

The national implementation of VAT Grouping in Sweden

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Abstract

This chapter deals with VAT groups in Sweden. Sweden introduced rules on VAT groups in 1998. The first groups were founded in 1999. In Sweden, only certain categories of entities may form VAT groups. VAT groups are mainly to be found in the financial and insurance sectors. Also, entities which are commission agents and principals, and which have a commission link such as that referred to in Chapter 36 of the law on income tax may form VAT groups. The reason not to extend the possibility to form VAT groups to all groups of companies was that the state otherwise would lose too much revenue. This limitation to only certain categories of entities is a feature that really stands out regarding Swedish VAT groups from a comparative perspective.

Keywords: VAT groups; Swedish tax law; Commission agent and principals.

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1. Introduction

Sweden introduced VAT on 1 January 1969. Thus, VAT has a history of more than 50 years in Sweden. In the original VAT Act,¹ there were no VAT group rules. The current VAT Act (1994:200), SVATA² came into effect on 1 July 1994. It was amended on 1 January 1995, when Sweden became a member of the EU and adjusted to the 6th VAT Directive.³ This VAT act did however originally not include any VAT grouping rules. Sweden introduced rules on VAT groups in 1998 in a new chapter 6 a of the SVATA. The first Swedish VAT groups were formed on 1 January 1999. There is a proposal for a new VAT Act in Sweden, which is scheduled to come into effect 1 January 2022.⁴ This aim of the proposal is to modernize the Swedish VAT Act, improve its structure and make it more in accordance with the VAT Directive.⁵

In this article internal discipline of the VAT Grouping in Sweden is described in the light of both the reasons for its introduction into national law and the mandatory or optional nature of the application of the scheme for the parties involved. Also, the criteria laid down in art. 11 of the

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1. *Lagen (1968:430) om mervärdesskatt.*
2. *SW: Mervärdesskattelagen.*
3. Directive 338/77/EC.
4. Governmental investigation SOU 2020:31 *Ny mervärdesskattelag.*
5. Directive 2006/112/EC.

VAT Directive, such as the financial, economic and organisational link and territorial limitation are discussed.

This article proceeds as follows. First the scope of Swedish VAT groups is discussed. From an EU perspective, Sweden stands out, since only three categories of entities may become members of a VAT group. Thereafter, the financial, economic, and organizational links, the representative member and the rules on entering and leaving a VAT group are described. This is followed by transactions between permanent establishments and VAT groups in Sweden or abroad and VAT groups in the proposed new VAT Act. The article ends with some concluding remarks.

2. Scope of VAT groups

Under art. 11 of the VAT Directive, not only taxable, but also non-taxable, persons may be included in a VAT group. This is not the case in Sweden, where only taxable persons may be included in the group. According to the Swedish Tax Agency, Swedish non-taxable persons who wish to enter a VAT group may not use the direct effect of art. 11.⁶ The Swedish Tax Agency relies in this regard on the Court of Justice of the European Union (CJEU) case C-108/14 Larentia + Minerva.⁷ This is a new position of the Swedish Tax Agency since April 2020. Previously, it was considered that normally only taxable persons were members of VAT groups, but non-taxable persons were not excluded.

In Sweden, only certain categories of entities may form VAT groups. According to the Swedish Supreme Administrative Court, the rules on VAT groups should be interpreted strictly.⁸ VAT groups are mainly to be found in the financial and insurance sectors. More specifically, the following entities may become members of a Swedish VAT group:

1. *Economic entities, placed under the surveillance of the Finance Inspectorate which exercise an activity which is exempt because the turnover from that activity is exempt under Paragraph 9 or Paragraph 10 of Chapter 3, [insurance and financial services]*

2. *Economic entities whose main purpose is to deliver goods or provide services to the economic entities referred to in subparagraph 1 above, or*

3. *Economic entities which are commission agents and principals, and which have a commission link such as that referred to in Chapter 36 of the law on income tax*

- Financial and insurance sector – problems with non-deductible input VAT
- Entities which are commission agents and principals – historically favourable treatment both regarding income tax and VAT⁹

The first two categories include entities that supply financial and insurance services as well as those whose main purpose is to supply goods and services to the first category.

