the very complex problem that I bring up regarding prosecution where suspicion on VAT fraud of carrousel type is combined with prosecution on suspicion of commercial money laundering, I limit myself in the following to that main case where criminal law consequences of an actual current law are concerned.

4 Tax fraud and commercial money laundering

4.1 Suspicion of carrousel trading and combination of tax fraud and commercial money laundering

In the capacity of practician, my experience is that the SKV sometimes specify its assertions on arrangements regarding carrousel trading to the error concerning the accounting of VAT being a matter of the entrepreneur aiming to *appropriate money from the Swedish state*. Then, it is not seldom lying near at hand for a prosecutor to either complete a suspicion of tax fraud or alter the description of the deed by stating that it is a matter of commercial money laundering.[81] In cases on suspicion of carrousel trading, this means that the prosecutor asserts that one or several enterprises in a chain of transactions appropriate money from a tax authority within the EU and that an enterprise in Sweden takes part in it, which according to sections 3 and 7 of the Act on Punishment for Money Laundering means that the suspect is taking part (Sw., *medverkar*) in measures to hide that *money or other property originates from crime or criminal activity or that the possibilities of somebody to profit by the property or its value are promoted*.[82]

Since, as mentioned, no payment crime exists in the Swedish criminal legislation and a falsely charged VAT only will have the consequence that a liability to pay such an amount to the State, he or she who in the capacity of real or fictitious seller of goods or services cannot be sentenced for tax fraud only because he or she has not paid the real or false VAT to the State. That *in itself* is not enough for criminal responsibility to emerge, since the tax fraud is, as also mentioned, an accounting crime, where the concept erroneous information (Sw., *oriktig uppgift*) is the prerequisite in SBL sec. 2 linking together the criminal law with the tax law and the concept tax surcharge.[83]

Taken by itself, commercial money laundering is, unlike tax fraud, not a risk crime, but an effect crime why the situation concerning proof is harder for the prosecutor with regard to that circumstance. However, it is, as mentioned, not seldom lying near at hand for the prosecutor to complete a suspicion of tax fraud or to alter the description of the deed by stating that it is a matter of commercial money laundering. Therefore, commercial money laundering is, in my opinion, in practice lying near at hand to abusive practice regarding VAT by the suspect *taking part in a measure that reasonably can be assumed taken for the purpose of hiding that for instance money originates from crime or criminal activity etc*.

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[81] See *lagen (2014:307) om straff för penningtvättsbrott* (the Act on Punishment for Money Laundering) sec:s 3 and 7. See also Forssén 2023a, p. 365.

[82] See Forssén 2023a, p. 365.

[83] See prop. 1995/96:170, *Översyn av skattebrottslagen* (Overview of the tax fraud act) , p. 91. See also Forssén 2023a, p. 361.

Thus, I consider that it is not clear that abusive practice *in itself* means that criminal law responsibility exists.[84] However, I consider that instead of responsibility for tax fraud *can* on the theme of commercial money laundering criminal responsibility exist also for abusive practice.

4.2 The combination of tax fraud and commercial money laundering – a need for precedents

With regard to the EBM not seldom claims responsibility for commercial money laundering at the same time as for tax fraud, when it is a matter of suspicion of carrousel trading, I consider that such a case should be tried by HD for guidance of the application of law. The development of the application of law concerning VAT frauds of carrousel type has gone in such a direction, by addition of commercial money laundering to the context, that NJA 2018 p. 704 is not sufficient as guidance, especially as the question on intent was not comprised by the leave to appeal in the case.[85] The rules in the Act on Punishment for Money Laundering refer in sec. 7 to sec. 3 but not to sec. 4, where the legislator expressly states that an intent of indifference can cause responsibility. I consider that that structure of rules and the legislator's comparison with professional fencing (Sw., *näringshäleri*) according to BrB Ch. 9 sec. 6 second para means that commercial money laundering presupposes an activity – a taking part – by the perpetrator. Therefore, the prosecutors should not use expressions like intent (Sw., *uppsåt*) in a description of a deed regarding commercial money laundering according to sec. 7 of the Act on Punishment for Money Laundering. In that respect, I compare the prerequisites for professional fencing with aim (Sw., *avsikt*), which was one of the subjective prerequisites for tax fraud before that crime was altered into a risk crime on 1 July, 1996, by SFS 1996:658, and nowadays only intentionally (Sw., *uppsåtligen*) is stipulated as subjective prerequisite for tax fraud according to SBL sec. 2. This means that an intent of indifference nowadays is sufficient regarding both when erroneous information is submitted in a return and when a return is not submitted at all.[86]

