VAT and the transaction concept

■ The carrousel by the tax and economic crime authorities (SKM and EBM)

lawyer Björn Forssén, lecture at Swedish Law Meeting Wednesday 14 November, 2001, at 09.00—11.00 – Website: www.forssen.com

Arranger: VJS

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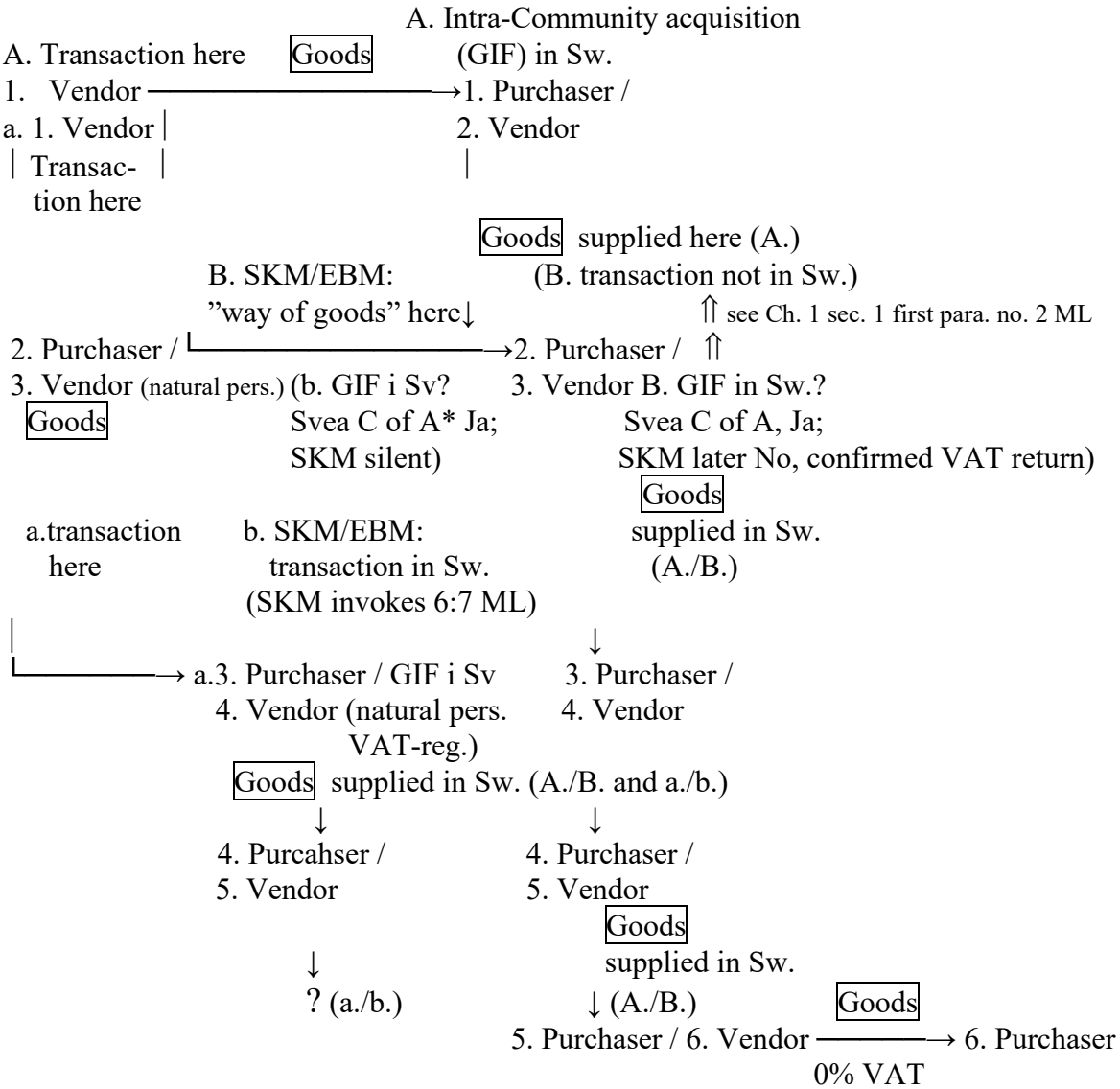
Abbreviations

