Competition advantages with transactions of goods after VAT free transactions of goods in certain warehouses and of financial services

[Translation of the article *Konkurrensfördelar med varuomsättningar efter momsfria omsättningar av varor i vissa lager och av finansiella tjänster*, by Björn Forssén, published in original in *Tidningen Balans fördjupningsbilaga* (The Periodical Balans Annex with advanced articles) 1/2018, pp. 3–10.] Translation into English by the author of this article, Björn Forssén.]

Is it possible to within the frame of the law lower the taxable amount and thereby the price of goods, by a from taxation exempted transaction of goods according to the rules on VAT free transactions of goods in certain warehouses being set off against a from taxation exempted financial service, before the goods are taken out from such a warehouse? That is, without any conflict arising with the rules on the taxable amount of value-added tax (VAT)? In this article is Björn Forssén bringing up this topic.

In this article, I am treating the situation that a purchaser can purchase goods which are taxable according to *mervärdesskattelagen (1994:200)*, the [Swedish] VAT act, abbreviated GML,[1] as well as according to the EU's VAT Directive (2006/112/EC) to a lower price due to the vendor being able to lower the price on his sale of the goods to the purchaser, by preceding meausres during the time the goods have been placed in certain warehouses according to the rules in Ch. 9 c of the GML, which are closest corresponded by the rules in articles 154-163 of the VAT Directive. This gives the vendor competition advantages against other suppliers who have their goods in warehouses comprised by the general rules of the GML and the EU's VAT Directive. The rules in Ch. 9 c of the GML is one of the examples in Ch. 1 sec. 2 last para. of the GML on *special rules about who in certain cases is tax liable* (Sw., "*särskilda bestämmelser om vem som i vissa fall är skattskyldig*"), and in the way mentioned they can indirectly affect the price of the goods, so that it becomes lower.

I conclude, there is nothing in the VAT Directive which would disqualify that a lowering of the taxable amount and thereby of the price of the goods is made based on a matching/set-off of a tax free transaction of the goods during the time that the goods have been placed in the tax warehouse against a tax free financial service. Therefore, the legislator should perhaps regard that the purchaser can circumvent the case-law regarding the general VAT rules which mean that the taxable amount of the goods must not be lowered by a *matching* of a discount for *fast payment*. Abusive practice should nor be present in that respect – at least not if the goods are only comprised by one round of the described matching procedure.

Finally, I also give for the context some proposals on research or law alterations.

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[1] Note! The GML was replaced on 1 July, 2023 by *mervärdesskattelagen (2023:200)*, abbreviated ML, which, however, does not lead to any alteration of the problems described in this article. By the way, Ch. 9 c of the GML is corresponded by Ch. 11 of the ML.

The rules on exemption from taxation for transaction of goods

According to Ch. 9 c sec. 1 first para. no.:s 1, 3 and 4 of the GML the following transactions of goods are exempt from taxation:

- a transaction of goods mentioned in sec. 9 of Ch. 9 c, if the goods are intended to be placed in such a tax warehouse within the country (Sweden) mentioned in sec. 3 of Ch. 9 c;
- a transaction of goods mentioned in sec. 9 of Ch. 9 c, if the goods are sold during the time they are placed in a tax warehouse within the country (Sweden) mentioned in sec. 3 of Ch. 9 c; and
- a transaction of non-Union goods made in an installation for temporary storage, a customs warehouse or a free zone within the country (Sweden), if it is made during the time they are placed there.

The tax exemption for a transaction of goods in those cases applies according to Ch. 9 c sec. 1 second para. of the GML only on the assumption that it is not aiming to a final usage or consumption, i.e. that the transaction is made to someone who is trading with goods and not to a consumer or someone who shall use it in his or her activity.

Tax warehouse and non-Union goods, installation for temporary storage, customs warehouse and free zone

Tax warehouse means according to Ch. 9 c sec. 3 of the GML:

- for goods in sec. 9, which constitute energy products according to Ch. 1 sec. 3 *lagen (1994:1776) om skatt på energi* (the Swedish Energy Tax Act) and are comprised by the procedure rules mentioned in sec. 3 a of the same chapter, such authorised tax warehouses run by an authorised warehousekeeper according to Ch. 4 sec. 3 of that act;
- for ethyl alcohol, such authorised tax warehouses run by a warehousekeeper authorised according to sec. 9 of *lagen (1994:1564) om alkoholskatt* (the Swedish Alcohol Tax Act); and
- for other goods in sec. 9, such authorised tax warehouses run by a warehousekeeper authorised according to sec. 7.