As support of a need for a precedent from the HD as guidance for the application of law in cases of suspected carrousel trading, where the prosecutor asserts responsibility for commercial money laundering at the same time as responsibility for tax fraud, I furthermore state what the legislator has expressed about crime competition. Since self-laundering (Sw., *självtvätt*), that is laundering of profits from one's own criminality, is comprised by the rule on punishment in above-mentioned sec. 7, the legislator states that situations of competition also can araise in relationship to the for crime (Sw., *förbrottet*). Moreover, the legislator states that general criminal law principles mean that a certain subsequent action is considered to be included as such a natural part of the for crime that it shall be considered as consumed by and punished together with the for crime. The legislator states that the court therefore normally should sentence to responsibility only regarding the for crime.[87]

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[84] Compare that this is also what I stated in Forssén 2022 and Forssén 2023a.

[85] See Björn Forssén, *Näringspenningtvätt i momskarusell* (Commercial money laundering in VAT carrousel), ***Dagens Juridik*** (Today's Law) of 2023-10-02 (Forssén 2023c) and Forssén 2022, p. 125. Forssén 2023c is available on www.dagensjuridik.se, and also on www.forssen.com.

[86] See Forssén 2023c, where I refer to the preparatory works to the reform of the SBL in 1996 and to the Act on Punishment for Money Laundering: prop. 1995/96:170, s. 11 and. prop. 2013/14:121 – *En effektivare kriminalisering av penningtvätt* (A more effective criminalization of money laundering), p. 115.

[87] See prop. 2013/14:121, p. 112.

In Forssén 2024d, I reasoned also about the legal certainty principle on double criminal liability in BrB Ch. 2 sec. 2 second para. Then, the question concerned whether commercial money laundering can come up if tax fraud in Sweden is supposed to be a for crime to commercial money laundering in another involved EU Member State, where tax fraud is not determined as a risk crime, but as an effect crime.[88] In this article, I repeat that Sweden, by not solving the question on double criminal liability regarding for crimes at the trial of commercial money laundering, disregard a convention from the United Nations (UN) which Sweden has accessed – The UN's convention against Transnational Organized Crime of 15 November 2000 (Sw., *FN:s konvention mot gränsöverskridande organiserad brottslighet av den 15 november 2000*). However, in this article I leave out the principle on double criminal liability to save space and refer – like in Forssén 2025a – interested readers to Forssén 2024d, when it is a matter of that principle in the present context.[89]

Regardless of the last-mentioned limitation, I would like to see, especially when prosecutors assert suspicion of tax fraud which concerns VAT together with suspicion of commercial money laundering, reasoning about crime competition in the investigations by the EBM and in criminal cases regarding asserted carrousel trading. If the enterprise that the SKV and the EBM are investigating is deemed having constituted a crime tool in carrousel trading, the investigations should contain viewpoints on whether asserted crime also shall be deemed constituting a for crime to commercial money laundering. In the investigations must – like in other cases of investigations than those of carrousel type – all three basic criteria that forms the VAT principle in article 1(2) of the VAT Directive be regarded, that is a principally general right of deduction, reciprocity and passing on of the tax burden to the consumer as tax carrier. In my series of articles (2020–2023), where I went through the theses in the field of indirect taxes during 1994–2020, I conveyed inter alia that in the research in the field of VAT should above all the importance of regarding the right of deduction have been considered as central regardless of the choice of method in the theses, since the principle of a general right of deduction is just one of the parts of the VAT principle according to article 1(2). Thus, the right of deduction is central for at all making a deeper reasoning on VAT in the meaning of the EU law.[90] Of course, the same must also apply in tax audits and investigations by the EBM, so that those at all can be deemed regarding VAT.

