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# VAT fraud by carousel trading – experiences in Sweden regarding VAT, accounting and criminal law in relation to the EU law

[Translation of the article *Momsbedrägerier genom karusellhandel – erfarenheter i Sverige avseende mervärdesskatt, redovisning och straffrätt i förhållande till EU-rätten*, by Björn Forssén, published in original in Swedish in Tidskrift utgiven av Juridiska Föreningen i Finland – Eng., The journal published by the Law Society of Finland (abbreviated JFT), JFT 4–6/2023 s. 344–378.]

## 1 Introduction

I give a course with the title *Momsbedrägerier genom karusellhandel* (VAT frauds by carrousel trading),[1] and use that title also in the title of this article. The inspiration to the article comes to some exten from the course material, where inter alia another article of mine on the topic, published in *Svensk Skattetidning* (Swedish Tax Journal) last year (2022)[2] and the lecture I gave on the topic at Svensk Juriststämma (Swedish Law Meeting) more than two decades ago, on 14 November, 2001,[3] are included. For example, I am setting out from an article of mine published 2023-06-13 in *Tidningen Balans* (The Periodical Balans), which is issued by *Föreningen Auktoriserade Revisorer* (the Institute for the Accountancy Profession in Sweden, abbreviated FAR).[4] In this article, I account for my perception about the experiences in Sweden of the phenomenon with frauds regarding VAT by carrousel trading in relation to the EU law – regarding above all the VAT act (Sw., *mervärdesskattelagen*), the civil law accounting law and tax fraud (Sw., *skattebrott*) according to the Tax Fraud Act, *skattebrottslagen (1971:69)*, abbreviated SBL.[5]

There are many different versions of the prenomenon VAT frauds by carrousel trading. However, the common denominator is that frivolous enterprises take meaures 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 is in conflict with the EU law in the field of VAT, since it follows by article 1(2) of the EU's VAT Directive

[1] The first occasion was in Stockholm (2022-11-30): arranger *Institutet för juridisk utbildning* (the Institute for legal education, abbreviated IFJU (Stockholm).

[2] *Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704* (VAT frauds of so-called carrousel type and NJA 2018 p. 704), Swedish Tax Journal 2022 p. 118-130 (Forssén 2022)

[3] Lecture at the 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. (Forssén 2001).

[4] *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 Annex with advanced articles) 2023 pp. 1-9, published 2023-06-13 on www.tidningenbalans.se. (Forssén 2023a).

[5] EU, abbreviation of the European Union or the Union.

(2006/112/EC),[6] inter alia that VAT according to the EU law 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”,[7] and that ”[t]he common system of VAT shall be applied up to and including the retail trade stage”.[8] An often occurring example of VAT frauds of so-called carrousel type is that it in a chain of enterprises exists a fictitious enterprise, which in the investigations by the tax authority (Sw., *Skatteverket*, abbreviated SKV) and the Economic Crime Authority (Sw., *Ekobrottsmyndigheten*, abbreviated EBM) is called a missing trader (or goalkeeper company or front enterprise). Such an enterprise issues an invoice with a false VAT, that is the invoice does not correspond with a real transaction of goods or a service, and the reciver of the invoice tries to exercise right of deduction for the amount denoted as VAT, by accounting the amount as input tax in a VAT return to the SKV. Since the receiver of the invoice knew or should have known that the info on VAT was false, it is a case of abusive practice which can cause a criminal law responsibility for both the issuer and the receiver of the invoice.

VAT frauds by carrousel trading is a big problem for the Swedish state. It is not a new phenomenon and has not arisen due to Sweden’s EU-accession in 1995. It existed already in the 1980’s, which I mention in a book from 2021.[9] However, the scope of the problem has escalated the last decades, and today can a single errand comprise billions of Swedish crowns of accounted VAT which can be questioned by the SKV and the EBM. In an interview in the SVT during the month of July in 2023 a figure of 5 billion Swedish crowns was mentioned – in claimed deductions for input tax that is not corresponded by payment of output tax – regarding what is usually described as Sweden’s and the EU’s largest VAT fraud. On the reporter Mikael Grill Pettersson’s question, regarding how much was secured by the authorities, the chief prosecutor by the EBM, Jonas Svanfeldt, abswered, I would say below 5 per cent (Sw, ”*jag skulle säga under 5 procent*”), and the EBM’s Director General, Monica Rodrigo, said that it is like a milch cow (Sw., ”*det är som en mjölkko*”).[10] It has in other words not been helpful that so-called reverse charge has been introduced for further situations after this was done for investment gold on 1 January, 2000, which I come back to with reference to Forssén 2022. Furthermore, legal security has in my opinion been set aside in the context, by the investigations from the SKV’s and the EBM’s nowadays are initiated in the first place by trading being carried out between Sweden and other Member States of the EU regarding a certain sort of goods, above all electronical products. This takes place instead of questions about the concept transaction being subject to a thorough judgment, like in the investigations at the time of my lecture at the Swedish Law Meeting in 2001.[11] This is

[6] Complete title of the EU’s VAT Directive (2006/112/EC): COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax.

[7] See article 1(2) first para of the VAT Direvtive.

[8] See article 1(2) third para. of the VAT Directive.

[9] See *Skatt i skrattspegeln*, Tax in the distorting mirror (self-published 2021), part 1 pp. 111-114 [”*’Flygande mattor’ och ’karuseller’*” (’Flying carpets’ and ’carrousels’)]. (Forssén 2021a).

[10] See https://www.svt.se/nyheter/inrikes/trots-fallande-domar-miljardbelopp-fran-bedragerier-kan-landa-hos-kriminella (visited 2023-07-25). Published on 14 July, 2023 on the website of the Swedish Television (Sw., *Sveriges Televisions*, abbreviated SVT).

[11] Compare with the title of that lecture: VAT and the transaction concept. The carrousel by the tax and economic crime authorities (abbreviated SKM and EBM).

decreasing the legal security, since transaction is mutual in relation to the concept acquisition for which deduction for input tax is claimed, by the right of deduction arising at the time the deductible VAT becomes chargeable (the reciprocity principle).[12] If justified demands on effective investigations by the SKV and the EBM and the legal security for the individual entrepreneur, who becomes subject of investigation in the present respect, shall be upheld, I consider that the focus must continuously be set on questions about the concept transaction. Instead, the legislator has tried since in 2000 to take care of the phenomenon in question by introducing reverse charge , whereby however a necessary reaction from the legislator is lacking, which I come back to and refer to Forssén 2022 and also to Forssén 2023a.

## 2 The new Swedish VAT act

### *2.1 The carrying out of the main rules in the VAT Directive for supply of goods and supply of services*

In Sweden has a VAT reform been made on 1 July, 2023: *mervärdesskattelagen (1994:200*, the VAT act, abbreviated GML) was replaced on 1 July, 2023 by *mervärdesskattelagen (2023:200*, abbreviated ML). However, this reform does not affect my perception of the questions treated in this article. The ML constitutes an alteration of the GML for the purpose of making the regulation more easy to understand and apply. Thus, the ML has in comparison with the GML got a new structure, been modernized regarding language and adapted to to the VAT Directive's concepts, structure and systematics.[13] In a previous article in the JFT, I have written about the proposal to the nowadays introduced ML, which was given in SOU 2020:31, *En ny mervärdesskattelag* (A new VAT act).[14] In the article, I mentioned inter alia that the suggestion to abolish the concept *skattskyldig* (tax liable), and replace it with VAT Directive's concept *betalningsskyldighet* (liability of payment) was a step in the right direction,[15] which was thus carried out on 1 July, 2023 by the introduction of the ML.

Especially interesting in the present context is in my opinion that the VAT reform inter alia means that the for tax liability – nowadays liability of payment – of VAT necessary prerequisite *transaction within the country of goods or services that is taxable* "*omsättning inom landet av varor eller tjänster som är skattepliktig*", which existed in the GML Ch. 1 sec. 1 first para. no. 1, has been replaced in the ML with the concepts delivery and supplies (Sw., *leverans* and *tillhandahållanden*). Thereby is also the terminology regarding the tax object in pursuance of the VAT Directive.[16] Instead of GML Ch. 2 defining what constitutes transaction is the scope of the VAT determined in the ML for the main cases of tax objects, by the necessary prerequisites in that respect being determined with the expressions *delivery of goods for consideration which is made within the country* (Sw., "*leverans av varor mot ersättning som görs inom landet*") and *supplies of services for consideration which are made*

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

[13] See prop. 2022/23:46, *Ny mervärdesskattelag* (New VAT act), p. 1.

[14] See *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).

[15] See Forssén 2020a, pp. 388.

[16] See ML Ch. 5 sec. 3 first para. and sec. 26 and prop. 2022/23:46, pp. 361, 362 and 371. See also Forssén 2020a, section 3.4.

*within the country* (Sw., ”*tillhandahållande av tjänster mot ersättning som görs inom landet*”) respectively in Ch. 3 sec. 1 no. 1 and no. 3 respectively. Moreover may on the theme of the tax object be mentioned that no special definition of goods or service, like in GML Ch. 1 sec. 6, is made in the ML. In ML Ch. 5 sec. 7 is with *material assets* (Sw., ”*materiella tillgångar*”) meant the same as the term *goods* (Sw., in the singular, ”*vara*”) in GML Ch. 1 sec. 6 first para. first sen. In principle is no alteration meant, but with *material assets* (Sw., ”*materiella tillgångar*”) instead of *material things* (Sw., ”*materiella ting*”) the language is modernized and a better correspondence with the VAT Directive is achieved.[17] By ML Ch. 5 sec. 3 first para, and sec. 26 respectively is the articles 14(1) and 24(1) of the VAT Directive respectively implemented, that is the main rules of what constitute taxable transactions regarding supply of goods and regarding supply of services respectively: ”‘Supply of goods’ shall mean the transfer of the right to dispose of tangible property as owner” and ”‘Supply of services’ shall mean any transaction which does not constitute a supply of goods”.

Due to the concepts goods and service not given any special definition in the ML, but being included in the determination of taxable transactions, that is in the concepts delivery of goods and supply of services, has my perception of the importance of the determination of the tax object, that is of questions which previously were related to the concept of transaction (Sw., *omsättning*) and nowadays constitute questions about the concepts delivery (of goods) and suppy (of services) respectively, been strengthened in the present context – regarding questions about the phenomenon carrousel trading by the VAT reform of 1 July, 2023. However, the need to judge whether an effort regards goods or a service remains, since the terms even nowadays are used in the ML, by being included in the concepts delivery of goods and supply of services respectively in ML Ch. 5 sec. 3 firts para. and sec. 26 respectively, in pursuance of of artycles 14(1) and 24(1) respectively of the VAT Directive. The difference is that the determination of the tax object is made in one step, instead of like previously in two steps, that is first concerning what constitutes goods and service respective according to GML Ch. 1 sec. 6 and thereafter concerning whether a transaction of goods or service respectively existed according to GML Ch. 2 sec. 1. Other questions about the tax object are the same in the ML as in the GML, that is they concern whether exemption from taxation exists and whether delivery of goods or supply of service – for consideration – is made within the country or abroad.

In connection with invstigations about VAT frauds by carrousel trading, it is important to correctly distinguish between goods and services, since carrouse trading is not a precise concept and the effort to judge must be referred to the concept delivery of goods and the concept supply of services respectively, for the existing situation being possible to analyse for purposes of tax law and criminal law. By the reform on 1 July, 2023 the secondary law in the field of VAT has been implemented in the ML inter alia by the concept material assets replacing goods,[18] but support is lacking for what is meant by service, since there is no rule in the VAT Directive giving a direct or assisting guidance to the determination of service. However, there is a primary law support to the meaning of the term service, by article 57 first para. of the Treaty on the Functioning of the European Union (abbreviated TFEU), which has the following wording: ”Services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons”.