The goods stated in sec. 9 in Ch. 9 c of the GML are:

goods pertaining to the following numbers of the combined nomenclature (Sw., *kombinerade nomenklaturen*), KN-no., according to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff,
1. tin (KN-no. 8001),
2. copper (KN-no. 7402, 7403, 7405 or 7408),
3. zinc (KN-no. 7901),
4. nickel (KN-no. 7502),
5. aluminium (KN-no. 7601),
6. lead (KN-no. 7801),
7. indium (KN-no. ex 8112 91 or ex 8112 99),
8. corn (KN-no. 1001 to 1005, 1006: only unpolished rice, or 1007 to 1008),
9. oil plants and oily fruits (KN-no. 1201 to 1207), coconut, Brazilian nut and cashew nut (KN-no. 0801), other nuts (KN-no- 0802) or olives (KN-no. 0711 20),
10. corn and seed for sowing, including soya beens (KN-no. 1201 to 1207),
11. coffee, not roasted (KN-no. 0901 11 00 or 0901 12 00),

12. tea (KN-no. 0902),
13. cocoa beans, whole or broken, raw or roasted (KN-no. 1801),
14. raw sugar (KN-no. 1701 11 or 1701 12),
15. rubber, in original forms or as plates, sheets or strips (KN-no. 4001 or 4002),
16. wool (KN-no. 5101),
17. chemicals in bulk (chapters 28 and 29),
18. mineral oils, including hydrogenated vegetable and animal oils and fat, natural gas, biogas, propane and butane; also including crude petroleum oils (KN-no. 2709, 2710, 2711 11 00, 2711 12, 2711 13, 2711 19 00, 2711 21 00 or 2711 29 00),
19. silver (KN-no. 7106),
20. platinum; palladium, rhodium (KN-no. 7110 11 00, 7110 21 00 or 7110 31 00),
21. potatoes (KN-nr 0701),
22. vegetable oils and fat and their fractions, regardless whether they are refined or not, however not chemically modified (KN-no. 1507 to 1515),
23. wood (KN-no. 4407 10 or 4409 10),
24. ethyl alcohol, E85 and ED95 (KN-no. 2207 or 3823 90 99),
25. fatty acid methyl esters (KN-no. 3823 90 99),
26. pine oil (KN-no. 3803 00 10), and
27. additions in motor fuel (KN-no. 3811 11 10, 3811 11 90, 3811 19 00 or 3811 90 00).

With non-Union goods, installation for temporary storage, customs warehouse and free zone is meant according to Ch. 9 c sec. 2 of the GML the same as in Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (the so-called Union Customs Code).

To lower the taxable amount and thereby the price on taxable goods

General VAT rules

If the vendor makes a from taxation exempted transaction of goods according to Ch. 9 c of the GML in a n economis activity, the person in question has a right of reimbursement for input tax in the activity according to Ch. 10 sec. 11 first paragraph of the GML. The question is whether the taxable amount and thereby the price can be lowered due to measures taken during the time the goods have been placed in a warehouse according to Ch. 9 c of the GML, when the goods are sold after that they have been taken out from such a warehouse and comprised by the rule on generally taxable transactions of goods and services according to Ch. 3 sec. 1 first paragraph of the GML.

In pursuance of Ch. 7 sec. 2 first paragraph of the GML the taxable amount is constituted, for charging of output tax on a taxable transaction of goods or a service, of all cost elements (direct expenses, write-offs etc.) by the enterprise for the production of the goods or the service together with a mark-up for profit. The taxable amount is in other words consisting of the price for the goods or the service, wherein is included the value of article of exchange, invoicing fees, freight fee, postage and similar, compensation for taxes and fees and other additions to the price except interest.

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The words ”*utom ränta*” (*except interest*) were abolished from Ch. 7 sec. 3 a of the GML on 1 January, 2003, by SFS 2002:1004. The government suggested first that the words *utom ränta* would be retained in the then to Ch. 7 sec. 2 transferred text, despite that they lacked an equivalent in the rules on taxable amount in article 11 A.(2)a and b of the Sixth Directive (77/388/EEC) – nowadays article 78 first para. a and b and second para. of the VAT Directive. Thereafter, the government joined the perception of the Council on Legislation (Sw., *lagrådet*) that the words *utom ränta* would be abolished. It was considered that a developed national practice and case-law of the Court of Justice of the EU (CJEU) already existed, meaning that certain interest, for example financial interest based on a special agreement between the parties on postponed time of payment, would not be included in the taxable amount, whereas other types of interest, for example interest paid at leasing with purchase option, can be deemed constituting such a side cost regarded in article 11 A.(2)b of the Sixth Directive – nowadays article 78 first para. b and second para. of the VAT Directive – and which thereby shall be included in the taxable amount, provided that the interest is not based on a debt to the lessor. The exception for interest in the GML was considered applied in correspondence with the CJEU’s case-law. Furthermore, the government considered that it was not necessary with such special rules in the GML as were stipulated in article 11 A.(2)b last part of the Sixth Directive – and now to be found in article 78 second para. of the VAT Directive – and which means that the Member States may view costs which are subject of a separate agreement as side costs.[2]