Since verdicts are passed without the mentioned respect for the subject VAT as it is determined in article 1(2) of the VAT Directive, that is in the meaning of the EU law, they are not complying with the individual's right to a fair trial according to article 6(1) of the European Convention on the Human Rights (ECHR).[91] They are based on an actual practice – an actual current law – which must be broken by decisions in the highest instances, so that current law in a true sense will become in guidance for the application of law at the courts. In other words, a need for precedents exists in the existing legal situation concerning the cases which in the present respects regard the subject VAT. The outcome of such verdicts that are

[88] In Forssén 2025a, I mentioned this, since the question on double criminal liability is one of the questions that I deem remain for the legislator to bring up after SOU 2024:32.

[89] See Forssén 2024d, p. 10.

[90] See Forssén 2020b, p. 744.

[91] The ECHR's complete title is: European Convention for the Protection of Human Rights and Fundamental Freedoms Rome 4 November 1950.

concerned now should per definition also be deemed obviously due to gross negligence or gross mistake by the first and second instances and already for that reason should leave to appeal be decided by the highest instance.[92] The verdicts that I consider shall not continue to confirm a for question of law purposes erroneous but actually existing current law (an actual current law) can in a true sense not be grounds for the prerequisite erroneous information concerning neither tax surcharge nor tax fraud.[93] If article 1(2) of the VAT Directive is not fully regarded in the underlying investigations can thus neither criminal law responsibility be placed on the individual for assertion on commercial money laundering, if it all shall be deemed regarding VAT in Sweden or another Member State. In my opinion, it is namely fundamental that the imposing of responsibility also then must regard VAT according to the EU law.

5 The legal certainty demands leave to appeal in the HFD and the HD when the basic principles of what constitutes VAT according to the EU law is disregarded in the carrousel cases

5.1 For the individual leave to appeal on the theme of fair trial is most important

If article 1(2) of the VAT Directive is not fully regarded in a tax audit lying as foundation to the appealed decision in the tax case it can be questioned both regarding the tax and the tax surcharge issues and the tax fraud question whether the cases in first and second instance have been tried at all regarding the subject VAT. Especially concerning the problems about whether a *missing trader* should have accounted for the amount falsely denoted as VAT in issued invoice in a special tax return instead of a VAT return it happens that the SKV, as mentioned, specify its assertions on arrangements regarding carrousel trading to the fault concerning the accounting of VAT being a matter of the entrepreneur aiming to *appropriate money from the Swedish state*. I consider that it should lead to an improved legal certainty on liability certainty if payment regarding VAT, regardless of thereby meaning real or false VAT, would be expressly exempted from criminal law liability by clarifying this in the SBL. Instead, criminal measures taken against the tax account system especially regarding reimbursements of VAT would then be addressed by instituting legal proceedings according to the general rule against frauds, BrB Ch. 9 sec. 1, regardless of whether it is a matter of abusive practice.[94]

If the basic criteria of what is meant by VAT according to article 1(2) of the VAT Directive have not been treated in a tax case or in a criminal case concerning carrousel trading and contains questions on tax fraud and/or commercial money laundering, but where the verdicts yet have been passed on the theme of VAT, there exists a need for precedents. A for question

[92] Besides when it is of importance for guidance of the application of law with a trial in the HFD or the HD it may be so also if there are extraordinary reasons for such a trial, e.g. if the verdict in an administrative court of appeal (Sw., *kammarrätt*) or court of appeal (Sw., *hovrätt*) is due to a gross negligence (Sw., *grovt förbiseende*) or a gross mistake (Sw., *grovt misstag*). See sec. 36 first para of *förvaltningsprocesslagen (1971:291*, the Administration Procedural Act, here abbreviated FPL) and Ch. 54 sec. 10 first para *of rättegångsbalken (1942:740*, the Code of Judicial Procedure, here abbreviated RB).

