

The prices of foodstuffs cause law alterations and planning regarding indirect taxes

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DEBATE – by Björn Forssén, Member of the Swedish Bar Association and Doctor of Laws

On the Swedish Television's (Sw., *Sveriges Television*, abbreviated SVT) **Agenda** 2023-03-12 Camilla Kvartoft was leading a debate between the minister of finance, Elisabeth Svantesson, and the left-wing leader Nooshi Dadgostar, where the theme was pro and con introduction of a price ceiling for foodstuffs. Nooshi Dadgostar stated that the minister of finance should take up the question of a price ceiling for staple commodities.: it should be possible to summon representatives for the ICA-group, Coop and Axfood, which together stand for 90 per cent of the sales of foodstuffs in Sweden, to the Department of Finance for such talks. The minister of finance was against an introduction of a price ceiling, but flagged for certain measures, to come to terms with the rushing prices of foodstuffs, to be awaited within short in the spring budget.

I suggest that an overview of the situation will be made partly by Sweden bringing up on the EU level to change the rules on the taxable amount for VAT, partly by the foodstuffs industry using the possibility of planning taxes regarding the VAT concerning goods which come from abroad and are placed in tax warehouses.

In pursuance of GML Ch. 7 sec. 2 first para second sen. *mervärdesskattelagen (1994:200)*, the VAT act, abbreviated GML,¹ which is nearest corresponded by article 73 of the EU's VAT Directive (2006/112/EC), shall taxes and fees except VAT be included in the taxable amount for VAT. This means that when excise duties are included in the consumer prices, like with fuel, VAT is levied on a price including such a tax. Thus, it emerges a "tax on tax"-effect. The minister of finance will probably not keep up producing a suggestion to alter this in the spring budget, but in the existing suggestion of a new VAT act according to the government's proposition 2022/23:46 should the taxable amount for VAT become clean of excise duties. It is a matter that the minister of finance should bring up with the prime minister to take up on the EU level as soon as possible, so that a mitigation can be achieved for the consumers already in connection with the new VAT act, which is proposed to come into force on 1 July, 2023.

Since it, like the left-wing leader pointed out, exists in principle an oligopoly market within the foodstuffs sector, a discussion should be started between the minister of finance, the SKV and the three big organizations of the industry about a for the prices of foodstuffs mitigating planning of taxes. In that respect, I refer to Forssén 2018, "*Konkurrensfördelar med varuomsättningar efter moms fria omsättningar av varor i vissa lager och av finansiella tjänster*" (Competition advantages with transactions of goods after VAT free transactions of goods in certain warehouses and of financial services) – *Balans fördjupning* (The Periodical Balans Annex with advanced articles) 1/2018 pp. 3-10. (Forssén 2018).

¹ The GML was replaced on 1 July, 2023 by *mervärdesskattelagen (2023:200)*, the VAT act, abbreviated ML.

In that article I mention whether it is possible to lower within the frames of the law the taxable amount and thereby the price of goods, by a from taxation exempted transaction of goods according to the rules of VAT free transactions of goods in certain warehouses being matched against a from taxation exempted financial service, before the goods are taken out from such a warehouse. The question is whether this is possible without a conflict rising with the rules on the determination of the taxable amount for VAT.

According to special rules in GML Ch. 9 c on who is tax liable for goods in certain warehouses, which are nearest corresponded by the articles 154-163 of the VAT Directive, are transactions of certain goods exempted from taxation, if they are sold during the time they are placed in so-called tax warehouses, in an installation for temporary storage, a customs warehouse or a free zone within the country (Sweden). The supposition for tax exemption is that the transaction of the goods is not aiming to a final usage or consumption, that is 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.

From the taxable amount for VAT is real interest exempted. Since 2003, this is not expressly stipulated in the GML, but it is considered following by article 78 second para of the VAT Directive. Thus, it is only real interest that shall not be included in the taxable amount, that is what the vendor of taxable goods or a service charge in interest to grant the customer a postponement with the payment, or it shall be a matter of interest on a debt that the purchaser has to the vendor, that is on a customer credit which is normally granted. In pursuance of the case-law of the Supreme Administrative Court (*Högsta förvaltningsdomstolen*, abbreviated HFD) must, however, not a hidden interest compensation lower the taxable amount, by a from taxation exempted financial service matching the otherwise calculated price of the taxable goods or service, so that the taxable amount is partly set off.