Thus, it is only real interest (Sw., *verklig ränta*) which is not included in the taxable amount, i.e. what the vendor of taxable goods or a service charge in interest to grant the customer a posponement with the payment, or it shall be a matter of interest on a debt that the purchaser has to the vendor, i.e. on a customer credit which is normally granted. Xx In pursuance of the case-law of the Supreme Administration Court (*Högsta förvaltningsdomstolen*, abbreviated HFD) must, however, not a hidden interest compensation lower the taxable amount, by a from taxation exempted financial service – compare Ch. 3 sec. 9 of the GML – matching the otherwise calculated price of the taxable goods or service, so that the taxable amount is partly set off. Current law can be illustrated with the following example:

> Assume that it is a matter of a boat builder (deliverer) who has got an order for a sailing-boat and that the orderer (purchaser) takes up a loan in bank to finance the building of the boat. Furthermore, it is assumed that the boat builder according to the credit may withdraw the loan concurrently with the building of the boat making progress. The price of the boat is calculated to SEK 1 million. If the credit is withdrawn in a *normal* pace, the orderer shall pay an interest of SEK 100,000 to the bank. Assume moreover that the loan would cost another SEK 25,000 in interest if the whole of the credit would be allowed to

[2] See prop. 2002/03:5, *Vissa mervärdesskattefrågor, m.m.* (Certain value-added taxation questions, etc.), p. 108.

be withdrawn by the boat builder at once, but that the strengthening of liquidity that would follow for him in that case makes it possible to lower the price of the boat with the corresponding amount. If the orderer is lacking right of deduction or reimbursement for input tax, he or she would gain by paying a higher interest to the bank when the boat builder can withdraw the whole of the credit at once and at the same time, by the strengthening of liquidity, van lower the taxable amount, which gives a lower cost mass than the originally calculated and thereby a lower taxable amount on which the output tax is charged.

Although the price of the boat, with regard of the mentioned assumption, would be set at SEK 975,000, VAT is still calculated on the originally calculated price of SEK 1 million. The difference would only mean that a set-off is made against the financial service matching the strengthening of liquidity by the boat builder, by the boat builder being able to withdraw the whole credit at once, i.e. a certain part of the consideration – the taxable amount – has been received by the boat builder by the set-off. Nor is it a matter of some quantity discount that can lower the taxable amount, but of discount for *fast payment*.[3]

The special rules in Ch. 9 c of the GML in relation to the rules about exemption from taxation for financial services

The review above of the HFD's case-law in relation to the example with the lowering of the taxable amount for the transaction of the sailing-boat concerns the general VAT rules of the GML. The question is whether the special rules in Ch. 9 c of the GML mean that the mentioned case-law can be circumvented if it is a matter of such goods which are comprised by those rules and the measure is taken, during the time the goods are placed in a warehouse according to Ch. 9 c, of a from taxation exempted transaction of goods being matched against a from taxation exempted financial service according to Ch. 3 sec. 9 of the GML.

Now it is assumed that a purchaser acquires from a vendor such goods which are enumerated in Ch. 9 c sec. 9, and which the vendor has placed in an authorised tax warehouse according to Ch. 9 c sec. 3 of the GML situated within the country. In that case, the goods can during the time they have been placed there have been sold without charging of VAT, according to Ch. 9 c sec. 1 first para. no. 1 of the GML. Thus, the question is – by comparison with the example with the sailing-boat according to above – what instead applies now concerning the taxable amount in connection with the goods being taken out from the tax warehouse and liability of payment of VAT emerging according to Ch. 9 c sec. 5 of the GML, if the taxable amount and thereby the price are lowered due to an arrangement similar to that based on a discount for *fast payment* but instead based on a matching/set-off of the transaction of the goods against a from taxation exempted financial service.

If a part of the taxable amount for the goods in question is *matched* by a discount for *fast payment*, it shall normally not be lowered according to what is mentioned follows by case-law. However, here is the difference stipulated, compared to the example with the sailing-

[3] See the HFD's advance ruling on VAT RÅ 1986 ref. 46 and the HFD's case on VAT RÅ 1991 ref. 105. Those cases are also mentioned in section 12 213 151 of *Momsrullan Andra upplagan* (The VAT roll Second edition), by Björn Forssén, Melker Förlag, Laholm 2016 (cit. Forssén 2016), and on pp. 54 and 214 in *Momshandboken Enligt 2001 års regler* (The VAT handbook . According to the rule's of 2001), by Björn Forssén, Norstedts Juridik, Stockholm 2001.

boat, that an equivalent scenario like concerning the discount for *fast payment* means that a from taxation exempted transaction has been made of goods during the time they have been placed in a tax warehouse and that matching/set-off then has been made against acquisition of a from taxation exempted financial service according to Ch. 3 sec. 9 of the GML. By Ch. 9 c sec. 1 first para. no. 2 follows that exemption from taxation exists for *transaction of services which regards such a transaction mentioned in no. 1*, i.e. in Ch. 9 c sec. 1 first para. no. 1 of the GML.