[17] See prop. 2022/23:46, pp. 361 and 362.

[18] See ML Ch. 5 sec. 7 and article 15 of the VAT Directive.

I consider that article 57 TFEU is corresponding with the main rule of supply of services, that is ML Ch. 5 sec. 26 and article 24(1) of the VAT Directive, by the negative determination of services causing that they are not comprised by efforts falling under the free movement of goods. However, the correspondence is lacking insofar as also the freedoms which concern persons and capital are excluded from the concept service according to article 57 TFEU. The TFEU stipulates inter alia that the so-called four freedoms of movement between the Member States of goods, services, persons and capital and, which is often mentioned as a fifth freedom, the freedom of establishment for the citizens of the EU and enterprises in the Member States.[19] The hiring out of personnel – that is of natural persons – constitutes an example of a taxable transaction according to the main rule on supply of services in the main rule article 24(1) of the VAT Directive, and a financial transaction would also be a taxable transaction, if exemption from taxation was stipulated for financial transactions, like mediation of payments, in article 135(1)(d)-(f) of the VAT Directive.[20] In both those cases the preliminary judgement of service in article 57 TFEU does not correspond with the secondary law in the form of Ch. 5 sec. 26 and article 24(1) of the VAT Directive, since persons and capital are excluded from what is meant with service according to article 57 TFEU.

Although the terms goods and service respectively are not defined in the EU's legislation on VAT, either in the VAT Directive or in the COUNCIL IMPLEMENTING REGULATION (EU) No 282/2011 on implementing measures for the VAT Directive (the so-called Implementation Regulation),[21] I consider thus that it *can* be of interest in connection with investigations about carrousel trading to broaden the perspective above all on service, so that a distinction against goods can be made based on other fields of law governed by the EU law, like company law (Sw., *bolagsrätt*) and intellectual property law (Sw, *immaterialrätt*) – which constitute examples of fields where rules are important for the four freedoms to function.[22] This proposal of mine is in line with that I in a previous article in the JFT has stated that the research should notice that there is a preliminary law definition of the concept service in article 57 TFEU, and that it applies also in other fields than the filed of tax, if the EU's institutions have been conferred competence in the field in question.[23]

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[19] The four freedoms are to be found in: article 28 TFEU, regarding goods; article 56 TFEU, regarding services; article 45 TFEU, regarding persons; and article 63 TFEU, regarding capital. The principle of the EU-citizens' free establishment within the Union is to be found in article 49 TFEU.

[20] See Björn Forssén, *Momsrullan IV: En handbok för praktiker och forskare* (Eng., The VAT roll IV: A handbook for practicians and researchers) self-published 2019, section 12 201 010 (Forssén 2019a).

[21] The complete title of the Implementation Regulation is: COUNCIL IMPLEMENTING REGULATION (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

[22] Concerning company law and intellectual property law may be mentioned that the adaptation of Swedish rules to the EU law had come far already by the EEA-treaty, that is already a year before Sweden's EU-accession in 1995 See prop. 1994/95:19, *Sveriges medlemskap i Europeiska unionen* (Sweden's membership of the European Union) Part 1, pp. 157 and 158. EEA, European Economic Area.

[23] See Björn Forssén, *Momsforskningen i Sverige – metodfrågor* (The VAT research in Sweden – method questions). JFT 6/2020, pp. 716-757, 756 (Forssén 2020b).

*2.2 A certain comparison with Danish and Finnish VAT law*

I may in the context give a proposal in a certain respect regarding the Finnish VAT act, *mervärdesskattelagen (1501/1993)*, abbreviated FML. It is stipulated in the FML sec. 1 first para. no. 1, the main rule for the liability of payment of VAT to the State, that the liability regards *business activity-like sales of goods and services in Finland* (Sw., ”*rörelsemässig försäljning av varor och tjänster i Finland*”). I note that the FML means that the determination of the tax object shall be made in two steps in the same way as was the case in the GML, by FML sec. 17 stipulating what constitutes goods and service respectively and sec. 18 stipulating what constitutes *sale of goods* (Sw., ”*försäljning av vara*”) and *sale of service* (Sw., ”*försäljning av tjänst*”) respectively. Thus, the FML corresponds with the GML in the present respect.

Since the phenomenon of VAT frauds by carrousel trading often concerns at least two Member States at the same time, I consider that the articles 14(1) and 24(1) of the VAT Directive, that is the main rules of what is meant with taxable transations, should be implemented in the FML in the same way as has been done in the ML by the reform of 1 July, 2023. In my opinion, it is decisive in that respect that harmonisation of the Member States’ national legislations in the field is demanded – in pursuance of article 113 TFEU – regarding what makes the taxable event, that is taxable transactions in the form of delivery of goods and supply of services respectively.[24] According to recital 7 of the preamble to the VAT Directive it is stated that the tax rates and exemptions from taxation regarding goods and services which are not completely harmonised.[25] Thus, the FML should in my opinion be altered, so that no definition of goods and service is made and *sale of goods* (Sw., ”*försäljning av vara*”) and *sale of service* (Sw., ”*försäljning av tjänst*”) respectively are replaced with the concepts *supply of goods* and *supply of services* respectively according to the main rules in articles 14(1) and 24(1) respectively, like what has been done in the present repsct by the ML replacing the GML on 1 July, 2023.

Since I in this context also mention the third Nordic country, Denmark, I may also mention that the determination of the tax object is made in one step in *lov om merværdiafgift* (*momsloven*), i.e. the Danish VAT act. That is, no special definition of goods and service, like in the GML and the FML, is made in *momsloven*, but delivery of goods and supply of service respectively are determined in sec. 4 of the *momsloven*. Thus, the articles 14(1) and 24(1) of the VAT Directive may be implemented in *momsloven*. Therein, it is stipulated in sec. 4 first para. second sen. what is meant by *delivery of goods*, Dan., ”*levering af en vare*”, namely *transfer of the right to as owner decide over material property* (Dan., ”*overdragelse af retten til som ejer at råde over et materielt gode*”). In the third sen. of the rule is to be found a correspondence to the determination of supply of services, by it therein is stipulated that delivery of a service comprises every other delivery (Dan., ”*levering af en ydelse omfatter enhver anden levering*”).[26] Thus, in the main rules of delivery of goods and supply of a service respectively the determination of a service in *momsloven* is made not in two steps, but in one step, like in the corresponding main rules of the directive, why there is no reason for

[24] See article 63 of the VAT Directive, which reads: ”The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.”

[25] See also Forssén 2020b, p. 726.

[26] See *Danske Love* (Danish laws), https://danskelove.dk/momsloven (visited 2023-07-31).

me to give a proposal regarding *momsloven* in the way I am instead doing in this section regarding the FML.

By my proposal regarding the FML would also that legislation become conform with the VAT Directive concerning delivery of goods and supply of services, and the Swedish ML and the Finnish FML would thereby – together with the Danish *momsloven* – be harmonised in that respect in pursuance of article 113 TFEU. What I am stating in this article about a determination of the tax object in one step, instead of in two, should thus be of guidance for the reform I am suggesting regarding FML sec:s 17 and 18. Furthermore, where the phenomenon carrousel trading is concerned, the experiences in Sweden I am giving in this article about the VAT, the accounting and the criminal law in relaton to the EU law may hopefully inspire authors of jurisprudential literature and evetually the legislators in Sweden and Finland. In the latter respect, I consider that the fact that the phenomenon in question often concerns at least two Member States shows the importance of the legislators in for example Finland, Sweden and Denmark making as much reform work as possible in the field of VAT in co-operation, whereby I include the criminal law in that respect. I may, in that respect emphasize that the importance of such a Nordic co-operation is rather high, since the competence in the field of criminal law still remains on national level.

## 3 VAT frauds by carrousel trading – a phenomenon and not a legally specified concept

There is no precise determination of what is meant by ”VAT carrousels”, but what is often a typial common denominator for plans of so-called carrousel type is, as mentioned, that no final value-added taxation shall take place by the goods or the service reaching the consumer. Instead, the product is sent around in a carrousel of wholesalers, where also retailers can be included, so that the VAT on goods or services in a chain of enterprises will not be passed on to a consumer as tax carrier. Since carrousel trading is not a precise concept legally, I denote the matter, as also mentioned, a phenomenon.

In Forssén 2022, I refer inter alia to literature from Denmark, where the phenomenon in question was described already in the end of the 1990’s. Christian Dresager at the Danish tax authority (*Told- og Skattestyrelse*) wrote an article on the subject already in 1999, *Moms-karruselsvig: en svigsmetode der eskalerer* (VAT-carrousel fraud: a method of fraud escalating).[27] In the above-mentioned lecture in 2001, I mentioned the article by Christian Dresager, and that he (on p. 24) inter alia states the following: *There is no real definition of VAT-carrousel fraud in any place of the legislation or the literature* (Dan., ”Det findes intet sted i lovgivningen eller litteraturen en egentlig definition på moms-karruselsvig”). Since this is the case also today, I denote in Forssén 2022 and in this article VAT frauds of carrousel type a phenomenon.

In two Danish theses (*kandidatafhandlinger*) is inter alia the article from 1999 by Christian Dresager mentioned, and I also mention those theses in Forssén 2022. In one of them is inter alia the following stated: *The VAT-carrousels basically function so that one company in the carrousel is reimbursed VAT, while another company builds up a big debt of VAT to thereafter go bankrupt and never pay the VAT* (Dan., ”*Momskarrusellerne fungerer grundlæggende på den måde, at det ene selskab i karrusellen får penge tilbage i moms, mens et andet selskab oparbejder en stor momsgæld for derefter at gå konkurs og aldrig indbetale*

[27] See *Revision og regnskabsvæsen*, 1999 *årgång* (annual volume) 68, no. 2, pp. 23-28.

*momsen*").[28] In the other the following is mentioned as typical for a VAT-carrousel: *The perpetrators' objective with a VAT-carrousel is to generate big VAT amounts, by not paying VAT on sales to the tax authority. The fraudulent enterprises give themselves out as lacking the possibility to pay, whereas it is in reality the will to pay that they are lacking* (Dan., "*Svindlernes formål med en momskarrusel er, at få genereret store momsbeløb, ved ikke at betale salgsmoms til SKAT. Svindlervirksomhederne udgiver sig for at mangle en betalingsevne, mens det i virkeligheden er en betalingsvilje de mangler*".[29]

Thus, it is about the same view on VAT frauds by carrousel trading that exists in the two EU Member State Sweden and Denmark. By the way, Christian Dresager pointed out this phenomenon also concerning services in the beginning of the 2000's, by his his article *VAT-carrousel fraud with services – the new method of fraud – what is the authorities doing?*[30]

## 4 Regarding measures from the legislator to counteract carrousel trading

### *4.1 Reverse charge – a method used by the legislator in Sweden on several occasions since in 2000 against VAT fraud by carrousel trading*

In Forssén 2022, I mention inter alia that reverse tax liability – nowadays reverse liability of payment – exists for intra-Union acquisitions of goods from enterprises in other Member States and for an enterprise's acquisition of services from an enterprise abroad and for certain cases of transaction within the country between enterprises.[31] I mention some of the other cases of reverse liability of payment (reverse charge) which have been introduced in the field of VAR in Sweden since in 2000.