CLO – Central Liaison Office
EBM – *ekobrottsmyndigheten*, the Economic Crime Authority
EC/EEC/EU – European Community/European Economic Community/European Union
GIF – *gemenskapsinternt förvärv*, intra.Community acquisition
KVR – *kvartalsrapport*, Quarterly Recapitulative Statement
ML – *mervärdesskattelag (1994:200)*, the VAT act [Note! Replaced on 1 July, 2023 by *mervärdesskattelagen (2023:200)*]
NJA – *Nytt juridiskt arkiv (avd. 1)*, the yearbook of the Supreme Court
prop. – *regeringens proposition*, the Government's bill
RSV – *Riksskatteverket*, the National Tax Board
RÅ – *Regeringsrättens årsbok*, the yearbook of the Supreme Administrative Court
SBL – *skattebetalningslag (1997:483)*, the tax payment act
SkBrL – *skattebrottslag (1971:69)*, the Tax Fraud Act
SKM – *skattemyndigheten*, the tax authority
SkU – *skatteutskottets betänkande*, the tax committee's report
SOU – *statens offentliga utredningar*, the Swedish Government's official reports
VAN – value added network
VAT – value added tax
VIES – VAT Information Exchange System

Practice case (’carrousel trading’) – ’way of the goods’ etc.

’Way of the goods’	VIES/VAN/CLO/KVR	Customs procedure
Other EC-country Than Sweden A/B e.g. Luxemburg a/b e.g. England	Sweden	Other EC-country than Sweden or place outside the EC



A./B. (See my article in *Ny Juridik 4/2000* pp. 69-83 or Appendix 3 in my book *Momshandboken Enligt 2001 års regler*, Norstedts Juridik, regarding Svea C of A’s* case B 1378/96 and B 6517/99 and B 9502/99)
a./b. (see Svea C of A’s* case no. B 3610/01)

- A./B., (certain) gold VAT free in Luxemburg, but not in Sweden before 2000; a./b., gold taxable both in England and Sweden. Importance for the GIF-question (Ch. 2a sec. 3 first para. no. 3 ML: vendor ”tax liable”; distance sale Ch. 5 sec. 2 first para. no. 4 ML)

- ”Way of goods”, the main rule Ch. 5 sec. 2 first para. no. 1 ML – the mentioned difference pointless.

*[Svea C of A, the Svea Court of appeal]

’Carrousel trading’

- SKM/EBM regard goods to Sweden leaving Sweden
- Ordinary cases: trading with gold, base metals, mobile phones, computers etc.

Comments:

- Not any tried and established institute like e.g. dividend funds, which after tax audits only were considered existing for tax advan (see RÅ 1990 ref 101 I and II)
- *Lag (1995:575) mot skatteflykt*, the Act Against Tax Avoidance, does not comprise VAT

Consequences of acquisitions within the country deemed constituting GIF

Acquisition of goods within the country corresponding to taxable transaction by the deliverer

Own further sale within the country:	Output tax +	
Acquisition	Input tax -	(equal to output tax
Tax to pay/to be reimbursed +/-		by the deliverer)

GIF from the other EC-country

Own further sale within the country:	Output tax +	
GIF, calculated output tax	Output tax +	(corresponding transaction by
Which is deducted as input tax directly	Input tax -	the deliverer in the other EC-country
Tax to pay/to be reimbursed +		zero rate taxation there)

Output tax on a GIF may be deducted as input tax in the same VAT return (jfr prop. 1994/95:57 s. 79). Such output and input tax is deemed regarding the same question, why the set-off prohibition in Ch. 15 sec. 3 of the tax payment act, *skattebetalningslagen (1997:483)*, SBL, is not considered applying according to the RSV (see the RSV’s writ of 1999-09-17, dnr 9165-99/110). It means that tax surcharge is not imposed for an omitted accounting of VAT on a GIF.The EBM seems to accepted this and speaks about erroneous information due to input tax being falsely deducted as for an acquisition equal to a supply made by the deliverer within the country, and does not bring up that an erroneous information is submitted due to omitted accounting of VAT on a GIF.