Thus, it can be questioned whether it at a later taxable withdrawal of goods from the tax warehouse exists motive, based on the VAT Directive, to claim that the taxable amount should be determined without regard of the matching against the financial service, i.e. like according to the HFD's case-law concerning the discount for *fast payment*. I find no such motives, and the problem does not seem to have been addressed yet in theses in the field of VAT,[4] why I suggest that it should be subject of research. The question might be a part of a larger research project where Ch. 9 c of the GML as a whole is treated, e.g. as an element of a project regarding international trade, income tax and indirect taxes.

Thus, I consider, with reservation for abusive practice might existing if the same goods are repeatedly comprised by such measures that I am describing here during the time they are placed in a tax warehouse, that support is lacking against lowering the taxable amount and thereby the price of goods by the following *example* of measures:

- X and Y are assumed to be Swedish entrepreneus whose activities cause tax liability and thus entitling to deduction for input tax on acquisitions or imports in the activity according to the main rule in Ch. 8 sec. 3 first para. of the GML.

  No one of the two is assumed having so-called mixed activity, why they have full right of deduction for input tax. Thus, the rules on revaluation to market value of the pricing between closely connected parties in Ch. 7 sec:s 3 a-3 d of the GML are not coming up.

- Y owns a batch of the base metal copper (goods) and X are interested in purchasing a certain volume of those goods. Y has placed the goods in a tax warehouse in Sweden, and the market value of the volume that X is interested of purchasing from Y is SEK 10,000 excluding VAT, i.e. SEK 12,500 including VAT, whereof VAT SEK 2,500.

- Y has a loan in bank of SEK 1,000,000 and would be able to lower the calculated price on his goods, if Y could get paid faster for the goods from X, so that Y could pay less in interest to the bank due to Y being able to amortize faster on the bank loan. However, X and Y know that the State, based on the HFD's case-law according to the general VAT rules, still would claim that the price is SEK 10,000 excluding VAT, and that the VAT on the sale of the batch of copper shall be SEK 2,500 (25 % x 10,000).

[4] See e.g. pp. 257-281 regarding Taxable Amount i *Financial Activities in European VAT A Theoretical and Legal Research of the European VAT System and the Actual and Preferred Treatment of Financial Activities*, by Oskar Henkow, and pp. 143-150 and pp. 175-183 regarding *Skattesats och beskattningsunderlag* (Tax rate and taxable amount) and *Beskattningsunderlag och Omvärdering av beskattningsunderlaget* (Taxable amount and Revaluation of the taxable amount) respectively in *Neutral uttagsbeskattning på mervärdesskatteområdet* (Neutral withdrawal taxation in the field of VAT), by Mikaela Sonnerby.

- Instead of the scenario with faster payment X and Y aim to use the special rules for tax warehouses in Ch. 9 c of the GML in relation to the rules on financial services in Ch. 3 sec. 9 of the GML by the following alternative scenario for an improved competition situation against other deliverers of the same sort of goods, by lowering the price including VAT to the customer of X.

- Y issues an option to X to get to purchase the batch of copper.

  X pays for the option a premium to Y of 5 per cent on the market value of the batch of copper.

  Y's issuing, sale of the option is exempt from VAT as a financial service.

  X pays 4 per cent on the market value excluding VAT, i.e. SEK 400 (4 % x 10,000).

  Y receives from X: SEK 400. Compare below A).

  Y receives from X SEK 9,600 (10,000 – 400) for the batch of copper, which is sold by Y without VAT due to the transaction being made when the goods are placed in the tax warehouse. Thus, the option is used by Y's sale of the goods to X, when the goods were placed in the tax warehouse. Compare below B).

  Y's income for the batch of copper is SEK 10,000 (400 + 9,600), i.e. Y's result is not lowered due to the alternative scenario.

- X is making a withdrawal of the goods – the batch of copper – from the tax warehouse and accounts for output tax of SEK 2,400 (25 % x 9,600). X may deduct the equivalent amount as input tax. Compare below C).

  The cost for X is SEK 10,000 (400 + 9 600) regarding the acquisition of the batch of copper, i.e. the result for X is not lowered due to the alternative scenario.

- By the alternative scenario with an income for the option of SEK 400, Y can get an improved cash flow and amortize on the bank loan, and thereby lower the calculated price of the sale of goods to X below the level of SEK 9,600, by the bank interest and thereby the cost mass being lower for Y, before the sale of the goods to X is made. Assume that Y can lower the price with another SEK 40 excluding VAT due to the HFD's case-law that disqualifies lowering the tax amount due to faster payment regards the general VAT rules and not the present special rules for goods in a tax warehouse and matching against a financial service. This means the following:

  - Y's result is not affected, since the cost for the bank interest is SEK 40 lower and is equal to the further lowering of the price of the goods of SEK 40 excluding VAT to SEK 9,560 excluding VAT (9,600 – 40).

  - X sets a price to customer for the goods in question of SEK 9,960 excluding VAT (10,000 – 40). X's result is not affected, since the price is equal to the cost for the option of SEK 400 plus the purchase price for the goods of SEK 9,560 (400 + 9,560=9,960).

