The Entrepreneur and the Making of Tax Laws

–

A Swedish Experience of the EU law

Second edition

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– A Swedish Experience of the EU law

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PREFACE

This book is about fiscal sociology aspects on the tax rules as such. It's a new branch of fiscal sociology concerning certain aspects regarding the making of tax laws. The making of tax laws could be deemed a subject in its own right, which I would name sociology of tax laws. However, I won't introduce it as a new subject, since that might cause confusion with the sociology of taxation, which is synonymous with fiscal sociology. I neither regard the making of tax laws a subfield to fiscal sociology, but I consider it a bridge between aspects of economics and sociology on the fiscal sociology, i.e. as a so to speak certain aspect on fiscal sociology fitting within the subject in those broader senses. *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law* has three basic parts: Part A concerns systematic issues on the making of tax laws from the perspective of the entrepreneur and how the legislator's intentions of taxation are conveyed by the texts; Part B concerns communication distortions mainly due to poor texts, with focus set on the use of the concept tax liable in the Swedish Value Added Tax Act 1994 in some instances where the EU's VAT Directive instead contains the concept taxable person; and Part C is about consequences thereof for the entrepreneur mainly concerning charges of tax surcharge and tax fraud. There's also an Epilogue tying together the conclusions in Part C with those in Part A and Part B.

In this second edition I've added two parts, D and E. In the first edition, containing parts A-C (including their Epilogue), I made inter alia the fiscal sociology reasoning on how what I name communication distortions occur. By Part D I'm adding linguistics and pedagogy to the subject of the making of tax laws by putting that reasoning into a context of the use of language in law in general. Thus, in Part D the focus is set more on the language issue itself than on imperfections in the system which is supposed to convey the legislator's intentions with tax rules. In Part E, I only make some suggestions on research about fiscal sociology in the broader senses mentioned that might be influenced by the experiences from parts A-D.

The first three parts of this book, A-C, can be read separately with regard of their various mentioned themes. Before reading parts D and E I advise reading at least Part B and the Epilogue to parts A-C.

Stockholm in October 2015
Björn Forssén

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ABBREVIATIONS

AA, Administration Act
APA, Administration Procedural Act
art., article
ATF, Act on Tax Fraud
BKA, Book-keeping Act
C, curia (about the CJEU)
CA, Companies Act, Act on *Handelsbolag* and *Enkla Bolag*
CF, Code fiscal
CFREU, the EU Charter of Fundamental Rights
Ch., chapter
Cit., citation
CJEU, Court of Justice of the EU
CJP, Code of Judicial Procedure
COM, the EU Commission
CTP, Code of Taxation Procedure
EC, the European Community
ECHR, the European Convention of Human Rights
ECLI, European Case-Law Identifier
ECOSOC, The Economic and Social Council
ECR, European Court Reports
EEC, European Economic Community
e.g., exempli gratia, for example
et al., and others
etc., etcetera
EU, (the) European Union (or the Union)
F, (in F-tax), *företagare* (i.e. entrepreneur)
FS, fiscal sociology
FTT, Financial Transaction Tax
GAAP, Generally accepted accounting principles
GST, goods and services tax
HD, *Högsta domstolen* (the Supreme Court)
HFD, *Högsta förvaltningsdomstolens* (the SAC); also concerning the HFD's yearbook
HST, harmonized sales tax
IBRD, International Bank for Reconstruction and Development
IDA, International Development Association
i.e., id est, that is
IMF, International Monetary Fund
IT, information technology
ITA, Income Tax Act
LFT, Logic Function Tree
LSEUA, Law on Sweden's EU Accession
LSt Stockholm, *Länsstyrelsen i Stockholms län* (i.e. the County Administrative Board of Stockholm)
LSWT, Law on State Wealth Tax
LU, Luxemburg
Moms, abbreviation of *mervärdesskatt* (compare: VAT)
NAIRU, Non accelerating inflation rate of unemployment
No., number
OECD, Organization for Economic Co-operation and Development
p., page; pp., pages
para., paragraph

PBL, problem-based learning
PC, Penal Code
POTB, passing on the tax burden
Prop., *Regeringens proposition*, Government bill
Rec., *Recueil de la Jurisprudence de la Cour*
ref., report case
REG, *Rättsfallssamling från EU-domstolen, Tribunalen och Personaldomstolen*
RSV, *Riksskatteverket*, the National Tax Board (replaced 2004 by the tax authority)
RÅ, *Regeringsrättens årsbok* (from 2011 HFD)
SAC, the Supreme Administrative Court
SASB, the Swedish Accounting Standards Board
SBL, *skattebetalningslagen (1997:483)* [replaced by CTP 2011]
SC, Swedish Constitution
SE, Sweden
sec., section
sen., sentence
SFS, *svensk författningssamling*, Swedish Code of Statutes
SITA State Income Tax Act
SKV, *Skatteverket* (i.e. the tax authority)
SOU, *statens offentliga utredningar*, Swedish government official reports
TAHVAT, Tax Authority's Handbook on VAT
TFEU, Treaty on the Functioning of the EU
TL, *taxeringslagen (1990:324)* [replaced by CTP 2011]
UK, United Kingdom
UN, United Nations
US, United States
v., versus
VAT, value added tax
VATA, Value Added Tax Act
www, world wide web

INTRODUCTION

Part A – The Entrepreneur and the Making of Tax Laws: A Sociological Study of the Swedish Experience

The topic of this book is fiscal sociology or, as it's also called, the sociology of taxation. However, the subject within the field I've chosen is not the usual concerning aspects of economics or sociology on fiscal sociology, i.e. I don't go into fiscal sociology in that broader sense. Instead I launch a new branch of fiscal sociology: Fiscal sociology aspects on the tax rules as such. It concerns certain aspects regarding the making of tax laws. Thereby I raise a number of issues concerning how the tax rules at hand communicate the intentions of the legislator.

Questions on whether or not taxation is the proper tool of financing infrastructure and welfare concern the subject in the broader sense mentioned. I don't add anything to that score. Instead the focus of Part A is why the issues raised mean problems to make a tax rule a proper tool for the purpose of transmitting the legislator's imperative to pay tax or acknowledgement of tax deduction to the individual entrepreneur. Thereby the perspective is the Government's intentions of taxation in relationship to the individual entrepreneur as the taxable person and the examples of problems are from the Swedish horizon.

Part B – Tax liable contra taxable person: A Sociological Study of Swedish Communication Distortions of the EU's VAT Directive

In Part B I follow up, still from the perspective of the entrepreneur, with this main issue: If there are differences regarding the meaning of a rule in the EU's VAT Directive (2006/112/EC) compared with the output when making the supposedly corresponding tax rule in *mervärdesskattelagen (1994:200)*, i.e. the Swedish Value Added Tax Act 1994, there will be consequences for the entrepreneur's legal rights under the EU law.

In my licentiate's dissertation and doctor's thesis at Örebro University in 2011 and 2013, I concluded, by use of the traditional Swedish law dogmatic method, that such differences exist between the VAT Directive (2006/112) and the Value Added Tax Act 1994. However, the Swedish legislator has thereafter only initiated the abolishment of a connection to the non-harmonised income tax law for the determination of the tax subject and the introduction of the concept beskattningsbar person, i.e. taxable person, into the Value Added Tax 1994, whereas I argued for a more holistic reform, which I also mention in Part A.

In Part B, I comment a couple of those differences from the sociology of taxation perspective as communication distortions by raising e.g. the following questions: What does it mean if the entrepreneur can't rely on the Value Added Tax Act 1994 complying with a directive rule on the right to deduct input tax, with the intentions in the recitals – i.e. the motives – in the preamble to the VAT Directive (2006/112) or with case law established by the Court of Justice of the EU? Should the EU Commission be able to rely on the Swedish Government properly addressing e.g. problems concerning the entrepreneur's situation due to the Value Added Tax Act 1994's lack of compliance with the EU law when they are pointed out by the Commission? Should the risk of communication distortions lead to suggestions for altering e.g. the main rule on taxable person in the VAT Directive (2006/112)?

Part C – Consequences of Communication Distortions of the EU's VAT Directive: A Sociological Study of the Swedish Experience

In Part C, I follow up, still from the perspective of the entrepreneur, with this main issue: What consequences may in practice be expected due to rules in *mervärdesskattelagen (1994:200)*, i.e. the Swedish Value Added Tax Act 1994, or in *skatteförfarandelagen (2011:1244)*, i.e. the Swedish Code of Taxation Procedure 2011, not complying with the supposedly corresponding rules in the EU's VAT Directive (2006/112/EC)? In Part B I mention consequences for the entrepreneur's legal rights under the EU law being caused by such communication distortions between the act and the directive. In Part C, I follow up by also giving some examples of consequences in practice regarding e.g. national issues concerning tax surcharge (*skattetillägg*) and tax fraud (*skattebrott*).

Epilogue: Concluding remarks tying Part A, Part B and Part C together

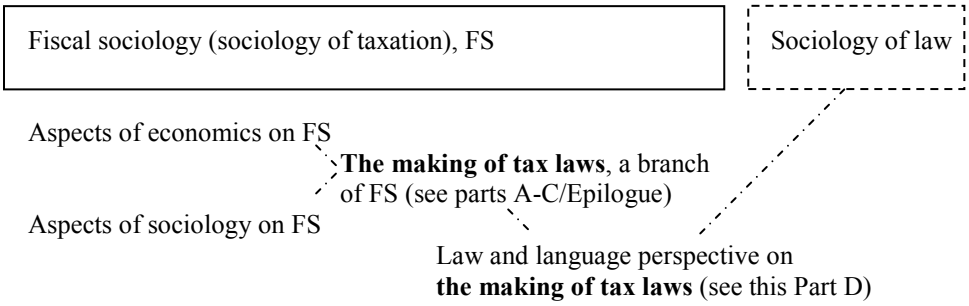
In the Epilogue I make some remarks tying the conclusions about the consequences mentioned in Part C together with those in parts A and B.

Part D – Communication Distortions within tax rules and Use of language in law

In Part D, I'm reasoning from the linguistic law and language perspective about *why* a text containing a tax rule may make a poor tool to convey the intention of the legislator to the tax subject, e.g. to an entrepreneur. A resulting question is whether there's any pedagogy to support a decrease of a risk of communication distortions between the legislator's intentions with a tax rule and how it's perceived. Part D

concerns linguistics and pedagogy with respect of the topic *law and language* and mainly connects to Part B, where I mention experiences of *how* such communication distortions may occur. In Part D, I'm mainly leaving out systematic imperfections concerning the making of tax laws and consequences of communication distortions, which instead are dealt with in parts A and C.

This figure illustrates my idea of the position of *the making of tax laws* in relation to fiscal sociology and to sociology of law (or legal sociology):[1]



Fiscal sociology is a subject in its own right which primarily deals with aspects of economics and sociology regarding it, not necessarily with laws on taxation. Thus, I distinguish fiscal sociology from sociology of law. I deem the making of tax laws a branch of fiscal sociology which forms a bridge between aspects of economics and of sociology on fiscal sociology in these broader senses. However, *the law and language perspective on the making of tax laws* should also be considered a topic within sociology of law.

Part E – Ideas about fiscal sociology studies by aspects on economics or sociology that may be influenced by the experiences from parts A-D

In Part E, I make some reflections on fiscal sociology in the broader senses mentioned. Thereby I mention some ideas about how to go further with fiscal sociology studies by research on economics or sociology that may be influenced by the experiences from parts A-D.

Research – where to find suggestions on research efforts

I continuously make suggestions on research efforts: See Part A, sec:s 1.1, 3.2.2, 3.3.1, 3.3.2 and 4.2; Part B, sec:s 3.2.1 and 4.2; the Epilogue to parts A-C; Part C, sec. 3.2; Part D, sec. 4.2; and Part E, Ch. 3.

[1] See Part D, sec. 2.1.

Part A

The Entrepreneur and the Making of Tax Laws: A Sociological Study of the Swedish Experience

1. HISTORY, TERMINOLOGY, METHODOLOGY, PRINCIPLES, DELIMITATIONS, PRESUPPOSITIONS AND OUTLINE

1.1 HISTORY

For socialist as well as capitalist countries taxation is the inseparable twin of the modern state. In its time even Soviet Russia had to leave its tax-free stage of the years 1920 and 1921. To the average mind there's no doubt that taxation should be appraised as a method of financing government, i.e. used as a tool of public finance. The modern viewpoint is that the concept of taxation covers both the sphere of public finance and the sphere of sociology, which means the evolvement of the subject of the sociology of taxation.[2]

It's mentioned in Jacobs & Waldman 1983 that Joseph Schumpeter already in 1918 argued that an area he called fiscal sociology had great promise, but they also noted that there had been little subsequent work in this field.[3] Using both the expression fiscal sociology and the expression the sociology of taxation, it's also mentioned in Martin, Mehrotra & Prasad 2007 that Schumpeter had predicted in 1918 that the sociology of taxation would have a rosy future, and they added that that future had arrived.[4] They noted from a conference at Northwestern University on the 4th and 5th of May 2007 that some new work had finally opened up the field of public finance to sociological inquiry, whereas sociologists and even economic sociologists before had left it to economists. However, the research mentioned or suggested concerned e.g. understanding of the social sources of economic redistribution by the state, tax policy as an important means by which states make markets for the purpose of collecting taxes, how tax systems are shaped by economic ideas and how taxation affects other fundamental institutions of society.[5]

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[2] See Mann 1943, p. 225.
[3] See Jacobs & Waldman 1983, p. 550. By the way: According to Wagner 2007, p. 180 the term fiscal sociology was coined by the Austrian economist Rudolf Goldscheid in the course of a controversy with Schumpeter, who was also an Austrian economist, regarding the treatment of Austrian public debt after the dissolution of the Austro-Hungarian Empire. See also Martin, Mehrotra & Prasad 2009, p. 2.
[4] See Martin, Mehrotra & Prasad 2007, p. 4.
[5] See Martin, Mehrotra & Prasad 2007, pp. 4 and 5.

In other words, research exists or is suggested and discussed within the field of the sociology of taxation.[6] However, it concerns the use of taxation as a tool of public finance etc. This book concerns the sociology of taxation restricted to aspects of how this tool function for the purpose of conveying via a tax rule the Government's intentions of imposing the individual tax liability or granting the individual the right of tax deduction. I deem this to fit well into the research mentioned and that it also makes the sociology approach to taxation more complete.

1.2 TERMINOLOGY

The main thread in this work concerns the functioning of tax rules as a tool to make an effective transmission of the Government's intentions of tax liability or right of tax deduction to the individual as the tax payer. The subject in this book lies within the field of fiscal sociology, which, as mentioned, is also named the sociology of taxation.

To my knowledge no research has been made concerning sociology aspects regarding the making of tax laws, at least not in the meaning of how to make a tax rule communicate effectively between the legislator and the individual. Therefore, it could also be a subject in its own right, which I would name sociology of tax laws, e.g. because it borders the disciplines linguistics and pedagogy. However, to avoid confusion with the concept sociology of taxation I won't introduce such a special concept. Instead I use in this book the concept sociology of taxation – or fiscal sociology – restricted to the meaning tax rules as a proper tool for the purpose of transmitting the legislator's imperative to pay tax or acknowledgement of tax deduction to the individual. That means various issues in relationship to the making of tax laws. By a taxable person or a tax payer I mean an entrepreneur, if not otherwise stated.

1.3 METHODOLOGY, PRINCIPLES, DELIMITATIONS AND PRESUPPOSITIONS

I don't aim to make any analysis *of* tax rules with the traditional Swedish law dogmatic method (*rättsdogmatisk metod*), which means studies of legal rules by using various legal sources for the purpose of judging their current law meaning.[7] In this work the subject concerns instead, as mentioned in the previous section, tax rules as a proper tool for the purpose of communicating the legislator's imperative to pay tax or acknowledgement of tax deduction to the entrepreneur as taxable

[6] See also e.g. Bell 1974, Campbell 1993, Jinno & DeWit 1998, Backhaus 2001, McCaffery 2008, Martin 2009, Martin, Mehrotra & Prasad 2009 and Smoke 2011.
[7] See Barenfeld 2005, p. 15; Gunnarsson & Svensson 2009, pp. 92 and 93; Hellner 2001, p. 23; Peczenik 1995, p. 312; Sandgren 2009, p. 118; and Forssén 2013, p. 31.

person. How a tax rule functions for the purpose of communicating the legislator's intention by it to the tax payer demands an analysis about the rule, i.e. an analysis *on* the tax rule. The Government bill may e.g. express an intended scope of the tax rule, but by the case law it's been given a restricted scope in relation to that intention. The issue in the described restricted sociology of taxation perspective of this work is then not whether or not the interpretation made by *Högsta förvaltningsdomstolen* (HFD)[8] can be questioned. It concerns instead why a distortion has occurred, where the communication of the Government's intention of the scope of the tax rule is concerned. Therefore, in this work I only use court cases – and other sources – as empirical material for studies of the described communicative functioning of tax rules. Those studies also comprise issues on how the participants of the taxation and court procedures concerning taxes between the individual and the state are handling the tax rules.

Thus, the studies in this book concern a number of issues regarding the communicative functioning of tax rules, where the analysis mainly consists of presenting and reasoning about some examples of problems in that respect. I delimit this presentation to experiences regarding the Swedish tax system and don't use a comparative method. However, I believe the issues I raise aren't uniquely Swedish and that this work may be of interest also for international research and debate.

Another delimitation of this work is that I focus on the entrepreneur's situation within the Swedish tax system. A market economy presupposes free enterprise building society. This provides a reasonable level of infrastructure guaranteed by taxation for the benefit of entrepreneurs as well as consumers and also functions of social security. You must continuously have new entrepreneurs to sustain the market economy and the tax system.[9] Therefore, I put the entrepreneur in focus of this work and one issue about the described communicative functioning of tax rules is how much or how little entrepreneurs, e.g. via employers' organizations, are influencing the process of making tax laws. Thereby I presuppose that the entrepreneur should be considered the primary interested party. A general election is often about the tax rates, but constitutional questions about the tax laws concern sociology of taxation in the meaning of this work. Since the existence of a tax system presupposes loyalty to it by a collective of individuals, the entrepreneur should be considered the main interested party concerning the making of tax laws. In that respect I deem the state represented by the tax authority, as well as other interested parties, secondary to the

[8] The Supreme Administrative Court (SAC). Before 2011, *Regeringsrätten*.

[9] See Campbell 2009, p. 256, where he states that without tax revenues it is inconceivable how states could provide the support necessary for capitalism itself.

entrepreneur. The tax authority should only work under current tax laws and one of the issues in this work is therefore instead how the state, represented by the tax authority making tax assessments etc. and participating in court procedures concerning taxes, is handling the tax rules. Thus, I argue for the interest of the individual – e.g. of the entrepreneur – as the basic norm for taxation rather than the principle of *Lex Regia* as the presupposition for an assumption of the people agreeing to the existence of a tax system.[10]

The issues I raise don't concern the use of tax revenues. Of course questions on whether or not or to what degree tax revenues come to proper use, for the benefit of building roads and giving the citizens medical care etc., are very important. However, those points with taxation belong to the concept of the sociology of taxation in the broader sense. Since they aren't central for the more restricted aspects on the sociology of taxation in this work, I leave them out and might get back to them another time. Instead the questions I raise are about getting the tax system into shape concerning how the tax rules function for the purpose of communicating the Government's intention by them to the entrepreneur.