The Swedish implementation of Article 11 of the VAT Directive¹⁰ is narrow. In case C-480/10, the Commission v Sweden, the Commission challenged Sweden regarding limiting VAT groups to certain categories of entities. The case had the potential to deal with the general issue of how much Member States may restrict a provision when implementing it into national law, while still constituting an implementation of the actual rule. The CJEU stated however:

6. The Swedish Tax Agency, Skatteverket, Rättslig vägledning, Mervärdesskatt, Mervärdesskattgrupp, <https://www4.skatteverket.se/rattsligvagledning/edition/2020.14/339694.html> accessed 22.11.2020.

7. See C-108/14 Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham, ECLI:EU:C:2008:357.

8. Supreme Administrative Court Case RÅ 2004 ref. 34.

9. Chap. 6 a Sec. 2 *mervärdesskattelagen* (1994:200), the Swedish VAT Act, SVATA. (Translation by the CJEU).

10. Directive 2006/112/EC.

“Sweden submits that, in order to prevent tax evasion and avoidance, [...], it decided to restrict the possibility of forming a VAT group to those undertakings which are placed, directly or indirectly, under the supervision of the Finance Inspectorate and which are therefore covered by a public monitoring system. The Commission has failed to show convincingly that, in the light of the need to combat tax evasion and avoidance, that measure is not well founded.”

Consequently, the CJEU limited its answer to whether the Commission had shown if there was a need to combat tax evasion and tax avoidance or not. Even though it is not explicit from this case, it is perhaps possible to draw the conclusion that if the Commission had succeeded in showing that there was no such need, the narrow implementation of Article 11 that Sweden had applied would not have been possible.

Interestingly, in the *travaux préparatoires*, the limitation to only include financial and insurance companies was mainly justified by the international competition these sectors are subjected to, since they are often groups of companies, with both taxable and tax-exempt activities.¹¹ This led to disadvantages for Swedish companies that were burdened with non-deductible input VAT. The introduction of VAT groups was supposed to solve this problem. For the third category of entities, namely the commission agents and principals, the reasoning was different. Historically, these entities had been treated favourably from a VAT perspective.¹² This favourable VAT treatment had to be abolished when Sweden became a member of the EU. Through the introduction of VAT groups, a new opportunity to support these entities arose. Thus, also the commission agents and principals were given the opportunity to form VAT groups.¹³

The requirements for qualifying as entities which are commission agents and principals, and which have a commission link such as that referred to in Chapter 36 of the law on income tax are very detailed. Not at all each entity which is a commission agent, or a principle under private law qualifies. To qualify, the taxable income or loss should be transferred to and taxed at the principal. The following requirements must be fulfilled.¹⁴

1. The commission agreement must be written
2. The commission agent shall work exclusively for its principal
3. The commission agent may not carry out any business of its own worth mentioning – only a smaller business is allowed
4. The commission link must have lasted the entire tax year
5. Both entities tax year must end at the same time
6. Both companies must be entitled to give and receive group contribution to/from each other. This includes an integration in ownership exceeding 90 %.

A Swedish VAT group may only include establishments in Sweden.¹⁵ An entity in the financial or insurance sector may only be part of one VAT group.¹⁶ The commission agents and principals may, however, be part of more than one VAT group.¹⁷

11. Government Bill *Proposition 1997/98:148, Gruppregistrering i mervärdesskattesystemet*, pp. 27-28.

12. Government Bill *Proposition 1997/98:148, Gruppregistrering i mervärdesskattesystemet*, p. 56.

13. Government Bill *Proposition 1997/98:148, Gruppregistrering i mervärdesskattesystemet*, p. 56.

14. Chap. 36 Sec. 3 if the Swedish income tax act (1999:1229), *Inkomstskattelagen*.

15. Chap. 6 a Sec. 2 SVATA.

16. Chap. 6 a Sec. 2 SVATA.

17. Chap. 6 a Sec. 2 SVATA.

3. Financial, economic, and organizational links

The participants of a Swedish VAT group have to be bound to one another by financial, economic, and organizational links.¹⁸ The links have to be fulfilled cumulatively.¹⁹ The determination of whether these links are fulfilled or not has to be made on a case-by-case basis.²⁰