Comments:

The SKM does sometimes not bring up GIF in its taxation decisions, but the EBM speaks about GIF with the consequence that the defendant only would have output tax to account for on his further sale. Regardless whether congruity exists between the SKN and the EBM: only apparent risk of tax avoidance or evasion by the defendant as long as the tax proceedings are not decided and it has not been clarified that the deliverer or, if that person is disregarded by the SKM/EBM, someone else has done a supply within the country that makes right of deduction for input tax emerging for the defendant’s acquisition (see Ch. 8 sec. 3 first para. of the ML, Ch. 8 sec:s 5 and 17 of the ML and Ch. 11 sec. 5 of the ML, deduction by virtue of a VAT carrying invoice, and Ch. 11 sec. 4 no. 1 of the ML, deduction by virtue of an issued transaction note).

Sec. 2 *skattebrottslagen (SkBrL)*, the Tax Fraud Act

- He or she who in another way than orally – i.e. in writing – with intent gives an erroneous information to an authority or omits to submit a tax return, a statement for control purposes or another prescribed information to an authority, and thereby causing a risk of tax (Sw., *skatt*) being withheld the public (*first part* of the rule)
- or wrongly counted in or reimbursed to himself or herself or someone else (*second part* of the rule),
- is sentenced for *tax fraud* to prison for two years at the most (third part of the rule).

Intent	+	erroneous info	=	tax fraud
1	+	1	=	1
0	+	1	=	0
1	+	0	=	0

My attitude, suppositions to sentence for tax fraud

Intent by the suspected/defendant regarding of him given erroneous information on input tax and/or output tax by himself (the *first part*)
or
if input tax by a purchaser in relation to the suspected/defendant (the *second part*).

The attitude of the EBM (and of the SKM)

Vendor	***Vendor***	***Purcahser/Vendor***	***Purchaser***
Case 1		**Tilltalad (fanns i Sv.)**	
(See the Svea Court of appeal's cases B 6517/99 and B 9502/99)			
Detained in his absence (**svensk i Lux.**)	Disregarded EBM/SKM claim wrong charging VAT	EBM claims no right to deduct input tax (11:5 ML). wrong charging VAT Instead GIF⇒Only output tax	Not investigated
Alt in my opinion: transaction in Sweden 5:2 1st para. no. 1 ML 5:2 1st para. no. 4 ML		Alt in my opinion: issuing a transaction note to the first vendor (11:4 no. 1 ML) Above all as the SKM later confirmed the return The SKM's auditing memos: 1998, GIF or not GIF; 1999, GIF.	
Case 2	**Defendant (was in Sw.)**		
(See the Svea Court of appeal's case B 3610/01)			
Not questioned	The EBM claims output VAT due to professional and supply in Sweden	Not even heard Notes reg. him have been drawn up by the next person, but the SKM deems that they concern the defendant. Support by 6:7 ML. The appeal court/ the district court do not even mention 6:7 ML.	'Cleared' by the EBM!. The SKM continues investigating

My opinion: a lot to continue to examine, not possible to sentence the defendant without investigation of the others.
The defendant has made an open accounting of his own circumstances and intent can for him only regard erroneous information in other persons' returns, e.g. by the person who was 'cleared' by the EBM to use him as witness against the defendant, i.e. by the person that the SKM considers have 'appropriated' deduction for input tax by his drawing up of notes to claim deduction.

Cardinal error in the EBM's investigations and the Svea Court of appeal's verdicts

Disengagement of the defendant's VAT return and question about output or input tax there.