[93] To levy a tax surcharge, it must appear as clearly that a to the SKV submitted information is erroneous, which follows of SFL Ch. 49 sec. 4 and 5. The necessary prerequisites for tax fraud in SBL sec. 2 are: intent (Sw., *uppsåt*), erroneous information, Sw., *oriktig uppgift* (or omission to file a return etc) and risk, Sw., *fara* (of tax evasion etc.).

[94] See Forssén 2023b, sections 5 and 8 and Forssén 2024d, p. 9.

of law purposes wrong but actually existing practice – an actual current law must be broken why the HFD, and the HD respectively should give leave to appeal, so that a current law in a true sense is developed and becomes of guidance for the application of law. Furthermore, the outcome of verdicts in an administrative court of appeal and a court of appeal respectively to the disadvantage of the individual has been, in my opinion, obviously due to gross negligence or gross mistake at those instances by the subject VAT not given a true analysis therein, although the verdicts in question contain the words VAT or value-added tax. Therefore, extraordinary reasons for the HFD and the HD respectively to give leave to appeal exist regarding the individuals' appeal of such verdicts by an administrative court of appeal and a court of appeal respectively.

At the mentioned oversight of the directive rule article 1(2) and thus of what constitutes VAT according to the EU law leave to appeal is called for especially in the HD already due to it, as mentioned, can be questioned if even the correct criminal law legislation has been treated in the court of appeal. For the individual's legal certainty cannot ECHR article 6(1) regarding the right to a fair trial be considered fulfilled either in the tax proceedings or the criminal law proceedings concerning VAT, where article 1(2) of the VAT Directive has not been fully regarded therein and the verdicts thus cannot be deemed to have been about VAT in the meaning of the EU law. Thus, I consider that it is of importance as guidance for the application of law that precedents are established by the HFD and the HD in the present respect and would as well benefit the individual´s right to a fair trial. I am also reminding about the HFD having a special responsibility in the context by the court – like the district administrative courts and the administrative courts of appeal – being comprised by the principle of ex officio examination (Sw., *officialprincipen*) according to FPL sec. 8 and thus *have to secure that the case will examined as far as its character demands* (Sw., "*ska se till att målet blir så utrett som dess beskaffenhet kräver*").

Furthermore, I come back here, as mentioned, to the Swedish system with leave to appeal in the highest instances being criticized by Denmark as something that can lead to a parallel legal practice in Sweden compared to the EU law in the field of VAT.[95] That apprehension is well worth taking seriously.

If the individual appeals to the HD or the HFD and claims concerning an interpretation question regarding a legal act like the VAT Directive, for example regarding article 1(2), that a preliminary ruling shall be obtained from the CJEU on the matter, it follows by sec. 1 first para of *lagen (2006:502) med vissa bestämmelser om förhandsavgörande från Europeiska unionens domstol* (the act on certain rules on preliminary rulings from the CJEU) and TFEU Article 267 third para that the court is obliged to state the reasons to a decision to not obtain such a preliminary ruling, where the court itself is not able to interpret the EU law.[96] In my

[95] See the EU-case C-99/00 (Lyckeskog), ECLI:EU:C:2002:329, item 11, and the Danish government's criticism there meaning that the Swedish system with leave to appeal in the highest instances cause a risk of a domestic practice deviating from that of the CJEU. I have mentioned this also in e.g. *Momsrullan IV: En handbok för praktiker och forskare* (The VAT roll IV: A handbook for practicians and researchers), self-published 2019, Forssén 2019c, p. 89 and *Skatteförfarandepraktikan – med straff- och europarättsliga aspekter: Andra upplagan* (the Taxation Procedure handbook – with criminal law and European law aspects: Second edition), self-published 2019, Forssén 2019d, section 10.4. Forssén 2019c and Forssén 2019d are available on www.forssen.com, and in printed versions at Kungliga biblioteket i Stockholm (the National Library of Sweden) and at the Lund University Library.