The point with reverse charge is that an enterprise will not get a claim on reimbursement of VAT against the State, but an enterprise purchasing taxable goods or services accounts in its VAT return for a calculated output tax on the expenditure for the acquisition and is entitled to make a deduction for a corresponding amount as input tax in the same return.[32] Concerning the trade of goods between enterprises in various Member States the Customs Department (Sw., *Tullverket*) shall thereby not take out customs for the goods like when imports of goods are made from a third country (place outside the EU). The sale of for example taxable goods is zero rated by the vendor in one of the Member States, and the purchaser in the other Member State accounts thus a calculated output tax on the acquisition and may deduct the same amount as input tax, but only to the extent that that person has full right of deduction or

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[28] See *MOMSKARRUSELLER – REVISORS ROLLE* (VAT carrousels – the auditor's role), by Anita Holm Thorstensen and Karina Skovgaard Svane, section 2.7 ("*Hvordan opbygges en momskarrusel*"), How a VAT carrousel is built up. Danish *kandidatafhandling* submitted (*afleveret*) on 23 May, 2013 at Copenhagen Business School.

[29] See *EFFEKTERNE AF OMVENDT BETALINGSPLIGT*: *THE EFFECT OF REVERSE CHARGE*, by Jeanne Kierulff Nielsen and Yvonne Nygaard, section 5, "*Momskarruselsvig*" (VAT-carrousel fraud). *Kandidatafhandling* submitted on 7 May, 2015 at Copenhagen Business School.

[30] See *Momskarruselsvig med ydelser – den nye svigstrend – hvad gör myndighederne?* (VAT-carrousel fraud with services – the new method of fraud – what is the authorities doing?) By fuldmægtig, cand.merc.jur. Christian Dresager, Told- og Skattestyrelsens Svigsbekæmpelsekontor. SR-SKAT ONLINE SR 2001-0179.

[31] See Forssén 2022, pp. 118 and 119.

[32] See prop. 1994/95:57, *Mervärdesskatten och EG* (The VAT and the EC), p. 79.

reimbursement for input tax in the person's activity. Thus, a taxation effect occurs by the purchasing enterprise, if that enterprise is lacking or has a limited right of deduction or reimbursement in its activity. Control of the taxation of taxable goods or services between enterpises in different Member States is made by them giving recapitulative statements to their tax authorities, which then via their *central liaison offices* can check that accounting of reverse charge has been fulfilled in given VAT returns and recapitulative statements.

More than two decades ago reverse charge was introduced in the GML for *transactions within the country* between enterprises – regarding goods in the form of fine gold and investment gold.[33] Since more services have come to be supplied from a distance reverse charge was extended on 1 January, 2000 to the main rule in the GML for enterprises' acquisitions of services from enterprises abroad.[34]

In Forssén 2022, I mention that the criminal case regarding VAT in HD, NJA 2018 p. 704, concerned trading with precious metals: gold, platinum and silver. Regarding goods in the form of gold the fineness was to low for it to be a question of fine gold or investment gold, and concerning platinum and silver reverse charge did not exist in the GML (which circumstances are still the same according to the ML). Thus, the general rules on liability of payment of VAT (previously tax liability to VAT) applied to all parts of the case – not rules on reverse charge.[35] Thus, I consider that it is remarkable that the legislator has omitted to make sure introducing reverse charge also for gold of a low fineness, platinum and silver. I may especially emphasize this due to the SKV stating in its investigations *high risk goods* as a sign of the existence of VAT fraud by carrousel trading. What would motivate that classification is according to the SKV that it is a matter of expensive goods easy to move, and in that respect should in my opinion platinum qualify well to be called high risk goods. This proves in my opinion an obvious inconsistency on behalf of the legislator when it is a matter of using the institute reverse charge to suppress the phenomenon of VAT frauds by carrousel trading.

*4.2 Especially about so-called cross invoicing and the legislator's reasoning about reverse charge for trading with mobile phones etc.*

On 1 April, 2021 reverse charge was introduced concerning transactions within the country between taxable persons regarding goods in the form of mobile phones etc., but not for services in the form of IP-telephony (VoIP).[36] Thereby, reverse charge applies for trading within the country between taxable persons regarding goods in the form of mobile phones, integrated circuit devices, gaming consoles, tablets and portable computers. The requirement

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[33] See Ch. 1 sec. 2 first para. no. 4 a, which was introduced on 1 January, 2000, by SFS 1999:640. See also prop. 1998/99:69, *Särskilda mervärdesskatteregler för investeringsguld* (Special VAT rules for investment gold) and Forssén 2022, p. 119.

[34] See SFS 2009:1333 (and SFS 2009:1334) and prop. 2009/10:15, *Nya mervärdesskatteregler om omsättningsland för tjänster, återbetalning till utländska företagare och periodisk sammanställning* (New VAT rules on the country of supply, refund to foreign entrepreneurs and recapitulative statement). See also Forssén 2022, pp. 118 and 119.

[35] See Forssén 2022, p. 120.

[36] See GML Ch. 1 sec. 2 first para. no, 4 f and seventh para., its wording according to SFS 2020:1220 (and 1221). See also prop. 2020/21:20, *Omvänd skattskyldighet vid omsättning av vissa varor* (Reverse charge at supply of certain goods).VoIP, Voice over Internet Protocol.

for reverse charge to apply instead of general VAT rules is that the taxable amount for the transaction of those goods in an invoice that all in all exceeds 100,000 Swedish crowns and that the liability of registration for the purchaser is not only a consequence of the acquisition.

In Forssén 2022, I mention that the government first suggested an introduction of reverse charge for both goods in the form of mobile phones etc. and services in the form of VoIP, but that this was not decided for VoIP, but only for the trading between enterprises regarding mobile phones.[37] Thereby, the government gave up in the bill its proposal of 2020-04-17,[38] which meant that reverse charge also would apply to services in the form of VoIP. In SVT's morning programme 2020-09-18 the then minister of finance, Magdalena Andersson, explained that VoIP was exempted from the reform by referring to *the business community* (Sw., *näringslivet*) having argued that they wanted to avoid difficulties with VoIP. Be that as it may, I, however, note that since 2015 is VoIP mentioned in article 6a(1)(b) of the Implementation Regulation as an example of telecommunicatons services according to article 24(2) of the VAT Directive.[39] By the way, the Danish parliament adopted on 1 June, 2023 rules on reverse charge (Dan., *omvendt betalingspligt*) regarding telecommunications services (Dan., *teleydelser*), to counteract VAT frauds (Dan., *momssvig*), and in that respect is no exemption for VoIP stipulated.[40] This is in line with my perception meaning that such a special treatment of VoIP compared with other telecommunications services as was suggested by the Swedish government 2020-04-17 is not complying with the Implementation Regulation, which is a legislation directly applicable in each Member State according to article 288 second para. TFEU.

Regardless whether the minister of finance abandoned the suggestion to introduce reverse charge also for VoIP was due to the perception by an anonymous business community about difficulties or by a realization of VoIP being mentioned since 2015 in the Implementation Regulation as an example of telecommunications services according to article 24(2) of the directive, this makes it hard for the SKV to continue asserting that such services constitute *high risk goods* for VAT fraud of carrousel type. If the suggestion on reverse charge had been introduced for VoIP too, it would have stopped the asserted VAT frauds by so-called *cross invoicing* in the form of invoicing regarding such services. However, *cross invoicing* is not something only connected with what is usually called VAT fraud by carrousel trading. *Cross invoicing* means quite simply that a false charging of VAT is made to an enterprise to set off output tax in the enterprise by accounting falsely charged VAT as input tax. *Cross invoicing* can be a special issue, and not necessarily seen in connection with what is referrable to a "VAT carrousel". The falsely charged VAT regarding for example services in the form of VoIP might be one matter (question) and a carrousel regarding goods another question in the same enterprise.

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[37] See Forssén 2022, p. 119.

[38] See the Treasury's memo Fi2020/01855/S2.

[39] See Forssén 2022, p. 119.

[40] See *Vedtaget af Folketinget ved 3. behandling den 1. juni 2023 Forslag til Lov om ændring af momsloven, chokoladeafgiftsloven, skattekontrolloven og forskellige andre love og om ophævelse af lov om ændring af momsloven* (Approval of the Parliament by 3. treatment on 1 June, 2023 Proposal of law on alteration of *momsloven*, act on chocolates fee, the tax control act and various other acts and on cancellation of law on alteration of *momsloven*): https://www.ft.dk/samling/20222/lovforslag/L75/som_vedtaget.htm (besökt 2023-08-01).

Thus, I consider that the legislator should have noted in the investigation that led to the reform on 1 April, 2021 that investigations and cases which have been motives to it connects the phenomenong ”VAT carrousels” with *cross invoicing* as if they were connected questions normally, when the two phenomena should in the first place be seen as different questions, which *can* occur in the same investigation and case. Such inconsistencies should in my opinion be avoided for example in the continuing treatment of the EU-criminal law investigation's official report about criminalization of transgressions of EU-regulations, SOU 2020:13, ”*Att kriminalisera överträdelser av EU-förordningar*” (To criminalize transgressions of EU-regulations), In Forssén 2022, I also note that the criminal case in the HD, NJA 2018 p. 704, is mentioned on the pages 48 and 54 in the report, but that it is not giving anything further for the interpretation of the case.[41]

## 5 Especially about missing trader and liability to pay erroneously charged VAT

### *5.1 In general about fictitious invoice with erroneously charged VAT – false VAT*

In connection with the case of VAT frauds by carrousel trading where fictitious enterprises – so-called missing trader (or goalkeeper company or front enterprise) – is used, I may mention something from Forssén 2023a regarding the consequences of an enterprise issuing a fictitious imvoice with an amount falsely entered as VAT.

On 1 January, 2008 was introduced in the GML Ch. 1 sec. 1 third para. and sec. 2 e, by SFS 2007:1376, a rule about that he or she who falsely has charged VAT in an invoice is *liable of payment* (Sw., *betalningsskyldig*) to the State for the amount, dspite that it does not constitutet VAT according to the general VAT rules.[42] The rule is based on article 203 of the VAT Directive, which stipulates that ”VAT shall be payable by any person who enters the VAT on an invoice”. I denote such a falsely charged VAT a false VAT. The amount shall be accounted for in the order applying for the payment liable's accounting of output tax for the accounting period during which the invoice was issued.[43] The liability to pay to the State such a false VAT remains until the accounting period during which the enterprise has issued a credit note, if the SKV does not waive the demand for a credit note due to special reasons (Sw., *särskilda skäl*).[44] Article 203 is included among the articles in section 1 Chapter 1 of section XI of the VAT Directive which comprises ”[p]ersons liable for payment of VAT to the tax authorities”,[45] but, for pedagogical reasons, I do not use in this article *liable of payment* (Sw., *betalningsskyldig*) regarding persons who are comprised by ML Ch. 16 sec. 23 and article 203 of the directive, but I am writing that they are liable to pay to the State a false VAT. In this way, I am reserving in this article the concept liable of payment for persons who shall pay a real VAT to the State, that is for whom a liability of payment regards taxable transactions concerning delivery of goods or concerning supply of services. A falsely charged

[41] See Forssén 2022, p. 129.

[42] GML Ch. 1 sec. 1 third para. and sec. 2 e § corresponded by ML Ch. 16 sec. 23.

[43] See GML Ch. 13 sec. 27, which are corresponded by ML Ch. 7 sec. 49 first para.

[44] See GML Ch. 13 sec. 28 and Ch. 11 sec. 10 respectively, which are corresponded by ML Ch. 7 sec. 50 and Ch. 22 sec. 46 and Ch. 17 sec 22 and sec. 23 no. 3 respectively.

[45] See articles 192a-205 of the VAT Directive.

