Commercial money laundering in VAT carrousel

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

In my debate article in *Dagens Juridik* (Today's Law) "*Livsmedelspriserna föranleder lagändringar och planering avseende indirekta skatter*" (Food prices cause alterations of law and planning regarding indirect taxes),[1] I referred to Forssén 2022, "*Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704*" (VAT frauds of so-called carrousel type and NJA 2018 p. 704), where I reason starting out from that case in the Supreme Court of Sweden (Sw., *Högsta domstolen*, abbreviated HD), when it is a matter of whether tax fraud can exist in cases of abusive practice in *VAT carrousels* (Sw., "*momskaruseller*". In a completing article by Stig von Bahr, formerly judge in the Supreme Administrative Court (*Högsta förvaltningsdomstolen*, abbreviated HFD) and the Court of Justice of the EU (CJEU), in *Svensk Skattetidning* (Swedish Tax Journal) 2022 (pp. 498-504), "*Mer om missbruk och momsbedrägeri*" (More about abuse and VAT frauds), he dismissed categorically my warning for abusive practice on the theme of criminal law sanctions.

I may, with regard of how the carrousel cases seem to develop, repeat my warning of abusive practice against the VAT system leading to criminal responsibility, although abusive practice, which I still consider, cannot *in itself* (Sw., "*i sig*") lead to responsibility for tax fraud, whereby I add a warning for criminal responsibility for commercial money laundering (Sw., *näringspenningtvätt*).

The Economic Crime Authority (Sw., *Ekobrottsmyndigheten*, abbreviated EBM) not seldom claims responsibility for commercial money laundering together with responsibility for tax fraud, and in that respect I point out that the defence lawyers in such errands and criminal cases should pay attention to how the subjective prerequisites are described and denoted in the deed description.

In section 3 of my mentioned article in the Swedish Tax Journal, I put the senior judge of appeal's perception, meaning that the defendant should have been acquitted with regard of the criminal law principle of legality, in relation to the HD's remark that the question of intent was not comprised by the leave to appeal regarding erroneous information. In my opinion, this means, despite that the HD confirmed the verdict of conviction by the majority of the Svea Court of appeal, it is not clear that abusive practice *in itself* means that criminal law responsibility exists. In that respect, I also stated that in the individual case it shall always be decided if also the risk prerequisite for tax fraud is fulfilled, which I reminded of, since the HD did not especially treat the risk prerequisite within the frame of the given leave to appeal. However, I set the focus this time on the question of intent, and state that in the cases where the EBM concerning one and the same arrangement (Sw., *upplägg*) attacks for example the owners of a limited company (Sw., *aktiebolag*) for commercial money laundering as well as for tax fraud the defence lawyers should call in question whether the same subjective prerequisites are invoked for both crimes.

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[1] See *ANNEX 1*.

The prerequisite intent in the Tax Fraud Act, *skattebrottslagen (1971:69)*, abbreviated SBL, which together with erroneous information and risk constitute the necessary prerequisites for criminal responsibility according to sec. 2 of the Tax Fraud Act, *skattebrottslagen (1971:69)*, abbreviated SBL, does not exist in *lagen (2014:307) om straff för penningtvättsbrott* (the [Swedish] Act on Punishment for Money Laundering). The Act on Punishment for Money Laundering has the following structure concerning the subjective prerequisites for the crimes money laundering and commercial money laundering respectively.