A *financial link* applies when the companies form a group of companies under the accounting regulations. The *travaux préparatoires*, which are an important source of interpretation in Swedish law, refer to the group definition in Directive 83/349/EEG.²¹ However, also entities which do not formally form a group of companies should be able to form a VAT group, for example when several companies together have a controlling influence over one company.²² The Swedish Tax Agency gives as an example on the financial link when a bank through ownership or otherwise has a controlling influence over a taxable person which supplies services to the bank.²³

The financial link may also be fulfilled where the ownership is limited, but the entities create a unit following an agreement on exchange of goods or services on continuous basis.²⁴ In such a situation, strong economic and organizational links compensate a weaker financial link.²⁵ In the Swedish Supreme Administrative Court Case RÅ 2005 not. 105 a financial integration of 8 % ownership was sufficient.

An *economic link* applies when there is an exchange of goods or services between the entities on a continuous basis or when a company cooperates with another company and the both companies promote each others' business activities.²⁶ According to the *travaux préparatoires* the economic link between two entities is normally the reason for forming a VAT group.

An *organizational link* exists when the entities have common administrative functions, such as management and marketing.²⁷ In RÅ 2005 not. 105 the Supreme Administrative Court found that a very extensive cooperation for a long time which resulted in highly integrated activities compensated a weak financial integration.

4. The representative member

Each VAT group has its representative member. The representative member is appointed by the Tax Agency after a proposal of the group members. The proposal shall be followed if special reasons do not speak against the proposed representative member.²⁸ Such special reasons are for example the risk of tax evasion.²⁹ In the case of the commission agents and principals, the principal shall

18. Chap. 6 a Sec. 3 SVATA.

19. Government Bill *Proposition 1997/98:148, Gruppregrering i mervärdesskattesystemet*, p. 72.

20. Government Bill *Proposition 1997/98:148, Gruppregrering i mervärdesskattesystemet*, p. 72 and Swedish Supreme Administrative Court Case RÅ 2005 not. 106.

21. Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts. See Government Bill *Proposition 1997/98:148, Gruppregrering i mervärdesskattesystemet*, p. 71.

22. Government Bill *Proposition 1997/98:148, Gruppregrering i mervärdesskattesystemet*, p. 71 and Swedish Supreme Administrative Court Case RÅ 2005 not. 106.

23. The Swedish Tax Agency, Skatteverket, Rättslig vägledning, Mervärdesskatt, Mervärdesskattegrupp, <https://www4.skatteverket.se/rattsligvagledning/edition/2020.14/339694.html> accessed 22.11.2020.

24. Swedish Supreme Administrative Court Case RÅ 2005 not. 106.

25. Swedish Supreme Administrative Court Case RÅ 2005 not. 106.

26. Government Bill *Proposition 1997/98:148, Gruppregrering i mervärdesskattesystemet*, p. 72.

27. Government Bill *Proposition 1997/98:148, Gruppregrering i mervärdesskattesystemet*, p. 72.

28. Chap. 6 a Sec. 4 SVATA.

29. Government Bill *Proposition 1997/98:148, Gruppregrering i mervärdesskattesystemet*, p. 72.

be appointed as representative member.³⁰

The representative member has a duty to inform the Tax Agency if circumstances that were relevant for the registration of the group has changed. The Tax Agency should be informed in written form within two weeks after the changes.³¹ Examples of such changes are when the integration in ownership has decreased.³² The Tax Agency may impose the representative member to fulfil its duty of information.³³

The representative member is liable to declare and pay the VAT in behalf the group. It also represents the group in tax matters and submits the periodic VAT declaration. If the representative member would not pay the VAT, all the other members become liable to pay the tax.