VAT – false VAT – constitutes in other words an amount which is not comprised by the VAT principle in article 1(2) of the VAT Direcive.

According to the preparatory works to the reform in 2008 there are various cases of what I denote false VAT, where one example means that a person *committing tax fraud by issuing invoices with VAT which do not correspond to any real transaction (fictitious transactions)*.[46] Thus, it is a case of a missing trader existing in a chain of enterprises. Since the receiver of the invoice knew or should have known that the information on VAT was false (a fictitious transaction), it is, as I describe in the beginning of this article, a matter of a case of abusive practice which can cause criminal law responsibility for both the issuer and the receiver of the invoice. In Forssén 2023a, I note that the reform on 1 July, 2023 is not changing the problems that I brought up therein,[47] and in this article I mention something about the consequences that fictitious invoicing with a falsely charging of VAT cause concerning the VAT itself, the accounting and criminal law and for the question of registration to VAT. Thereby, those questions form, together with what I write otherwise in this article about VAT frauds of so-caled carrousel type, a basis for continuing studies of or legislation about ”VAT carrousels” in Sweden and for example in Finland. The question is whether the legislator in Sweden has taken consistent and effective measures to suppress the phenomenon VAT frauds by carrousel trading, by the introduction of reverse charge and the implementation of the VAT Directive’s article 203.

*5.2 Especially about invoice with false VAT and the VAT question itself*

The legislator considered that it followed already by GML Ch. 8 sec. 2 first para. that a falsely charged VAT does not constitute input tax, since such an amount is not constituting output tax according to the GML, but constitutes, as mentioned, what I call a false VAT.[48] By the liability of payment for such a false VAT being stipulated in a separate rule, GML Ch. 1 sec. 2 e, the legislator emphasized that for the person falsely charging VAT shall the measure not lead to anything else than a liability of payment.[49] Since it is not a matter of liability of payment according to the general VAT rules for the issuer of the invoice, the reciprocity principle is not fulfilled for the receiver, and that enterprise is thus not entitled to deduct the amount as an input tax.[50]

By the way, it may be mentioned concerning the scope of the right of deduction that the reform on 1 July, 2023 means, that the main rule in the (Ch. 13 sec. 6) connects to taxable person (Sw., *beskattningsbar person*) instead of like in the main rule in the GML (Ch. 8 sec. 3 first para.) to the concept tax liability (Sw., *skattskyldighet*). Thereby, the main rule in article 168 a of the VAT Directive has been implemented in the ML. I suggested this, as side issue

[46] See prop. 2007/08:25, *Förlängd redovisningsperiod och vissa andra mervärdesskattefrågor* (Prolonged accounting period and certain other VAT issues), p. 91.

[47] See also Forssén 2023a, section 1.

[48] GML Ch. 8 sec. 2 first para. corresponded by ML Ch. 13 sec. 4 no. 1 and 2.

[49] See prop. 2007/08:25, p. 90.

[50] See GML Ch. 8 sec. 2 first and second para:s and sec. 3 first para. and article 167 of the VAT Directive. See also Forssén 2023a, section 2.

D, in my licentiate's dissertation,[51] and regarding the main question A therein, that is the main rule for the determination of the tax subject, I suggested that the connection to the income tax law and the concept business activity (Sw., *näringsverksamhet*) would be limited so that a rule competition did not exist between the GML and the main rule of taxable person in article 9(1) first para. of the VAT Directive.[52] The connection to the income tax law in the mentioned respect was abolished on 1 July, 2013, by SFS 2013:368, whereby article 9(1) first para. of the VAT Directive was implemented in GML Ch. 4 sec. 1. In my doctor's thesis, which concerned the rule on tax and payment liability in *enkla bolag* (approx. joint ventures) and *partrederier* (shipping partnerships), GML Ch. 6 sec. 2,[53] I repeated the side issue D.[54] In Forssén 2020a, I stated, as mentioned above, that it was a step in the right direction that SOU 2020:31 contained a suggestion to abolish the concept tax liable (Sw., *skattskyldig*) and replace it with liability of payment (Sw., *betalningsskyldighet*),[55] which, as also mentioned above, has been made by the ML. By the reforms on 1 July, 2013 and on 1 July, 2023 have important parts of my suggestions in Forssén 2011 and Forssén 2013 been implemented in the Swedish VAT legislation, and in this article I bring up questions which the legislator and rsearchers should be working with especially to suppress the phenomenon with VAT frauds of so-called carrousel type. The reforms in 2013 and 2023 are important for the implementation of the VAT Directive, but they do not constitute any solution of the mentioned phenomenon.

Moreover, I have – set out from Forssén 2013 – brought up in a previous article in the JFT the question how legal figures which are not legal entities are treated in the GML and the FML.[56] That *sammanslutningar* and *partrederier* are regarded as tax subjects according to FML sec. 2 first para. and sec. 13, whereas *enkla bolag* and *partrederier* are not considered constituting tax subjects according to GML 6 sec. 2 meant that I suggested in Forssén 2013 that Finland and Sweden would jointly make a proposal by the EU on clarifying in article 9(1) first para. of the VAT Directive whether a non-legal entity can constitute a taxable person,[57] which I repeated in Forssén 2019b.[58] Also that question should be considered important to treat by the

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[51] See *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).

[52] See Forssén 2011, pp. 248 and 250 (regarding the main question A) and p. 262 (regarding the side issue D).

[53] See Forssén 2013.

[54] See the so-called coat in Forssén 2013, pp. 26 and 27.

[55] See Forssén 2020a, p. 388.

[56] See *Om rättsliga figurer som inte utgör rättssubjekt – den finska och svenska mervärdesskattelagen i förhållande till EU-rätten* (On legal figures that are not legal entities – the Finnish and Swedish VAT in relationship to the EU law). JFT 1/2019, pp. 61-70 (Forssén 2019b).

[57] See Forssén 2013, pp. 225 and 226.

[58] See Forssén 2019b, pp. 61 and 62. GML Ch. 6 sec. 2 corresponds in the ML by Ch. 4 sec. 16 – see Forssén 2020a, pp. 390, 393 and 395. A special problem that I am bringing up concerning ML Ch.4 sec. 16 is the following. The voluntary rule on appointing a representative for *enkelt bolag* or *partrederi* is getting a further scope in Ch. 4 sec. 16 second para., by the reference to Ch. 5 sec. 2 of the Taxation Procedure Act, *skatteförfarandelagen (2011:1244)*, abbreviated SFL. Therein is the concept activity (Sw., *verksamhet*) used, but in ML Ch. 4 sec. 16, which consitutes the mandatory rule on who is a taxable person concerning the partners themseves, is the closer concept economic activity (Sw., *ekonomisk verksamhet*) used. See Forssén 2020a, p. 395. The concept *verksamhet* (activity) has not been changed in SFL Ch. 5 sec. 2 by the reform on 1 July, 2023: see prop. 2022/23:46, p. 173.

legislator with regard of the problems with VAT frauds by carrousel trading, since that phenomenon, as mentioned, often concerns at least two Member States at the same time.

*5.3 Especially about invoice with false VAT and the accounting*

According to the main rule in the ML the accounting liability occurs when a business transaction, by which the liability of payment has occurred, has been booked or should have been booked according to *god redovisningssed*, Generally Accepted Accounting Principles (GAAP),[59] and the liability of payment presupposes according to the main rules in ML Ch. 3 sec. 1 that delivery of goods or supply of services for consideration has been made within the country by a taxable person acting in this capacity,[60] that is that such transactions have been made within the country (Sweden) in principle by an entrepreneur. According to the main rule on liability of invoicing in the ML shall each taxable person secure that an invoice is issued by the taxable person (or in that person's name and on behalf of that person by the purchaser or a third person) for delivery of goods or supply of services which is made to another taxable person (or to a legal person which is not a taxable person),[61] that is even if liability of payment according to the ML does not occur. The rules on liability of invoicing in the ML are special rules in relationship to the Book-keeping Act, *bokföringslagen (1999:1078)*, abbreviated BFL, as general legislation on accounting liability for a person required to maintain accounting records (Sw., *bokföringsskyldig*) regarding the person's business transactions. By the general rules on definitions of certain concepts in the Annual Accounts Act, *årsredovisningslagen (1995:1554)*, abbreviated ÅRL, it follows by Ch. 1 sec. 3 first para. no. 3 that with net sales (Sw., *nettoomsättning*) is meant in the ÅRL: income from sold goods and services made which are included in the enterprise's normal activity with deduction for discount given, *VAT and other tax which is directly connected to the transaction*. I make the same judgment as in Forssén 2023a, namely that without an underlying business transaction no transaction emerges according to the ML, and thus neither any liability of payment, accounting liability or invoicing liability according to the ML. Thus, all in all is my judgment that without an underlying business transaction no transaction according to the GML occurs, and thereby neither any tax liability, accounting liability or invoicing liability according to the GML.[62]

According to Ch. 1 sec. 2 first para. no. 7 of the BFL business transaction means *all changes in dimension and composition of an enterprise's wealth which depends on the enterprise's economic relations with the surrounding world, like cash received and paid, claims and debts emerged and own contributions to and withdrawals froms the activity of money, goods or something else*. Thus, a fictitious invoice shall in my opinion not be booked in the current recording, since it is not corresponding to any business transaction that affects the course, economic result or balance of the business. However, the enterprise which has issued the invoice is liable of payment to the State for the false VAT entered therein, and the question is how that amount shall be accounted (besides in a special tax return).

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[59] See ML Ch. 7 sec. 14 no. 1. See also prop. 1993/94:99, *om ny mervärdesskattelag* (about a new VAT act), p. 234.

[60] See ML Ch. 3 sec. 1 no. 1 and 3.

[61] See ML Ch. 17 sec. 10.

[62] See also Forssén 2023a, section 3.

According to Ch. 3 sec. 1 of the ÅRL shall the balance sheet in summary account for the enterprise's total assests, allocations and debts and equity on the balance sheet day. Since the false VAT in question does not constitute VAT, it shall not be accounted for as any tax debt in the balance sheet or as postponed tax in a note in the annual report.[63] The false VAT neither constitutes any contingent liability (Sw., *eventualförpliktelse*) or any commitment which is comprised by the rules in the ÅRL about off-balance sheet items. Although a commitment does not constitute an off-balance sheet item, it can, however, be appropriate according to the preparatory works to the BFL to mention in a note or in the administration report.[64]

I consider that an enterprise which has issued a fictitious invoice with a false VAT therein is liable to account for the amount in question in a note in the annual report, if it is of importance for the judgment of the *balance* of the business. I deem that it is – at least concerning not insignificant suchlike amounts – due to the liability of payment to the State affecting the liquidity of the enterprise and the prudence concept meaning that the enterprise must not be overvalued in the accounting. In Ch. 5 of the ÅRL it is stated what shall be entered in notes in the annual report. Concerning the demand of notes for smaller and bigger enterprises is in my opinion what is stated regarding so-called contingent liabilities (Sw., *eventualförpliktelser*) in Ch. 5 sec. 15 of the ÅRL of interest in the present context. There it is stipulated that if an enterprise has guarantee commitments, economic commitments or contingent liabilities which shall not be entered in the balance sheet (contingent liabilities), it shall inform about the sum of those. Regardless whether a false VAT has been paid or not to the State, *the liability of payment* remains only until a credit note has been issued by the enterprise (compare above), why I consider that it constitutes a contingent liability. The amount shall not be accounted for in the current recording,[65] but I deem that a remaining liability of payment should be mentioned in a note in the enterprise's annual report.