According to sec. 3 first para will he or she who takes certain mentioned measures be sentenced for money laundering crime, if the measure is aiming to conceal money or other property originating from crime or criminal activity or to promote the possibilities for someone to profit by the property or its value. Thus, the subjective prerequisite is *aiming to* (Sw., ”*syftar till*”). In sec. 4 the money laundering crime is extended to comprise also he or she who is taking the mentioned measure without having such an aim as stipulated in sec. 3. According to the statute commentary (Sw., *författningskommentaren*) is the aim connected with the deed and not the perpetrator, which means that the perpetrator himself or herself does not have to have the mentioned aim with his or her acting, but it is sufficient that someone other participating has such an aim and the perpetrator having intent in relation to this. The legislator exemplifies this with that if he or she having earned money on an illegal activity, with the aim to conceal the origin, asks someone else to receive the money on his or her bank account, the receiver of the money makes himself or herself liable for money laundering crime, although he or she does not himself or herself have the aim to conceal the origin of the money. However, there is a demand for him or her being sentenced as responsible, that he or she have the intent to the mandator having such an aim with the deed. His or her own aim can however be another, for example to get a consideration for his or her measure [see prop. 2013/14:121, *En effektivare kriminalisering av penningtvätt* (A more effective criminalization of money laundering) pp. 108-109]. If an aim according to sec. 3 does not exist, a person can be sentenced for money laundering according to sec. 4. Then may an intent of indifference (Sw., *likgiltighetsuppsåt*) exist according to prop. 2013/14:121, p. 112.

By sec. 7 first para follows that the extension of money laundering crime made in sec. 4 to apply also to intent of indifference does not apply to commercial money laundering. Sec. 7 only connects to sec. 3, by sec. 7 stipulating that for commercial money laundering is he or she sentenced who, in a business activity or as a part of an activity carried out habitually or otherwise on a larger scale, takes part in a measure which reasonably can be assumed being taken with such an aim stipulated in sec. 3. According to the statute commentary the criterion that the measure reasonably can be assumed taken with a money laundering aim means that the perpetrator makes himself or herself liable of a blameworthy risk-taking. Whether the property later on is proven legitimate does not acquit from responsibility. The criterion constitutes an objective prerequisite which shall be covered by the perpetrator’s intent, why the words *reasonably can be assumed* (Sw., ”*skäligen kan antas*”) nearest having the function of pointing out that it is the circumstances under which the measure was taken hat should be decisive for whether a blameworthy risk-taking shall be deemed existing. The legislator compares with – in my translation – business-fencing (Sw., *näringshäleri*), according to Ch. 9 sec. 6 second para of the BrB, and states that it should normally exist some qualifying circumstance for a money transaction to be deemed taken with a money laundering aim, since such a transaction normally cannot not be deemed as something suspicious, why the way in which the transactions are carried out is stipulated to possibly constituting such a circumstance. The legislator stipulates that the expression *taking part in a measure* (Sw.,

”*medverka till en åtgärd*”) regards that the perpetrator is taking part in such a measure stipulated in sec. 3 (see prop. 2013/14:121, p. 115).

The structure with a reference in sec. 7 to sec. 3, but not to sec. 4 where the legislator expressly stipulates that intent of indifference can cause responsibility, and the legislator's comparison with business-fencing means in my opinion that commercial money laundering presupposes an activity – a taking part – by the perpetrator, why I deem that the prosecutors should not use expressions like intent in a deed description regarding commercial money laundering according to sec. 7 of the Act on Punishment for Money Laundering. I compare the prerequisites for commercial money laundering with *purpose* (Sw., ”*avsikt*”), which was one of the subjective prerequisites for tax fraud, before that crime was altered to a risk crime on 1 July, 1996, and it nowadays only is stipulated *intent* (Sw., ”*uppsåtligen*”) as subjective prerequisite for tax fraud according to sec. 2 of the SBL, which means that an intent of indifference is sufficient both for erroneous information in a tax return and for no tax return being submitted at all (see p. 11 in prop. 1995/96:170).

With regard of the EBM not seldom claiming responsibility for commercial money laundering together with a charge for tax fraud regarding, where ”VAT carrousels” are concerned, I consider that such a case should be tried by the HD for guidance of the application of law. The development of the application of law concerning VAT frauds of so-called carrousel type has in my opinion taken such a direction, by the addition of commercial money laundering to the context, that NJA 2018 p. 704 is giving a sufficient enough guidance, especially as the question of intent was not comprised by the leave of appeal in that case.