5. Changes in the VAT group

VAT groups are optional in Sweden. It is up to the entities that wish to form a VAT group to apply at the Swedish Tax Agency, which makes the decision concerning the registration of a new group.³⁴ The Tax Agency shall make such a decision when the legal requirements for the establishment of a VAT group are met, and when there are no special reasons that speak against the formation of a VAT group.³⁵

Furthermore, it is the Tax Agency that decides about new group members and whether a company is permitted to leave the group.³⁶ A member should be permitted to leave the group and the group should be dissolved if the concerned group members apply for that and no special reasons speak against it. A group shall be dissolved *ex officio* if the requirements for being a VAT group are not met anymore.³⁷ The same applies if there are special reasons for dissolving a VAT group.³⁸

A VAT group ceases to exist when the Tax Agency has decided so.³⁹ If all group members apply for the dissolution of the group, the Tax Agency shall make such a decision, if not special reasons speak against it.⁴⁰ Thus, the Tax Agency may reject an application of dissolution.⁴¹ The decision of dissolution comes into effect the day of the decision of the Tax Agency or a later date that the Tax Agency decides.⁴² A VAT group cannot be dissolved with retroactive effect.⁴³

30. Chap. 6 a Sec. 4 SVATA.

31. Chap. 6 a Sec. 7 SVATA.

32. Government Bill *Proposition 1997/98:148, Gruppregistrering i mervärdesskattesystemet*, p. 45.

33. Chap. 6 a Sec. 7 SVATA.

34. Chap. 6 a Sec. 4 SVATA.

35. Chap. 6 a Sec. 6 SVATA.

36. Chap. 6 a Sec. 5 SVATA.

37. Chap. 6 a Sec. 6 SVATA.

38. Chap. 6 a Sec. 6 SVATA.

39. Chap. 6 a Sec. 5 SVATA.

40. Chap. 6 a Sec. 6 SVATA.

41. The Swedish Tax Agency, Skatteverket, Rättslig vägledning, Mervärdesskatt, Mervärdesskattegrupp, <https://www4.skatteverket.se/rattsligvagledning/edition/2020.14/339694.html> accessed 22.11.2020.

42. Chap. 6 a Sec. 6.

43. The Swedish Tax Agency, Skatteverket, Rättslig vägledning, Mervärdesskatt, Mervärdesskattegrupp, <https://www4.skatteverket.se/rattsligvagledning/edition/2020.14/339694.html> accessed 22.11.2020.

6. Transactions between permanent establishments and VAT groups in Sweden or abroad

Just like Article 11 of the VAT Directive, the SVATA does not deal with the issue of how cross-border transactions between permanent establishments and VAT groups shall be taxed. Thus, the courts and the Swedish Tax Agency have clarified this. The first case from the Swedish Supreme Administrative Court, RÅ 2006 not. 29, dealt with the situation where a Swedish group member supplied services to its foreign branch. According to the Court, this was not an intra-group supply.

In HFD 2015 ref. 22, the Swedish Supreme Administrative Court stated that the acquisition of services from a foreign head office to its Swedish branch, which was a member of a Swedish VAT group, was not an intra-company transaction.⁴⁴

In May 2019, the Swedish Tax Agency released guidelines on supplies of services between a fixed establishment in Sweden and a foreign VAT group, where the permanent establishment is a member.⁴⁵ The statement is based on a case from the Swedish Supreme Administrative Court, HFD 2018 ref. 42.

According to the statement of the Swedish Tax Agency, the following applies. If the permanent establishment of a foreign entity is included in a foreign VAT group under foreign national law, supplies from the PE to the group shall be disregarded for VAT purposes. If such a permanent establishment in Sweden is not a part of the foreign VAT group under foreign national law, supplies between the PE and the group are taxable transactions.

This creates the situation that the application of Swedish law depends on foreign law. Foreign law is a matter of fact in a Swedish tax procedure, whose content has to be convincingly shown by the party that has the burden of proof for the fact.

7. VAT groups in the proposed new VAT Act

In the proposed new VAT Act there are no major changes in the VAT grouping rules, but some minor ones. Still, only entities that supply financial and insurance services as well as those whose main purpose is to supply goods and services to the first category and entities which are commission agents and principals will be able to form VAT groups.

Beside some redactional changes, the VAT grouping rules will move chapters. In the current VAT Act, the VAT groups are regulated separately in Chap. 6 a. In the proposed VAT Act, the rules will move to Chap. 4, where the taxable person is regulated.⁴⁶ Furthermore, in current the VAT grouping rules, the term taxable person is not used. Instead, the VAT Act speaks about tax liability. These changes may seem as details, but they are part of a major restructuring of the structure and terminology in Swedish tax legislation. The changes are welcome, since Sweden has lived with a VAT Act of inconsistent terminology and structure since it was introduced in 1994.