[96] See also Björn Forssén, *Nya förvaltningslagen och skatteförfarandet – studiematerial: Andra upplagan* (the new Administration Act and the tax procedure – study material: Second edition), self-published 2019, Forssén

opinion, this means that above all the HFD should take a positive attitude toward replacing an actual current law with a current law in a true sense regarding inter alia the two main cases in this article, which presupposes a trial in the HFD. That would benefit the legal certainty for the individuals also in cases on tax fraud and commercial money laundering that concern VAT, since the general courts thereby get guidance although the HD would not take a positive attitude, where giving leave to appeal is concerned.

5.2 The HD is actually not trying VAT fraud if the leave to appeal only regards erroneous information

In the above-mentioned case NJA 2018 p. 704 the HD made the question whether the defendant had submitted an erroneous information to the SKV in the meaning regarded in the SBL, by for the defendant's own company having claimed deduction for input tax, to the sole question on the theme of tax fraud and declared the question leave to appeal pending concerning the case as for the rest. The HD concluded that the company's claim of deduction meant that an erroneous information had been submitted according to SBL sec. 2. Thereby, the HD considered that the court of appeal's verdict would stand good.

In Forssén 2022, I have criticized the HD's mentioned limitation of the leave to appeal in NJA 2018 p. 704. Above all, I set the senior judge of appeal's perception that the defendant should have been acquitted with regard to the criminal law principle of legality in relation to the HD's remark about the question on intent not being comprised of the leave to appeal. Thereby, I concluded, as mentioned, that it is not clear that abusive practice *in itself* means that criminal law responsibility exists. Furthermore, I stated that it in the individual case always shall be decided whether also the risk prerequisite for tax fraud is fulfilled. I reminded about this, since the HD neither treated the risk prerequisite within the frame of the leave to appeal.[97]

In the tax audits lying as grounds for tax cases as well as for criminal cases on the theme of tax fraud of carrousel type, the SKV omits, in my experience, that the Advocate General in the opinion for a judgment to the CJEU in the joint cases C-131/13, C-163/13 och C-164/13, as mentioned, considers that a trader even may not be aware of participating in such a fraud and acting in good faith. Therefore, I repeat my criticism of the HD in NJA 2018 p. 704 limiting the leave to appeal to only regard the prerequisite erroneous information. In fact, by that limitation a trial is not conducted of the question on tax fraud according to SBL sec. 2 on the theme of VAT fraud, regardless of whether a case concerns VAT fraud of carrousel type or any other case of asserted VAT fraud. Thus, I consider that NJA 2018 s. 704 has a limited importance as guidance for the application of law on the theme of tax fraud. Thus, the HD has every reason to give leave to appeal in that respect and the need for this does not become less by the prosecutors not seldom completing the description of the deed with assertions on commercial money laundering.

2019e, p. 36. Forssén 2019e is available on www.forssen.com, and in a printed version at Kungliga biblioteket i Stockholm (the National Library of Sweden) and at the Lund University Library.

[97] See Forssén 2022, p. 125.