Although frivolous operators cannot be expected to give information in the annual report about a false VAT for which liability of payment to the State remains over the year-end, it is in my opinion of interest that for example a missing trader is obliged to do so, since it means an element of control to take into consideration in for instance investigations and cases on VAT fraud by carrousel trading. If nothing else, it supports my perception that the book-keeping should be considered constituting decisive evidence also in such cases, when it is a matter of erroneous information being given in VAT returns by enterprises in a chain where the SKV or the EBM asserts that a missing trader is included.

### *5.4 Especially about invoice with false VAT and criminal law responsibility*

The SBL was altered on 1 July, 1996, by SFS 1996:658, so that the effect crime *skattebedrägeri* nowadays constitutes a risk crime, called *skattebrott* (both expressions read tax fraud in English). This means that the criminal cases can be decided without awaiting legally binding decisions in the tax courts. However, what is erroneous information must be

[63] See Ch. 5 sec. 36 of the ÅRL about that a big enterprise shall inform in a note in the annual report regarding postponed tax.

[64] See prop. 1998/99:130, *Ny bokföringslag m.m.* (New book-keeping act etc.) Part 1, p. 303.

[65] Then the result must not be undervalued for income tax purposes, I consider that the amount shall neither be written off.

decided with guidance of the tax rules, so that the connection between the criminal tax case and the taxation question will not be broken.[66] The tax fraud is described as follows in sec. 2 of the SBL:

*He or she who in another way than orally 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 being withheld the public or wrongly counted in or reimbursed to himself or herself or someone else, is sentenced for tax fraud to prison for two years at the most*.

Thus, it shall be a matter of an *erroneous information* in writing given with *intent* in a tax return etc. and that a *risk* shall emerge for *tax* (Sw., *skatt*) to be withheld from the State or wrongly counted in or reimbursed to the person filing the tax return etc. Thereby, the tax fraud concerns wrongly or omitted accounting of tax, that is it constitutes an accounting crime. Thus, there is no payment crime in itself concerning the tax account system (Sw., *skattekontosystemet*), which was introduced on 1 November, 1997, whereby the so-called collection crime (Sw., *uppbördsbrottet*) was abolished regarding tax deduction at source (Sw., *källskatteavdrag*).[67]

If an enterprise, for example a natural person (sole proprietorship) or a legal person like a limited company (Sw., *aktiebolag*), has issued an invoice wherein an amount falsely is denoted as VAT, the amount shall, as what I denote a false VAT, be accounted for in a special tax return (SFL Ch. 26 sec. 7), unlike a real VAT which is accounted for in a VAT return (SFL Ch. 26 sec. 21). That the as VAT falsely denoted amount constitutes a false VAT may be meaning that the issuer of the invoice has not committed a crime regarding tax (Sw., *skatt*), 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 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. An amount which constitutes a false VAT may thereby be deemed as *skatt* (tax) only concerning the procedure for its accounting, not materially.[68]

To determine what is *skatt* (tax) materially by a procedure rule in the SFL is in conflict with the principle of legality for taxation measures in Ch. 8 sec. 2 first para. no. 2 of the 1974 Instrument of Government, *regeringsformen (1974:152)*, abbreviated RF. Thus, 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 thereby not be deemed committing tax fraud according to the SBL. This since an erroneous information regarding *skatt* (tax) which shall be accounted for in a VAT return do not come up. Tax surcharge (Sw.,

[66] See prop. 1995/96:170 p. 91.

[67] See prop. 1996/97:100, *Ett nytt system för skattebetalningar, m.m.* (A new system for tax payments etc.) Part 1 p. 450; the tax payment act, *skattebetalningslagen (1997:483)*, which was replaced on 1 January, 2012 by the SFL.

[68] See also Forssén 2023a, section 4.

*skattetillägg*), which by the way also is considered a criminal charge,[69] can neither be imposed on false VAT, since the sanction tax surcharge is imposed on *skatter* (taxes) which are comprised by the SFL,[70] and an amount in the form of a false VAT is not *skatt* (tax) in a material respect. The only consequence is procedural and regards the liability of payment, that is the sole proprietorship or the limited company shall account for an amount that constitutes a false VAT in a special tax return and pay it to the State, which demand, as mentioned, applies as long as a credit note has not been issued.

However, tax fraud can come up 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, according to GML Ch. 8 sec:s 2 and 3. In such a case can criminal law responsibility be of interest also for he or she who has issued the invoice with the false VAT, namely according to BrB Ch. 23 sec. 4 for complicity in the tax fraud that the receiver of the invoice can be deemed to have committed by trying to make a deduction of the amount. That situation can be subject of investigations by the SKV and the EBM in cases regarding VAT frauds by carrousel fraud, where a missing trader exists in a chain of enterprises, whereby it issues an invoice with a false VAT and the receiver of the invoice tries to exercise right of deduction for the amount by noting it as input tax in a VAT return to the SKV. Since the receiver of the invoice in the hypothetical example knew or should have known that the information of VAT was false, it is 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.[71]

The CJEU considers taken by itself that the right of deduction for input tax cannot be denied anyone for acquisitions made for the purpose of making taxable transactions, only because someone before or after in the chain of delivery has made a with regard of VAT fraudulent transaction which the person in question did not know about and neither could have known about.[72] However, it is so in the present hypothetical example that the receiver of the invoice

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[69] The Swedish tax surcharge is according to the European Court of Justice comparable with *a criminal charge* according to article 6 of the European Convention. See the European Court of Justice's verdicts on 23 July, 2002: Janosevic v. Sweden, Application no. 34619/97, item 71; and Västberga Taxi Aktiebolag and Vulic v. Sweden, Application no. 36985/97, item 82. Thereby, the legislator confirmed that tax surcharge is to be considered a sanction comparable with a criminal charge according to the European Convention. See prop. 2002/03:106, *Administrativa avgifter på skatte- och tullområdet, m.m.* (Administrative charges in the fields of tax and customs etc.), p. 245.

[70] See SFL Ch. 49 sec. 2.

[71] 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, I state that despite that the Supreme Court of Sweden (Sw., *Högsta domstolen*, abbreviated 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. The senior judge of appeal, who was dissentient and wanted to acquit the defendant, stated inter alia that the Court of Justice of the EU (CJEU) in the case C-255/02 Halifax et al. (ECLI:EU:C:2006:121), item 93, 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 instead reimbursement liability since the deduction has become unjustifiably*. I also noted that the senior judge of appeal moreover stated that the criminal law principle of legality according to Ch. 1 sec. 1 of the BrB 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. See Forssén 2022, pp. 123–125.

[72] See the Joint cases C-354/03, C-355/03 and C-484/03 Optigen et al. (ECLI:EU:C:2006:16), item 55. See also Forssén 2022 p. 121.

has not received goods or services and thus he or she knew or should have known that the invoice received was drawn up for the sake of appearances, why he or she gave erroneous information in the VAT return to the SKV, by therein noting the amount in the invoice received as an input tax, which he or she thus is not entitled to deduct. In such a case can responsibility for tax fraud come up or tax surcharge be imposed.[73]

If the receiver of the invoice has booked the false VAT as input tax, he or she can also be responsible for book-keeping crime according to BrB Ch. 11 sec. 5 first para. due to erroneous information as well in his or her book-keeping, if the other suppositions for such responsibility are fulfilled, that is if the accounting measure is made with intent or by carelessness and means that the balance of the business cannot be judged on the whole.[74]

Although a natural person carrying out an activity under sole proprietorship or as a representative of a limited company cannot be deemed committing tax fraud for the issuing itself of the fictitious invoice with a false VAT, he or she can be responsible for book-keeping crime regarding the annual report according to BrB Ch. 11 sec. 5 first para.[75] This can, in pursuance of what I am stating in the nearest preceding section, be the case if the liability to pay to the State the amount which constitutes false VAT is not mentioned in a note in the enterprise's annual report, that is if the contingent liability that the liability of payment means demands such an information for the balance of the business being possible to judge on the whole. By the way, the circumstances in the present case should typically be like that the prerequisites intent or carelessness are fulfilled.[76]

In the hypothetical example of above, I state, as mentioned, that it constitutes a case of abusive practice that *can* lead to criminal law responsibility for both the issuer and the receiver of the invoice. Furthermore, I state, as also mentioned, that 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, but that it in my opinion thus *can* be the case. Stig von Bahr, formerly judge in the Supreme Administration Court (*Högsta förvaltningsdomstolen*, abbreviated HFD) and the CJEU, has written an article in Swedish Tax Journal 2022 (pp. 498-504), "*Mer om missbruk och momsbedrägeri*" (More about abuse and VAT frauds), 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*.[77]

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[73] The prosecutor may, however, not prosecute a natural person if the SKV has decided to impose tax surcharge on him or her (SBL sec. 13 b). Tax surcharge may not be imposed if the preliminary investigation already is going on against him or her regarding the SBL (SFL Ch. 49 sec. 10 a).

[74] See also regarding inter alia the prerequisite false document at *coarse* book-keeping crime in BrB Ch. 11 sec. 5 second para.

[75] According to BFL Ch. 6 sec. 1 first para. no. 1, limited companies shall always finish the current recording with an annual report, whereas a natural person (sole proprietorship) shall do so onlu on conditions according to item 6 of the rule.

[76] See also regardsing inter alia the prerequisite false document at *coarse* book-keeping crime in BrB Ch. 11 sec. 5 second para.

[77] See Stig von Bahr, *Mer om missbruk och momsbedrägeri* (More about abuse and VAT frauds), *Svensk Skattetidning* (Swedish Tax Journal) 2022, pp. 498-504, 499 (von Bahr 2022).

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*. However, he did not want to consider my noticing of the nuance of what my expression *in itself* (Sw., "*i sig*") means, why the readers of Swedish Tax Journal gets the impression that Stig von Bahr goes further then I, by him so categorically dismissing my warning for abusive practice on the theme of criminal sanctions. It can exist various criminal law questions in a case of abusive practice, like for example complicity to erroneous exercise of right of deduction for falsely charged VAT. Therefore, I state in a follow-up article in the Internet paper *Dagens Juridik* (Today's Law) that I disagree with Stig von Bahr, but that he should of course be invoked by the defence lawyers for expert evidencce in ongoing cases on carrousel trading or in connection with petitions for a new trial regarding a conviction in such a case.[78] However, I may, for the research and to the legislator, emphasize my own viewpoints, and repeat them also here in the JFT, which feels satisfactory for me to know that it makes it clear what my standpoint is in questions about abusive practice and criminal law.