- X's customer pays SEK 12,450 including VAT instead of SEK 12,500, i.e. SEK 9,960 plus 25 per cent VAT, SEK 2,490, on top of that is SEK 12,450 (9,960 + 2,490). Compare below D). That gives X a competition advantage against other deliverers of the same sort of goods, by the price becoming SEK 50 including VAT lower for X's customer (12,500 – 12,450), i.e. SEK 40 excluding VAT.

- The State is totally getting SEK 10 less in VAT revenues (2,500 – 2,490). The option of SEK 400 lowers the VAT with SEK 100 on the withdrawal of the goods from SEK 2,500 to SEK 2,400, but it is a zero-sum game since output tax and input tax of SEK 2,400 cancel each other out. Compare below C). It is because Y can lower Y's cost mass by lowering the bank interest that the price to X's customer can be lowered with SEK 40 without this affecting the result either by X or Y. The State's VAT revenues becomes correspondingly lower, i.e. SEK 10 lower (2,500 – 2,490 or 25 % x 40 or 20 % x 50).

- For the sake of simplicity, above has been assumed that X does not make a mark-up for profit when the goods are sold on to the customer. The procedure with matching of the special rules in Ch. 9 c of the GML against the rules on financial services in Ch. 3 sec. 9 of the GML can be used for a mark-up for profit equal only to a part of the lowering of the price that it is causing, and still mean that the price to customer becomes lower than for deliverers who are not using the procedure. Assume that X makes a mark-up for profit equal to half the lowering of the price of SEK 40 excluding VAT that the procedure in the example is causing. This means that X sets a price of the goods of SEK 9,980 excluding VAT (9,960 + ½ x 40). Thus, the price to consumer is SEK 12,475 including VAT [9,980 + 2,495 (25 % x 9,980)], which is SEK 25 lower than the alternative SEK 12,500 including VAT. In this case the State's VAT revenues becomes SEK 5 less compared to the alternative without a usage of the matching procedure (2,500 – 2,495=5), instead of SEK 10 less which applied when X did not do any mark-up for profit at all.

A) Y's transaction constitutes securities and the transaction is exempt from taxation according to the rules on financial services - see Ch. 3 sec. 9 of the GML and article 135(1)(f) of the VAT Directive. In the last sentence of the directive rule it is stipulated that from the concept securities etc. are in the present context excluded documents representing ownership to goods and such rights or securities regarded in article 15(2). Article 15(2) is not of interest here, since it concerns rights to immovable property. Of interest is instead article 9 of the Council's implementing regulation (EU) No 282/2011 (the Implementation Regulation), where it is stipulated that the sale of an option in the cases where such a transaction would fall within the scope of article 135(1)(f) of the directive and constitute a taxable transaction according to the main rule for supply of services, article 24(1) of the VAT Directive, shall such a supply of services "be distinct from the underlying transactions to which the services relate". Since the option is not founding right of ownership to the batch of copper (the goods), before it has been called off, should in my opinion the premium that Y receives from X for the issuing, the sale of the option be considered exempt from taxation according to Ch. 3 sec. 9 first para. and third para. no. 1 and article 135(1)(f) of the VAT Directive. However, see below especially about article 9 of the Implementation Regulation and article 24(1) of the VAT Directive and private law options – regarding a need for precision in article 24(1) of the directive.

B) Y's sale of the batch of copper constitutes a VAT free transaction of goods according to Ch. 9 c sec. 1 first para. no. 4 compared to sec. 9 no. 2 of the GML, since the transaction is made during the time the goods are placed in the tax warehouse.

C) If the purchaser of goods – here X – cause the goods to cease to be placed in the tax warehouse, X becomes tax liable, according to Ch. 9 c sec:s 4 and 5 of the GML, but gets to deduct that VAT as inout

tax, if X has right of deduction or reimbursement of input tax in X's activity, since the output tax which shall be paid to the State in that case also constitutes input tax according to Ch. 8 sec. 2 second para. of the GML. Thus, for the State it becomes equal to nil: oputput tax 2,400 minus input tax 2,400.

D) When the goods are sold by X after they have been taken out from the tax warehouse, the general taxation of transaction of goods and services according to Ch. 3 sec. 1 first para. of the GML applies and the normal tax rate of 25 per cent applies to the goods in question – the batch of copper – according to Ch. 7 sec. 1 first para. of the GML.

Note that mixed activity can emerge by Y in the example and the revaluation rules in Ch. 7 sec:s 3 a-3 d of the GML become present, whereby the following may be mentioned:

- The element of VAT free financial service by the usage of the option in the example can cause that Y gets a mixed activity that limits the right of deduction for input tax. Then may – in case the parties are so-called closely connected parties according to the rules in Ch. 7 sec:s 3 a-3 d of the GML – revaluation of the pricing of the goods in question to market value be relevant due to those rules (and Ch. 1 sec. 9 of the GML). Therefore should such a VAT free transaction regarding financial services by Y be lower than five (5) per cent of Y's total turnover (i.e. of VAT free transactions plus taxable transactions) in the activity. Then will Y still have full right of deduction for inout tax according to the so-called 95-per cent rule in Ch. 8 sec. 14 first para. no. 1 of the GML. Thereby is Y's activity not comprised by the limitation of the right of deduction in mixed activities according to Ch. 8 sec. 13 of the GML, and Y is not comprised by Ch. 7 sec. 3 b no. 2 of the GML of the revaluation rules.