5.3 A continued unclear legal situation is to the detriment of both the legal certainty and public treasury

If the legal situation is not clarified in the respects mentioned in this article, it is not only negative for the individuals, but it will in the long run also be detrimental to public treasury. In the latter respect, I may mention that I finished my lecture in 2001 by stating that verdicts meaning that the SKV and the EBM gain a hearing for their viewpoints in cases of carrousel trading without support in current law in a true sense lead to problems for the SKV and the prosecutors once new guidance is given by decisions in the HFD and in the HD.[98] Then, fraudulent enterprises may have adapted to a misdirected actual current law, and the defenders can ask the simple question if the law did not apply in previous verdicts in the first and second instances of the administrative courts and the general courts. It will become a legal morass, where the State loses tax revenues that should belong to public treasury. Thus, the arguments that normally apply as motives for a restrictive application of the prerequisite extraordinary reasons concerning leave to appeal on for instance the grounds of gross negligence or gross mistake becomes for the here mentioned cases instead precisely arguments for the HFD and the HD ought to give the individual leave to appeal on these grounds at the individuals' appeal of a verdict by an administrative court of appeal or of a verdict by a court of appeal.

6 Comprehensive conclusions

The SKV publishes inter alia its standpoints in various taxation questions on its website (www.skatteverket.se), under *Rättslig vägledning* (Legal guidance). Thereby, the standpoints form part of an administrative practice which is binding for the civil servants at the SKV , but if an opposite viewpoint follows by current law according to the tax legislation or interpretations which forms case-law by decisions from the HFD or the CJEU the SKV and the civil servants there – like everyone else – obligated to follow such a current law that I call current law in a true sense, instead of the SKV's administrative practice. The problem that I bring up in this article concerns cases regarding value-added tax (VAT), where what I name an actual current law can exist at the SKV – in the form of administrative practice – or at the district administrative courts and the administrative courts of appeal.

I have chosen to bring up the question on the existence of an actual current law concerning two cases which thereby constitute the main cases for my reasoning in this article about legal certainty in cases on VAT and connected questions in Sweden. The two cases concern the question on the existence of an actual current law regarding the special 'VAT commission rule' and regarding the staffing enterprises' hiring out of personnel within the fields of health care and social care and the exemption from VAT respectively. What is especially interesting with these cases is that the SKV in its standpoints has made brief additions, where the SKV states ta hits legal judgment remain after the GML being replaced by the ML on 1 July, 2023. Thus, the additions contain no analysis of the questions by the SKV, why I am going through how the perceptions on the existence of an actual current law which deviates from the VAT Directive in the two cases can undermine the legal certainty for the individual entrepreneur in cases on VAT and connected questions in Sweden.[99]

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[98] See Forssén 2001.

[99] See section 1. See also my reference there to Forssén 2019b, section 1.4 (*Språkliga frågor* – Language questions) regarding the expressions *faktisk gällande rätt* (actual current law) and *gällande rätt i egentlig mening* (current law in a true sense) respectively and in which sections therein that I use these. Inter alia I do so when I bring up the special 'VAT commission rule' GML Ch. 6 sec. 7 in the sections 3.3.3–3.3.4, which rule is also

The perception at the SKV (and the EBM) on the special 'VAT commission rule' in GML Ch. 6 sec. 7 has been that it means that a middleman – like an agent – is comparable with a trader, although not having an agreement on commission trading in a civil law sense with the mandator. Then, an ordinary agent shall account for VAT on a taxable amount corresponding with the gross amount received from the purchaser of the goods or the services mediated, instead of only on the commission that the agent keeps as income. I consider that the VAT reform on 1 July, 2023 has meant that this does not apply anymore. By the introduction of ML Ch. 5 sec. 3 second para no. 3 and sec. 27 an adaptation is made to the articles 14(2)(c) and 28 of the VAT Directive, so that it no more exists any such special rule – 'rubber rule' – as both the authorities have claimed.

Thus, it is for reasons of legal certainty important that it will not be established as an actual current law that a special rule in the form of a special 'VAT commission rule' would exist meaning that the middleman shall be viewed as a trader also in other cases than commission trading in a civil law sense. Such an actual current law can be established by the SKV's addition on 2023-05-31 in its standpoint of 2020-09-25 meaning that the ML does not cause the SKV's legal judgment to be altered.