If the competence remains by the Swedish Parliament, the legislator's intentions – i.e. motives – are normally to be found in the preparatory work to a tax rule, i.e. mainly in the Government bill. If competence is in accordance with the Swedish Constitution 1974 conferred to the institutions of the European Union (EU),[11] are the intentions of a Swedish tax rule primarily expressed by the EU law, e.g. where a rule in the Value Added Tax Act 1994 is concerned. The EU law doesn't use preparatory work. Instead motives for e.g. a value added tax (VAT) rule is to be found in the paragraphs in the preamble to the VAT Directive (2006/112). The paragraphs in the preamble to an EU directive are also called recitals.[12] Although the issues in this book are analysed from a Swedish horizon, it's important to recognize that the recitals – i.e. the motives – in the preamble to the VAT Directive (2006/112) should also be deemed expressing law political aims for the Value Added Tax Act 1994. Namely since the intended result with the VAT Directive (2006/112) is binding for Sweden as a Member State and Member States are obliged to harmonise their VAT acts.[13]

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[10] See Strömberg-Back 1963, p. 61 and e.g. also pp. 113, 116, 127 and 138.
[11] See Ch. 10 sec. 6 SC 1974 and art:s 4(1) and 5(2) of the Treaty on EU.
[12] See e.g. para:s 3 and 19 in *ADV Allround* (C-218/10) and para:s 3 and 27 in *BLM* (C-436/10).
[13] See art. 288 para. 3 and art. 113 TFEU. See also Prechal 2005, pp. 180 and 317; Stensgaard 2004, p. 25; Hiort af Ornäs & Kristoffersson 2012, p. 21; and Forssén 2013, pp. 22 and 37.

For the described restricted aspects on the sociology of taxation in this work I've chosen from Swedish and EU tax law the following principles as law political aims for the Swedish tax system:

- The principle of legality for taxation. That principle follows from the Swedish Constitution 1974,[14] and it may limit also an EU conform interpretation of a national tax rule governed by EU law: the CJEU has established that the Member States aren't obliged to interpret the national law *contra legem*.[15]

- The principle of neutrality of taxation. The tax reform in the early 1990's was made inter alia under the assumption of a law political aim that neutrality should exist between taxation of income of earning and income of business activity.[16] Concerning VAT the principle of neutrality is also important for the purpose of harmonisation of the Member States VAT acts. Harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.[17] Competition shall not be distorted due to the VAT. To harmonise indirect taxes – such as the VAT – there's a demand of a level playing field on the internal market so that the consumers won't choose between suppliers of goods and services due to differences between them concerning the VAT.[18]

- The principle of an efficient tax collection. A poor communicative functioning of tax rules will undoubtedly lead to poor efficiency concerning tax collection. It's equally important for the state and the entrepreneur that the tax collection by the tax authority is efficient. In the long run you cannot create the level playing field previously mentioned, if competition will be distorted due to tax collection not functioning efficiently. In the preparatory work to the national VAT rules the state's interest of an efficient tax collection has been expressed as the entrepreneur in principle functioning as the state's tax collector.[19] On the EU level there's also an ambition for the future that the tax authorities should increase their activities concerning collection

[14] See Ch. 8 sec. 2 para. 1(2) SC 1974.
[15] See para. 110 in *Adeneler et al*. (C-212/04). See also Forssén 2013, p. 38.
[16] See Prop. 1989/90:110 Part 1, p. 1.
[17] See art. 113 TFEU and VAT Directive (2006/112), para 4 (and also para:s 5 and 7), in the preamble. See also Terra & Kajus 2012, p. 6; Forssén 2013, p. 30; and Forssén 2011, p. 46.
[18] See Terra & Kajus 2012, p. 6; Forssén 2013, p. 59; and Forssén 2011, p. 46.
[19] See Prop. 1989/90:111, p. 294.

of VAT.[20] In line with this the EU also aims by increasing the registration control to avoid letting too many into the VAT system.[21] Thus, I name also the objective of an efficient tax collection – including tax control – as a principle and law political aim for the Swedish tax system.

Mainly with regard of the principles mentioned I raise the questions concerning the Swedish tax system listed in the next section. They concern how to get the tax system into shape regarding, as mentioned, the tax rules' function for the purpose of communicating the Government's intention to the entrepreneur. I aim to comment what I consider tendencies in favor of or against the functioning of the tax system as a tool to fulfil those principles.

1.4 OUTLINE

By the issues brought up in this book I also aim to give input for e.g. researchers or politicians to work on prudent adjustments of the existing Swedish tax system or to start on a new footing by revising the tax system altogether. As mentioned in the previous section I use for the analysis in this work the Socratic form by listing a number of questions. These are the questions in this part which also give the structure for the further outline of it:

- How does the tax authority's information and communication of a tax rule work?[22]

- What influence does the individual entrepreneur have on the making of tax laws?[23]

- What would ensure the influence of the individual entrepreneur on the making of tax laws?[24]

- Does a balance exist in the making of tax rules and in the taxation and court procedures between the entrepreneur and the state?[25]

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[20] See COM(2010) 695 final, concerning the future for the common VAT system within the EU, and the following up in COM(2011) 851 final. See also Šemeta 2011, p. 3; Forssén 2013, pp. 59 and 60; and Forssén 2011, pp. 80 and 223.
[21] That was the opinion stated by Stephen Bill, the head of the cabinet at the previous EU Commissioner on taxes Lászlo Kovács, at the Stockholm Seminar (23 Jan. 2009). See also Forssén 2011 pp. 52 and 223.
[22] See Ch. 2, sec. 2.1 and 2.2.
[23] See Ch. 2, sec. 2.1 and 2.3.
[24] See Ch. 2, sec. 2.1 and 2.4.
[25] See Ch. 3.

I end this part with a summary and concluding viewpoints concerning my commentaries of the questions listed above.[26]

[26] See Ch. 4.

2. INFORMATION AND COMMUNICATION OF TAX RULES AND INFLUENCE ON THE MAKING OF TAX LAWS

2.1 INTRODUCTION

As mentioned the main thread in this work concerns the functioning of tax rules as a tool to make an effective transmission of the Government's intentions of tax liability or right of tax deduction to the individual as the tax payer,[27] where the focus is set on the entrepreneur's situation in that respect within the Swedish tax system.[28] The sociology of taxation perspective in this work concerns why a distortion may occur regarding the communication of the Government's intentions.[29] In the next chapter I present and comment a couple of examples of problems concerning the taxation and court procedures concerning taxes with regard of unbalances thereby between the entrepreneur and the state, where such a communication distortion is the cause of the problems or contributes to the emergence of them. Before going into those examples of problems, in this chapter I look into, as previously mentioned,[30] a couple of questions concerning the making of and communication of tax rules of importance for the risk of problems emerging, namely:

- how the tax authority's information and communication of a tax rule work[31] and

- what influence the individual entrepreneur has on the making of tax laws.[32]

- In the latter respect I also look at how to ensure the influence of the individual entrepreneur on the making of tax laws.[33]

I begin with the informative role of the tax authority, since it's also the entrepreneur's counterparty concerning taxation. Hence the division in the further presentation between on the one hand that issue and the other two systematic questions on the making of tax laws and on the other

[27] See sec. 1.2.
[28] See sec. 1.3.
[29] See sec. 1.3.
[30] See sec. 1.4.
[31] See sec. 2.2.
[32] See sec. 2.3.
[33] See sec. 2.4.

hand the questions in the next chapter whether a balance exists between the two parties on the taxation and court procedures concerning taxes.

2.2 HOW THE TAX AUTHORITY'S INFORMATION AND COMMUNICATION OF A TAX RULE WORK

In my opinion the tax system should basically work in the same way regardless of the choice of different types of economics. It should function regardless of a choice between e.g. Keynesian economics and Monetarism, i.e. between on the one hand governmental intervention in the economy by expenditures rather than concerning the role of monetary policy and on the other hand a central bank limiting or expanding the supply of money in the economy (and letting the market take care of itself).[34] In either case I argue that just printing money or pushing money back and forth between banks and entrepreneurs don't produce any goods or services. The entrepreneurs' ideas create enterprises producing goods and services to the consumers, i.e. create the market. Therefore, a market economy with public finance, i.e. with a tax system, provides that the tax system mustn't be perceived by the entrepreneurs as an obstacle for free enterprise. Instead the EU law demands e.g. that the principle of neutrality of taxation is upheld by inter alia the Swedish tax system concerning indirect taxes to ensure the establishment and the functioning of the internal market.[35] The entrepreneur's counterparty concerning taxation is the state represented by the tax authority. Thus, the question how an entrepreneur perceives the tax laws decided by the Parliament is very much depending on how the tax authority communicates the tax rules.

The tax authority has two main roles, namely on the one hand to make decisions on taxation, examining tax returns and auditing entrepreneurs and on the other hand to inform about the tax rules.[36] The previous concerns the issues in the next chapter, and in this section I address the latter from these aspects:

- The legislator often states in the preparatory work to a tax rule that the tax authority will give proper information for the purpose of application.[37]

- To fulfil its task presupposed by the legislator the tax authority communicates with the public by issuing brochures and various

[34] See Radcliffe 2013, at the sec. Tax Basics of Monetarism.
[35] See sec. 1.3.
[36] See Ch:s 40-42 CTP 2011 and sec:s 1, 4 and 5 AA 1986.
[37] See e.g. Prop. 1978/79:141, p. 67.

writs on different tax problems, both on formal issues on taxation and on material tax rules.[38]

The writs made by the tax authority is binding only for the civil servants in their work with making decisions on taxation, if the writs don't contradict the tax rule at hand.[39] However, the administrative courts – also the HFD – will typically follow the writs made by the tax authority under the same circumstances. Unless the HFD is quite sure of wanting another solution and it's weighing for or against fifty-fifty, the practice will be accepted which the tax authority establish by its directions and general advice.[40] This causes problems in cases of failure by the tax authority to communicate the meaning of a tax rule by issuing distorting writs. An individual misinformed by e.g. a writ from the tax authority concerning the application of a certain tax rule cannot count on the courts placing a responsibility for failure of administration at the tax authority. The RÅ 2004 ref. 2 (30 Jan. 2004) is a flagrant example on this phenomenon, where the implications were the following:

- A so called close company rule on division of taxation of capital gain from the sale of shares in two close companies into income of earning and income of capital for one of the owners of the companies was tried by the HFD.[41]

- The tax reform in the early 1990's was, as mentioned,[42] made inter alia under the assumption of a law political aim that neutrality should exist between taxation of income of earning and income of business activity. The brochures issued by the tax authority about the rule in question underpinned this perception. The HFD stated that various interpretations could be made of the wording of the tax rule in question.

- However, the HFD made an interpretation based on the preparatory work to the rule and made a decision in contradiction of the general law political aim mentioned: The close company rule limiting the income of earning part from the sale of the shares was deemed applicable only to one and the

[38] See the website of the Swedish tax authority (*Skatteverket*): www.skatteverket.se.
[39] See Ch. 8 sec:s 1 and 9-13 SC 1974 and Påhlsson 1995, pp. 77, 78, 79, 80, 81, 116, 117, 118 and 264.
[40] See Påhlsson 1995, pp. 118 and 119; and also Forssén 2007, p. 154.
[41] See sec. 3 12 b mom. SITA 1947. By the way the SITA was later on replaced by the ITA 1999. The equivalent to sec. 3 12 b mom. SITA in the ITA 1999 is Ch. 57 sec. 22. As mentioned last in RÅ 2004 ref. 2 (30 Jan. 2004) the same day the HFD made the same verdict in 7266-7267-2002 (30 Jan. 2004), which concerned the other owner of the shares in the two close companies in question.
[42] See sec. 1.3.

> same company, not two. Thereby the situation for the owner of the companies wasn't neutral compared to what would apply to an employee owning stock market shares. To come to that conclusion, it wasn't enough for the HFD to look into one set of preparatory work. It took three sets of preparatory work for the HFD to make its decision to the individual's disadvantage. In my opinion the HFD's conclusion is not compatible with either the principle of neutrality of taxation according to current law or the Swedish Constitution 1974 and its principle of legality for taxation.[43]

In conclusion I deem that RÅ 2004 ref. 2 (30 Jan. 2004) reveals a necessity of keeping writs and other information made by the tax authority at a minimum if they should exist at all. I believe this is the only way to break a development where the tax authority in practice has become a second legislator. The HFD must be forced to fulfil its role of filling gaps of interpretation concerning a tax rule. The protection of the legal rights of the individual demands this.

It's a problem concerning the development of current law regarding taxes that the HFD for the purpose of interpretation looks at the preparatory work to the tax rule or writs from the tax authority about it rather than into the wording of the rule. The HFD is supposed to develop current law by its verdicts. Thus, opposed to the phenomenon described concerning RÅ 2004 ref. 2 (30 Jan. 2004), legislation in the field of taxation isn't supposed to be made in the preparatory work. However, there's another issue about the Swedish procedural system which adds to the problem described. Since the early 1970's there's a demand for leave to appeal to bring a case before the HFD.[44] Furthermore, the HFD does not in general have to give motives to a decision not to grant a leave to appeal.

The Swedish system with the demand for leave to appeal to highest court has also met negative criticism on an EU law basis from the Danish government, which, according to paragraph 11 in *Lyckeskog* (Case C-99/00), considered that it would risk leading to a domestic Swedish case law in conflict with the EU law in fields where the EU has the competence, e.g., as mentioned,[45] concerning VAT. In those fields the HFD or *Högsta domstolen* (HD)[46] are obliged to obtain a preliminary ruling from the CJEU, where they've found themselves in

[43] See Ch. 8 sec. 2 para. 1(2) SC 1974. See also sec. 1.3.
[44] See sec. 35 APA 1971.
[45] See sec. 1.3.
[46] The Supreme Court.

need of such a ruling (*acte clair*).[47] However, the criticism didn't lead to any revision of the system with the demand for leave to appeal to the highest courts. It only led to a law meaning that the HFD or the HD since mid 2006 are obliged to give their motives for not obtaining a preliminary ruling by the CJEU, if a party has asked for such a ruling.[48]

2.3 THE ENTREPRENEURS' INFLUENCE ON THE MAKING OF TAX LAWS

Since I have the perspective of the individual on the issues in this book, the question is what influence the individual entrepreneur (with a small business enterprise) has on the making of tax laws. In my opinion entrepreneurs *in spe* carry little weight by the politicians where e.g. necessary revision of the tax system is concerned, if they don't join a strong pressure group like the employers' organizations. Otherwise, the only individual entrepreneurs with a possibility to influence the tax legislation are those of great wealth. I give these two examples of the phenomenon:

1. Because of tax evasion and abusive practice of the right of deduction for input tax within the building sector the Government asked for and got permission from the EU to introduce in mid 2007 a special regime in the Value Added Tax Act 1994 of so called reverse charge between building contractors.[49] However, this was a legislation proposed by the Government to the Parliament under the assumption that the few big building companies in Sweden which rule on the major building sites aren't taking part in benefitting from the tax evasion and abusive practice in question. Instead the Government state in the preparatory work to the law introducing the reverse charge regime that the big players have complained about problems to control more than one link down in a chain of subcontractors.[50] This is quite amazing, since the few big building companies control the cost of a man hour on their building sites. The so called F-tax card issued by the tax authority to one subcontractor in such a chain should be given legal effect on the same premise regardless of whether the mandator happens to be one of the big building companies or another subcontractor.

[47] See art. 267 para. 3 TFEU. See also Terra & Kajus 2012, pp. 248, 250 and 256; Prechal 2005, pp. 32 and 33; Ramsdahl Jensen 2003, p. 16; Hiort af Ornäs & Kristoffersson 2012, p. 22; Forssén 2013, p. 46; and Forssén 2011, pp. 64 and 65.
[48] See sec. 2 of SFS 2006:502.
[49] See Ch. 1 § 2 first para. 4 b and second para. of ML, according to SFS 2006:1031.
[50] See Prop. 2005/06:130, pp. 20, 31 and 46.

The F in F-tax stands for *företagare*, i.e. entrepreneur.[51] The possession of an F-tax card means that a mandator shall be able to rely on the entrepreneur handling the collection of taxes and social fees for his employees. If the entrepreneur fails to do so the tax authority is supposed to revoke the entrepreneur's F-tax card and the mandator can choose someone else for the assignment at hand. Instead of the Government asking the EU for permission to introduce the exemption mentioned from the general rules in the VAT Directive (2006/112) the tax authority should have made better efforts to make the F-tax system work, and not only concerning the building sector. One alternative measure should have been the tax authority making more thorough control for VAT registration purposes and also to execute such control in the field, not just from the office desk. The reform leading to a tax authority with a nation-wide coverage that came into effect in 2004 was conducted without registration issues even being mentioned in the preparatory work.[52] The efficiency of the tax authority's auditing activities should typically become increased, if a lot of the rotten examples were sifted out already at the registration stage. In other words: Instead of relying on the tax authority moralizing about entrepreneurs within certain sectors being known for tax evasion, the legislator should have initiated an investigation leading to a proper reform of the organization of the tax authority with the focus set on where the control resources are most useful.

By the way the F-tax institute has been altered on the 1st of January 2012.[53] Nowadays an F-tax-card isn't issued. Instead of getting the tax authority's acknowledgement of the status as entrepreneur on a card an approval for F-tax is just registered by the tax authority. A mandator can get a copy of the F-tax status of a contractor from the tax authority's register. The legal consequences of the F-tax status is thereby nowadays connected to the approval by the tax authority and the tax authority can revoke that approval.[54] However, what I write about the F-tax card in this book should in principle also apply under similar circumstances in 2012 and later.

2. An issue of interest concerning the constitutional dimension of the democracy concept is the case of the introduction of a certain

[51] See Prop. 1991/92:112, p. 76.
[52] See Prop. 2002/03:99.
[53] See Ch. 9, Ch. 10 sec:s 11-14 and Ch. 59 sec:s 7-9 CTP 2011.
[54] See Prop. 2010/11:165 Part 1, pp. 324-326.

> rule for the assessment year of 1998. This rule meant that main owners of shares in listed companies were excluded from any retroactive taxation of wealth concerning such shares, where they had been moved from the Stockholm Stock Exchange's A-list to its OTC- or O-lists in order to avoid wealth tax.[55] There are just a handful of people who are main owners of shares in listed companies. Thus, the signal from the politicians was: If you grow big enough as an entrepreneur to get your company listed, you'll get tax breaks. In my opinion it's a democratic deficit on a constitutional level not relieving also ordinary share holders from retroactive taxation.[56] Moreover, in the context of the topic of this work, granting the very few tax favors won't stimulate the individual to become an entrepreneur. I wrote about this and the miserable attitude held by the Council on Legislation concerning constitutional viewpoints on the phenomenon.[57]
>
> The chairman of the Council on Legislation replied, but didn't even comment about the fact that main owners were excluded. The chairman suggested that I should make my complaints with regard of the shape of the constitution.[58]

In conclusion the answer to the question on what influence the individual entrepreneur has on the making of tax laws is: he or she has a rather bleak influence on the making of tax laws. The individual entrepreneur must join some kind of pressure group, e.g. a small enterprises association, to be able to interest members of Parliament to introduce a bill. Then the individual entrepreneur might have a chance to compete with a strong lobby consisting of e.g. trade unions and employers' organizations for the attention of the Parliament. In this respect there's the tax authority to consider, with, as mentioned,[59] its influence on the tax system by its relationship to the legislator, which also affects the administrative courts.

Thus, in my opinion, when speaking of a level playing field for the purpose of neutrality of taxation benefitting entrepreneurs and consumers, there's a democratic deficit to the disadvantage of the individual entrepreneur to consider, which is detrimental for the rights of the individual in that respect in relation to the tax system. In my

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[55] See sec. 3 para. 1(4) LSWT 1997 (amended by SFS 1997:954). By the way the LSWT 1997 was revoked by the end of 2007, and thereby has the Swedish taxation of wealth been abolished altogether [see SFS 2007:1403 and Prop. 2007/08:26, p. 1].
[56] See Ch. 2 sec. 10 para. 2 SC 1974.
[57] See Forssén 1998 (1), pp. 509-517.
[58] See von Bahr 1998, pp. 701-702.
[59] See sec. 2.2.

opinion the entrepreneur is the most important figure for the tax system. An economy with production of goods and services as the basis for public finance by taxation provides free enterprise. Therefore, the basic presuppositions for the tax system should have the individual entrepreneur in focus and not become an obstacle for new ideas to be realized by the individual entrepreneur.

Regardless whether the entrepreneur is arguing his or her case with the bank or the tax authority, the entrepreneur should be able to rely on the value of having a book-keeping in order. If the idea is good enough for the bank to grant a loan it should also be good enough for the tax authority to issue the F-tax card. If the bank has found the person in question and the idea creditworthy, the bank has reviewed the economic plans and demands and found that the book-keeping is likely to be in order, e.g. by asking for the name of the accountant etc. In the same way the tax authority should focus on the same terms to register for F-tax.