The EBM speaks about a crime plan, that persons have 'lived' on VAT money, but does not build up any real proof on how this relates to the defendant's VAT return, but attacks him and omits preceding persons in the chain of purchasers and vendors where the defendant is included and omitting the following persons or uses them as witnesses against the defendant.

Erroneous information, Comments:

- No payment crime regarding the ML (sec. 2 of the SkBrL, *first part*)
- Repayment crime regarding the ML by the defendant or someone else (sec. 2 of the SkBrL, *second part*)

- Each accounting period one deed (see NJA 1984 p. 520)
- VAT, no 'attempt' – automatic decisions (see prop. 1995/96:170 p. 93)

- One VAT system but two forms of registration (see bet. 1994/95:SkU7 p. 72)
- All time before VAT registration: the assess for arrears institute applies (see RÅ 1987 ref 115)

- Börje Leidhammar recommends trial of the taxation question, before the subjective prerequisite is tried in a lawsuit (see p. 415 in his article in *SkatteNytt* (Tax news) 2000 pp. 405-417, *Om muntlig förhandling* (On oral proceedings).
  Support for this: the preparatory works to the SkBrL: prop. 1995/96:170 p. 92

- Erroneous information shall be given a uniform interpretation regardless whether tax surcharge, assessment for arrears or tax fraud is concerned (see p. 415 in Leidhammar's article and p. 242 in Bertil Wennergren's *Förvaltningsprocess* (Administrative procedure), Norstedts 1971)
- Erroneous information concerns subject matter information [see section 3.1 in Börje Leidhammar's article *Oriktig uppgift – upplysningsskyldighet och bevisbörda, en replik* (Erroneous informatin – information liability and burden of proof, a reply) *SkatteNytt* 2000 pp. 279-283 and my articles *in SkatteNytt* 1996 pp. 417-474, *SkatteNytt* 1999 pp. 258-268 and *SkatteNytt* 2000 p. 284 and my book *Momshandboken Enligt 2001 års regler* (Norstedts Juridik), p. 109etc., and the RSV's writ dnr 11530-99/100 and RÅ 1999 Ref 16]

- The transaction is the business transaction here (jfr prop.1993/94:99 p. 240) – compare the cause.

- The Svea Court of appeal (B 3610/01) does not mention if the SKM is basing decisions on Ch. 6 sec. 7 of the ML

Crime plan, Comments:

- Division of 'VAT profit', asserted by the EBM despite only one prosecuted in the chain.

- Purchase prices higher than sale prices: suspicious according to the EBM. The SKM's audit memo may, however, mean that professionality according to the ML is obvious: if so, objection on grounds of relevance.
  Professionality ML: independent of the result [see article 4(1) of the Sixth VAT Directive (77/388/EEC) and RÅ 1996 Not 168.
  Reference in Ch. 4 sec. 1 of the ML to income tax and business activity obsolete since Sweden's EU-accession in 1995. RÅ 2000 Ref 5 with references to several EC-verdicts establish: the EC-directives, e.g. the Sixth VAT Directive, have direct effect]

The tax liability to VAT

Ch. 1 sec.1 first para. of the ML

Value-added tax shall be paid to the State:

1. at such *transaction within the country* of goods or services which are taxable and made in a professional activity

    - goods: material things (incl. real estates) + gas, warmth, cold and electrical power
    - services: everything else that can be supplied in a professional activity (see Ch. 1 sec. 6 of the ML)
    - transaction, see Ch. 2 of the ML (contractual transfer of right of disposal, see SOU 1994:88 Appendix 1 p. 39 and the RSV's Guide to VAT (*Handledning för mervärdesskatt*) 2000, p. 285)
    - complete transfer of ownership regarding goods, always transaction of goods and never transaction of service (see prop. 1989/90:111 p. 189)
    - transaction of goods or service taxable, if not exempt in Ch. 3 of the ML
    - professional, see Ch. 4 of the ML [see tax liable person article 4(1) of the EC's Sixth VAT Directive (77/388/EEC)]
    - transaction within or outside the country, see Ch. 5 of the ML

and in two cases of import (Sw. *införsel*) to the country, namely:

2. at taxable intra-Community acquisition (GIF) of goods which are chattels (Sw., *lös egendom*), if the transaction is not made within the country

    - *import of goods from another EC-country,* see Ch. 2a of the ML *(def. of GIF=acquisition of the right as owner to dispose of goods which are sent from another EC-country, see prop. 1994/95:57 p. 167)*

3. and at such import of goods into the country which is taxable (import from a third country)

    - import of goods from a place outside the EC, see Ch. 2 sec. 1a of the ML

The tax liability according to Ch. 1 sec. 1 first para. no. 1 of the standing on different legs:

Professional	+	taxable	+	transaction	+	within the country	=	tax liability
1	+	1	+	1	+	1	=	1
0	+	1	+	1	+	1	=	0
1	+	0	+	1	+	1	=	0
1	+	1	+	0	+	1	=	0
1	+	1	+	1	+	0	=	0

All prerequisites are necessary prerequisites for the emergence of the tax liability.

Also single, temporary transaction here causes tax liability here, regardless of where in the world the professional activity is carried out (prop. 1994/95:57 p. 155).

Tax liability ⇒ right of deduction Ch. 8 sec. 3 first para. of the ML;
Right of deduction can be exercised by virtue of a VAT carrying invoice
(see Ch. 8 sec:s 5 and 17, Ch. 11 sec. 5 of the ML, prop. 1994/95:57 p. 136 and prop. 1993/94:99 pp. 210, 211 and 217 and RÅ 1984 1:67) SOU 1964:25 p. 382: the purchaser's right of deduction for input tax is completely independent from the vendor's fulfilling of his responsibility of accounting and payment. The reciprocity principle is fundamental within the tax law.
With invoice is e.g. transaction note corresponding (see Ch. 1 sec. 17 of the ML and Ch. 11 sec. 4 no. 1 of the ML)

Ch. 6 sec. 7 of the ML – one intermediation service, two transactions

Sale of own goods (retailer): one purchase and one sale

- two questions, see Ch. 15 sec. of the SBL and the set-off prohibition

An intermediary is equal to a retailer according to Ch. 6 sec. 7 of the ML
(no warehouse of one's own, see prop. 1993/94:99 p. 190 and RÅ 1996 Not 192)

- output and input tax one question in my opinion and the set-off prohobition of Ch. 15 sec. 3 of the SBL does not apply.
- the Svea Court of appeal's verdict B 3610/01: not mentioning that the SKM is invoking 6:7 ML.

See Ch. 9c of the ML, either taxable for VAT – taxable for VAT or exempt from VAT – exempt from VAT.

Note! Only correspondence to 6:7 ML for *services* in the EC's article 6(4) of the Sixth VAT Directive (77/388/EEC). The directive law direct effect to the individual's advantage (RÅ 2000 Ref 5). The solidarity principle in article 5 of the Rome Treaty (see prop. 1994/95:19 Part 1 pp. 141, 487 and 488). Preliminary ruling from the Court of Justice of the EC (prop. 1994/95:19 Part 1 p. 483). 6:7 ML materially unchanged since the general taxation of goods from 1960 (see prop. 1993/94:99 p. 190 and prop. 1968:100 p. 121).

Intra-Community acquisition and transaction

- According to Ch. 1 sec. 1 first para. no. 2 of the ML can the same business transaction constitute both transaction within the country and GIF here (Prop. 1994/95:57 p. 157)

- The transaction coours *when* an agreement exists on purchase of goods by law of contracts (see Ch. 2 sec. 1 of the ML, SOU 1994:88 Appendix 1 p. 39 and the RSV's Guide to VAT (*Handledning för mervärdesskatt*) 2000, p. 285)

- GIF: transfer of the right of ownership to the goods and cross-border trading within the EC (see prop. 1994/95:57 p. 167)

- A sale of goods from an enterprise in an EC-country to an enterprise in another EC-country has two sides: the purchaser's acquisition (GIF) in the receiving country a reflection of the vendor's transaction in the other country (see prop. 1994/95:57 p. 156)