- In the example becomes the relation between VAT free transaction of option and total turnover by Y four (4) per cent (400/10,000). Thus will not the revaluation rules come up, although X and Y are closely connected parties according to those rules.

I give the following comments to the example:

- The problem in question can – without limitation to goods enumerated in sec. 9 in Ch. 9 c – also concern non.Union goods placed in other forms of certain warehouses than tax warehouses, namely in an installation for temporary storage, a customs warehouse or a free zone within the country. However is, in my opinion, the problem not as obvious in such cases, since exemption from taxation for services then are constituted by services made *in* such a warehouse (see Ch. 9 c sec. 1 first para. no. 3) and not – like according to Ch. 9 c sec. 1 first para. no. ***2*** – by services *which regard* a transaction of goods placed in the tax warehouse.[5] Concerning proceedings may furthermore be mentioned that it is the tax authority, *Skatteverket* (SKV), that has the burden of proof regarding the size of the transaction,[6] i.e. regarding the taxable amount.

[5] See Ch. 9 c sec. 1 first para. no. 3 of the GML. See also Ch. 9 c sec. 1 first para. no. 4, which for goods placed in a tax warehouse according to Ch. 9 c sec. 1 first para. no. 1 stipulating exemption from taxation for services made *in* such a warehouse.

[6] See HFD 2014 ref. 40, which taken by itself regarded application of the rules in Ch. 7 sec. 3 a of the GML on revaluation, but where the HFD stated that *a starting-point for the judgment is that the SKV has the burden of proof as far as the size of the transaction is concerned*.

- Thus, the described matching procedure to lower the taxable amount for VAT purposes should be applied for goods according to someone of the 27 items in Ch. 9 c sec. 9 of the GML, like copper, which are placed in a tax warehouse. Furthermore should, with regard of the relationship between VAT free transaction of option and total turnover not disqualifying the 95-per cent rule for full deduction of input tax in mixed activities, the procedure be of interest for enterprises with large volumes of such goods.

- The special rules on who is tax liable in Ch. 9 c of the GML can also comprise a purchaser who is a consumer, since sec. 5 in Ch. 9 c stipulates that it is *who* (Sw., ”*den som*”) causes the goods to cease to be placed in such a way that is stipulated in Ch. 9 c sec. 1 who becomes liable to pay the VAT that shall be taken out in that respect. However, it may according to the SKV be considered unusual that someone who is not taxable person applies the rules on exemption from taxation in customs warehouses and tax warehouses.[7]

- At signing of agreement should especially attention be given to clearly mention that the descibed matching procedure concerns two separate transactions, i.e. first is a transaction of the option made and thereafter is a transaction of goods made. The agreement between X and Y can be deemed regarding composite supplies (Sw., *sammansatta transaktioner*).

    - If a composite supply exists, and is deemed concerning *two* considerations and thereby *two* supplies (transactions), like in the example above, it is possible with the matching procedure regarding Y’s transactions of the option and of the goods which are placed in the tax warehouse respectively, to accomplish that the taxable amount on X withdrawal of the goods becomes lower for VAT purposes.

        The recently stated provides however that the issuing, the sale of the option is considered exempt from taxation according to Ch. 3 sec. 9 first para. and third para. no. 1 and article 135(1)(f) of the VAT Directive: Compare above A) and what is stated below about article 9 of the Implementation Regulation and a need for precision in article 24(1) of the VAT Directive regarding private law options. By the way, for the question whether the same agreement causes one or more supplies can a certain comparison be made with the reasoning in *skatterättsnämnden* (SRN), the Swedish Board of Advance Tax Rulings, in the advance ruling RÅ 2005 ref. 11 (which was confirmed by the HFD). The question there concerned applicable VAT rate for golf lessons. The majority in the SRN judged a commitment to supply at a later occasion golf lessons as separate services: the commitment itself was considered constituting one supply and and the supply of the golf lessons as another supply. The commitment itself was deemed not constituting a service within the field of sports comprised by the reduced VAT rate of 6 per cent in pursuance of Ch. 3 sec. 11 a first para. and Ch. 7 sec. 1 third para. no. 10 of the GML. Instead it was considered constituting a service comprised by the general VAT rate of 25 per cent. The chairman of the SRN was dissentient, and considered that the consideration given at the commitment, i.e. the closing of the agreement, cannot be deemed constituting a supply of service, but that the tax liability is released first if the service is performed (Ch. 2 sec. 1 third para. no. 1 of the GML) or

[7] See SKV’s standpoint 2014-02-14, dnr 131 770374-13/111.

advance payment is given for ordered goods or service (Ch. 1 sec. 3 second para. of the GML).[8]

- If a composite supply by Y would be deemed concerning *one* consideration and thereby *one* supply, can the transaction 1) be deemed having different character for VAT purposes with regard of the option and the goods respectively *or* 2) the consideration be deemed gievn partly as an advance payment, partly as the remaining part of the consideration founding transaction of goods according to Ch. 2 sec. 1 first para. no. 1 of the GML, which I denote the advance payment case. I consider that a matching procedure by Y cannot be used in any of these two cases to lower the taxable amount for the goods at X's withdrawal of them from the tax warehouse. This provides that it is a matter of two supplies at different points of time by Y: firstly a tax free transaction of the option and secondly a tax free transaction of the goods when they are placed in the tax warehouse.