By investigating already at the registration of an entrepreneur whether he or she has ensured the maintaining of accounting records, i.e. of a book-keeping, the tax authority improves the possibility of a level playing field and neutrality of taxation for entrepreneurs by already at the gate keeping out those who shouldn't have had an F-tax card to begin with. A more efficient tax control already at the registration stage makes e.g. the tax authority's VAT auditing activities more efficient. An improved sifting at the registration stage will make room for the tax authority to use its resources for a more focused weeding out of rotten or criminal players in the playing field by revoking their F-tax registration etc. On the whole these suggestions would most likely give a taxation procedure in sync with the collection of tax and vice versa. In the next section I give my suggestions for constitutional changes to accomplish that the making of tax laws is genuinely influenced also by the individual entrepreneur.

2.4 HOW TO ENSURE THE INFLUENCE OF THE INDIVIDUAL ENTREPRENEUR ON THE MAKING OF TAX LAWS

The question what would ensure the influence of the individual entrepreneur on the making of tax laws may lead to several plausible suggestions. However, to genuinely speak of how to ensure the influence of the individual entrepreneur in that respect, I consider there's foremost necessary to look at the question from a perspective of the rights of the individual, i.e. from the constitutional perspective. Therefore, in this section I give my suggestions for constitutional changes to accomplish that the making of tax laws is genuinely influenced also by the individual entrepreneur.

In the latter section I mentioned that the chairman of the Council on Legislation suggested that I should make my complaints regarding the shape of the constitution, rather than criticizing the council of a lack of engagement in investigating retroactive effects of tax legislation and the question of equality in that sense between the little man and the Establishment. Well, here goes.

To make it possible for an entrepreneur, regardless of whether he or she is a little or a big guy, to have any influence on the process of the making of tax laws, I deem that the politicians should not be involved in that process, where it concerns formulating tax rules. The politicians should in principle only be involved in the process of making tax law insofar as it concerns establishing tax rates. I argue for the formulation of tax rules – i.e. of rules meaning the imperative pay tax or an acknowledgement of tax deduction to the individual – being worked out by the professionals, leaving in principle only questions about tax rates to the politicians – under the Swedish parliamentary of today. I give the following arguments for this seemingly radical opinion.

If the professionals from various sectors work out the texts of the tax rules one gets a more straight forward information and communication to the entrepreneur of the content of the tax rule. In other words, it would benefit the primary norm perspective of the tax rule at hand. From the secondary norm perspective, e.g. for the purpose of registration for F-tax of an entrepreneur, previously mentioned,[60] the tax authority should be able to rely on a vocabulary used by the Swedish Accounting Standards Board (SASB) rather than the wording of a rule formulated by politicians. Then the text of the tax rule will become closer to reality simply by the mere fact that the SASB is closer to the entrepreneurs than politicians of various backgrounds.

The SASB is by its recommendations supposed to develop the concept of generally accepted accounting principles (GAAP).[61] GAAP is in its turn relevant for the fulfilment of the requirement to maintain accounting records, which is the presupposition for calculating the result of the enterprise and thereby for the determination of the income tax.[62] Regardless whether the entrepreneur is arguing his or her case with the bank or the tax authority, the entrepreneur should, as mentioned,[63] be able to rely on the value of having a book-keeping in order. In the same way the tax authority should, as also mentioned,[64] focus on the same

[60] See sec. 2.3.
[61] See Ch. 8 sec. 1 para. 1 sen. 1 BKA 1999.
[62] See Ch. 14 sec:s 2 and 4 ITA 1999.
[63] See sec. 2.3.
[64] See sec. 2.3.

terms to register for F-tax. In other words, the secondary norm perspective – i.e. the control perspective of the rule at hand – would also benefit from a system where the tax rules are formulated by the authority closest to the reality for entrepreneurs, here the SASB. It would reduce the previously described risk of distortions of the information and communication of tax rules.[65] By leaving the formulation of tax rules to the professionals – or at least to the authority with the broadest perspective on enterprises and the terms of starting and developing enterprises – the parlance of taxation won't become unfamiliar for the entrepreneurs. Instead of issuing writs concerning the interpretation of the tax rules, the tax authority should only work under current tax laws and focus on control and investigation.[66] There's also to consider that small enterprises aren't comprised by the obligation of annual auditing since the 1st of November 2010.[67] This means that small companies are likely to save the cost of appointing an auditor, and thereby they no longer use on a regular basis a professional aid which otherwise look into the rules for the benefit of the company. All the more reason in my opinion to see to it that distortions mentioned here are more likely to be prevented already at the legislative stage.

To be able to introduce what I suggest about removing the formulation of the tax rules from the politicians and improving a democratically balanced influence on the development of the tax system between the entrepreneur and the state, I also suggest the following on a constitutional level:

- The Parliament should consist of two chambers instead of today's one.[68] In one chamber there could be a representation of trade unions, employers' organizations and other organizations and public bodies. That would be the second chamber whose suggestions would be put before the first chamber consisting of representatives elected by the people in public elections.

- A chief task for the second chamber would be working out proposals of new tax rules or alteration of existing tax rules with regard of efficiency. Thereby the possible and efficient ways of covering a common need by taxes – i.e. the fulfilment of a budget – would be defined by the representatives of the second chamber receiving information from their organizations. Thus, the so to speak representatives of the professionals would work out the technicalities and formulate the wordings of the tax rules.

[65] See sec. 2.2.
[66] See sec:s 1.3 and 2.2.
[67] See sec. 2 AA 1999 (amended by SFS 2010:837). See also Forssén 2006, pp. 19-25.
[68] See Ch. 3 sec. 2 SC 1974.

- Then the suggested legislation on taxes would be tried by the first chamber. The determination of the tax rates would be a privilege of the first chamber, but it would only be allowed to turn away a tax rule suggested by the second chamber. The first chamber wouldn't be allowed to work out an alternative rule in a technical sense. That would be the privilege of the second chamber.

My suggestions about the parliamentary system and how it should work concerning e.g. the tax legislation procedure are only in principle. Of course there are also other more detailed solutions to make where the distribution between the suggested two chambers of the work on taxes is concerned. For instance there could be a steering committee appointed by the two chambers and with the task to deem whether a certain issue to begin with belongs in the first or the second chamber. Perhaps it would be possible to divide issues into infrastructure and tax issues and other issues respectively, where the first category would belong to the second chamber to begin with and other issues would be initiated directly at the first chamber. The main objective would nevertheless be to make a new system, where infrastructure and tax issues are handled by the second chamber to begin with so that those issues are guaranteed to be handled by representatives of the professionals and the procedure from initiation – or even instigation – of the issue to the final wording of e.g. the tax rule will be as transparent as possible.

The purpose with my suggestions is firstly that good technocracy will be implemented so that the tax system will be built upon a fundament of an efficient charge and collection of taxes.[69] Thereby the individual in the meaning of the consumer as well as the entrepreneur will be increasingly ensured that the tax authority´s work in a true sense guarantees competition neutrality between enterprises and thereby also consumption neutrality with regard of the entrepreneurs' tax situation.

Furthermore, the system suggested will bring out the lobbyists in the open by the first chamber reviewing proposals from the second chamber. Today it's very much impossible to investigate the lobbyists' influence on e.g. the tax legislation, which means a democratic deficit. Someone might consider that the system I'm suggesting leads to corporatism. That's of course always something to consider, where matters of democracy and above all democratic deficit are concerned. However, I infer that the function of bringing out lobbyism to light by

[69] Regarding my expression good technocracy: Compare with Backhaus 2013, p. 342, where he use the expression good governance when stating that (Vilfredo) Pareto's State can also be benign, enlightened, civilized and civilizing and not only Leviathan.

the system suggested balances that argument. It should be deemed favorable to the democratic control of how e.g. a tax rule comes about, if that control is possible to make the whole way back to the actual initiator.

What I'm aiming at is to make the tax system more trustworthy for the individual entrepreneur. An entrepreneur shall be able to perceive that the system is as neutral as possible both where the making of tax rules are concerned and concerning the taxation and court procedures about taxes. In the next chapter I continue with questions on whether there is a balance in the latter senses today between the individual and the state. The questions are: Does a balance exist in the making of tax rules and the taxation and court procedures concerning taxes between the entrepreneur and the state? In other words, I argue in chapter 3 for the changes I've suggested above by showing examples of an unbalanced system today with regard of those questions.

3. WHETHER A BALANCE EXISTS IN THE MAKING OF TAX RULES AND IN THE TAXATION AND COURT PROCEDURES CONCERNING TAXES BETWEEN THE ENTREPRENEUR AND THE STATE

3.1 INTRODUCTION

In this chapter I aim to give some underpinning reasons for the suggestions mentioned to increase the entrepreneur's influence on the tax system.[70] Therefore, I present a couple of examples of unbalances in that respect with today's system concerning the entrepreneur contra the state:

- First I work on the perspectives of the making of tax rules and of the procedural influence of the tax authority's writs and handbooks.[71]

- Then I give examples on unbalances between the entrepreneur and the state concerning taxation and court procedures.[72]

3.2 WHETHER A BALANCE EXISTS IN THE MAKING OF TAX RULES BETWEEN THE ENTREPRENEUR AND THE STATE

3.2.1 The making of a tax rule

3.2.1.1 Today's Swedish system

In today's Swedish system a law rule normally comes about by the Government appointing a committee concerning some issue. The committee presents a report, which will be sent for consideration to various public bodies, authorities, courts and other organizations, e.g. trade unions and employers' organizations.[73] The committee's report and the considerations received will thereafter be the basis for the Government department, e.g. the Treasury, handling the legislative issue at hand when it works out its bill. The Council on Legislation will make its comments.[74] Then the final Government bill will be referred to the parliamentary committee germane to the issue at hand and it will give

[70] See sec. 2.4.
[71] See sec:s 3.2-3.2.2.
[72] See sec:s 3.3-3.3.2.
[73] See Ch. 7 sec. 2 SC 1974.
[74] See Ch. 8 sec. 21 SC 1974.

its report over the bill.[75] A decision by the Parliament on the issue will finally be based on the bill and that report.[76] This is also normally the procedure under which a tax rule comes about, and in accordance with the principle of legality for taxation a tax rule must be issued by law.[77]

3.2.1.2 The legislator's interference with issues judged in the case law leading to a conflict with the intended current law and to missed reform opportunities

In 2009 the legislator introduced in the Income Tax Act 1999 a rule on giving a certain acknowledgement of what's agreed between the entrepreneur and the mandator for the purpose of judging whether the circumstances qualify under the independence prerequisite. This was only a codification of the current case law according to the Council on Legislation.[78] Although I mention the following problems that could be resulting effects of the legislator's reform:

- Nevertheless the opinion of the Council on Legislation was that the reform in 2009 has opened a certain income tax problem. The development of the case law may namely become contrary to the purpose of the reform, which was that more were supposed to get F-tax cards. If the evidence of what's agreed between the entrepreneur and the mandator becomes too much emphasized when deeming whether a contractor shall be considered independent and not arranged within the mandator's organization as an employee of the mandator, other circumstances at hand may be disregarded.[79] The current case law before 2009 already meant that a person could be deemed an entrepreneur although he or she only had one mandator, e.g. according to RÅ 1984 1:101 (7 Feb. 1985) concerning entrepreneurs with special competence. The reform was mainly motivated by RÅ 2001 ref. 25 (17 Jan. 2001), which meant that a farmer temporarily helping another farmer with his or her work during absence on account of vacation or illness was deemed an entrepreneur. The legislator's interference with an issue already solved by the case law might lead to a conflict with the intended current law.

- The reform in 2009 concerned the Income Tax Act 1999. Then the equivalent of taxable person in the Value Added Tax Act

[75] See Ch. 4 sec. 5 SC 1974.
[76] See Ch. 8 sec. 1 SC 1974.
[77] See Ch. 8 sec. 2 para. 1(2) SC 1974. See also sec:s 1.3 and 2.2.
[78] See Ch. 13 sec. 1 para. 2 ITA 1999 (amended by SFS 2008:1316), and Prop. 2008/09:62, p. 32 and also Forssén 2011, p. 312.
[79] See Forssén 2011, p. 312.

1994 was determined by reference to the concept business activity in the Income Tax Act 1999. Thereby integrating the non harmonized income tax law in the Value Added Tax Act 1994, where the EU law is supposed to be implemented. This connection for the purpose of determining who's a taxable person was abolished in the Value Added Tax Act 1994 on the 1st of July 2013,[80] which is in line with what I recommended in my licentiate's dissertation on the 15th of December 2011.[81] However, the legislator missed what the EU commission criticized Sweden for in a notification of the 26th of June 2008 on starting a procedure about breach of the EU law concerning the determination of who's a taxable person according to the main rule in article 9(1) first paragraph of the VAT Directive (2006/112). The criticism concerned not only the connection mentioned between the Value Added Tax Act 1994 and the Income Tax Act 1999, but also the use in the Value Added Tax Act 1994 of the concept tax liable instead of taxable person for the determination of the emergence of the entrepreneur's right to deduct input tax.[82] The legislator should rather have focused on this than working on problems already solved by the case law. The determination of who's a taxable person is solved for VAT purposes by the reform of the 1st of July 2013, but it's not sufficient to fully address the problems raised by the EU commission concerning the Value Added Tax Act 1994. The legislator has – at least for the time being – missed the opportunity of making a reform to get the Value Added Tax Act 1994 fully conform with the VAT Directive (2006/112) concerning the determination of who's a taxable person *and* of the emergence of such a person's rights. Another problem in that respect raised by me concerning the mentioned use of the concept tax liable instead of taxable person concerns registration for VAT purposes. For the benefit of foremost the control of when an entrepreneur making transactions exempted from VAT begins to make also taxable transactions and can no longer only be registered in the general tax register, but also belongs to the VAT register, Chapter 7 section 1 of the Code of Taxation Procedure 2011 should, for that registration liability, also refer to taxable person instead of tax liable, which would be in accordance with article 213 of the VAT Directive (2006/112).[83]

[80] See Ch. 4 § 1 according to SFS 2013:368 (and Prop. 2012/13:124).
[81] See Forssén 2011, p. 304.
[82] See Forssén 2011, pp. 308, 319 and 320.
[83] See Forssén 2011, pp. 301, 320 and 321.

The first problem mentioned above concerning the legislator's reform in 2009 should be viewed both in a primary and a secondary norm perspective. To emphasize according to the rule then introduced the evidence of what's agreed between the entrepreneur and the mandator might make it easier for some person to deem whether he or she has the character of entrepreneur for income tax purposes and thereby whether he or she is entitled to register for F-tax (primary norm perspective). However, the tax authority emphasizing that particular evidence when making an investigation e.g. on registration for F-tax might on the other hand lead to a too narrow control perspective, where other circumstances at hand indicating the status of the person are left out (secondary norm perspective). In that case the rights of the individual might be set aside in the taxation and court procedures compared to what would rule if the principle of a free trial of evidence is upheld as usual by the courts. Thus, the legislator interfering with issues already judged in the case law is likely to lead to a conflict with the intended current law. If it was motivated to introduce a certain evidence rule for farmers, which I doubt, it should have been restricted to them and not been given a general scope for judging business activities. If there was a real problem, it would probably be processed more apt by an assembly of professionals, such as the second chamber in the parliamentary two chamber solution that I suggest.[84]

The second problem mentioned above concerning the reform of 2009 is in my opinion that the legislator had the wrong focus when zeroing in on the prerequisites for who's an entrepreneur for income tax purposes. The issue was already solved in the case law. The legislator missed then and again in 2012, when reforming the legislation on taxation procedure, and yet again on the 1st of July 2013, when reforming the Value Added Tax Act 1994, the opportunity to make a more holistic reform including also the needs of reforming the rules on the entrepreneur's right to deduct input tax and liability to register for VAT purposes. By the way, in this bigger picture I'd like to add that I've also concluded there's a need to reform the so called representative rule on tax liability in *enkla bolag* (approximately translated joint ventures) and *partrederier* (shipping partnerships) in the Value Added Tax Act 1994 and in the Code of Taxation Procedure 2011,[85] so that it too complies with the main rule of who's a taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112).[86] The representative rule should with reflection on partners in *enkla bolag* and *partrederier* and the activities carried out by the use of *enkla bolag* and *partrederier* refer to the concept taxable person, i.e. in compliance with the main rule

[84] See sec. 2.4.
[85] See Ch. 6 sec. 2 VATA 1994 and Ch. 5 sec. 2 CTP 2011.
[86] See Forssén 2013, p. 212 and PAPER, p. 43.

of article 9(1) first paragraph of the VAT Directive (2006/112). Today the representative rule opens also for ordinary private persons, i.e. consumers, to become tax liable and entitled to deduction of input tax as partners of *enkla bolag* and *partrederier*, since the concept partner is defined by a civil law, i.e. the Companies Act 1980 and the Sea Act 1994,[87] not demanding that they themselves are entrepreneurs.[88] I made those conclusions by the use of the traditional Swedish law dogmatic method.[89] That was necessary, since the described discrepancies between the Value Added Tax Act 1994 and the VAT Directive (2006/112) weren't apparent. Although, when thereby revealed the discrepancies are in my opinion also of interest as examples of communication distortions in the sociology of taxation meaning of this book,[90] namely as examples of erroneous implementation of EU law by the national legislator. This reform opportunity concerning the Value Added Tax Act 1994 has also been missed by the legislator. In the same context, I also concluded there's a need for the legislator to ask for clarification by the EU on the issue whether the concept taxable person may apply also to non legal entities such as *enkla bolag* and *partrederier*.[91]

Thus, by the example in this section I point out that the legislator's interference with issues already judged in the case law is likely to lead to a conflict with the intended current law and missed reform opportunities. A more holistic approach by the legislator concerning the mentioned need of reforming the Value Added Tax Act 1994 would benefit legal certainty for the individual entrepreneur, which in its turn in that field typically also would promote the objective of an efficient tax collection, including tax control, since the entrepreneur in principle is considered functioning as the state's tax collector concerning VAT.[92]

3.2.2 Unbalances between the entrepreneur and the state due to the procedural influence of the tax authority's writs and handbooks

The impact of the tax authority's writs and handbooks on the taxation and court procedures is also of interest, where the risk of unbalances thereby between the entrepreneur and the state is concerned. I give the following examples on this phenomenon.

[87] See Ch. 1 sec. 3 CA 1980 and Ch. 5 sec. 1 para. 1 sen. 1 SA 1994.
[88] See Forssén 2013, pp. 15, 128, 153, 154, 155, 211 and 212.
[89] See sec. 1.3.
[90] See sec:s 1.2 and 1.3.
[91] See Forssén 2013, pp. 209 and 222 and PAPER, p. 47.
[92] See sec. 1.3.

1. I've mentioned that the tax authority is issuing various writs on different tax problems.[93] Such writs are as also mentioned only binding for the civil servants, if they aren't in conflict with the tax rule at hand.[94] However, in other cases the HFD typically follows the tax authority's writs. For instance, it's been stated that, unless the HFD is quite sure of wanting another solution and it's weighing for or against fifty-fifty, what the tax authority establish by its directions and general advice will also be accepted as practice.[95] Thereby lower instances of the administrative courts are prompted to use the tax authority's writs and their interpretation of the tax rule at hand is influenced by these writs. Concerning problems that may arise in this respect I make the following short remarks:

- In Påhlsson 1995 problems are mentioned inter alia with a rule in the Value Added Tax Act 1994 prohibiting the right of deduction of input tax by reference to the Income Tax Act 1999, which concerns expenses for the purpose of entertainment and similar.[96] The writ issued by the tax authority could be interpreted as the price frame set by the tax authority as a limit not possible to exceed.[97] This would be in conflict already with the non binding status of the writs.[98]

- I've also criticized this phenomenon.[99] I deem that e.g. the writ's use of the concept social life might be to blunt to make the delimitation of what's not deductible input tax on expenses for entertainment and similar. Foremost this may be the case with respect of article 176 of the VAT Directive (2006/112), whereof follows that the prohibition of the right of deduction firstly concerns expenditure which is not strictly business expenditure. Everyone might not understand to appeal a decision in lower instances of the administrative courts and all appeals don't – as mentioned[100] – reach the HFD and thereby the possibility to get uncertainties in current law straightened out by preliminary rulings from the CJEU.[101]

[93] See sec. 2.2.
[94] See sec. 2.2.
[95] See Påhlsson 1995, pp. 118 and 119; and also Forssén 2007, p. 154.
[96] See Påhlsson 1995, p. 263.
[97] See Påhlsson 1995, pp. 263 and 264.
[98] See Påhlsson 1995, p. 264.
[99] See Forssén 1998 (2), pp. 848-854; Forssén 2000 (1), pp. 34-41; and Forssén 2007, pp. 241 and 242.
[100] See sec. 2.2.
[101] See Forssén 2007, p. 243.