- Only four cases of GIF according to Ch. 2 a sec. 2 of the ML, namely:

1. for consideration, import from another EC-country to Sweden
2. for consideration, import to another EC-country than Sweden (sec. 6)
3. transfer of goods here from another EC-country according to sec. 7
4. transfer of goods here from another EC-country according to sec. 9

In all cases except case no. 2 (the reserve rule, see below) shall a trial be made against sec. 3 (see Ch. 2 a sec. 10 of the ML), which means that the concept *tax liable* gets a decisive importance. Not considered by the Svea Court of appeal in case B 1378/96. The sentenced has a great interest of awaiting the final result of an ongoing investigation according to the Committee directive (Sw., *Kommittédirektiv*) 1999:10 regarding the meaning of concepts like *tax liable* (Sw., "*skattskyldig*") and *taxable person* (Sw., "*skattskyldig person*"). Last bid: expected to be finished on 2002-09-30.

- The purchaser's VAT-registration (VAT-no.) only decisive for the vendor in the other EC-country being able to make a zero rate taxation of his transaction there (see prop. 1994/95:57 p. 78).

- Only one case since VAT-no. having a meaning in itself for a purchaser being deemed making a GIF here: namely at a cross-border where the goods do not arrive to Sweden, but are sent from Sweden or another EC-country to yet another EC-country, but the purchaser is invoking his Swedish VAT-no. If the purchaser does not show that he is charged VAT also in another EC-country, he shall account for a calculated output tax here (see the so-called reserve rule in Ch. 2 a sec. 2 no. 2 and sec. 6 first para. of the ML and prop. 1994/95:57 pp. 79 and 156)

- Several purchasers can make a GIF regarding the same cross.border import here. A simplification directive exists for such situations at tripartite trading (see Ch. 2 a sec. 6 of the ML, Prop. 1994/95:57 p. 159, articles 28b. A1 och 28c. E3 of the EC's Sixth VAT Directive, 77/388/EEC and 3:30b ML)

Ch 5: *where* does the transaction take place, whitin the country?

- The VAT is a consumption tax – neutrality of competition a key concept
- RÅ 1985 1:40 (see RÅ-series, not CD-rom or Internet). Several transactions (agreements) can be projected on the same transportation of goods ⇒ transaction in each part

Sec. 1 – portal rule: sec:s 2-8 describe transactions within the country: all other transactions take place abroad + transactions mentioned in sec:s 9 and 11

- All rules on country of supply except Ch. 5 sec. 8 second para. of the ML models without real trial of consumption
- Former main rule, Ch. 5 sec. 9 first para. no. 1 of the ML – the *delivery concept*, regarding tripartite trading (see prop. 1994/95:57 p. 183)
- Within the EC: decisive for the place of the transaction where the goods *exist* when the transportation to the purchaser begins, see Ch. 5 sec. 2 first para. no. 1 of the ML and article 8(1) a of the EC's Sixth VAT Directive and the RSV's Guide to VAT (*Handledning för mervärdesskatt*) 2001, p. 285, where the RSV also italicizes the word "*finns*" (exists).
  [On p. 284 the RSV emphasizes the importance of beginning a VAT investigation with determining country of supply. Feel free to add: an investigation on VAT can never be isolated to one person in a chain of vendors abd purchasers, see my first book: *Mervärdeskatt En läro- och grundbok i moms* (Value-added tax A text and basic book), p. 21 (Publica, 1993)]