8. Concluding remarks

To conclude, the main reason for introducing VAT groups in Sweden was to make Swedish financial institutions and insurance companies more internationally competitive, since they were otherwise burdened with non-deductible input VAT due to the fact that they are often groups of companies, with both taxable and tax-exempt activities. That also entities which are commission agents and principals were included, had traditional reasons. The possibility for the financial and insurance

44. See also C-7/13 Skandia America Corp. (USA), filial Sverige v. Skatteverket, ECLI:EU:C:2014:2225.

45. *Skatteverket (The Swedish Tax Agency), Tillhandahållanden av tjänster mellan ett företags etablering*

46. *Governmental investigation SOU 2020:31 Ny mervärdesskattelag*, 528.

sector to form VAT groups is on the one hand rational, but on the other hand there are other lines of businesses that have the same VAT issues. One such business line is real estate, where both taxable and exempt activities are carried out. In Sweden, there is no option to make transactions with new buildings taxable, which make all supplies of real estate tax exempt, with no right to deduct input VAT. Thus, in my view, the limitation to the financial and insurance sector is too narrow.

The possibility for economic entities which are commission agents and principals, and which have a commission link such as that referred to in Chapter 36 of the law on income tax to form VAT groups is not rational at all. There are further favourable group treatments under corporate income tax than these, for example the tax regime with group contributions and group deductions, which apply to far more groups than the commission regime. Beside the historical reason, there is no reason at all why exactly the commission agents and principals should have a special VAT treatment.

From the *travaux préparatoires* it is obvious that the limitation of the Swedish VAT grouping rules only to certain categories was not mainly to combat tax evasion and tax avoidance. Even though the commission failed in proving an infringement of EU law in case C-480/10, the legal ground for the narrow scope of the Swedish VAT groups is frail. The alternative for Sweden would however, due to the loss of tax revenue, not be to extend the VAT grouping regime to all groups of companies, but rather to abolish the VAT groups. From this perspective, the outcome of the legal procedure was from the perspective of the businesses, the most favourable one.

Swedish VAT grouping is of optional nature. The main disadvantage with optional rules is that they may open up for tax planning and also abuse, when the entities may use the possibility to decide whether and when they would be part of a VAT group to improve its tax positions. Entering a VAT group in Sweden is easy, since the Tax Agency is obliged to make such a decision when the legal requirements for the establishment of a VAT group are met, and when there are no special reasons that speak against the formation of a VAT group. The same applies when group members wish to leave the group or when the group wants to be dissolved. The opening not to register or deregister a VAT group when special reasons speak against it may be used if there is a risk for abuse. Consequently, the advantage for the businesses of opting for forming a VAT group or not, is balanced against the Tax Agency's interest in preventing that VAT groups are used for abusive purposes. The position of the Tax Agency is also strengthened by a possibility to dissolve a VAT group *ex officio*, if there are special reasons.

The link criteria are flexible in Sweden and decided on a case by case basis. There is for example no certain percentage of integration on ownership that must be fulfilled.

Sweden does not accept international VAT groups. All the entities that are included in a Swedish VAT group must be established in Sweden. If a PE in Sweden of a foreign VAT group is included in a foreign VAT group under foreign law, the transactions from the PE to the foreign VAT group are disregarded for VAT purposes. If, however, the PE is not included in the foreign VAT group, the supply between the PE and the group will be considered as a taxable transaction. In that sense, foreign VAT grouping regimes are considered for Swedish tax purposes.

Based on the discussion above, in my view, the only feature that really stands out regarding the Swedish VAT group regime is its limited scope, only to some categories of entities. In the best of worlds, the regime would be extended to include all groups of companies which fulfilled the link and other criteria. Such a change would however probably require a firmer specification of the link criteria, not to extend the scope too much. In the current unstable economy, I would not recommend such an extension, since they would necessarily lead to a loss of tax revenue.

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