- By the way, Påhlsson 1995 concerned the tax authority's writs, but regarding current law by the end of 1994.[102] Sweden made its accession to the EU on the 1st of January 1995.[103] This seems to be the reason why Påhlsson 1995 didn't concern the specific problem with the VAT rule in question referring to the non harmonized income tax law. Therefore, I consider that it is high time for someone to make a new research effort concerning the influences that the tax authority's various writs have on current law. Is it e.g. in compliance with the EU law on VAT?

2. A research effort as recently mentioned could also concern the application of the rules on tax surcharge – i.e. administrative fees of a penal character – and the influence thereby of the tax authority's yearly handbook on VAT.[104] I give the following example of problems in this respect here:

- For instance are in my opinion at least the lower instances of the administrative courts influenced by that handbook when judging if supplies by building contractors are made and should be taxed or if they aren't supplied yet. The building contractor is liable to withdrawal taxation of VAT – i.e. VAT liable already before issuing an invoice – for each step of the project ready to use by the customer. The tax authority suggests in its handbook that withdrawal taxation should be based on the building contractor's project accounting or in lack of such or other documentation on what's considered reasonable.

- To my experience it's often a matter of the tax authority looking for some document to make a simple pinpointing of an accounting period in which VAT should be accounted for and paid. The problem then is that the tax authority looks away from the economical agreement between the building contractor and the customer and whether it can be construed so that taxation might occur in the accounting period in question. That's in my opinion in conflict with the preparatory work from the late 1970's about the VAT rule in question, since it states there should be a distinction for the purpose of establishing when taxation is due between work that's been delivered and work for which taxation may rest until the final economical settlement between the contractor and the customer.[105] The problem is that the lower instances of the administrative courts don't regard the

[102] See Påhlsson 1995, p. 6.
[103] See LSEUA 1994.
[104] See TAHVAT 2013 Part 1 and Part 2.
[105] See Prop. 1978/79:141, pp. 48 and 49.

latter, but follow instead the tax authority's handbook. That's probably why there has not been any case tried by the HFD on the matter. I make this assumption inter alia because of the following. The legislator stated in the 1970's that it was important that the tax authority would issue recommendations on the accounting of VAT concerning building projects rather than having detailed tax rules concerning the taxation of steps of the project.[106] Such writs were issued by the tax authority,[107] but they were called back by the tax authority by the end of May 2001.[108] Thus, leaving e.g. courts to use the preparatory work from the late 1970's or the tax authority's yearly handbook for the purpose of interpretation, where the latter probably would be considered more contemporary than the previous.

- I deem there's at least a risk for so called circular evidence, where the tax authority in a case at hand refers to its own handbook and claims that the time of withdrawal taxation should be based on e.g. a building meeting document rather than the final economical settlement, if lower instances of court follow the tax authority's handbook too. As a resulting effect there's often also a tax surcharge levied due to erroneous information in the tax return consisting of the tax being allocated to the wrong accounting period. Again, since all appeals don't reach the HFD, I suggest a research effort to investigate legal uncertainties in this respect and e.g. how many entrepreneurs that's gone bankruptcy e.g. over a five year period and where the only issue was such a matter of tax surcharge.

Thus, by the examples in this section I point out that the impact that the use of the tax authority's writs has on administrative courts interpreting the tax rule at hand presents a risk of procedural unbalances between the entrepreneur and the state represented by the tax authority, to the disadvantage of the entrepreneur. That works against the interest of the individual entrepreneur fulfilling the function of the state's tax collector concerning VAT,[109] and will typically work against the objective of an efficient tax collection, including tax control.[110]

[106] See Prop. 1978/79:141, p. 67.
[107] See RSV Im 1981*:3* and RSV Im 1984:2.
[108] See RSV 2001:18.
[109] See sec. 1.3.
[110] See sec:s 1.3 and 3.2.1.2.

3.3 WHETHER A BALANCE EXISTS IN THE TAXATION AND COURT PROCEDURE BETWEEN THE ENTREPRENEUR AND THE STATE

3.3.1 The parties' misconceptions about circumstances in the case at hand

As mentioned the tax authority should make more thorough control for VAT registration purposes and execute such control in the field, not just from the office desk.[111] Thereby should more likely misconceptions be avoided between the individual entrepreneur filing a registration form and tax authority performing control. If the civil servant handling the form for VAT registration only look into the language used in it the interpretation of the entrepreneur's intended activity may be too limited. That might lead to misconceptions of the circumstances in the case at hand and to unnecessary court procedures. To my experience the following could in practice be an example of the phenomenon:

- When reading the registration form filed by the entrepreneur the civil servant at the tax authority can be caught by some word or words therein or in an answer from the entrepreneur after questions being made to him or her by the tax authority. For example the entrepreneur intends to lease out a business and use in the form rent about the consideration for the leasing. Rent could be perceived as more useful to describe letting out of premises. If the entrepreneur had used the word fee instead, it would better indicate that the supplies intended concern leasing out a business. Thereby may the tax authority's conclusion be altered from e.g. letting out of business premises to the activity really intended, i.e. the leasing out a business. That would change the picture from the entrepreneur assumed to supply a service exempted from value added taxation (letting out of business premises), with just a possibility under certain conditions to voluntary register for tax liability to VAT, to the entrepreneur being considered supplying a service taxable according to the mandatory rules of the Value Added Tax Act 1994 (leasing out of a business).[112] Furthermore, in connection with the investigation can also a copy of a contract have been obtained that wrongly gives the impression of letting out of business premises, just because the entrepreneur has used a standard form bought in a bookstore and labeled Lease contract. The tax authority may refuse the entrepreneur input tax

[111] See sec. 2.3, item 1.
[112] See Ch. 3 sec. 1 para. 1 VATA 1994 compared with Ch. 3 sec. 3 para. 2-4 and Ch. 9 sec. 1 VATA 1994 (amended by SFS 2013:954),

> deduction arguing that he or she wrongly has registered under the voluntary tax liability scheme. That may cause a tax case to go on for a long time, before it's clarified that the activity is really about the leasing out of a business and that the person in question has a right of deduction of input tax under the mandatory rules of the Value Added Tax Act 1994.[113]

The example above shows that the risk of misconceptions of the circumstances in the case at hand increase, if the investigator relies on the wording of e.g. a registration form and concepts used therein rather than doing a real control of what's actually the activity at hand. Such a control should in cases open for interpretation be made by the civil servant in the field, not just from the office desk. By seeking the underlying verbs to a concept used by the entrepreneur the civil servant is more likely to deem the activity properly, and that's typically a matter of e.g. actually visiting the premises in the example above. Thereby unnecessary court procedures can be avoided. Furthermore it's also a matter of avoiding suspicions by the court of reconstruction after the event, if the activity intended is investigated thoroughly from the beginning rather than the lawyer having to indicate and point out later on in a court procedure that the entrepreneur and the tax authority has misconstrued each other. In my opinion there are far too many court procedures where the individual's rights are set aside because of misconceptions about the circumstances at hand not becoming subject of judgment at all or being so too late. Thereby, there's an obvious risk of harming the individual entrepreneur's trust in the procedural system which works against the interest of the individual entrepreneur fulfilling the function of the state's tax collector concerning VAT.[114] Thus, risking too the objective of an efficient tax collection, including tax control.[115]

I suggest a research effort to investigate legal uncertainties about the phenomenon described in this section. The topic could e.g. be how many administrative court procedures over a five year period at a couple of randomly selected first instance administrative courts could have been avoided, if distortions due to the way of investigation could have been avoided so that a registration form or tax return would have been judged more closely to the activities intended or at hand. The rule of thumb should in my opinion be that the civil servant doesn't try to use a concept, label or some kind of noun before knowing more about the relevant verbs. Taxation is usually about activities and by the example from practice I try to show that a reality check would be preferable

[113] See Forssén 2007, pp. 158 and 159.
[114] See sec. 1.3.
[115] See sec:s 1.3, 3.2.1.2 and 3.2.2.

rather than just going on the wordings of documents to avoid legal uncertainty about the individual entrepreneur's actual or intended activities. Distortions in the procedure of taxation could in my opinion occur due to the mere fact that a decision on taxation is legal merely by containing reasons at all – without any reference to whether those reasons are materially relevant or in compliance with current law.[116] Thereby there's no request for the internal audit at the tax authority to investigate more than the formal legality of decisions on taxation. Consequently, the civil servant's handling of the subject matter in the registration form filed or in tax return at hand is not likely to become analysed by the internal auditors. Therefore, the research effort suggested should inter alia concern whether the court verdicts chosen reveals matters of poor underpinning reasons for the decision, e.g. because the civil servant by the tax authority has not done a reality check of the documents in the case despite their wordings being open for interpretation about the individual entrepreneur's actual or intended activities.

By the way, in this context I may also mention that I've concluded that the demand meaning that the tax subject shall be a taxable person, leading to the mentioned reform of the Value Added Tax Act 1994 on the 1st of July 2013,[117] also applies to voluntary tax liability for letting out of business premises. There's no support in the facultative articles 12 and 137(1)(d) of the VAT Directive (2006/112) for the formulation of the existing Chapter 9 section 1 of the Value Added Tax Act 1994 opening for also an ordinary private person, i.e. a consumer, being comprised by the possibility for such voluntary tax liability.[118] In my opinion, that's another topic for reformation of the Value Added Tax Act missed by the legislator,[119] which could have been addressed at the reform in 2014 when the demand to apply for voluntary tax liability for letting out of business premises was replaced by the possibility to simply state such a tax liability in the invoice to the subject hiring the premises.[120]

3.3.2 The courts disregarding current law when trying the case at hand

Legal uncertainty in the court procedures could also concern a judge simply disregarding current law when trying the case at hand. I present one example of this from my experience:

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[116] See sec. 20 para. 1 sen. 1 AA 1986.
[117] See sec. 3.2.1.2.
[118] See Forssén 2013, pp. 159, 160, 215 and 216.
[119] See sec. 3.2.1.2.
[120] See Ch. 9 sec. 1 VATA 1994 (amended by SFS 2013:954),

- In a criminal case on tax fraud[121] and book-keeping crime[122] I was public defense counsel for a partner of a company within the building business. The case concerned that company's involvement in a so called tangle with alleged purchase of false invoices. The partner and the other owner of the company were convicted for coarse tax fraud and book-keeping crime by the court of appeal to one year of imprisonment each.[123]

- The company in question was commissioned by ordering companies which in their turn were subcontractors to bigger – by the prosecutor named well-reputed – mandators. The prosecutor made that remark concerning the mandators with reference to the tax authority's website. The company, which itself hired a subcontractor, would however according to the prosecutor not have had to rely on that subcontractor-company's possession of F-tax card issued by the tax authority. However, on a direct question during the proceedings in the court of appeal the prosecutor acknowledged that the company's own book-keeping was exemplary. It was a relevant question, since it wasn't questioned that the work had been carried out and there wasn't any deviation in the company's monthly accounting of withholding tax and employer's contribution (for national social security purposes) compared with the company's yearly statement for control. In that respect nothing indicated that so called black money to workers would have existed and the accounting also matched the payrolls issued of the company to the trade union. That control was missing in the protocol of the preliminary investigation from the prosecutor, despite that it from book-keeping material audited by tax authority's auditor, who was called as witness on the prosecutor's request, followed that it was possible to make.

- Consider that the prosecutor's burden of evidence is on the level beyond reasonable doubt, and that the court of appeal neither for the objective prerequisites nor for the question of intent evaluated the importance of the defense having to do the control work and force the prosecutor by the question stated to cease to make insinuations on explanations after the event. The prosecutor's only argument was that the company and the other more than fifty companies which had hired the subcontractor in question had pulled in the same direction. However, the prosecutor's argument wasn't accepted by the Stockholm district court, which acquitted the two owners of the company in question. The Stockholm district court allowed me to present and comment the tax rules in the case concerning the topic of

[121] See sec. 2 ATF 1971.
[122] See Ch. 11 sec. 5 PC 1962.
[123] See B 5292-01 et al. (20 Dec. 2001).

tax fraud, whereas the court of appeal didn't allow this. Then it's neither surprising that the court of appeal in its verdict hasn't regarded that the tax authority's auditor, who testified on the prosecutor's request, had not made the audit with full regard of current law. In the district court the tax authority's auditor stated as reason for responsibility for withholding tax and employer's contribution and refused right to deduct input tax that the F-tax couldn't be deemed being in force, if the subcontractor didn't have a properly done book-keeping. That's not in compliance with the intentions of the F-tax, which instead is that the mandator shall in principle be able to rely on the subcontractors F-tax card.[124] Questions in this respect weren't allowed to be put to the tax authority's auditor at the court of appeal. Thus, the verdict by the court of appeal was in my opinion based on a procedural error.

- Above all the conviction is dubious when it from the preparatory work to the Act on Tax Fraud 1971, with reference to the preparatory work to the F-tax, follows that a mandator shall be able to rely on information in the invoice from the hired person about F-tax. It's stated there that if an F-tax card is invoked shall it in principle rule.[125] Thus, the F-tax means, contrary to what the tax authority's auditor stated in his testimony, that the mandator shall not have to go behind the F-tax card and control whether the hired person has a properly done book-keeping and is fulfilling his tax accounting. Instead it follows from the preparatory work to the F-tax that as an effective remedy against not fulfilling the obligations shall deregistration from F-tax be made by the tax authority.[126] In the case in question had the tax authority made an F-tax-audit concerning the subcontractor in question, but didn't connect to that measure, despite the subcontractor not fulfilling the tax accounting. Deregistration was made far later at a new investigation. Had the tax authority acted according to the presuppositions for the system with F-tax, would the mandator company instead only have had half of the problems which concerning whether it could rely on the F-tax-information from the subcontractor. This is very conspicuous, since the company in question knowingly was the only one having a properly done book-keeping to show in the so called tangle, where some fifty companies were – according to the prosecutor – supposed to have pulled in the same direction. By the way, the company in question and its two owners were knowingly the only in the whole so called building business tangle that paid all the claims caused by those to the criminal proceedings attached tax proceedings.

[124] See Prop. 1991/92:112, pp. 74, 76 and 85.
[125] See Prop. 1995/96:170, p. 121.
[126] See Prop. 1991/92:112, p. 92.

- Thus, the book-keeping crime has only been able to be imputed by the prosecutor on the two owners of the company in question as a consequence of alleged tax fraud and that has not even been allowed to be mentioned in the court of appeal. To go further to the HD there's a demand of leave to appeal.[127] In B 447-02 (13 May 2002) the HD didn't find any reason to grant leave to appeal. The punishments had already been served by the two representatives of the company in question when the tax case was decided to their and the company's disadvantage.[128] They didn't have the strength after that treatment to even appeal to the HFD the tax cases concerning themselves and their company. Above all, the treatment of them by the procedural system is in my opinion conspicuous, since current tax law was allowed to be a part of the procedure by the Stockholm district court, which acquitted the two owners of the company in question (and nobody else in the so called tangle), but not by the court of appeal.

The phenomenon described with an entrepreneur being convicted by today's legal system for book-keeping crime, despite a properly done book-keeping being an undisputed fact in the proceedings, but the verdict being built on the court of appeal setting aside current tax law under the proceedings, should be a suitable subject for a research effort on the topic of sociology of taxation. It's yet another example of a procedural unbalance to the disadvantage of the individual entrepreneur working against the interest of the entrepreneur e.g. fulfilling the function of the state's tax collector concerning VAT, which undoubtedly is counterproductive for the objective of an efficient tax collection, including tax control.[129] In my opinion the value as a whole for the entrepreneur of having the ambition to have a properly done book-keeping should thereby be given a proper sociology of taxation analysis, i.e. an analysis of what procedural value it has and should have for the entrepreneur.[130] The enterprise tax rules, e.g. concerning F-tax, should – as mentioned[131] – in principle use the same vocabulary as in recommendations from the SASB. That would decrease the risk of distortions of the information and communication of tax rules and increase an effective review of the application of the tax rules. The case mentioned in this section is in my opinion an illuminative example of the advantage for legal certainty of a common perspective of checks and balances concerning the application of the rules on book-keeping and

[127] See Ch. 54 sec. 9 CJP 1942.
[128] See the Stockholm administrative court of appeal's 4886-4890-03 and 778-04 (24 Aug. 2004).
[129] See sec. 3.3.1 and also sec:s 1.3, 3.2.1.2 and 3.2.2.
[130] See Forssén 2007, pp. 271-274.
[131] See sec. 2.4.

taxes. If the court of appeal had been urged to undertake that by a common primary and secondary norm perspective on the rules on book-keeping and F-tax, the anomaly of a verdict on book-keeping crime, despite an undisputed properly done book-keeping, would in my opinion most likely not have been possible.

4. SUMMARY AND CONCLUDING VIEWPOINTS

4.1 SUMMARY

Introduction

The topic of this book concerns a certain angle of fiscal sociology or, as it's also called, the sociology of taxation, namely regarding the making of tax laws. Thereby I don't aim to go into aspects of economics on fiscal sociology, i.e. the broader sense of the subject. I restrict the topic of this book to the sociology of taxation aspects of how the tool taxation functions for the purpose of conveying via a tax rule the Government's intentions of imposing the individual tax liability or acknowledging the individual the right of tax deduction.[132] Therefore it could be considered a subject in its own right, which I would call sociology of tax laws, but it would probably cause confusion. Therefore, instead of introducing a special concept I use in this book the concept sociology of taxation – or fiscal sociology – in the restricted sense mentioned.[133] I focus on the individual entrepreneur's situation within the Swedish tax system and consider thereby also influences on it by the EU law. Thus, the studies concern a number of issues about the communicative functioning of tax rules, with an analysis mainly consisting of presenting and reasoning concerning some examples of problems regarding how the tax rules function for the purpose of communicating the Government's intention by them to the entrepreneur.[134] Therefore, I raise in this part the following questions:

- How does the tax authority's information and communication of a tax rule work?

- What influence does the individual entrepreneur have on the making of tax laws?

- What would ensure the influence of the individual entrepreneur on the making of tax laws?

- Does a balance exist in the making of tax rules and in the taxation and court procedures between the entrepreneur and the state?[135]

[132] See sec. 1.1.
[133] See sec. 1.2.
[134] See sec. 1.3.
[135] See sec. 1.4.

I've analysed those questions mainly with regard of the principles of legality for taxation, neutrality of taxation and an efficient tax collection, including tax control, as my, for this work, chosen law political aims for the Swedish tax system.[136] The result is the following.

How the tax authority's information and communication of a tax rule work

The phenomenon of the legislator stating in the preparatory work to a tax rule that it's presupposed that the tax authority will give proper information for the purpose of application must in my opinion be abandoned altogether. I've come to this conclusion by analysing the HFD's reasoning and motivation in RÅ 2004 ref. 2 (30 Jan. 2004).