  1) In the present case with *one* transaction at *one* occasion by Y shall the transaction in the first mentioned case be divided into two parts of different VAT character, according to the principle of division which is the main rule in such cases according to Ch. 7 sec. 7 of the GML: The part of the transaction that regards the tax free financial service does not give a right to deduction for input tax in the activity, whereas the part of the transaction that regards the tax free transaction of goods which are placed in the tax warehouse gives a right of reimbursement for input tax on acquisitions in the activity, which means that a so-called zero rate taxation is made in that part.

  2) In the other case – the advance payment case – may a principle of the principal apply, where the transaction of the goods might be deemed constituting the dominating part of Y's effort, why the supply is comprised by a *zero rate taxation* for VAT purposes by Y when Y sells the goods to X during the time the goods are still placed in the tax warehouse. The following applies for Y concerning the advance payment.

  An advance payment causes tax liability for the person receiving it, if the transaction of the goods or service is taxable when the advance payment is received (see Ch. 1 sec. 3 second para. second sen. of the GML). This means that the advance payment does not cause tax liability for Y, since the goods are placed in the tax warehouse and a transaction of the goods then would be exempt from taxation according to Ch. 9 c sec. 1 first para. no. 4 compared with sec. 9 no. 2 of the GML – compare above B). Y sells the goods to X tax free when the goods are placed in the tax warehouse. This does however not cause any limitation of Y's right to lift input tax on acquisitions in the activity, since transaction exempt from taxation according to Ch. 9 c sec. 1, as mentioned, gives a right of reimbursement for input tax in the activity according to Ch. 10 sec. 11 first para. of the GML. In other words, the advance payment is, as mentioned above, included in a taxable amount of SEK 10,000 excluding VAT which cause a *zero rate taxation* by Y when Y sells the goods to X during the time they are placed in the tax warehouse. Thus, in the advance payment case it is, unlike in case 1), not a matter of Y making a from taxation unqualified exempt transaction of service which would not give either right of deduction or right of reimbursement for input tax in the

[8] See Forssén 2016, p. 191 (section 12 213 153). See also pp. 101 and 102 in the article *Bitcoins och mervärdesskatt* (Bitcoins and value-added tax), by Björn Forssén, *Svensk skattetidning* (Swedish Tax Journal) 2017 pp. 95-106 (cit. Forssén 2017).

activity. By the way, it may be mentioned that if X was established in a country outside the EU that service would also be subject of *zero rate taxation* (see Ch. 10 sec. 11 *second* para. no. 1 of the GML, and Y would neither in case 1) have to regard rules on mixed activity or (in the case X and Y are closely connected parties) the revaluation rules. Under the same supposition – i.e. if X would be established outside the EU – applies furthermore the same for Y in the case above with *two* supplies.

Need for precision

Below, I reason especially about article 9 of the Implementation Regulation and article 24(1) of the VAT Directive and private law options – regarding a need of precision in article 24(1) of the directive.[9]

Article 9 of the Implementation Regulation regards, as mentioned, inter alia the main rule concerning supply of services in the VAT Directive, i.e. article 24(1) of the directive. Article 9 of the Implementation Regulation stipulates, as also mentioned, that the sale of an option shall, in cases where such a sale is a transaction within the field of application of article 135(1)(f) of the VAT Directive, constitute such a supply of services regarded in article 24(1) of the directive. Thereby shall the supply of services be deemed as distinct from the underlying transactions to which the services relate.

I consider there is a need for a precision of what is comprised by the main rule in article 24(1) of the directive. It should be made by introducing a special item in article 24, not by article 9 of the Implementation Regulation. I consider that a concept like trading of securities also in the future should be developed by the CJEU's case-law, like what has already been done by the EU-case C-2/95 (SDC) meaning that trading of securities comprises documents which alter the legal and financial situation between the parties. Already by the EU-case C-235/00 (CSC) follows that the exemption in the directive's article 135(1)(f) for supply of securities regards transactions causing legal and economical alterations between the parties, whereby supply of a service which is only material, technical or administrative and which does not cause such alterations between the parties constitute taxable transactions. That especially for options stipulate in article 9 of the Implementation Regulation what already follows by the CJEU's case-law can in my opinion give the perception that it is unclear whether an option constitutes securities for VAT purposes. For example, the stock market is a second-hand market and there is no limitation of it concerning options to buy or sell shares. It should not exist any limitation of what constitutes securities in addition to what already follows by the last sentence in article 135(1)(f) of the VAT Directive (and of article 15(2) of the VAT Directive). However, it can in my opinion exist a need for precision of which sorts of options that are comprised by the exemption from taxation for financial services, whereby I may state the following:

- If such a precision shall be made of the exemption from taxation that I mention above, it should be made in the VAT Directive, instead of in the Implementation Regulation.