I have in the capacity of practician the experience that the SKV sometimes specifies its assertions on planning (Sw., *upplägg*) regarding carrousel trading that the fault concerning the VAT accounting is meant to make possible for the entrepreneur to *unfairly appropriate money from the Swedish State* (Sw., *tillskansa sig pengar från svenska staten*). Then it is also very near for the prosecutor to either complete a suspicion of tax fraund or alter the deed desription, by stating that a matter of commercial money laundering exists.[79] This means in the present context that the prosecutor claims that one or more enterprise in a transaction chain appropriates money from a tax authority within the EU, and that an enterprise in Sweden is contributory to this, which according to the Act on Punishment for Money Laundering sec:s 3 and 7 in such a case means that the suspected is *contributory* (Sw., "*medverkar*") to concealing that *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* (Sw., "*pengar eller annan egendom härrör från brott eller brottslig verksamhet eller till att främja möjligheterna för någon att tillgodogöra sig egendomen eller dess värde*"). Since there is no payment crime in itself in the Swedish criminal law legislation and a falsely charged VAT only cause a liability of payment of such an amount to the State, can he or she who in the capacity of real or made up vendor of goods or services not be sentenced to responsibility for tax fraud only be cause he or she not having paid the real or false VAT to the State. It is *in itself* not sufficient for criminal responsibility occurring, but the tax fraud is, as mentioned, an accounting crime, where the concept erroneous information is the prerequisite in SBL sec. 2 which ties together the criminal law with the tax law and the sanction tax surcharge. Commercial money laundering is, unlike the tax fraud, not a risk crime, but an effect crime,

[78] See in *ANNEX 1*: Björn Forssén, *Livsmedelspriserna föranleder lagändringar och planering avseende indirekta skatter* (Food prices cause alterations of law and planning regarding indirect taxes), *Dagens Juridik* (Today's Law) 2023-03-15 (Forssén 2023d). By the way, Forssén 2023a is also published after Forssén 2022 and von Bahr 2022. However, Forssén 2023a was written as a follow-up to Forssén 2022, and I submitted the manuscript to *Tidningen Balans* (The Periodical Balans), to be sure of the application questions being well received – which also proved to be the case. The combination with my longer more theoretical articles in the JFT and my shorter articles – often also more oriented on application questions like the accounting of falsely charged VAT – in *Balans fördjupning* (The Periodical Balans Annex with advanced articles) has been appreciated, when I during the last years thereby has prodiúced material to my – since 2015 – yearly recurrent lectures and seminars on the EU Master programme at Södertörn University (Stockholm).

[79] See *lagen (2014:307) om straff för penningtvättsbrott* (the Act on Punishment for Money Laundering) sec:s 3 and 7.

but it is in my opinion near at hand to abusive practice concerning VAT, by the suspected *contributing to a measure which is reasonably likely to be taken for the purpose* to conceal that for example money originating from crime or crminal activity etc.[80] Thus, I consider – like what I stated in Forssén 2022 – that it is not clear that abusive practive *in itself* means that criminal law responsibility exists. However, I consider that instead of responsibility for tax fraud *can* on the theme commercial money laundering criminal law responsibility exist for abusive practice and not only for frauds.

## 6 The question whether reverse charge and implementation of article 203 of the VAT Directive can suppress VAT frauds by carrousel trading

In section 1, I account for the phenomenon with VAT frauds by carrousel trading is a big problem for the Swedish State, which is shown by one single errand may comprise billions of Swedish crowns in accounted VAT which is questioned by the SKV and the EBM.

In section 2.1, I state that it was astep in the right direction, to suppress VAT frauds of so-called carrousel type, that the Swedish VAT act was reformed on 1 July, 2023, so that the concepts goods (Sw., in the singular, ”*vara*”) and service (Sw., ”*tjänst*”) respectively no longer are given special definitions therein, but are included in the determination of taxable transactions, that is in the concepts *delivery of goods* (Sw., *leverans av varor*) and *supply of services* (Sw,, *tillhandahållande av tjänster*) respectively. That the national legislation in the field thereby has become conform with the VAT Directive, so that the concept transaction (Sw., *omsättningsbegreppet*) has been abolished and the determination of the tax object nowadays is conform with the directive, means in my opinion that the importance of the determination of the tax object has been strengthened, where investigations of VAT frauds by carrousel trading are concerned.

In the latter respect, I also state in section 2.1 that although the terms goods and service respectively are not defined in either the VAT Directive or the Implementation Regulation *can* it be of interest in connection with investigations about carrousel trading to broaden the perspective above all on service, so that a distinction against goods can be made based on other fields of law governed by the EU law, like company law and intellectual property law. In that respect, I refer to the primary law, where article 57 TFEU contains a definition of service, which applies also in other fields than the field of tax, if the EU’s institutions have been conferred competence in the field in question, like concerning for example the company law and the intellectual property law.

In section 2.2, I am giving a suggestion regarding the FML, whereby I am, concerning sec:s 17 and 18, stating that the definition of *goods* (Sw., in the singular, ”*vara*”) and *service* (Sw., ”*tjänst*”) should be abolished and replaced by the concepts *sale of goods* (Sw., ”*försäljning av vara*”) and *sale of service* (Sw., ”*försäljning av tjänst*”) respectively. Thus, the FML would conform with the determination of the tax object according to the main rules in articles 14(1) and 24(1) respectively of the VAT Directive, like what has been done in the present respect

[80] See sec. 7 of the Act on Punishment for Money Laundering. Note the expression *for such a purpose* (Sw., ”*i sådant syfte*”) in that rule: *a measure which can be reasonable to assume being taken for such a purpose mentioned in sec. 3* (Sw., ”*en åtgärd som skäligen kan antas vara vidtagen i sådant syfte som anges i 3 §*”). The effect crime commercial money laundering lacks the criterion intent, and has thus a more narrow scope regarding what constitutes a necessary subjective prerequisite compared with intent (Sw., *uppsåtligen*) for the tax fraud, which is a risk crime and where already eventual intent – intent of indifference (Sw., *eventuellt uppsåt* or *likgiltighetsuppsåt*) – can fulfil the prosecutor’s deed description in a subjective respect.

by the ML replacing the GML on 1 July, 2023 corresponds with the GML in the present respect.

In section 2.2, I also emphasize that the importance of a Nordic co-operation between the legislators is rather high, where a reform work to suppress VAT frauds by carrousel trading is concerned, since that phenomenon often concerns at least two of the EU Member States at the same time. A Nordic co-operation is especially important due to the competence in the field of criminal law not being conferred to the EU's institutions, but remains at national level with the Member States, for example Sweden, Finland and Denmark.

In section 3, I conclude that view on VAT frauds by carrousel trading in Sweden and Denmark is about the same. Thereby, I mean that there is no precise determination of what is meant by "VAT carrousels". The common denominator for plans of so-called carrousel type is at least that no final value-added taxation shall take place by the goods or the service reaching the consumer. Instead, the product is sent around in a carrousel of wholesalers, where also retailers can be included, so that the VAT on goods or services in a chain of enterprises will not be passed on to a consumer as tax carrier. Since carrousel trading is not a precise concept legally, I denote the matter a phenomenon.

A harmonisation of the VAT legislations in the Nordic Member States of the EU is in my opinion necessary for the actual taxation in the field fulfilling the harmonisation demand on the Member States' VAT legislations according to article 113 TFEU. It is a forst step towards suppressing VAT frauds by carrousel trading, whereby I as a start of that work suggest the adaptation according to above of the FML to the VAT Directive concerning the determination of the tax obejct, and in that respect can the VAT reform in Sweden on 1 July, 2023 be of guidance. Therafter, a co-operation should take place in the field of criminal law, where also Denmark would be included. It is probably rather ineffective, where the ambition to suppress the phenomenon in question is concerned, that the geographically close Nordic countries in question go their own way, since at least two of the EU's Member States often are involved in the present sort of errands and the EU cannot be expected to issue legislation in that field, but the initiative must be taken at national level by Sweden, Finland and Denmark.

In section 4.1, I state that the legislator in Sweden may be deemed failing with suppressing the phenomenon of VAT frauds by carrousel trading, where the introduction of reverse liability of payment (previously reverse tax liability) is concerned in various fields, which has been done since 2000. The failure by the legislator is rather obvious with regard of one single errand likely nowadays to comprise billions of Swedish crowns of accounted VAT being questioned by the SKV and the EBM. The situation was not such over two decades ago, that is at the time for my lecture at Swedish Law Meeting in 2001.[81] Instead, what has happened according to my experience is that the investigation and the judgment of the tax object, that is of the transaction's character and planning, have been replaced by the inevestigations by the SKV and the EBM nowadays being initiated in the first place by trading carried out between the Member States of the EU regarding a certain sort of goods, above all electroninal products, which I mention in section 1. In section 4.2, I also mention that concepts are introduced in connection with investigations and cases on asserted "VAT carrousels", where concepts or expressions are used by the SKV and the EBM without explanation that they not necessarily need to be seen in connection with suchlike carrousels. An often occurring example of this is so-called cross invoicing, which quite simply means that a false charging of

[81] Forssén 2001.

VAT is made to an enterprise to set off output tax in the enterprise by accounting falsely charged VAT as input tax. Such an example is services in the form of so-called VoIP (which is space for telephony on the Internet). The falsely charged VAT regarding VoIP might be one matter (question) and a carrousel regarding goods another question in the same enterprise, which in my opinion shows that cross invoicing can be a special issue which not necessarily needs to be seen in connection with what is pertaining to a ”VAT carrousel”.

In sections 5.1-5.4, I also show that the introduction by SFS 2007:1376 on 1 January, 2008 in GML Ch. 1 sec. 1 third para. and sec. 2 e (nowadays ML Ch. 16 sec. 23) of article 203 of the VAT Directive, which stipulates that ”VAT shall be payable by any person who enters the VAT on an invoice”, cannot be deemed an effective measure by the legislator of cases of so-called missing trader (or goalkeeper company or front enterprise) in connection with ”VAT carrousels”. That such a person is included in a transaction chain and since the reform in 2008 can be made liable to pay to the State a falsely charged VAT, as lon as a credit note is not issued, does not mean that the person in question can be imposed responsibility for tax fraud, only because that liability is nt fulfilled. Instead, such a responsibility can be imposed the receiver of the invoice, if he or she has tried to exercise right of deduction for the amount falsely denoted as VAT according to ML Ch. 13 sec. 4 no. 1 and 2 (previously GML Ch. 8 sec. 2 first para.).

In section 7.1, I return to the reform on 1 January, 2008 and that SFS 2007:1376 also meant inter alia that the facultative rule in article 80 of the VAT Directive, about revaluation under certain suppositions of the taxable amount between *closely connected persons* (Sw., *förbundna parter*), was introduced in the Swedish VAT act. In that respect, I mention the criminal law aspects on the questions about the consideration (the pricing question) and when a delivery or supply being made without consideration (free of charge). In section 7.2, I mention the pricing question also in connection with general VAT rules and special rules on goods in certain warehouses.

## 7 Especially about criminal law responsibility at under-price transactions or supplies free of charge in connection with VAT carrousels

### *7.1 The pricing question in connection with rules on revaluation of taxable amount for VAT and withdrawal VAT*

By the VAT reform on 1 January, 2008 was not only the above-mentioned article 203 of the VAT Directive implemented in the GML about the liability to pay to the State an amount falsely denoted as VAT for the issuer of the invoice, but by SFS 2007:1376 was also on 1 January, 2008 implemented in the GML the facultative rule in article 80 of the VAT Directive. The directive rule means that under certain circumstances shall the taxable amount between a deliverer or a supplier and a purchaser, which I in this section name vendor and purchaser, provided also that they constitute so-called *closely connected persons* (Sw., *förbundna parter*), so that – if the consideration has been set at over- or under-price – the taxable amount by the vendor will be adjusted to market value. At the same time, the main rules in the GML for withdrawal taxation were altered, so that withdrawal VAT only occurs when a delivery of goods or supply of a service is made free of charge, that is without consideration. In this section, I mention those rules set out from criminal law aspects on the pricing question regarding a product that exists in an errand about VAT fraid by carrousel trading.

The rules that I am mentioning in this section were introduced in 2008 due to a Swedish case in the CJEU, namely the verdict C-412/03 (Hotel Scandic Gåsabäck),[82] which was a preliminary ruling by the CJEU in the HFD's advanced ruling RÅ 2005 not. 51, and pronounced by the CJEU on 20 January, 2005. The two changes of rules introduced in the GML on 1 January, 2008, by SFS 2007:1376 meant the following:

- The main rules regarding withdrawal taxation were altered, so that a delivery of goods or supply of a service must be made free of charge for withdrawal taxation to be made.[83]

- The revaluation rules mean that under certain suppositions shall a too low or too high price (consideration) regarding the goods or the sevice cause a revaluation of the taxable amount for VAT by the vendor,[84] so that the taxable amount is determined to market value.[85]

The suppositions for revaluation to be made of the taxable amount, in case consideration has been taken out and no supply free of charge has come up that would cause withdrawal taxation, are the following: the vendor and the purchase shall be closely connected (Sw., *förbundna*); *and* one of them shall have an activity in which full right of deduction or reimbursement of input tax on acquisitions (or imports) does not exist.