The HFD tried a close company rule of the State Income Tax Act 1947 on division of taxation of capital gain from the sale of shares into income of earning and income of capital with regard of an owner of two close companies selling the shares in both the companies. Although stating that various interpretations could be made of the wording of the tax rule, the HFD looked into three sets of preparatory work and made its decision to the owner's disadvantage. The decision was contrary to the general law political aim of neutrality of taxation: The tax reform in the early 1990's was made inter alia under the assumption that neutrality should exist between taxation of income of earning and income of business activity. The HFD's decision meant that the close company rule limiting the income of earning part from the sale of the shares was deemed applicable only to one and the same company, not two. Thereby the situation for the owner of the companies wasn't neutral compared to what would apply to an employee owning stock market shares. The tax authority's information and communication of the tax rule hadn't worked, since the brochures issued by the tax authority about the rule in question underpinned the perception of the principle of neutrality of taxation mentioned ruling concerning the situation at hand.

The HFD's decision can, in my opinion, not be considered compatible with either the principle of neutrality of taxation according to current law or the Swedish Constitution 1974 and its principle of legality for taxation. The case reveals a necessity of keeping writs and other information made by the tax authority at a minimum if they should exist at all. The HFD mustn't be allowed to rely on gaps, by virtue of statements in the preparatory work, supposedly becoming filled out by the tax authority as some kind of second legislator. Instead, the HFD must be forced to fulfil its role of filling gaps of interpretation

[136] See sec. 1.3.

concerning a tax rule. The protection of the legal rights of the individual demands this. Therefore, I've concluded that the tradition with the legislator stating in the preparatory work to a tax rule that it's presupposed that the tax authority will give proper information for the purpose of application must be abandoned.[137]

The entrepreneurs' influence on the making of tax laws

I've answered the question about what influence the individual entrepreneur has on the making of tax laws that it is rather bleak.[138] I've given two examples of the little guy's dilemma in that respect.

- The first one concerned the building sector, where the Government asked the EU for permission to introduce in mid 2007 a special regime in the Value Added Tax Act 1994 of so called reverse charge between building contractors, rather than facing that the auditing activity by the tax authority worked poorly concerning problems with the so called F-tax card for entrepreneurs. The Government stated in the preparatory work to the rules on the special regime that the big players had complained about problems to control more than one link down in a chain of subcontractors. I argue that the legislator, instead of relying on the tax authority moralizing about entrepreneurs within certain sectors being known for tax evasion, should have initiated an investigation leading to a proper reform of the organization of the tax authority with the focus set on where the control resources are most useful, which in my mind would be the registration control.[139]

- The latter is my opinion an example of the entrepreneur with the small enterprise not having the same influence at all on the making of tax laws as the big players. The individual entrepreneur must join a strong pressure group to become influential in that respect. I've also presented an example of the legislator, concerning a rule on wealth tax, explicitly excluding main owners of shares in listed companies from retroactive taxation with regard of the rule. Not relieving also ordinary share holders from retroactive taxation creates in my mind a democratic deficit on a constitutional level. In the context of the topic of this work, I also deem that as something not stimulating the individual to become an entrepreneur. In my opinion the signal from the politicians was: If you don't grow big enough,

[137] See sec. 2.2.
[138] See sec. 2.3.
[139] See sec. 2.3, item 1.

you won't become an individual entrepreneur with a possibility to influence the tax legislation.[140]

Thus, in my opinion, when speaking of a level playing field for the purpose of neutrality of taxation benefitting entrepreneurs and consumers, there's a democratic deficit to the disadvantage of the individual entrepreneur to consider. It's detrimental for the rights of the individual in relation to the tax system and for the economy. An economy with production of goods and services as the basis for public finance by taxation provides free enterprise. The basic presuppositions for the tax system should in my opinion have the individual entrepreneur in focus and not become an obstacle for new ideas to be realized by the individual entrepreneur. Therefore, the influence of the individual entrepreneur on the making of tax laws must be ensured.[141]

How to ensure the influence of the individual entrepreneur on the making of tax laws

To genuinely speak of how to ensure the influence of the individual entrepreneur on the making of tax laws, I consider there's foremost necessary to look at the question from a perspective of the rights of the individual, i.e. from the constitutional perspective. That's led me to give the following suggestions for constitutional changes:

- I argue for the formulation of tax rules being worked out by the professionals, leaving in principle only questions about tax rates to the politicians. If the professionals from various sectors work out the texts of the tax rules one gets, in the primary norm perspective, a more straight forward information and communication of the content of the tax rules to the entrepreneur. I also believe it would benefit the tax authority's control activities, i.e. the secondary norm perspective, too.

- To be able to go through with that suggestion, I also suggest that The Parliament would consist of two chambers instead of today's one. In one chamber there could be a representation of trade unions, employers' organizations and other organizations and public bodies. The second chamber would answer for working out proposals of new tax rules or alteration of existing tax rules with regard of efficiency. Thereby the representatives of the professionals would work out the technicalities and formulate the wordings of the tax rules. The suggested legislation on taxes would be tried by the first chamber. The

[140] See sec. 2.3, item 2.
[141] See sec. 2.3.

> determination of the tax rates would be a privilege of the first chamber, but it would only be allowed to turn away a tax rule suggested by the second chamber and not allowed to work out an alternative rule in a technical sense. That would be the privilege of the second chamber.

The purpose with those suggestions is firstly that good technocracy will be implemented so that the tax system will be built upon a fundament of an efficient charge and collection of taxes. Thereby, I believe the individual entrepreneur as well as the consumer will be increasingly ensured that the tax authority´s work truly guarantees competition neutrality between enterprises and also consumption neutrality with regard of the entrepreneurs' tax situation. I believe the suggestions will also bring out the lobbyists in the open by the first chamber reviewing proposals from the second chamber all the way back to the actual initiator of a particular tax rule.

However, I'm aiming with my suggestions to make the tax system more trustworthy for the individual entrepreneur. Although, an entrepreneur shall not only be able to perceive that the system is as neutral as possible where the making of tax rules are concerned, but also concerning the taxation and court procedures about taxes. Therefore, I've continued with questions on whether there is a balance in the latter senses today between the individual and the state. Thus, by the following questions I show with examples existing unbalances with the making of tax rules and in the taxation and court procedures concerning taxes between the entrepreneur and the state, which will serve as arguments for the above suggested systematic changes.[142]

Whether a balance exists in the making of tax rules between the entrepreneur and the state

One of my examples concerned the legislator in 2009 introducing in the Income Tax Act 1999 a rule on giving a certain rule already covered by the current case law. By interfering with issues already judged in the case law, I argue that it's likely that the legislator cause a conflict with the intended current law and miss reform opportunities. A more holistic approach by the legislator concerning the need of reforming the Value Added Tax Act 1994 regarding the use of the concept tax liable would have benefitted legal certainty for the individual entrepreneur, which in its turn typically also would have promoted the objective of an efficient tax collection, including tax control, since the entrepreneur in principle is considered functioning as the state's tax collector concerning VAT.[143]

[142] See sec. 2.4.
[143] See sec. 3.2.1.2.

I've also given some examples of the tax authority's writs and handbooks having an impact on the taxation and court procedures, which causes a risk of unbalances between the entrepreneur and the state. Thereby I've pointed out that the impact that the use of the tax authority's writs has on administrative courts interpreting the tax rule at hand presents a risk of procedural unbalances between the entrepreneur and the state represented by the tax authority, to the disadvantage of the entrepreneur. This is working against the interest of the individual entrepreneur fulfilling the function of the state's tax collector concerning VAT and typically also against the objective of an efficient tax collection, including tax control.[144]

Whether a balance exists in the taxation and court procedure between the entrepreneur and the state

By giving a not so unusual example from practice, I've shown that the risk of misconceptions of the circumstances in the case at hand increase, if the investigator relies on the wording of e.g. a registration form and concepts used therein rather than doing a real control of what's actually the activity at hand. In cases open for interpretation the civil servant should make such a control in the field, not just from the office desk. By seeking the underlying verbs to a concept used by the entrepreneur it's more likely to deem the activity properly, and unnecessary court procedures can be avoided. If the individual's rights are set aside because of misconceptions about the circumstances at hand not becoming subject of judgment at all or being so too late during the proceedings, there's an obvious risk of harming the individual entrepreneur's trust in the procedural system. That would also work against the interest of the individual entrepreneur fulfilling the function of the state's tax collector concerning VAT and risking too the objective of an efficient tax collection, including tax control.[145]

I've also given an example of legal uncertainty in the court procedures concerning a judge simply disregarding current law when trying a criminal case on tax fraud and book-keeping crime, where I was public defense counsel for a partner of a company within the building business. The entrepreneur was convicted for book-keeping crime despite a properly done book-keeping being an undisputed fact in the proceedings. The verdict was built on the court of appeal setting aside current tax law under the proceedings. It's another example of a procedural unbalance to the disadvantage of the individual entrepreneur working against the interest of the entrepreneur e.g. fulfilling the

[144] See sec. 3.2.2.
[145] See sec. 3.3.1.

function of the state's tax collector concerning VAT. That's undoubtedly counterproductive for the objective of an efficient tax collection, including tax control.[146]

4.2 CONCLUDING VIEWPOINTS

In the latter section I've summarized a number of reasons for moving the subject of sociology of taxation on to the making of tax laws. If not being considered a subject in its own right, I hope that I've come up with something new that fits well within existing research in the field in the broader sense.[147]

However, it's of the essence to note that the topic brought up by me doesn't concern the sociology of taxation in the broader sense meaning the use of taxation as a tool of public finance. It's all about sociology of taxation restricted to aspects of how this tool function for the purpose of conveying via a tax rule the Government's intentions of imposing the individual tax liability or granting the individual the right of tax deduction. Thereby I don't mean to disregard the sociology of taxation in the broader sense mentioned. A resulting question from my work is e.g. whether the economists at the Treasury should be allowed at all to make tax tables without a foregoing analysis of what it's worth for the entrepreneurs in terms of avoiding insecurity regarding the rights of the individual if they make the effort of having a book-keeping in order.[148]

In other words I believe it's necessary to carry on the sociology of taxation research efforts bearing in mind the necessity of at least considering issues and problems concerning the making of tax laws. I hope that I've shown with this work that this is necessary to be able to make a sociology approach to taxation more complete.[149] The restricted aspects mentioned shall neither be thought of as presenting a narrow approach as desirable per se. On the contrary: I've made some delimitations concerning this work, but, for continued efforts of research on sociology of taxation restricted to the aspects mentioned on the making of tax laws, there are of course all reason to leave those delimitations and consider also disciplines such as linguistics and pedagogy and to make comparative studies etc.[150]

The result of my trial of the Swedish tax system with regard of the chosen law political aims for it, i.e. the principles of legality for taxation, neutrality of taxation and an efficient tax collection, including

[146] See sec. 3.3.2.
[147] See sec. 1.1.
[148] See sec:s 3.3.2 and 4.1.
[149] See sec. 1.1.
[150] See sec:s 1.2 and 1.3. Concerning especially linguistics and pedagogy, see Part D.

tax control, is that the system contains serious flaws.[151] Thus, this book should be considered input for e.g. researchers or politicians to work on prudent adjustments of the Swedish tax system or to start on a new footing by revising it altogether.[152]

[151] See sec. 4.1.
[152] See sec. 1.4.

Part B

Tax liable contra taxable person: A Sociological Study of Swedish Communication Distortions of the EU's VAT Directive

1. BACKGROUND, TERMINOLOGY, DELIMITATIONS, METHODOLOGY, PRINCIPLES AND OUTLINE

1.1 BACKGROUND

The Swedish Value Added Tax (VAT) Act, *mervärdesskattelagen (1994:200)* [the Value Added Tax Act 1994], is, since Sweden's accession to the European Union (EU) in 1995, supposed to be harmonised with the VAT acts of the other Member States and the EU's VAT Directive (2006/112/EC) accordingly implemented by it, since the intended result with the VAT Directive (2006/112) is binding for the Member States and they are obliged to harmonise their VAT acts.[153] Concerning the non-harmonised tax law the competence mainly remains by the Swedish Parliament, where the legislator's intentions – i.e. motives – are normally to be found in the preparatory work to a tax rule, i.e. mainly in the Government bill of the rule.[154] However, concerning VAT law the competence is, in accordance with the Swedish Constitution 1974, conferred in general to the institutions of the European Union (EU).[155] This doesn't mean that the EU has a right of taxation of its own. The EU Commission has suggested the introduction of some kind of an EU tax,[156] but this doesn't seem to be expected within the near future. Until then the tax sovereignty concerning e.g. VAT remains by Sweden and the other Member States. Instead the EU law affects the VAT law in the Member States by the competence conferred to the EU institutions. Thus, the intentions of a Swedish tax rule are primarily expressed by the EU law, e.g. where a rule in the Value Added Tax Act 1994 is concerned. The EU law doesn't use preparatory work, why motives for such a rule instead are to be found in the paragraphs in the preamble to the VAT Directive (2006/112), i.e. in the so called recitals.[157]

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[153] See art. 288 para. 3 and art. 113 TFEU. See also Prechal 2005, pp. 180 and 317; Stensgaard 2004, p. 25; Hiort af Ornäs & Kristoffersson 2012, p. 21; and Forssén 2015 (1), sec:s 1.1.3 and 1.2.2.

[154] There are only a few EU directives on income tax: the Merger Directive (2009/133/EC), the Parent-Subsidiary Directive (2011/96/EU), the Directive on Taxation of Savings Income in the Form of Interest Payments (2003/48/EC) and the Interest and Royalties Directive (2003/49/EC). In e.g. these cases national laws shall be issued by approximation of the Member States, according to art. 115 TFEU.

[155] See Ch. 10 sec. 6 SC 1974 and art:s 4(1) and 5(2) of the Treaty on EU.

[156] See the weekly letter from the EU representation in Brussels no. 30, 2004. See also Forssén 2011, pp. 269 and 328; and Forssén 2015 (1), sec. 1.2.3.

[157] See e.g. para:s 3 and 19 in *ADV Allround* (C-218/10) and para:s 3 and 27 in *BLM* (C-436/10).

In Part A, I mentioned that the legislator hasn't made necessary adjustments of the Value Added Tax Act 1994 to make that act complying in certain respects with the use of the concept taxable person in the VAT Directive (2006/112).[158] Although the concept *beskattningsbar person* – i.e. taxable person – was introduced into the Value Added Tax Act 1994 on the 1st of July 2013 by SFS 2013:368 – replacing the earlier *yrkesmässig verksamhet* – and the previous connection to the non-harmonised income tax law for the purpose of determining the tax subject was correctly abolished thereby, I mentioned that I've argued in my licentiate's dissertation of 2011 and in my doctor's thesis of 2013 respectively[159] also for the following: A more holistic reform with regard of the use of the concept *skattskyldig* – i.e. tax liable – in the Value Added Tax Act 1994, concerning e.g. the determination of the right of deduction of input tax, and a review of the use of the concept tax liable concerning the so called representative rule on tax liability in *enkla bolag* (approximately translated joint ventures)[160] and *partrederier* (shipping partnerships) in the Value Added Tax Act 1994, referring also to the Code of Taxation Procedure 2011 [*skatteförfarandelagen (2011:1244)*].[161] By using the traditional Swedish law dogmatic method (*rättsdogmatisk metod*), which means studies of legal rules by using various legal sources for the purpose of judging their current law meaning,[162] I've concluded in my theses certain examples of differences with regard of the intended result of the VAT Directive (2006/112) due to the use of the concept tax liable in the Value Added Tax Act 1994 instead of taxable person, where I also made a directive conform – EU conform – interpretation[163] inter alia of the rules in the act using the concepts tax liability and tax liable regarding the right of deduction and *enkla bolag* and *partrederier*.[164]

In accordance with *Costa* (Case 6-64) the principle of the EU law's supremacy over national law is considered as fundamental for the realization of the EU law in the Member States.[165] The principle of supremacy would have been codified as a constitutional principle, if the Draft Constitutional Treaty of 2004 would have been ratified of all Member States, which would have made the EU law, in case of conflict,

[158] See Part A, sec. 3.2.1.2.
[159] See Forssén 2011 and Forssén 2013.
[160] See Forssén 2015 (1), sec. 1.1.1.
[161] See Ch. 6 sec. 2 VATA 1994 and Ch. 5 sec. 2 CTP 2011.
[162] See Barenfeld 2005, p. 15; Gunnarsson & Svensson 2009, pp. 92 and 93; Hellner 2001, p. 23; Peczenik 1995, p. 312; Sandgren 2009, p. 118; and Forssén 2015 (1), sec. 1.2.1.
[163] See Forssén 2015 (1), sec. 1.2.3.
[164] See Ch. 8 sec. 3 para. 1 and Ch. 6 sec. 2 sen. 1 VATA 1994
[165] See Ståhl 1996, p. 66; Prechal 2005, p. 94; Nergelius 2009, p. 58; Sonnerby 2010, p. 60; and Forssén 2015 (1), sec. 1.2.3.

superior to the constitutions of the Member States.[166] Instead the reform treaty, i.e. the Lisbon Treaty, came into force on the 1st of December 2009 and was then introduced in Swedish law by SFS 2009:1110.[167] The conflict which is the main thread in this Part B, i.e. the use in certain situations of the concept tax liable in the Value Added Tax Act 1994 when taxable person is used in the VAT Directive (2006/112), was concluded, as above mentioned, by directive conform interpretation of the act. That would also have been used by the national courts, if the issues had been put before them, since there's an obligation for the Member States' courts to conduct a directive conform – EU conform – interpretation as far as it's possible to interpret the national law in accordance with the directive's wording and purpose so that the intended result of the directive is achieved.[168] In this Part B, I comment the concluded differences between the Value Added Tax Act 1994 and the VAT Directive (2006/112) as communication distortions in the sociology of taxation meaning,[169] namely in the first place as examples of erroneous implementation in the two chosen instances in the Value Added Tax Act 1994 of the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112).[170] Although the issues in this Part B are from a Swedish horizon, the focus on them as examples of communication distortions with regard of conveying the intentions of EU law concerning VAT should be of an international comparative interest.

1.2 TERMINOLOGY

The subject in this Part B lies, like in Part A, within the field of fiscal sociology, which is also named the sociology of taxation. Once again the topic concerns sociology aspects regarding the making of tax laws in the meaning of how to make a tax rule communicate effectively between the legislator and the individual. This time I'm focusing on a couple of examples of conveying via a rule in the Value Added Tax 1994 the meaning of a rule in the VAT Directive (2006/112). Thereby I use in this Part B the expression communication distortions for the analysis in a sociology of taxation meaning of the differences between the Value Added Tax Act 1994 and the VAT Directive (2006/112) concluded in my theses regarding two of the cases of the use of the concept tax liable instead of the directive's taxable person, namely regarding the main rule on the right of deduction in Chapter 8 section 3

[166] See Nergelius 2009, p. 58.
[167] See also Forssén 2015 (1), sec. 1.5.
[168] See *von Colson & Kamann* (14/83) and para. 8 in *Marleasing* (C-106/89) and Forssén 2015 (1), sec. 1.2.3.
[169] See Part A, sec:s 1.2 and 1.3.
[170] See Part A, sec. 3.2.1.2.

first paragraph and the representative rule in Chapter 6 section 2 of the Value Added Tax Act 1994.[171]

As I stated in Part A, the subject could be deemed a subject in its own right, which I would name sociology of tax laws.[172] However, to avoid confusion with the concept sociology of taxation I still won't introduce such a special concept. Therefore I use also in this Part B the concept sociology of taxation – or fiscal sociology – restricted to the meaning tax rules as tools for transmitting the intended taxation by a tax rule, now with the focus recently mentioned. By taxable person I mean such a person in the sense of the main rule on who's a taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112) and by tax liable I mean such a person making taxable transactions according to that directive, if not otherwise stated. With the expression an ordinary private person I mean a person who's not a taxable person according to that main rule, i.e. a consumer.

1.3 DELIMITATIONS, METHODOLOGY AND PRINCIPLES

As mentioned,[173] I've inter alia concluded in my theses of 2011 and 2013 that the Value Added Tax Act 1994 doesn't comply with the VAT Directive (2006/112) when using the concept tax liable instead of taxable person: That's the case e.g. when tax liable is used in the Value Added Tax Act 1994 for the purpose of determining the right of deduction of input tax and concerning the so called representative rule on tax liability in *enkla bolag* and *partrederier*.[174] In this Part B, I make a review, from the restricted sociology of taxation perspective described in the previous section,[175] of the concept tax liable by delimiting the subject to concern those two examples.