To avoid legal uncertainty concerning whether the special 'VAT commission rule' can be considered applying according to the SKV's administrative practice, a clarification should be made in section 3.2 of the SKV's standpoint of 2020-09-25, *Förmedling av tjänster i eget eller i annans namn, mervärdesskatt* (Intermediation of services in one's own or somebody else's name, value-added tax), dnr 8-314934, so that there will not be any hesitation about current law in a true sense meaning that it nowadays is requested that an agreement on a commission trading in a civil law sense exists for a middleman to be compared for VAT purposes with a trader. In section 3.2 of the statement, the SKV refers to Ch. 6 sec. 7, that is to that rule in the GML, and states that it means that the intermediary of goods is treated *in the same way as a retailer of the goods* (Sw., "*på samma sätt som en återförsäljare av varan*"). By the addition of 2023-05-31 in the standpoint, I perceive that the SKV considers that the special 'VAT commission rule' still applies, why current law in a true sense as it nowadays should be perceived according to the ML demands the mentioned clarification by the SKV.[100]

Concerning the other main case of this article, the question is whether it can exist an actual current law meaning that the staffing enterprises within the fields of health care and social care are exempted from VAT. If so, exemption would apply even if such enterprises are not taking any health care or social care responsibility as a taxable person, but it instead is the personnel hired out that is fully qualified within the fields in question or can present some other fulfilled demand on authorization.

By its standpoints of 2018-10-25 the SKV adapted to the EU-case "go fair" Zeitarbeit and the HFD's advance ruling HFD 2018 ref. 41, so that the SKV nowadays does not express that from current law in a true sense previously deviating perception of exemption from VAT for

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brought up as one of the two main cases in the article regarding the existence of an actual current law. In section 3.4.2 of Forssén 2019b, I have also mentioned the same question as in the other main case of this article, i.e. the staffing enterprises' VAT status within health care and social care, but then I did not mention the existence of an actual current law in that respect. I did not do so in Forssén 2019a either, but this is done first by this article.

[100] See section 2.1.

the hiring out of personnel in question and which was due to the SKV treating the tax object question without first considering the tax subject question. Thus, it is correct in this case that the SKV in its standpoints of 2018-10-25, where one of them taken by itself was replaced on 2021-06-17 but without any difference in meaning, notes that its legal judgment remain after the introduction of the ML. However, it occurs in my experience that the big enterprises on the field of staffing consider that it would exist support in Finland for the previously generous application existing as an actual current law after the introduction of the ML. With regard to the history of unclear standpoints on the question about VAT and staffing on the fields in question, the SKV should have done more in connection with the VAT reform of 2023 than just noting briefly in the additions of 2023-05-31 and 2023-06-01 in the standpoints in question that the legal judgment remains. In my opinion, the SKV's additions do not contribute to the entrepreneurs being able to perceive the question on VAT in connection with staffing as legally certain.

It is also a matter of preventing the establishment in Sweden of a from the EU law deviating actual current law by giving the big dominating enterprises in the fields of health care and social care in Sweden any comparative support to pursue their opinion on continued exemption from VAT, whereby the smaller enterprises with lesser procedural muscles are forced to follow the big enterprises to avoid being driven out of competition. That counteracts the basic idea of a competition and consumption neutral VAT according to TFEU article 113 on the internal market for enterprises as well as for consumers. Thus, I suggest that the Finnish tax authority clarifies in its detailed instructions that it in accordance with the EU-case "go fair" Zeitarbeit is of a conclusive importance for the VAT question also regarding transfer of manpower within health care to determine who is a tax subject, before the question on the tax object is treated. By extension, my suggestion to the tax authority is thus aiming to accomplish a neutral application of the VAT issue between bigger and smaller staffing enterprises within health care and social care in Sweden.[101]

[101] See sections 2.2–2.2.2.