The vendor and the purchaser are according to ML Ch. 8 sec. 19 first para. *closely connected persons* (Sw., *förbundna parter*), *if there are family ties or other other close personal bonds, organizational bonds, bonds of ownership, financial bonds, bonds due to membership, bonds due to employment or other legal bonds*. Concerning bonds due to empleyment it is stated in ML Ch. 8 sec. 19 second para. that with such bonds are also meant *bonds between employer and an employee's family or other persons who are close to the employee*.

According to items 25 and 26 of the "Hotel Scandic Gåsabäck"-case, the Swedish government invoked the Sixth Directive (77/388/EEC) and that payment of VAT would be largely circumvented, if the tax liable or his employees could receive goods or a service for a symbolic amount and be taxed based on such a consideration. However, the CJEU sonsidered that that risk only could lead to the government making a request to the EU according to article 27 f the Sixth Directive nowadays article 395 of the VAT Directive – for a permit to introduce from the general VAT rules differing measures for the purpose of suppressing certain types of tax avoidance or evasion. The goverment did not do this, but introduced instead on 1 January, 2008 the rules on evaluation of the tax amount, by support of the facultative article 80 of the VAT Directive.

In connection with errands on VAT frauds by carrousel trading, it is to my experience not unusual that the SKV invokes that the pricing of for example electronical products is too low. It is not especially far-fetched to assume that the tax auditors in that respect – consciously or

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[82] The EU-case C-412/03 (Hotel Scandic Gåsabäck), ECLI:EU:C:2005:47.

[83] See GML Ch. 2 sec. 2 first para. no. 1 and sec. 5 first para. no. 1 which are corresponded by ML Ch. 5 sec. 9 first para. no. 2 and sec. 29.

[84] See GML Ch. 7 sec:s 3 a-3 d which are corresponded by ML Ch. 8 sec:s 17-19.

[85] See GML Ch. 1 sec. 9 which is corresponded by ML Ch. 2 sec:s 14 and 15.

unconsciously – seek a for VAT purposes withdrawal taxation of the vendor in the rules that would apply for withdrawal according to the Income Tax Act, *inkomstskattelagen (1999:1229)*, abbreviated IL. To my experience, it is nowadays neither unusual that the SKV in the beginning of a tax audit decides to only audit the VAT accounting in an enterprise suspected to be included in a ”VAT carrousel”. The SKV then – according to my perception – reason about VAT as if it would be a matter of an income tax errand, where market value is a general aim for the pricing not causing withdrawal taxation.[86] If the prosecutor uses such a reasoning as support of a deed description, should, in my opinion, the defence lawyer point out in a case on tax fraud regarding VAT, and poosibly already in an inquiry, that the SKV's reasoning is irrelevant for the question about taxation measures for VAT purposes.

If a vendor and a purchaser of for example electronical products only have activities with full right of deduction or reimbursement for VAT purposes, is thus taxation measures regarding VAT not occurring other that when the price is 0 Swedish crowns. If the SKV thus cannot take taxation measures for VAT purposes against the vendor or the purchaser by revaluating the consideration (rhe taxable amount), is neither the for tax fraud necessary objective prerequisite erroneous information fulfilled, regardless whether the SKV deems the pricing being too high or too lowg. Although tax fraud, as mentioned, is a risk crime, and cannot be decided without awaiting legally binding decisions in the tax courts, must namely – regardless of the construction otherwise of the tax fraud – still what is an erroneous information be decided with guidance from the tax rules, so that the connection between the tax fraud case and the taxation question is not broken.[87] Thereby, the in this section mentioned rules introduced in the Swedish VAT law in 2008 are ineffective as arguments for the SKV and the prosecutor in errands on VAT frauds by carrousel trading regarding the tax fraud question itself, regardless whether the vendor and the purchaser are *closely connected persons* – as long as a consideration has been charged so that it is not a matter of a supply free of charge which makes withdrawal VAT coming up.

I summarize the latter conclusion as follows:

If the SKV or the prosecutor states that the pricing of goods or a service are wrong, it is irrelevant *in itself* on the theme of VAT fraud by carrousel trading, if

- it is not a matter of a supply free of charge; *and*
- the price indeed is symbolical, but the parties are not closely connected to each other *or* the parties are closely connected to each other but neither one of them is lacking or having a limited right of deduction or reimbursement for input tax in the person's activity.

*7.2 The pricing question in connection with general VAT rules and special VAT rules about goods in certain warehouses*

According to the general VAT rules the taxable amount for output tax constitutes of all cost elements that the enterprise is using to produce the goods or the service added with a mark-up for profit. Thus, the taxable amount corresponds with the price for the goods or the service. Therein is included the value of article of exchange, invoicing fees, freight fee, postage and

[86] See IL Ch. 22sec:s 3 and 4.

[87] See prop. 1995/96:170, p. 91.

similar, compensation for taxes and fees and other additions to the price except interest. See ML Ch. 8 sec. 13 and article 78 first para. a and b of the VAT Directive.[88] In an article in *Balans fördjupning* (The Periodical Balans Annex with advanced articles), I mention that the case-law of the HFD concerning the determination of the taxable amount for VAT means – in pursuance of RÅ 1986 ref. 46 and RÅ 1991 ref. 105 – that a hidden interest compensation may not lower the taxable amount, by a from taxation exempted financial service matching the calculated price of the taxable goods or service, whereby the taxable amount is partly set off.[89]

In Forssén 2018, I state that such a lowering of the taxable amount for VAT, which thus is not possible according to the general VAT rules, can instead be carried through by application of the special rules on goods in certain warehouses which were introduced in GML Ch. 9 c on 1 January, 1996, by SFS 1995:1286, which are closest corresponded by articles 154-163 of the VAT Directive and in the ML are to be found in Ch. 11. In pursuance of ML Ch. 11 sec:s 10 and 11 the SKV is trying whether a warehousekeeper is suitable to install a tax warehouse, and thereby able to place in the tax warehouse 27 different sorts of goods – which are stipulated in an exhaustive enumeration in Ch. 11 sec. 3.[90]

In Forssén 2018, I use in an example one of the sorts of goods enumerated in ML Ch. 11 sec. 3, namely copper which is stipulated in item 2 of the rule, and reason about a quantity of copper which is placed in a certain warehouse in the form of tax warehouse.[91] In that respect, I state that 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, by a tax free transaction of the goods is matched against a tax free financial service during the time that the goods have been placed in the tax warehouse.[92] In my example, I assume that a limited company (Sw., *aktiebolag*) in Sweden has placed goods – which come from another Member State than

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[88] ML Ch. 8 sec. 13 was corresponded in the GML by Ch. 7 sec. 2 first para. scond an third sen. By the way, it may be mentioned that the words ”*utom ränta*” (*except interest*) were abolished from the GML Ch. 7 sec. 3 a on 1 January, 2003, by SFS 2002:1004. The government suggested first that the word *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 in the Sixth Directive – nowadays article 78 first para. a and b and second para. of the VAT Directive. However, the government joined the perception of the Council on Legislation (Sw., *lagrådet*) that the words *utom ränta* would be abolished, since a developed national practice and the CJEU’s case-law were considered existing meaning that for example financial interest 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, constitutes a side cost which shall be included in the taxable amount for VAT. See prop. 2002/03:5, *Vissa mervärdesskattefrågor, m.m.* (Certain value-added taxation questions, etc.), p. 108.

[89] See *Konkurrensfördelar med varuomsättningar efter momsfria 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* 1/2018 pp. 3-10. (Forssén 2018).

[90] See Forssén 2018, pp. 4-7.

[91] The headline to ML Ch. 11 is *Varor i skatteupplag* (Goods in tax warehouses), whereas the headline to GML Ch. 9 c was *Särskilt om varor i vissa lager* (Especially about goods in certain warehouses). I ML Ch. 11 sec. 4 stipulates the exemptions regarding tax warehouses and inter alia regarding installation for temporary storage, customs warehouse or free zone. In ML Ch. 2 sec. 24 it is stipulated taht for those terms and expressions the same is meant as in the Union Customs Code, that is the Regulation (EU) No 952/2013. The Union Customs Code replaced on 1 May, 2016 the Community Customs Code, (EEC) no. 2913/92, which is mentioned in the corresponding rule in the GML, that is Ch. 9 c sec. 2.

[92] See Forssén 2018, p. 3.

Sweden – in a tax warehouse, and that another company wants to purchase the goods. The first company company issues an option of the goods to the other company, which calls off the option, and when the goods still are placed in the tax warehouse that company purchases the goods.[93] According to article 9 of the Implementation Regulation the sale of an option falling within the scope of financial services services according to article 135(1)(f) of the VAT Directive constitutes a supply of service according to the main rule in article 24(1) of the directive. Since the option does not constitute ownership to the goods before call-off, I consider that the premium constitutes a consideration for a from taxation exempted financial service, why the supply of the option is exempted from taxation according to ML Ch. 10 sec. 33 first para. and third para. no. 1 and articke 135(1)(f) of the directive.[94] The goods – the quantity of copper – are also sold VAT free when they are placed in the tax warehouse according to ML Ch. 11 sec. 4 no. 4 compared with sec. 3 no. 2.[95] By the transactions during the time the goods are placed in the tax warehouse have two VAT free transactions been matched against each other, and the taxable amount for VAT can be lowered with an amount corresponding with the premium of the option, before the company which has purchased the goods sell them further, which thus is a taxable transaction.

Thus, I state in Forssén 2018 that the legislator perhaps should regard that the vendor and the purchaser, concerning 27 different sorts of goods, 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. I also state that abusive practice could come up regarding the matching (set-off) that I describe to lower the taxable amount for VAT, if the same goods are subject to several rounds of the described matching procedure.[96] Such a ”VAT carrousel” is of course also of interest for the legislator. In Forssén 2018, I point out that the company in my example which owns the goods placed in the tax warehouse becmes a so-called mixed activity which limits the right of deduction for input tax due to the sale of the option, that is depending on the thereby emerged element of supply of a VAT free financial service in the activity. However, a revaluation of the taxable amount according to what I mention in the nearest preceding section would presuppose that the involved companies constitute so-called *closely connected persons* (Sw., *förbundna parter*) according to the revaluation rules.[97]

In Forssén 2018, I state that the pricing question should be subject to research, whereby the problems regarding matching efforts for VAT purposes should not be seen as an isolated VAT problem, but be set in relation to the so-called correction rule regarding erroneous pricing in IL Ch. 14 sec:s 19 and 20 and *lagen (2009:1289) om prissättningsbesked vid internationella transaktioner* (the Pricing Information at International Transactions). In that respect, I also suggest that the research can be made in connection with the OECD-project of BEPS, which regards income tax and where the main question is the internal pricing between parties in

[93] See Forssén 2018, pp. 5-7.

[94] See Forssén 2018, p. 7. ML Ch. 10 sec. 33 first para. and third para. no. 1 were corresponded in the GML by Ch. 3 sec. 9 first para. and third para.