My method to make the sociology of taxation analysis of the issues in this Part B consists of first describing the concluded differences between the Value Added Tax Act 1994 and the VAT Directive (2006/112) concerning the two chosen examples from my theses. Thereafter I comment those differences from the sociology of taxation perspective as communication distortions, with regard of conveying the meaning of rules in the VAT Directive (2006/112), by raising e.g. the following questions:

- What does it mean if an entrepreneur can't rely on the main rule on the right of deduction in the Value Added Tax Act 1994, i.e.

[171] See sec. 1.1.
[172] See Part A, sec. 1.2.
[173] See sec. 1.1.
[174] See sec. 1.1.
[175] See sec. 1.2.

Chapter 8 section 3 first paragraph, complying with the corresponding main rule in the VAT Directive (2006/112), i.e. article 168(a), due to the use of tax liability in the rule mentioned in the Value Added Tax Act 1994?[176]

- Should the risk of communication distortions concerning the use of the concept tax liable in the representative rule in Chapter 6 section 2 of the Value Added Tax Act 1994 lead to suggestions for altering the main rule on taxable person in the VAT Directive (2006/112)?

Along with the first question I also deem whether the non-directive conform rule on the right of deduction works against the EU's ambition for the future meaning that the tax authorities should increase their activities concerning collection of VAT. Concerning the second question I suggest tools to handle problems regarding the use of the concept tax liable in the representative rule, if the EU won't alter the main rule on taxable person in the VAT Directive (2006/112).

In Part A I mentioned that the sociology of taxation in the present meaning borders e.g. the disciplines linguistics and pedagogy.[177] In this Part B, I'm completing my method to make the sociology of taxation analysis of the issues by suggesting, as recently mentioned, tools to especially handle problems regarding the use of the concept tax liable in the representative rule. Thereby I'm influenced by pedagogy and so called problem-based learning (PBL)[178] from that discipline. PBL and a holistic view rather than an atomistic approach work very well to analyse complex problems concerning tax laws, i.e. to make deep analyses in that respect. In my doctor's thesis I used various figures to make the law dogmatic analysis regarding e.g. the differences mentioned between the Value Added Tax Act 1994 and the VAT Directive (2006/112). Already in that context I named them models, i.e. tools, to be used for a purely pedagogy purpose.[179] In this Part B, I use some of those figures as tools to make the sociology of taxation analyses of the two chosen examples of the differences mentioned from

[176] The choice of this instance of difference between the VATA 1994 and the VAT Directive (2006/112) for the purpose of the sociology of taxation review in this book is in my opinion apparent, since it concerns the main rule on the right of deduction and the criticism raised also by the EU Commission in that respect should remain even after the reform of the VATA 1994 by SFS 2013:368 – see 2008/2002 K(2008) 2794 and Forssén 2015 (1), PAPER sec:s 2.4 and Ch. 4.
[177] See Part A, sec:s 1.2 and 4.2 and, especially about linguistics and pedagogy, Part D.
[178] See Ramsden 2003, p. 141; Stigmar & Lundberg 2009, p. 248; and Schyberg 2009, p. 52. See also Sandgren 2009, pp. 64-66; Gunnarsson & Svensson 2009, p. 94; and Brusling & Strömqvist 2007, p. 8.
[179] See Forssén 2015 (1), sec. 1.2.1.

my theses, now as communication distortions in the mentioned meaning.

For the sociology of taxation aspects in this work I consider first and foremost the following principles concerning the EU law on VAT as law political aims for the purpose of making the Value Added Tax Act 1994 effective with regard of conveying the meaning of the rules in the VAT Directive (2006/112):

- The principle of neutrality is important for the purpose of harmonisation of the Member States' VAT acts. Harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.[180] To harmonise indirect taxes – e.g. the VAT – there's a demand of a level playing field on the internal market so that the consumers won't choose between suppliers of goods and services due to differences between them concerning the VAT.[181] Thus, competition shall not be distorted due to the VAT. According to the CJEU the principle of neutrality is a fundamental principle for the VAT.[182]

- The principle of an efficient tax collection is also important. A poor communication functioning of tax rules will lead to poor efficiency with regard of tax collection. It's important both for the state and the entrepreneur that the tax collection by the tax authority is efficient. You cannot create the level playing field previously mentioned, if competition will be distorted due to tax collection not functioning efficiently. According to the EU Commission the EU has an ambition for the future meaning that the tax authorities should increase their activities concerning collection of VAT.[183]

In my doctor's thesis I chose and included in the law dogmatic method certain law political aims for the Swedish VAT system. They were firstly based on the EU law in the field of VAT, thus regarding both primary EU law and secondary EU law, i.e. regarding the TFEU and the

[180] See art. 113 TFEU and VAT Directive (2006/112), para 4 (and also para:s 5 and 7), in the preamble. See also Terra & Kajus 2012, p. 6; Forssén 2015 (1), sec. 1.1.3; and Forssén 2011, p. 46.
[181] See Terra & Kajus 2012, p. 6; Forssén 2015 (1), sec. 2.2; and Forssén 2011, p. 46.
[182] Se para. 59 in Schmeink, Cofreth & Strobel (C-454/98) and para. 25 in Ampliscientifica & Amplifin (C-162/07). See also Bjerregaard Eskildsen 2012, p. 42 and Forssén 2015 (1), sec. 2.4.1.1.
[183] See COM(2010) 695 final, concerning the future for the common VAT system within the EU, and the following up in COM(2011) 851 final. See also Šemeta 2011, p. 3; Forssén 2015 (1), sec. 2.2; and Forssén 2011, pp. 80 and 223.

VAT Directive (2006/112).[184] The law political aims thus recognized and chosen were: a cohesive VAT system, neutrality, EU conformity, an effective tax collection and legal certainty, including legality.[185] For the sociology of taxation aspects in this work I firstly consider, as mentioned, the principles of a neutral VAT and an efficient collection of VAT. The neutrality point of view is decisive for the establishment and the functioning of the internal market, according to primary EU law.[186] Therefore it's of interest in this work how the neutrality principle is expressed by the secondary EU law, i.e. by the VAT Directive (2006/112), and how if there are communication distortions concerning the Value Added Tax Act 1994 conveying the principle of a neutral VAT. In that context there's also the efficiency of tax collection to consider. If those two principles don't work there'll be consequences for the other law political mentioned: The Swedish VAT system won't be directive conform – EU conform – if the rules in the Value Added Tax Act 1994 aren't conveying the principle of neutrality, which is, as mentioned, a fundamental principle for the VAT. Another consequence thereof will be the Value Added Tax Act 1994 lacking with respect of the principle of harmonisation, which works against a cohesive VAT system. Thus, I consider mainly the principles of neutrality and an efficient tax collection when reviewing the fiscal sociology aspects in this work. In terms of consequences of communication distortions thereby, I regard in the first place legal certainty and make suggestions for alterations with regard of avoiding conflict with the legal rights of the individual and their demand on foreseeable decisions concerning the material rule of taxation at hand.

1.4 OUTLINE

As mentioned in the previous section I continue in the next chapter by describing the two chosen examples of concluded differences between the Value Added Tax Act 1994 and the VAT Directive (2006/112) concerning the right of deduction of input tax and concerning the so called representative rule on tax liability in *enkla bolag* and *partrederier*.[187]

In the chapter thereafter I comment those differences from the sociology of taxation perspective as communication distortions, with regard of the Value Added Tax Act 1994 conveying the meaning of rules in the VAT Directive (2006/112).[188] Thereby I raise a number of questions, e.g.

[184] See Forssén 2015 (1), sec. 1.2.1.
[185] See Forssén 2015 (1), sec. 1.2.1.
[186] See art. 113 TFEU.
[187] See Ch. 2.
[188] See Ch. 3.

those mentioned in the previous section.[189] Concerning problems regarding the use of the concept tax liable in the representative rule I suggest tools to handle them, if the EU won't alter the main rule on taxable person in the VAT Directive (2006/112).

I end this Part B with a chapter containing summary and concluding viewpoints.[190]

[189] See sec. 1.3.
[190] See Ch. 4.

2. TWO EXAMPLES OF DIFFERENCES BETWEEN THE VALUE ADDED TAX ACT 1994 AND THE VAT DIRECTIVE (2006/112)

2.1 INTRODUCTION

In my theses of 2011 and 2013 I concluded that the Value Added Tax Act 1994 doesn't comply with the VAT Directive (2006/112) with regard of a number of instances, due to the use in that act of the concept tax liable instead of the directives concept taxable person. A reform of the Valued Added Tax Act 1994 on the 1st of July 2013 by SFS 2013:368 meant a certain improvement of the act's compliance with the directive: The implementation of *beskattningsbar person* – i.e. taxable person – instead of an integration of the Income Tax Act 1999's, *inkomstskattelagen (1999:1229)*, concept *näringsverksamhet* – i.e. business activity – into the Value Added Tax Act 1994 means that legal persons no longer already as such are deemed tax subjects with regard of value added tax law.[191] However, that reform didn't resolve the differences I've concluded between the Value Added Tax Act 1994 and VAT Directive (2006/112) e.g. concerning the determination of the right of deduction of input tax and concerning the so called representative rule on tax liability in *enkla bolag* and *partrederier*. In this chapter I describe those two examples of differences chosen for this Part B with regard of the principle of a neutral VAT for the entrepreneurs and with regard of the principle of an efficient tax collection for the state and the entrepreneurs.

In the next chapter I comment those differences from the sociology of taxation perspective as communication distortions, with regard of conveying the meaning of rules in the VAT Directive (2006/112):

- Concerning the use of the concept of tax liability in the main rule on the right of deduction in the Value Added Tax Act 1994 I raise the question what it means if an entrepreneur can't rely on that main rule being applied in accordance with article 168(a) of the VAT Directive (2006/112). Thereby I also deem whether the non-directive conform rule works against the EU's ambition for the future meaning that the tax authorities should increase their activities concerning collection of VAT.

- Concerning the use of the concept tax liable regarding partners in *enkla bolag* or *partrederier* in the representative rule in the

[191] See sec. 1.1.

Value Added Tax Act 1994 I suggest tools to handle problems in that respect, if the EU won't alter the main rule on taxable person in the VAT Directive (2006/112).[192]

2.2 THE MAIN RULE ON THE RIGHT OF DEDUCTION IN THE VALUE ADDED TAX ACT 1994 DOESN'T COMPLY WITH THE CORRESPONDING RULE IN THE VAT DIRECTIVE (2006/112)

The mentioned reform of the 1st of July 2013 resolved the main problem raised by me in my licentiate's dissertation two years earlier, namely making the general determination of the tax subject in the Value Added Tax Act 1994 complying with the main rule on who's a taxable person in article 9(1) first paragraph of the VAT Directive (2006/112). However, I also raised two side issues concerning the use in that act of the concept tax liable to determine the right of deduction and to determine who's liable to register to VAT and named them side issue D and side issue E. These issues weren't even mentioned in the preparatory work leading to the reform mentioned by SFS 2013:368. At least side issue D, concerning the main rule on the right of deduction of input tax in the Value Added Tax Act 1994, should have been easy to find for the legislator, since it caused the EU Commission already in 2008 to notify Sweden of breaching the EU law.[193]

Although the tax subject is nowadays determined in accordance with the EU law, the Value Added Tax Act 1994 still use the concept tax liability to define the emergence and scope of the right of deduction. Therefore there's still an opening for the interpretation that there's a demand for taxable transactions to have occurred in the economic activity, before the right of deduction emerge for input tax on acquisitions or imports.[194] That's not complying with the CJEU's case law and the interpretation means there's a conflict with the principle of the VAT's neutrality when the Value Added Tax Act 1994 demands the tax subject to have made taxable transactions, i.e. being liable to account for output tax (tax liable) before he's granted the right of deduction of input tax.[195] It's made *acte éclairé* by *Rompelman* (Case 268/83) that it's the purpose by a taxable person to create such transactions that's decisive for the

[192] See sec. 1.3.
[193] See sec. 1.3.
[194] See the main rule on the right of deduction, Ch. 8 sec. 3 para. 1 VATA 1994, and the possibility to register new enterprises according to Ch. 10 sec. 9 VATA 1994 and Forssén 2011, sec:s 2.4.2, 6.1, 6.2 and 8.1.6. See also the sec. The conclusions concerning the side issues D and E – certain questions about the concept *skattskyldighet* in Forssén 2011 and PAPER sec. 2.4 in Forssén 2015 (1).
[195] See para. 23 in *Rompelman* (268/83). See also Forssén 2015 (1), PAPER sec. 2.4; and Forssén 2011, pp. 39, 215, 216, 262 and 320.

emergence of his right of deduction, and the concept taxable person is used in the main rule on the right of deduction, article 168(a) of the VAT Directive (2006/112), for that determination – not tax liable.[196] Thus, I've concluded that the opening for the interpretation result that the Value Added Tax Act 1994 demands taxable transactions having occurred before the right of deduction emerging isn't directive conform.[197]

2.3 THE SO CALLED REPRESENTATIVE RULE IN THE VALUE ADDED TAX ACT 1994

2.3.1 Introduction

The VAT Directive (2006/112) doesn't contain any rule corresponding to the so called representative rule in the Value Added Tax Act 1994.[198] The representative rule concerns the concept tax liable regarding partners in enkla bolag and shipping partnerships, which is a mandatory rule,[199] and the voluntary rule on appointing a representative to answer for the VAT payment regarding the activity in *enkla bolag* (joint ventures) and *partrederier* (shipping partnerships).[200] There's no specific equivalent in English to *enkla bolag*, but it may be approximately translated joint ventures.[201] The expression derives from the Swiss *einfache Gesellschaften*. In the Swedish civil law an *enkelt bolag* is defined as two or more having agreed to carry on activity in a company without establishing a *handelsbolag*, i.e. partnership. An *enkelt bolag* is thereby not a legal person. A Swedish shipping partnership is similar to an *enkelt bolag* mainly since it's neither a legal person and is sometimes mentioned as a form of *enkelt bolag*.[202]

The fundamental issue is a classical one: *enkla bolag* and *partrederier* aren't legal entities and one of the basic questions is if such an entity may be comprised by the concept taxable person of the VAT Directive (2006/112/EC). Since the representative rule has no equivalent in the VAT Directive (2006/112),[203] the analysis mainly concerned whether or not alterations in or amendments to the representative rule should be made in order to make the rule comply with the EU's VAT Directive

[196] See para. 23 in Rompelman (268/83). See also Forssén 2015 (1), PAPER sec. 2.4; and Forssén 2011, pp. 39 and 40.
[197] See sec. 1.1.
[198] See Forssén 2015 (1), sec:s 1.1.1 and 1.1.3.
[199] See Ch. 6 sec. 2 sen. 1 VATA 1994.
[200] See Ch. 6 sec. 2 sen. 2 VATA 1994 and Ch. 5 sec. 2 CTP 2011.
[201] See Forssén 2015 (1), sec. 1.1.1 and sec. 1.1.
[202] See Forssén 2015 (1), Abstract and sec:s 1.1.1 and 2.5 and Lodin et al. 2011, p. 514; Prop. 1998/99:130 Part 1, p. 231; Rinman 1985, p. 121; Sandström 2010, p. 39; Dotevall 2009, p. 158; and Lindskog 2010, p. 54.
[203] See Forssén 2015 (1), sec:s 1.1.1 and 1.1.3.

(2006/112). The analysis contained a number of questions, where a key issue to consider was the question whether an ordinary private person can be deemed tax liable (*skattskyldig*) merely because of his role as partner in an *enkelt bolag* or a *partrederi*. That wouldn't comply with the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), since it's made *acte éclairé* by EU case law that the criterion economic activity in the main rule also means a duration criterion for who's a taxable person, opposed to what's stipulated for some temporary transactions according to the facultative rule on taxable person in article 12.[204]

2.3.2 A partner being tax liable according to the representative rule

An important establishment in my licentiate's dissertation, which I came back to in my doctor's thesis, is that an ordinary private person cannot be considered having the character of taxable person according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112).[205] Therefore a major problem with the representative rule is, regarding the mandatory part of the representative rule,[206] that I've construed its wording so that an ordinary private person can be deemed tax liable merely because of his role as partner in an *enkelt bolag* or a *partrederi* (shipping partnership), which isn't in compliance with the directive rule mentioned on who's a taxable person.[207]

My interpretation of the representative rule has been decided by the question of what's the meaning of *enkla bolag* and *partrederier* according to Chapter 6 section 2 of the Value Added Tax Act 1994, whereby I concluded the following: Regardless whether the mandatory rule in the first sentence or the voluntary rule in the second sentence is concerned, what's meant thereby with *enkelt bolag* or *partrederi* is decided by the civil law. In the Act on *Handelsbolag* and *Enkla Bolag* 1980 [*lag (1980:1102) om handelsbolag och enkla bolag*], i.e. the Companies Act 1980, an *enkelt bolag* is, as mentioned,[208] defined as two or more having agreed to carry on activity in a company without establishing a partnership (*handelsbolag*).[209] A Swedish shipping partnership (*partrederi*) is, as also mentioned, similar to an *enkelt bolag*, mainly since neither are legal persons. A *bolag* can exist even if neither the activity object nor the purpose is of an economic nature, if only the

[204] See para. 18 in *Götz* (C-408/06), where the CJEU also referred to para:s 9 and 15 in *Commission v. the Netherlands* (235/85). See also van Doesum 2009, p. 155; Terra & Kajus 2012, p. 409; Ramsdahl Jensen 2003, p. 276; and Forssén 2015 (1), sec. 1.1.3.
[205] See Forssén 2015 (1), PAPER Ch. 3.
[206] Ch. 6 sec. 2 sen. 1 VATA 1994.
[207] See sec. 2.3.1.
[208] See sec. 2.3.1.
[209] See Ch. 1 sec. 3 CA 1980.

purpose is common. An *enkelt bolag* may thus exist without a demand that the activity constitutes business activity. Therefore a partner who's an ordinary private person can be deemed as tax liable for his share of the *enkla bolaget* (or the *partrederiet*) merely because of his role as a partner, since there's no special definition for VAT purposes of tax liable (*skattskyldig*) in Chapter 6 section 2 first sentence of the Value Added Tax Act 1994. Article 9(1) first paragraph of the VAT Directive (2006/112), containing inter alia the criterion economic activity, is thus not correctly implemented in the representative rule. According to Chapter 1 section 2 last paragraph of the Value Added Tax Act 1994 Chapter 6, inter alia containing section 2, is an example of special rules on the concept tax liable, which, by way of the described interpretation of the first sentence of the representative rule, expands the scope of that concept compared to the general rule in Chapter 1 section 2 first paragraph number 1.[210]

Thus, the reform of the 1st of July 2013 meant firstly that the general definition of the tax subject was made conform with taxable person in article 9(1) first paragraph of the VAT Directive (2006/112) by the implementation of *beskattningsbar person* (taxable person) into inter alia Chapter 4 section 1 of the Value Added Tax Act 1994.[211] Thereby the main rule on tax liable (*skattskyldig*), i.e. Chapter 1 section 2 first paragraph number 1 referring to section 1 first paragraph number 1 containing inter alia the prerequisite *beskattningsbar person* (taxable person), is also complying with the directive's main rule on who's tax liable (*betalningsskyldig*) in articles 2(1)(a), 2(1)(c) and 193. However, since the reform of the 1st of July 2013 didn't regard the representative rule at all,[212] the described problem in this section remains, i.e. the wording of Chapter 6 section 2 first sentence of the Value Added Tax Act 1994 opens for the non-directive conform interpretation that an ordinary private person who's a partner in an *enkelt bolag* or *partrederi* can be deemed as tax liable for his share of the *enkla bolaget* (or the *partrederiet*) merely because of his role as a partner. This is in conflict with the principle of neutrality, since the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), is supposed to have the fundamental function of distinguishing the tax subjects, i.e. the entrepreneurs, from the consumers.[213]

[210] See Forssén 2015 (1), sec:s 7.1.1 and 7.1.3.3.
[211] See sec:s 2.1 and 2.2.
[212] See the amendment SFS 2013:368. See also Forssén 2015 (1), sec. 1.3.
[213] See Forssén 2015 (1), sec. 1.1.3.