The circumstance that the gold may have been placed in Great Britain, when the defendant's transactions were made does according to the Svea Court of appeal (case B 3610/01) not present an obstacle to deem him or her tax liable according to Ch. 1 sec. 1 first para. no. 1 of the ML.
Inconsistent attitude on the Svea Court of appeal's part with RÅ 2000 Not 11, whereof follows that according to Ch. 5 sec. 2 first para. no. 1 of the ML compared with article 8(1) first para. a of the EC's Sixth VAT Directive (77/388/EEC) is the place of the delivery of goods when those are sent or transported either by the deliverer or by the receiver or by a third person deemed to be the place where the goods exist at the time when the dispatch or transport to the receiver begins.
Thus: another case where objective suppositions for criminal responsibility are not proven, but the defendant is still sentenced for tax fraud. [see my article in *Ny Juridik* (New Law) 4/2000 pp. 69-83 or Appendix 3 in my book Momshandboken Enligt 2001 års regler, Norstedts Juridik] Ch. 2 sec. 10 first para. regeringsformen (the Instrument of Government)?

To think about for the defence lawyer

- ’The way of the goods’ – hearing the tax auditor properly. Refer to the RSV’s Guide to VAT (*Handledning för mervärdesskatt*) 2001, p. 284, where the RSV emphasizes the importance of beginning a VAT investigation with determining country of supply. In e.g. the cases B 6517/99 och B 9502/99 (the Svea Court of appeal) above ’the way of the goods’ was never examined, but the cash flow, terms pf delivery etc. – two memos from the SKM existed, one of 1999 which stated GIF if the vendor is *a tax liable person carrying on a business activity* and one of 1998 stating GIF if *the vendor is tax liable to VAT* and not GIF if *the vendor is not tax liable to VAT*

- If it is uncontested that goods have been transported between Sweden and another EC-country, do not accept facts like terms of delivery, cash flow etc. as anything else than circumstantial evidence. Decisive for one of the necessary prerequisites for tax liability according to Ch. 1 sec. 1 first para. no. 1 of the ML, namely the concept *within the country*, is where the goods exist when agreement on sale was made, i.e. when the transaction occurred, if it is uncontested that it is a matter of EC-trading

- Are there more possible places from which a vendor can mention in the agreement that the goods shall be sent, e.g. a warehouse in Sweden and not only in the other EC-country?

- Are there more tax auditors, more memos in the investigation – summon all auditors as witnesses (also someone assisting the prosecutor, if he or she is a tax auditor in the investigation)

- Does the tax auditor consider that the tax control has been obstructed in any sense

- Has the defendant perhaps submitted an open accounting and not any erroneous information? Ignorance by the auditor does not mean that a risk for tax avoidance or evasion has existed, see prop. 1995/96:170 p. 94) Compare the Svea Court of appeal that in case B 3610/01 only sentenced the defendant by its own editorial wording of the verdict. It is expressed under headline if the question whether a transaction has been made that the defendant’s returns with enclosures state that he has *sold goods in Sweden*, but under the headline on the question whether transaction has been made within the country the Svea Court of appeal does not repeat its own conclusion!!!!??? How can the defendant at all be deemed having submitted an erroneous information? Erroneous information shall be given a uniform interpretation regardless whether one speaks about tax surcharge, assessment for arrears or criminal responsibility (see p. 415 in Börje Leidhammar’s article in *SkatteNytt* 2000, pp. 405-417, *Om muntlig förhandling* (On oral proceedings) and p. 242 in Bertil Wennergren’s *Förvaltningsprocess* (Administrative procedure), Norstedts 1971). (Noted after the lectire: KRS considered that no erroneous info had occurred; however, no leave to appeal in the Supreme Court.)

- If accounting has been made in a wrong accounting period, do not accept a net method, since each period is one deed (see NJA 1984 p. 520)

- Will the tax authority’s procedure differ from what general courts, the prosecutor considers regarding the taxation question?

- If the prosecutor summons expert witnesses, call for more of those, e.g. from the tax authorities

- Point out already when presnting the statement of facts that the prosecuto shall mention what he or she knows about the taxation question. Börje Leidhammar recommends trial of the taxation question, before the subjective prerequisite is tried in a lawsuit (see p. 415 in his article in *SkatteNytt* (Tax news) 2000 pp. 405-417, *Om muntlig förhandling* (On oral proceedings). Support for this: the preparatory works to the SkBrL: prop. 1995/96:170 p. 92