[95] See Forssén 2018, p. 7. ML Ch. 11 sec. 4 no. 4 compared with sec. 3 no. 2 were corresponded in the GML by Ch. 9 c sec. 1 first para. no. 4 compared with sec. 9 no. 2.

[96] See Forssén 2018, p. 9.

[97] See Forssén 2018, p. 7.

alignment of interests (Sw., *intressegemenskap*) with the purpose of taking measures about artificial deviations from prices set between unrelated parties.[98] A broadening of the perspective is in my opinion especially important as *lagen (1995:575) mot skatteflykt* (the Act Against Tax Avoidance) comprises income tax, but not VAT. Of course, in that respect shall also be regarded for the research as well as for the legislation work that the investigations regarding asserted ”VAT carrousels” should comprise also questions on income tax, instead of the SKV and the EBM, as I describe above, only focusing on the VAT and mix it with income tax law aspects of for example questions on withdrawal and pricing. This is something that the defence lawyers should remark as contradictory to the legal certainty in the procedure concerning tax law as well as criminal law.

With respect of legal certainty, I may thus state that it is important that the defence lawyer early points out inconsistencies of the SKV and the EBM for example in errands on ”VAT carrousels”, since it in my opinion is not unusual that a prosecutor asserts that an objection late in the proceedings contitutes a *reconstruction after the event* (Sw., *efterhandskonstruktion*) by the defendant, when an erroneous interpretation or application of the tax rules by the SKV and the EBM constitutes the real reason for the prosecutor altering the deed description, for example so that an assertion of tax fraud is changed to or completed with commercial money laundering. If the SKV’s investigation, on which the tax case and the criminal case are based, from the beginning contains an asserted VAT planning which all the involved are supposed to have used, cannot, in my opinion, the prosecutor suddenly change foot, so that those involved are supposed to have used two plans to *unfairly appropriate money from the State* (Sw., *tillskansa sig pengar från staten*)..

## 8 Summary and concluding viewpoints

### *8.1 Summary*

The review in this article may be considered showing that the legislator in Sweden cannot have taken consistent and effective meaures to suppress the phenomenon of VAT frauds by carrousel trading.

In the headline to section 6, I raise the question whether the legislator’s measures in the Swedish VAT act, consisting partly of the introduction of reverse charge for various situations, partly of the implementation of the directive rule on liability to pay falsely charged VAT, can be expected to suppress the phenomenon VAT frauds by carrousel trading. The answer is negative, since the phenomenon for more than two decades has come to mean that VAT debts where one single errand can comprise billions of Swedish crowns. The HD-case NJA 2018 p. 704, which I analysed in Forssén 2022, is insidious in that respect as it shows an obvious inconsistency of the legislator, where liability of payment was introduced for investment gold in 2000, but not for example for platinum. If expensive goods which are easy to move are considered constituting *high risk goods* in connection with ”VAT carrousels”, the question is how the legislator could omit to introduce the institute reverse charge for platinum, and not observing how the problem in question has increased for the public treasury during the years since 2000. For example platinum should, in my opinion, have been present on the theme ”VAT carrousels” for example in the errand that led to the mentioned HD-case.

[98] See Forssén 2018, p. 9. OECD, Organization for Economic Co-operation and Development. BEPS, base erosion and profit shifting.

Neither has the legislator observed that VoIP – space for telephony on the Internet – is treated in investigations of the SKV and the EBM as if it in connection with *cross invoicing* in itself would indicate the existence of a ”VAT carrousel”, when *cross invoicing* only constitutes an example of a falsely charged VAT being made to an enterprise to set off output tax in the enterprise by accounting of a falsely charged VAT as input tax. Regardless whether VoIP is used in that respect *cross invoicing* does not necessarily have to be seen in connection with ”VAT carrousels” regarding for example trading of electronical products. This can be an explanation to the legislator – according to what I state in section 4.2 – having reasoned inconsistently concerning VoIP in connection with the reform on 1 April, 2021, when reverse charged was introduced under certain suppositions for trading with electronical products, but not with VoIP, which causes an inconsistency also in relation to Denmark, where *omvendt betalingspligt* (reverse charge) was decided by the parliament on 1 June, 2023 for *teleydelser* (telecommunications services) without any special treatment of VoIP.

In sections 5.1-5.4, I also show that the implementation on 1 January, 2008 into the Swedish VAT act of aricle 203 of the VAT Directive, on liability to pay to the State an amount falsely denoted as VAT (as long as a credit note is not issued), cannot be deemed having constituted an effective measure by the legislator of cases of so-called *missing trader* (or goalkeeper company or front enterprise) in connection with ”VAT carrousels”. Sonce the reform in 2008 can such a person be made liable to pay to the State a falsely charged VAT, but the person in question cannot be imposed responsibility for tax fraud, only because that liability is not fulfilled. Instead, such a responsibility can be imposed to the receiver of the invoice, if he or she has tried to exercise right of deduction for the amount which has been falsely denoted as VAT, since it does not constitute an input tax according to the ML.

In section 7.1, I return to the reform on 1 January, 2008 and that SFS 2007:1376 also meant inter alia that the facultative rule in article 80 of the VAT Directive, about revaluation under certain suppositions of the taxable amount between *closely connected persons* (Sw., *förbundna parter*), was introduced in the Swedish VAT act. In that respect, I mention the criminal law aspects on the questions about the consideration (the pricing question) and when a delivery or supply being made without consideration (free of charge). In section 7.2, I mention the pricing question also in connection with general VAT rules and special rules on goods in certain warehouses, which were introduced in the Swedish VAT act in 1996. The question is also whether those measures by the legislator can be expected to suppress the phenomenon VAT frauds by carrousel trading.

The answer is negative also in those respects, whereby I conclude the following in section 7.1. If the SKV or the prosecutor states that the pricing of goods or a service are wrong, it is, in my opinion, irrelevant *in itself* on the theme of VAT fraud by carrousel trading, if

- it is not a matter of a supply free of charge; *and*
- the price indeed is symbolical, but the parties are not closely connected to each other *or* the parties are closely connected to each other but neither one of them is lacking or having a limited right of deduction or reimbursement for input tax in the person’s activity.

About the pricing question and the special VAT rules on goods in certain warehouses that were introduced in 1996, which I mention in section 7.2, I conclude there that the rules in question only open for further versions on the theme of carrousels. This time the phenomenon is supported by the rules, but I am warning for matching procedures which lower the taxable

amount for VAT, by setting off of financial services in the form of options on goods placed in tax warehouses against sale of goods during the time they are placed there, if such procedures are repeated concerning the same goods. It can, in my opinion, constitute abusive practice.

Concerning cases of abusive practice, I consider that they can cause criminal law responsibility for both the issuer and the receiver of an invoice, but based on NJA 2018 p. 704, I state in section 5.4 that abusive practice cannot *in itself* cause criminal responsibility, which I also stated in Forssén 2022. In his complement to Forssén 2022, I consider that Stig von Bahr – in von Bahr 2022 – is going further than I do, by him categorically dismissing my warning for criminal law consequences regarding cases of abusive practice concerning the VAT.

*8.2 Concluding viewpoints*

In section 7.2, I conclude that a broadening of the perspective on the phenomenon ”VAT carrousels” shouild be made in the research and by the legislator, so that also income tax questions are regarded in that respect. It is, in my opinion, in conflict with the legal certainty in the procedure concerning the phenomenon in question that the SKV and the EBM only focuse on the VAT in their investigations, but mix them with income tax law aspects on for example questions about withdrawal and pricing. Sometimes it is not clearly expressed which Member State’s puböic treasury is meant, when for example the SKV in the ongoing tax case regarding the same circumstances which are comprised by the prosecutor’s deed description claims that the suspected or the defendant has been aiming to *unfairly appropriate money from the State* (Sw., *tillskansa sig pengar från staten*). If the Swedish State is regarded with such an assertion, would, in my opinion, criminal law responsibility for fraud against the State exist according to the general rule on fraud in BrB Ch. 9 sec. 1, instead of criminal responsibility according to the special legislation on such responsibility, for instance if it is a matter of abusive practice which is not at the same time comprised by the prerequisites for tax fraud or commercial money laundering. This should, in my opinion, be regarded by the legislator for example in connection with the continuing treatment of the EU-criminal law investigation’s official report about criminalization of transgressions of EU-regulations, SOU 2020:13, which I mention in section 4.2.

I finished the lecture that I am mentioning initially – Forssén 2001 – by emphsizing the importance of all participants in proceedings about the phenomenon VAT frauds by carrousel trading regarding current law. Those who are aiming to cheat can adjust their modus operandi after verdicts which taken by themselves mean conviction, but where great lacks exist concerning the bases for sentences of conviction. Then emerge of course great difficulties for the SKV and the EBM to carry through tax cases and criminal cases respectively without regarding previous such verdicts. Then it will be rather easy for a defence lawyer to object that current law must have been present in such verdicts, and state that the prosecuor cannot change foot and claim that now shall the rules be interpreted and applied in another way than in a previous case. The question that a prepared defence lawyer raise is then of course if not the same current law has existed all the time. My perception over two decades ago is if possible more important today, with regard of the review in this article showing that the legislation measures that have been taken since then can hardly be considered meaning any simplification of current law for judgment of ”VAT carrousels”.

Finally, I may to the legislator iterate from my theses the importance of the rules on registration to VAT to be properly developed. In the research seems such questions not be of

interest in Sweden. In the system of handling extensive information (Sw., *masshanteringssystem*) that the tax accounting constitutes, it is, in my opinion, better that problems regarding who shall be registered to VAT being able to fix when the scope of them are to be compared with a brook (Sw., *bäck*), instead of having to handle a river (Sw., *flod*) of cases of cheating. The VAT system should, in my opinion, be about getting the collection the tax from the enterprises to function without frivolous persons being let into the system to *unfairly appropriate to themselves money from the State*. If not the registration function by the SKV is prioritized, it does not matter which measures of legislation that is taken against for example VAT frauds by carrousel trading. It is first by the registration that he or she who is aiming to cheat can get hold of the public treasury in the form of the tax account system (Sw., *skattekontosystemet*). In Forssén 2023a, I state that it is only a person who shall account for real VAT in VAT returns that shall register to VAT. In that respect, I also bring up that I mention in Forssén 2013 that the EU Commission already at the time had given up the standpoint that as many enterprises as possible should be comprised by the VAT system to recommend restraint so that priority instead is given to registration control and questions about collection.[99]

That for instance a *missing trader*, who has falsely charged what I denote a false VAT, shall account for such an amount in a special tax return and not register to VAT means taken by itself that such a person cannot exercise right of deduction for input tax in a VAT return. However, it does not, in my opinion, mean that frivolous enterprises are kept outside the VAT system itself. In many cases of VAT fraud it would have been sufficient with a taxation visit (Sw., *skattebesök*) for the SKV being able to establish that an entry of VAT registration was only an invention from a frivolous person. The person in question would have been refused registration and would not have had the opportnity to submit a VAT return with a claim on deduction of input tax. That should, in my opinion, be more effective than the SKV afterwards making audits of a number of enterprises on the theme of VAT cheating, when VAT returns have been submitted to the SKV. The EBM would not even get reports from the SKV on suspected VAT frauds by carrousel trading in the cases where an effective registration control has beem made by the SKV and the SKV having sifted the wheat from the chaff.

[99] See Forssén 2023a, section 5, and the reference to Forssén 2013, p. 76, where I refer to section 5.4.1, *Översyn av uppbörden av mervärdesskatt* (Overview of the collection of VAT), in the EU Commission's green paper *KOM(2010) 695 slutlig* [COM(2010) 695 final] and the EU Commission's follow-up to the green paper, COM(2011) 851 final p. 6.