- Regardless in which legislation the precision is made, it should concern the fixing of a border between on the one hand securities in the form of shares and options etc. for which there is a market and on the other hand what I denote as private law options. Private law options often regard other property than shares and are given by

[9] See Forssén 2016, p. 267 (section 12 213 235).

companies to the employees or the shareholders. If such an option is personal and cannot be sold on, it would in my opinion probably be a matter of a service taxable of VAT. Before Sweden's EU-accession in 1995, I stated that there is no market for a private law option, and therefore the issuing of such an option does not constitute trading of securities.[10] Now there is no such precision of the fixing of a border against private law options, why I consider that issuing of those are comprised by the exemption from taxation according to article 135(1)(f) of the VAT Directive.

Conclusions and proposals on research or law alterations

Conclusions

I have not found anything in the EU's VAT Directive or in the Implementation Regulation disqualifying a matching/set-off of a VAT free transaction of goods taking place during the time they are placed in a tax warehouse according to Ch. 9 c of the ML against a VAT free financial service according to Ch. 3 sec. 9 of the ML to be able to cause that the taxable amount and thereby the price of a taxable transaction of goods being lowered after they have been taken out from the tax warehouse. Thus, the legislator should in my opinion perhaps regard that the vendor and the purchaser thereby can circumvent the HFD's case-law regarding the general rules of the ML, which mean that the taxable amount of the goods may not be lowered by it being *matched* by a discount for *fast payment*. Abusive practice could however occur, if the goods are comprised by several rounds of the described matching procedure.

Proposals on research or law alterations

The question in this article should in my opinion be subject of research. It could, as mentioned, be a part of a larger research project where Ch. 9 c of the GML as a whole is treated, e.g. as an element of a project regarding international trade, income tax and indirect taxes. Since the special rules in Ch. 9 c concerning goods in certain warehouses not only regard transactions within the country, but also international trade of goods, the research that I am proposing could be carried out in connection with the ongoing OECD-project regarding income tax called BEPS (*base erosion and profit shifting*). A main question there is the transfer pricing between related parties, whereby the aim is to take measures against artificial deviations from prices set between unrelated parties. The pricing problems in this article concerning matching efforts for VAT purposes should with respect of research not be seen as an isolated VAT question, but should be put in relation to the so-called correction rule regarding erroneous pricing in Ch. 4 sec:s 19 and 20 *inkomstskattelagen (1999:1229)*, IL (the income tax act) and *lagen (2009:1289) om prissättningsbesked vid internationella transaktioner* (the act on advance pricing information at international transactions. Those income tax rules can be compared with the questions here about Ch. 9 c of the GML and of Ch. 7 sec:s 3 a-3 d of the GML regarding revaluation to market value of the pricing between closely connected parties, where the vendor or the purchaser has a so-called mixed activity and thereby a limited right of deduction for input tax. Note that the concept market value for application of the revaluation rules has a special definition in Ch. 1 sec. 9 of the GML, which can deviate from the determination of market value according to Ch. 61 sec. 2 of the IL.

[10] See pp. 142 and 143 in *Mervärdesskatt En handbok (2 uppl.)*, Value-added tax A handbook (2 edit.), by Björn Forssén, Publica, Stockholm 1994.

For the context and possible research efforts or the legislator's measures, I may also mention that I in another context has suggested that an amendment should be made in Ch. 3 sec. 9 of the GML to suppress that taxable barter can be hidden *behind bitcoins* (Sw., "*bakom bitcoins*").[11] My proposal means that exemption from taxation for bank and financial services or trading of securities should not comprise exchange services regarding virtual currency like bitcoin, if not a *report duty* as financial activity is fulfilled and permit in that respect received from *Finansinspektionen* (the Swedish Financial Supervisory Authority). In consequence thereby should the concept virtual currency also be introduced in Ch. 3 sec. 23 no. 1 of the GML – beside notes and coins – and with the same determination of what is regarded as I suggest for Ch. 3 sec. 9. The concept *legal* means of payment (Sw., "'*lagligt*' *betalningsmedel*") in Ch. 3 sec. 23 no. 1 should thus continuously be reserved for notes and coins. By these measures the problem with it not being possible for VAT purposes to make a distinction between legal and illegal activity with bitcoins gets its solution. It provides however that the legislator brings up with the EU Commission, the European Parliament and the council that corresponding alterations will be made in article 135(1)(b)-(f) of the VAT Directive.

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[11] See Forssén 2016, p. 193 (section 12 213 153). See also pp. 104 and 105 in Forssén 2017.