2.3.3 The voluntary appointment of a representative for the purpose of tax collection

The voluntary part of the representative rule, i.e. Chapter 6 section 2 second sentence of the Value Added Tax Act 1994 referring also to Chapter 5 section 2 of the Code of Taxation Procedure 2011, gives the partners of an *enkelt bolag* or *partrederi* the possibility to appoint and register by the tax authority one of them as representative to answer for the VAT payment regarding the activity in the *enkla bolaget* or *partrederiet*, i.e. to appoint one partner to administrate the tax collection by filing VAT returns for that activity. Thereby I've concluded e.g. that the use in Chapter 5 section 2 of the Code of Taxation Procedure 2011 of the expression *för verksamheten* (for the activity) shows that the *verksamhet* (activity) of the *enkla bolaget* or the *partrederiet* doesn't have to be *en ekonomisk verksamhet* (an economic activity). The voluntary rule thereby supports the interpretation of the mandatory rule mentioned in the previous section, meaning that an ordinary private person can become tax liable merely because of his role as partner of an *enkelt bolag* or a *partrederi*.[214]

Thus, there's a need to clarify the representative rule so that the latter interpretation will no longer be possible: The representative rule should in my opinion firstly be specified so that Chapter 6 section 2 first sentence of the Value Added Tax Act 1994 complies to *enkla bolag* and *partrederier* with *ekonomisk verksamhet* (economic activity) according to Chapter 4 section 1 of the Value Added Tax Act 1994 *and* so that it also stipulates that the partners of *enkla bolag* and *partrederier* shall be *beskattningsbara personer* (taxable persons) by themselves. The resulting question is whether the tax liability according to Chapter 6 section 2 first sentence still should apply to the partners in relation to their shares in the *enkla bolaget* or the *partrederiet*. I've concluded that the distribution of the tax liability amongst the partners instead should work so that the transaction criterion for tax liability is connected to the partner acting for the *enkla bolaget* or the *partrederiet*. That should be made by a partner's tax liability for the *enkla bolagets* or the *partrederiets ekonomiska verksamhet* (economic activity) being determined with reference only to Chapter 4 section 5 first paragraph of the Companies Act 1980.

Concerning the voluntary rule, Chapter 6 section 2 second sentence, there's the alternatives to keep it along with the mandatory rule or to abolish it and let each partner always answer for the tax collection of his taxable transactions for the *enkla bolaget* or *partrederiet*. If the representative rule would be retained at all, I've suggested the latter,

[214] See Forssén 2015 (1), PAPER sec. Ch. 3, and sec:s 6.2.2.3 and 6.2.2.4.

since I've concluded there's a vast need for precision by amendments of both the mandatory rule and the voluntary rule for an efficiency of collection being able to accomplish of the VAT in *enkla bolag* and *partrederier*. One problem is e.g. two partners sharing tax liability according to the representative rule can't use the same invoice from a deliverer to account for their respective right of deduction of input tax. Therefore an amendment making that possible should be made regarding Chapter 8 section 5 of the Value Added Tax Act 1994, which corresponds to article 178(a) of the VAT Directive (2006/112), so that the formal rules won't lead to half the VAT becoming a cost.[215] The CJEU held in *Terra Baubedarf-Handel* (Case C-152/02), paragraph 37, that the demand on having a correct invoice, to be able to exercise the right of deduction, serves one of the purposes desired by the Sixth Directive (77/388), nowadays the VAT Directive (2006/112), namely to ensure the collection of VAT and the tax authority's control thereby.[216] Although amendments as the mentioned of the representative rule would benefit the control of the collection, and thereby benefit the principle of an efficient tax collection, it would be at the expense of the legal rights of the individual, since the amendments necessary would become so many that it would be in conflict with the legal rights of the individual and their demand on foreseeable decisions concerning the material rule of taxation.[217] Therefore I also reason in the next chapter about a third possibility, namely the Finnish solution of making certain non-legal persons tax subjects, so that also an *enkelt bolag* or *partrederi* would be considered a tax subject for VAT purposes.[218] Is this possible at all under the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (2006:112), and, if not, should the risk of communication distortions lead to suggestions for altering the directive rule and making it possible?

[215] See Forssén 2015 (1), sec. 6.4.2.
[216] Se Forssén 2015 (1), sec:s 1.3 and 6.3.1 and also Forssén 2010, p. 60.
[217] See Forssén 2015 (1), PAPER Ch. 3.
[218] See Forssén 2015 (1), PAPER Ch. 4.

3. COMMUNICATION DISTORTIONS REGARDING TWO EXAMPLES OF DIFFERENCES BETWEEN THE VALUE ADDED TAX ACT 1994 AND THE VAT DIRECTIVE (2006/112)

3.1 INTRODUCTION

Concerning the main rule on the right of deduction and the representative rule respectively in the Value Added Tax Act 1994 the use of the concept tax liable isn't, as mentioned, directive conform, namely because:

- It opens for the interpretation of Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994 demanding that taxable transactions have occurred before the right of deduction emerging. This isn't complying with the main rule on the right of deduction, article 168(a) of the VAT Directive (2006/112), where the concept taxable person is used and which is interpreted as meaning that it's the purpose by a taxable person to create taxable transactions that's decisive for the emergence of his right of deduction.[219]

- It also opens for the interpretation of Chapter 6 section 2 of the Value Added Tax Act 1994 and Chapter 5 section 2 of the Code of Taxation Procedure 2011, i.e. the representative rule, meaning that an ordinary private person who's a partner in an *enkelt bolag* or *partrederi* can be deemed as tax liable for his share of the *enkla bolaget* (or the *partrederiet*) merely because of his role as a partner. This isn't complying with the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112).[220]

That the main rule on the right of deduction in the Value Added Tax Act 1994 isn't directive conform is in conflict with the principle of the VAT's neutrality.[221] The principle of neutrality is important for the purpose of harmonisation of the Member States' VAT acts and thereby to ensure the establishment and the functioning of the internal market and to avoid distortion of competition. There's a demand of a level playing field on the internal market so that the consumers won't choose

[219] See sec. 2.2.
[220] See sec:s 2.3.2 and 2.3.3.
[221] See sec. 2.2.

between suppliers of goods and services due to differences between them concerning the VAT. In other words, competition shall not be distorted due to the VAT. The principle of neutrality is a fundamental principle for the VAT.[222]

That an ordinary private person who's a partner in an *enkelt bolag* or *partrederi* can be deemed as tax liable for his share of the *enkla bolaget* (or the *partrederiet*) merely because of his role as a partner is also in conflict with the principle of neutrality. The main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), is supposed to have the fundamental function of distinguishing the tax subjects, i.e. the entrepreneurs, from the consumers.[223]

In this chapter I comment those differences between the Value Added Tax Act 1994 and the VAT Directive (2006/112) as communication distortions. Thereby I raise, as mentioned,[224] the following questions:

- What does it mean if an entrepreneur can't rely on the main rule on the right of deduction in the Value Added Tax Act 1994, i.e. Chapter 8 section 3 first paragraph, complying with the corresponding main rule in the VAT Directive (2006/112), i.e. article 168(a), due to the use of tax liability in the rule mentioned in the Value Added Tax Act 1994?

- Should the risk of communication distortions concerning the use of the concept tax liable in the representative rule in Chapter 6 section 2 of the Value Added Tax Act 1994 lead to suggestions for altering the main rule on taxable person in the VAT Directive (2006/112)?

Along with the first question I deem whether the non-directive conform main rule on the right of deduction works against the EU's ambition for the future meaning that the tax authorities should increase their activities concerning collection of VAT.[225] That phenomenon should have been easy to find for the legislator, since it caused the EU Commission already in 2008 to notify Sweden of breaching the EU law,[226] and therefore I raise the questions whether the EU Commission should be able to rely on the Swedish Government properly addressing the problem with the main rule on the right of deduction and *how* it is that the legislator hasn't addressed that problem.

[222] See sec. 1.3.
[223] See sec. 2.3.2.
[224] See sec. 1.3.
[225] See sec. 1.3.
[226] See sec. 2.2.

Concerning the second question I suggest tools to handle the problem described regarding the representative rule in the Value Added Tax Act 1994, if the EU won't alter the main rule on taxable person in the VAT Directive (2006/112).[227]

3.2 THE CONCEPT TAX LIABLE AND ITS USE CONCERNING THE MAIN RULE ON THE RIGHT OF DEDUCTION

3.2.1 What it means if an entrepreneur cannot rely on the main rule on the right of deduction complying with the EU law

In accordance with article 113 TFEU[228] the principle of neutrality is important for the purpose of harmonisation of the Member States' VAT acts.[229] The principle of a neutral VAT is also expressed in a number of the paragraphs in the preamble to the VAT Directive (2006/112),[230] i.e. in the so called recitals,[231] namely in paragraphs 4, 5 and 7 of that preamble.[232] The principle of neutrality in the field of VAT is also considered deriving from article 1(2) of the VAT Directive (2006/112).[233] That article is defining what VAT is according to the EU law, and from that principle, i.e. the VAT principle according to the EU law, can the following principles be derived: the principle of a general right of deduction, the principle of reciprocity and the passing on the tax burden principle (the POTB-principle).[234] I make the following review of those principles expressed by article 1(2) of the VAT Directive (2006/112):

The first paragraph of article 1(2) reads: "The principle of the common system of VAT entails the application to goods and services of 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." I deem this – along with the second paragraph of the article – expressing the POTB-principle.

The second paragraph of article 1(2) reads: "On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the

[227] See sec:s 1.3 and 2.1.
[228] The TFEU is primary EU law.
[229] See sec:s 1.3 and 3.1.
[230] The VAT Directive (2006/112) is secondary EU law.
[231] See sec. 1.1.
[232] See also Forssén 2015 (1), sec. 2.4.1.2.
[233] See Sonnerby 2010, p. 285 and also Forssén 2015 (1), sec. 2.4.1.2.
[234] See Forssén 2015 (1), sec. 2.4.1.2.

amount of VAT borne directly by the various cost components." I deem this – along with the first paragraph of the article – expressing the principles of a general right of deduction, reciprocity and POTB.

The third paragraph of article 1(2) reads: "The common system of VAT shall be applied up to and including the retail trade stage." I deem this – along with the first paragraph of the article – determining the scope of the VAT, by including all producers and distributors of goods or services including the retail stage. Thus, the consumer pays in the end, due to the POTB of the VAT link by link in the chain of entrepreneurs (the ennobling chain), a price including output tax on the total ennobling value of the product or the service in question. The principle of a general right of deduction, the principle of reciprocity and the POTB-principle forms the VAT principle.[235]

The CJEU has also established the essential characteristics of VAT in line with the principles of article 1(2), by stating: "Notwithstanding certain differences of wording, it appears from the case law that there are four such characteristics: it applies generally to transactions relating to goods or services; it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied; it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place; the amounts paid during the preceding stages of the process are deducted from the tax payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at that stage and the final burden of the tax rests ultimately on the consumer".[236]

By the described fundamental principles of VAT according to the EU law being upheld the VAT becomes neutral insofar as it doesn't, taken by itself, affect the competition due to differences in the value added taxation concerning the entrepreneurs or the goods or services included in the ennobling chain at hand. Thus, the VAT principle means that what is taxed is only the sum of the value added created within each enterprise. Thereby the consumer is affected as the tax carrier by the VAT of the total value added on the product or the service produced by the entrepreneurs included in the ennobling chain.

If an entrepreneur cannot rely on the main rule on the right of deduction in the Value Added Tax 1994 complying with the EU law, it means, in

[235] See Forssén 2015 (1), sec. 2.4.1.2; and also Forssén 2011, pp. 36, 37 and 272.
[236] See *Banca populare di Cremona* (C-475/03), para. 28. See also Bjerregaard Eskildsen 2012, p. 45; Cnossen 2006, p. 4; and Forssén 2015 (1), sec. 2.4.1.4.

relation to the VAT principle according to article 1(2) of the VAT Directive (2006/112), the following:

- If one or several of the entrepreneurs in the ennobling chain is erroneously denied to exercise the right of deduction there will arise a so called cumulative effect, i.e. a tax on the tax effect, where the consumer won't choose the deliverer of the product or the service in question but choose to purchase from a deliverer included in an ennobling chain where the POTB-principle works ideally due to the right of deduction being granted entrepreneurs comprised by that right.

- On the other hand the costumer would choose a deliverer who's overcompensated with regard of the right of deduction before a deliverer included in an ennobling chain where the right of deduction is granted correctly to all entrepreneurs in the chain.

In both cases the VAT is treated in conflict with the fundamental principle of a neutral VAT. These situations of an, in relation to article 1(2) of the VAT Directive (2006/112), erroneously applied right of deduction will consequently also be in conflict with the EU's ambition for the future that the tax authorities should increase their activities concerning collection of VAT.[237] In the first situation the VAT collection will be too high and in the second situation it will be too low in relation to the VAT principle in the EU law meaning, i.e. in the meaning of article 1(2).

It's the first situation that is the problem with the main rule on the right of deduction in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994 not complying with the CJEU's interpretation of the emergence of the right of deduction according to the EU law. There's an opening for the interpretation that the use of the concept tax liability instead of taxable person there's a demand by the Value Added Tax Act 1994 for taxable transactions to have occurred in the economic activity, before the right of deduction emerge for input tax on acquisitions or imports. That was side issue D in my licentiate's dissertation, and, as mentioned, the non-EU conform use the concept tax liability is in conflict with the principle of a neutral VAT and the EU's ambition of an effective collection of VAT. There are also problems regarding tax control causing an ineffective collection of VAT by the use of the concept tax liable instead of taxable person concerning the liability to register to VAT, which was side issue E in my licentiate's dissertation.[238]

[237] See sec:s 1.3 and 3.1.
[238] See sec. 2.2.

Concerning the latter I've concluded that the CJEU's case law cannot be deemed expressing clearly that also a taxable person who only has the intention to make from taxation unqualified exempted transactions shall be VAT registered according to articles 213–216 of the VAT Directive (2006/112). Anyhow, I've concluded from *Rompelman*, *Balocchi* (Case C-10/92), *INZO* (Case C-110/94) and *Gabalfrisa et al.* (Cases C-110/98 to C-147/98) that the CJEU case law at least doesn't contradict such an order.[239] I've also pointed out that control problems causing an inefficient tax collection may arise, if only taxable persons making taxable transactions or from taxation qualified exempted transactions (also called zero rated transactions) are comprised by the liability to register to VAT.[240] Problems are likely concerning control of altered circumstances compared to those at the filing of the application for registration if not all taxable persons should be comprised from the beginning by the same control system for VAT purposes.[241] Taxable persons who only intend to make from taxation unqualified exempted transactions are today comprised by the general tax register. They should instead from the beginning belong to the VAT register, like those which from the beginning have the intention to make taxable or from taxation qualified exempted transactions of goods or services. That would benefit both the tax authority's control and the entrepreneur's planning in advance if he moves on to make taxable or from taxation qualified exempted transactions.[242] Therefore I argue for the liability to register to VAT no longer being connected to the concept tax liable. Instead should Chapter 7 section 1 first paragraph numbers 3 and 4 of the Code of Taxation Procedure 2011 be altered so that it's stipulated therein that the application to the tax authority shall be made for VAT purposes when any economic activity according to the Value Added Tax Act 1994 is started, altered or revoked by a taxable person.[243]

By the way I didn't use a comparative analysis along with the law dogmatic method in my licentiate's dissertation, since the analysis of the concept tax liability in the Value Added Tax Act 1994 and questions about its EU conformity concerned VAT according to the EU law and nothing else.[244] Therefore I combined the law dogmatic method in my doctor's thesis with a certain comparative analysis in relation to EU Member States with legal figures similar to in the first hand the *enkla*

[239] See Forssén 2015 (1), PAPER sec. 2.4 and Forssén 2011, pp. 263, 320 and 321.
[240] Opposed to unqualified exempted transactions are transactions which are taxable or zero rated comprised by the right of deduction in the art:s 168(a) and 169 of the VAT Directive (2006/112).
[241] See Forssén 2011, pp. 263 and 321.
[242] See Forssén 2011, p. 263.
[243] See Forssén 2015 (1), PAPER sec. 1.4; and Forssén 2011, pp. 263 and 264.
[244] See Forssén 2011, p. 71.

bolagen, where the EU country Finland showed the most similar figures, namely so called *sammanslutningar* and *partrederier*, which also are enterprise forms that aren't legal persons, but – unlike *enkla bolagen* and *partrederierna* in the Value Added Tax Act 1994 – treated in the Finnish Value Added Tax Act 1993 as tax subjects.[245] Thus, concerning research on the interpretation of the Value Added Tax Act 1994 it's important, for the use of a comparative method, to distinguish between the VAT principle according to the EU law and according to definitions in VAT legislations of third countries, i.e. non-EU Member States: Outside the EU it's not unusual that the VAT in fact is a gross tax not granting the entrepreneurs a general right of deduction. That's more like the excise duties regardless whether such a tax is called VAT or goods and services tax. Therefore such taxes make a questionable material for the sake of comparison with the VAT according to the EU law, i.e. according to the VAT principle expressed by article 1(2) of the VAT Directive (2006/112).[246] However, regarding the subject of this Part B the recently mentioned doesn't mean that further research efforts in the field of fiscal sociology e.g. in the present sense, i.e. restricted to the meaning tax rules as tools for transmitting the intended taxation by a tax rule, cannot be performed by the use of comparative analyses with reference to third countries as well as EU Member States.