The question in my mentioned article is whether the special rules on goods in certain warehouses can be applied so that the taxable amount and thereby the price of goods that have been placed in such warehouses according to GML Ch. 9 c can be lowered due to measures which have taken place during that time, when the goods are sold after that they have been taken out from the warehouse and comprised by the general taxation of transactions of goods and services according to GML Ch. 3 sec. 1 first para. It would not be possible according to the general VAT rules to set off the taxable amount by selling a VAT free option on the goods during the time they are placed in the warehouse in question, but I deem that it is possible according to the special rules on who is tax liable in GML Ch. 9 c.

If it is possible with such a matching that I mention in the article, the three big players within the foodstuffs industry can in consultation with the Department of Finance and the SKV go through a planning to lower the price on 27 different goods and sorts of goods which are placed in tax warehouses. Those are enumerated in 27 items in GML Ch. 9 c sec. 9, and I mention some of them here: corn and seed for sowing (including soya beans), oil plants and oily fruits, certain nuts and olives, coffee (not roasted), tea, cocoa beans, raw sugar, wool, chemicals in bulk, mineral oils, natural gas, biogas, propane, butane, potatoes, vegetable oils and fat and their fractions (regardless of whether they are refined or not, however not chemically modified, wood, ethyl alcohol, E85, ED95, fatty acid methyl esters, pine oil and additions in motor fuel.

In the mentioned article, I conclude that there is nothing in the VAT Directive that would disqualify a lowering of the taxable amount and thereby of the price on goods based on a matching/set-off of tax-free transaction of the goods during the time they have been placed in a certain warehouse against a tax free financial service. Therefore, I state that the legislator perhaps should regard that the vendor and the purchaser thereby can circumvent the case-law regarding the general rules in the GML which mean that the taxable amount for the goods must not be lowered by for example a matching of a discount for fast payment. Moreover, I state in the article that abusive practice neither should be able to come up – at least not if the same goods only are comprised by one round of the described matching procedure.

On the theme of abusive practice I may mention that I in Forssén 2022, "*Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704*" (VAT frauds of so-called carrousel type and NJA 2018 p. 704), reason based on that case in the Supreme Court (Sw., *Högsta domstolen*, abbreviated HD) on frauds regarding the accounting of VAT, when it is a matter of cases of the mentioned type. In the first place, I am comparing the senior judge of appeal's perception of the question of coarse tax fraud with the decision by the HD, when it is a matter of abusive practice in relation to criminal law principle of legality. Stig von Bahr, formerly judge in the HFD and the Court of Justice of the EU (CJEU), has written an article in Swedish Tax Journal 2022 (pp. 498-504), "*Mer om missbruk och momsbedrägeri*" (More about abuse and VAT frauds), von Bahr 2022, 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*. I gave my viewpoints to Swedish Tax Journal on the manuscript to Stig von Bahr's article, and emphasized therein that I in my article states that *it is not clear that abusive practice in itself means the existence of criminal law responsibility*. Since I am not given the same space as others in Swedish Tax Journal, I asked the editor to send to Stig von Bahr my noticing of what the nuance of my expression *in itself* (Sw., "*i sig*") means. This was also done, but the answer I received from the editor was that *he chose not to adjust his article, which is his decision as author* (Sw., "*Han valde att inte justera sin artikel, vilket är hans beslut som författare*"). Since the planning that I am bringing up in *Balans fördjupning* in 2018 would be possible to analyse in connection with questions on carrousel trading, it is of interest that Stig von Bahr so categorically is dismissing my warning for abusive practice on the theme of criminal law sanctions. I disagree with him, but consider that he should be invoked by the defence lawyers as expert witness in ongoing cases on carrousel trading or in connection with petitions for a new trial regarding verdicts of conviction in such cases and be asked for his opinion by the Department of Finance, the SKV and the three foodstuffs enterprises in Sweden in a deepened dialogue (consultation) concerning the possibilities of such a planning that I am mentioning in *Balans fördjupning* in 2018.