3.2.2 Whether the EU Commission should be able to rely on the Swedish legislator addressing the problem with the use of the concept tax liable concerning the right of deduction and how it is that the legislator has not yet addressed this problem

Concerning the main rule on the right of deduction of input tax in the Value Added Tax Act 1994 not complying with article 168(a) of the VAT Directive the Swedish Government was informed already when the EU Commission made its formal notification of the 26th of June 2008 about Sweden breaching the EU law in that respect.[247] The EU Commission pointed out inter alia in its notification that the EU law means that the right of deduction emerge due to the intention of making taxable transactions and that it doesn't provide such transactions first occurring. This interpretation of the main rule on the right of deduction according to article 17(2)(a) of the Sixth Directive (77/388) – nowadays article 168(a) of the VAT Directive (2006/112) – was also made *acte éclairé* by the CJEU in *Rompelman*, where the CJEU held in paragraph 18 that "the right to deduct shall arise at the time when the deductible tax becomes chargeable",[248] and in paragraph 23 the CJEU made the

[245] See Forssén 2015 (1), sec. 1.2.1.
[246] See Forssén 2011, pp. 279-297.
[247] See sec:s 1.3 and 2.2.
[248] See also Forssén 2011, p. 275.

interpretation that it's the purpose by a taxable person to create taxable transactions that's decisive for the emergence of his right of deduction.[249]

The primary EU law means, as mentioned,[250] that the intended result with the VAT Directive (2006/112) is binding for Sweden as a Member State. In line with this the so called solidarity principle or loyalty principle, which follows by the primary EU law and the articles 4(3) of the Treaty on EU and 291(1) TFEU, means that Sweden as a Member State shall make every effort to implement article 168(a) of the VAT Directive (2006/112) correctly.[251] The solidarity principle or loyalty principle is sometimes also called the co-operation duty. This and the EU Commission's right according to article 337 TFEU to obtain information to fulfil its tasks means that Sweden is also obliged to co-operate with the Commission.[252]

Thus, the EU Commission should be able to rely on the Swedish Government properly addressing the problem with the main rule on the right of deduction, i.e. Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994. However, this was missed by the legislator in the reform of the 1st of July 2013,[253] and the preparatory work to the amendment SFS 2013:368 didn't even mention the questions on the determination of the right of deduction and the liability to register to VAT – although they were made obvious as the side issues D and E in my licentiate's dissertation of 2011.[254] Therefore the resulting question in this section is *how* it is that the legislator hasn't addressed even the problem concerning the main rule on the right of deduction yet.[255]

The explanation of how the Swedish Government has missed that the EU law's principle of a neutral VAT is distorted, although the EU Commission has notified the Government about the breach of EU law in this respect, must be sought in a Government official report from 2002, namely the investigation SOU 2002:74. I make the following review in this respect:

- Concerning specifically the issue on when the right of deduction emerge in an *yrkesmässig verksamhet*, i.e. – after the reform of

[249] See sec. 2.2.
[250] See sec. 1.1.
[251] See Prechal 2005, pp. 17, 180 and 219; Alhager & Hiort af Ornäs 2009, p. 16; Alhager 2001, p. 94; Sonnerby 2010, p. 63; Rendahl 2009, p. 39; Bernitz 2010, p. 67; Stensgaard 2004, p. 25; and Forssén 2011, sec. 1.2.5.
[252] Se Fritz et al. 2001, p. 148; and Forssén 2011, sec. 1.2.5..
[253] See sec. 2.2.
[254] See sec. 3.2.1.
[255] See sec. 3.1.

the 1st of July 2013 – by a taxable person,[256] the EU Commission notified the Government that the investigation SOU 2002:74 considered that to occur later than with respect of the Sixth Directive (77/388) – nowadays the VAT Directive (2006/112) – due to the then connection of *yrkesmässig verksamhet* to the non-harmonised income tax law and its concept business activity. The Commission held in line with *Rompelman* that it will become an arbitrary difference of the right of deduction if the first investments in the economic activity won't be deductible just because they are made before the property has begun leading to taxable transactions.[257] I've concluded that the use of the concept tax liable in Chapter 8 section 3 first paragraph makes the Value Added Tax Act 1994 not complying with article 168(a) of the VAT Directive (2006/112) in the present respect and that this is the case also after the reform of the 1st of July 2013. The question on the need to alter tax liability in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994 to taxable person, to make it conform with article 168(a), wasn't mentioned at all in the preparatory work or in the final amendment, i.e. SFS 2013:368.[258]

- The EU Commission doesn't seem to recognize that the investigation SOU 2002:74 didn't separate the concepts *yrkesmässig verksamhet* and tax liability. The investigation describes an *yrkesmässig verksamhet* to emerge later than an economic activity, and makes that judgement with reference to the right of deduction of input tax being connected to the concept tax liability in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994.[259] However, it was then *yrkesmässig verksamhet* that was *préjudiciel* in relation to the tax liability and the emergence of the right of deduction, not the opposite. If there's a delay of the emergence of the right of deduction according to the Value Added Tax Act 1994 compared to the VAT Directive (2006/112), that's depending on the use of the concept tax liability in Chapter 8 section 3 first paragraph, without any repercussion on the determination of *yrkesmässig verksamhet* or – today – taxable person. Therefore it's equally as important today to distinguish between taxable person and tax liable as it was before between *yrkesmässig verksamhet* and tax liable.[260]

[256] See sec. 1.1.
[257] See 2008/2002 K(2008) 2794, s. 7, where a reference also is made to SOU 2002:74 Part 1, pp. 81 and 87. See also Forssén 2011, p. 113.
[258] See Forssén 2015 (1), PAPER sec 2.4 and Ch. 4; and also sec. 1.3.
[259] See SOU 2002:74 Part 1, p. 87; and also Forssén 2011, p. 114.
[260] See also Forssén 2011, p. 114.

Thus, my answer to the question, *how* it is that the legislator hasn't yet addressed the problem concerning the main rule on the right of deduction in the Value Added Tax Act 1994 with regard of EU conformity, is that the Swedish Government believes that the implementation on the 1st of July 2013 of taxable person with regard of the tax subject automatically resolved also the issue concerning the determination of the right of deduction. The EU Commission is probably under the same impression. They are speaking over the heads of each other and neither one of the Swedish Government or the EU Commission are probably aware today of the described communication distortion in the Value Added Tax Act 1994 existing with regard of the intention of a neutral VAT, which is expressed by the recitals of the VAT Directive (2006/112) and the directive's article 1(2), secondary EU law, as well as by article 113 TFEU, primary EU law.[261]

3.3 ALTERATION OF THE MAIN RULE ON TAXABLE PERSON IN THE VAT DIRECTIVE (2006/112) OR TOOLS TO HANDLE THE CONFLICT BETWEEN THE VALUE ADDED TAX ACT 1994 AND THE VAT DIRECTIVE (2006/112) CAUSED BY THE USE IN THAT ACT OF THE CONCEPT TAX LIABLE REGARDING PARTNERS IN *ENKLA BOLAG* OR *PARTREDERIER*

3.3.1 Whether the communication distortions concerning the use of the concept tax liable regarding partners in *enkla bolag* or *partrederier* should lead to an alteration of the main rule on taxable person in the VAT Directive (2006/112)

Concerning the representative rule in the Value Added Tax 1994 there are mainly these two cases of communication distortions with regard of what's intended with the VAT Directive (2006/112):

- The wording of the mandatory part of the rule, Chapter 6 section 2 first sentence, opens for the interpretation that an ordinary private person who's a partner in an *enkelt bolag* or *partrederi* can be deemed as tax liable for his share of the *enkla bolaget* (or the *partrederiet*) merely because of his role as a partner. Thereby the Value Added Tax Act 1994 expands the scope of who can be a tax subject in relation to the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112). This is in conflict with the principle of neutrality, since the main rule on who's a taxable person is supposed to have the fundamental function of distinguishing the tax subjects,

[261] See sec:s 1.1 and 3.2.1.

i.e. the entrepreneurs, from the consumers.[262] To include such a partner in an *enkelt bolag* or *partrederi* into an ennobling chain of entrepreneurs would cause a distortion in relation to the VAT principle according to article 1(2) of the VAT Directive (2006/112).[263]

- Concerning the voluntary part of the rule, Chapter 6 section 2 second sentence, there's inter alia the opposite problem, namely the formal rule of Chapter 8 section 5 not allowing two or several of the partners in an *enkelt bolag* or *partrederi* using the same invoice from a deliverer to account for their respective right of deduction of input tax. That's not in compliance with *Terra Baubedarf-Handel*, where the CJEU held that the demand on having a correct invoice, to be able to exercise the right of deduction, serves one of the purposes desired by the Sixth Directive (77/388), nowadays the VAT Directive (2006/112), namely to ensure the collection of VAT and the tax authority's control thereby.[264] To exclude a partner who's a taxable person from the right of deduction makes that entrepreneur's input tax a cost which causes cumulative effects in the ennobling chain of entrepreneurs, which is also a distortion of the principle of a neutral VAT according to article 1(2) of the VAT Directive (2006/112).[265]

With reference to the VAT principle according to article 1(2) of the VAT Directive (2006/112) there's no reason to exclude enterprises conducted by *enkla bolag* and *partrederier* from the ennobling chain of entrepreneurs under that article only because those figures aren't legal persons. I've concluded that it's in conflict with the principle of neutrality to do so.[266] The problems with those figures and VAT would be resolved if the EU would alter article 9(1) first paragraph of the VAT Directive (2006/112) so that it would be clarified that the expression *any person who* in the article comprises also non-legal persons, if they fulfil the prerequisites of taxable person in that article.[267] The risk of communication distortions concerning what's intended in pursuance of the VAT Directive (2006/112) by the use of the concept tax liable in the representative rule in Chapter 6 section 2 of the Value Added Tax Act 1994 shows that there's a need for such an alteration of the main rule on

[262] See sec:s 2.3.2 and 3.1.
[263] See sec. 3.2.1.
[264] See sec. 2.3.3.
[265] See sec. 3.2.1.
[266] See Forssén 2015 (1), sec. 2.4.2.
[267] See Forssén 2015 (1), sec. 7.1.3.2.

taxable person in the VAT Directive (2006/112). It would make the representative rule obsolete.[268]

However, as long as there's no such clarification made as recently mentioned concerning the view on non-legal persons according to the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), I suggest in sections 3.3.2-3.3.2.3, from a sociology of taxation point of view, tools to handle the two cases of communication distortions due to the representative rule described in this section.

3.3.2 Tools to handle the conflict between the Value Added Tax Act 1994 and the VAT Directive (2006/112) concerning the use of the concept tax liable regarding partners in *enkla bolag* or *partrederier*

3.3.2.1 Introduction

If the EU doesn't make an alter the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), so that it's clarified that it comprises also non-legal persons, like *enkla bolag* and *partrederier*, if they fulfil the article's prerequisites of taxable person, it's necessary to use models – tools – for handling e.g. the problems described in the recent section concerning the representative rule. The representative rule in the Value Added Tax Act 1994 doesn't have any equivalent in the VAT Directive (2006/112),[269] but it must be given an EU conform interpretation by the Swedish authorities and courts as far as possible in accordance with the directive's wording and purpose so that the intended result of the directive is achieved.[270] Therefore the problems described with the representative rule, i.e. the rule both expanding the scope of who's a tax subject compared to the directive's main rule on taxable person and inter alia restricting the possibility of exercising the right of deduction compared to the directive's main rule in that respect, are better dealt with by using models explaining the communication distortions occurring with regard of the representative rule.[271] In other words tools are necessary from a fiscal sociology point of view to handle the situations causing problems, since there's no corresponding directive rule to implement, compared to the main rule on deduction not being EU conform, where it's just a matter of the legislator eventually addressing that problem by correctly implementing article 168(a) of the VAT Directive (2006/112) by changing tax liability

[268] See sec. 3.1.
[269] See sec. 2.3.1.
[270] See sec. 1.1.
[271] See sec. 3.3.1.

into taxable person in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994.[272]

In the next section I suggest a tool to handle the situation with the mandatory part of the representative rule, i.e. Chapter 6 section 2 first sentence of the Value Added Tax Act 1994, expanding the scope of who's a tax subject compared to what follows by the main rule on taxable person in article 9(1) first paragraph of the VAT Directive (2006/112). Thereafter I suggest a tool, which I call ABCSTUXY, to determine the tax subjects and to handle taxable transactions concerning *enkla bolag* or *partrederier*, where the partners have used the possibility to appoint one amongst them as a representative in accordance with the voluntary part of the representative rule, i.e. Chapter 6 section 2 second sentence of the Value Added Tax Act 1994 referring also to Chapter 5 section 2 of the Code of Taxation Procedure 2011.

3.3.2.2 Suggestion for a tool to handle the expansion of the numbers of persons deemed tax subjects due to the use of the concept tax liable

In terms of a law source hierarchy the present problem is that the VAT has both EU law and national sources. Sweden shall, as mentioned, be loyal to the EU law and respect that the VAT Directive (2006/112) is binding, which means that Swedish authorities and courts are, as far as it's possible, obliged to interpret the Value Added Tax Act 1994 in accordance with the directive's wording and purpose so that the intended result of the directive is achieved (EU conform interpretation).[273] In pursuance of the principle of the EU law's supremacy over national law,[274] the individual can invoke a directive rule, if it has so called direct effect, which means that it's sufficiently precise, clear and unconditional, thereby overriding a rule in the Value Added Tax Act 1994 that's incompatible with a directive rule.[275] The essential point with direct effect is that the individual has the right to invoke a directive rule to protect his interests, which thereby is a kind of procedural right with a corresponding obligation for the national authorities and courts to respect that right.[276]

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[272] See sec. 3.2.2.
[273] See sec:s 1.1, 3.2.2 and 3.3.2.1. See also Forssén 2015 (1), sec. 1.2.2.
[274] See sec. 1.1.
[275] See *Van Gend & Loos* (26/62) and Terra & Kajus 2012, p. 151; Ståhl 1996, p. 68; Bernitz 2010, p. 74; Sonnerby 2010, p. 63; Moëll 1996, p. 197; Nergelius 2009, p. 11; Habermas 2011, p. 58; and Alhager 2001, p. 94. Se also Prop. 1994/95:19 Part 1, p. 486 and Forssén 2015 (1), sec. 1.2.3.
[276] See Prechal 2005 pp. 99, 100 and 105; and van Dam & van Eijsden 2009, p. 28, where it's held that the national (tax)courts in practice should apply the EU law *ex officio*, i.e. on their own initiative, to avoid that they otherwise risk to be questioned before the CJEU. See also Forssén 2015 (1), sec. 1.2.3.

The demand on implementation of directives in national law and on regulations becoming expressed in national acts, so that their Union law origin show, supports a point of view meaning that EU law rules would be considered higher up in terms of a law source hierarchy than e.g. Swedish preparatory work.[277] There's a tradition of loyalty to preparatory work in Swedish law source law forming a national principle of interpretation meaning that the preparatory work should be followed, if there isn't any strong reason – above all with respect of the wording of the rule – for another interpretation.[278] However, the CJEU has, concerning the national court's obligation to make as far as possible an EU conform interpretation of the national law, said that this applies also if there's information of an opposite meaning on how the law shall be interpreted in the preparatory work to the national rule.[279] By article 267 TFEU follows that the CJEU in its role as the highest interpreter of the EU law assist the national courts with preliminary rulings on the interpretation of the EU law.[280] On the other hand it's the Swedish courts who can judge whether Swedish national principles on interpretation allows an EU conform (directive conform) interpretation of the Value Added Tax Act 1994.[281] Therefore it's of interest that an EU conform interpretation doesn't mean an obligation for the Member States to interpret the national rule against its wording (*contra legem*).[282] Thus, the national procedural law and the constitutional law with the therein stipulated principle of legality for taxation may limit the EU conform interpretation of e.g. the representative rule.[283]

The main rules on who's a taxable person and on the right of deduction, i.e. articles 9(1) first paragraph and 168(a) of the VAT Directive

[277] See also Hiort af Ornäs & Kristoffersson 2012, p. 24. See also Forssén 2015 (1), sec. 1.2.2.
[278] See Hiort af Ornäs & Kristoffersson 2012, p. 24; Sonnerby 2010, p. 66; and Kellgren 1997, p. 101. See also Forsssén 2014, sec. 1.2.2.
[279] See *Björnekulla Fruktindustrier* (C-371/02), para. 13, where the CJEU also refers to inter alia *Marleasing* (C-106/89), para. 8. See also Ståhl 2005, p. 69; Hettne et al. 2011, pp. 189–192; Prechal 2005, p. 186; and Sonnerby 2010, p. 66. See also Forssén 2015 (1), sec. 1.2.2.
[280] See Hiort af Ornäs & Kristoffersson 2012, p. 22; and Prop. 1994/95:19 Part 1, p. 475 and Holmberg et al. 2012, p. 30. See also Forssén 2015 (1), sec. 1.2.2.
[281] See Ståhl et al. 2011, p. 37; and Ståhl 2005, p. 70. See also Forssén 2015 (1), sec. 1.2.2.
[282] See *Adeneler et al.* (C-212/04), para. 110. See also Sonnerby 2010, p. 66; and Forssén 2015 (1), sec. 1.2.2.
[283] The national legal certainty principles for taxation measures is above all expressed in the prohibition of retroactive tax legislation according to Ch. 2 sec. 10 sen. 2 SC 1974 and the principle of legality for taxation according to Ch. 8 sec. 2 sen. 1 no. 2 SC 1974 (*nullum tributumj sine lege*). See also Eka et al. 2012, pp. 95 and 278; Holmberg et al. 2012, p. 356; and Forssén 2015 (1), sec. 1.2.2.

(2006/112), have direct effect.[284] The representative rule doesn't have any equivalent in the VAT Directive (2006/112), but must be given a directive conform interpretation as far as possible. This means on the one hand that the individual may invoke the EU law to avoid being considered tax liable under the mandatory Chapter 6 section 2 first sentence of the Value Added Tax Act 1994, if he's an ordinary private person and not a taxable person according to the main rule in article 9(1) first paragraph of the VAT Directive (2006/112). However, the Value Added Tax Act 1994 can on the other hand thereby be deemed expanding the scope of the VAT so that it gives an ordinary private person the right to deduct input tax on purchases merely because of his status as a partner in an *enkelt bolag* or *partrederi*.[285] An ordinary private person who's a partner in another type of company form, e.g. in an *aktiebolag*, i.e. limited company, or in a *handelsbolag*, i.e. partnership, won't become tax liable according to the main rule in the Value Added Tax Act 1994, i.e. Chapter 1 section 2 first paragraph number 1 merely because of his status as a partner in such a company, regardless whether it carries out any economic activity.[286] Therefore it's an expansion of the scope of the VAT in relation to the general rule in Chapter 1 section 2 first paragraph number 1, where the representative rule in the Value Added Tax Act 1994 opens for the interpretation that an ordinary private person can be comprised by the concept tax liable merely because of his status as a partner in an *enkelt bolag* or *partrederi*.[287]

In the latter respect it's a matter of whether or not the tax system is given any protection. In my opinion this should be possible when it's a matter of a situation like the described, since the interpretation result violates the fundamental idea of the main rule on taxable person distinguishing the tax subjects, normally entrepreneurs, from the consumers, i.e. from ordinary private persons.[288] The situation with partners in *enkla bolag* or *partrederier* that carries out economic activity being deemed tax liable merely because of their status as such partners sets aside both the principle of a neutral VAT and the principle of an efficient VAT collection, and in such an extreme way that it's more a matter of some sort of subsidy rather than a right of deduction being

[284] See *Rompelman* (268/83), para. 23; *BP Soupergaz* (C-62/93), para. 36; *Stockholm Lindöpark* (C-150/99), para. 35; *Kühne* (50/88), para:s 8 and 10; *Mohsche* (C-193/91), para:s 8, 9, 15, 17, 18 and 19; *Marks & Spencer* (C-62/00), para:s 27, 33, 38, 40, 46 and 47; *Feuerbestattungsverein* (C-430/04), para. 29; RÅ 2010 ref. 54 (20 Apr. 2010); SKV policy document of the 14th of December 2004; Kristoffersson 2010, p. 790; Hiort af Ornäs & Kristoffersson 2012, p. 56; and Westberg 2009, p. 30. See also Forssén 2015 (1), sec. 1.2.3.
[285] See sec:s 2.3.2 and 3.1.
[286] See Forssén 2015 (1), sec. 1.1.3.
[287] See sec. 2.3.2.
[288] See sec:s 2.3.2 and 3.1.

granted those partners. Therefore it's neither a matter of any protection worthy interest under the Swedish tax sovereignty that should be covered by the principle of legality for taxation in the Swedish Constitution 1974. Without thereby reasoning about any conferring of additional competence to the EU's institutions,[289] I deem that the national courts should apply the principle of prohibition of abusive practice held by the CJEU in *Halifax et al.* (Case C-255/02), paragraph 86, and redefine the legal facts so that a taxation of consumption is achieved and a consumer being denied the right to deduct input tax even if the representative rule would give him that right due to his status as partner in an *enkelt bolag* or *partrederi*.[290] To describe the situations caused by the expansion in question of the scope of the VAT by the use of the concept tax liable in Chapter 6 section 2 first sentence of the Value Added Tax Act 1994, I made this figure as a model – tool – to be used by inter alia national courts, the tax authority or individuals to handle the present or similar communication distortions with extreme interpretation results regarding the Value Added Tax Act 1994 compared to the VAT Directive (2006/112):

[289] See sec. 1.1.
[290] See Forssén 2015 (1), sec. 2.7.

Figure 1[291]

Test	**Result**	**Relevance of aims for trial of the concept *tax liable* in the representative rule**
Tax liable in the rule complying with art. 9(1) first para. of the VAT Dir.?	Expanding {rule competition; also between the rule and 1:1 first para. 1 ML and art:s 2(1)(a) and (c) and 193 of the VAT Dir.}	EU conformity and legal certainty incl. legality according to the EU law aren't relevant: The rule has no equivalent in the VAT Dir. _____ **Note** If *tax liable* in the rule isn't made compatible with art. 9(1) first para. of the VAT Dir., procedural solutions are necessary: - The individual may invoke that art. 9(1) first para. has direct effect {extreme interpretation result that a private person (consumer) would be comprised by tax liable; in conflict with the basic principles in art. 1(2) of the VAT Dir.} - The state may invoke the principle of prohibition of abusive practice in accordance with Halifax et al. (Case C-255/02). _____ **Note.** COM or another Member State might go to the CJEU claiming breach of treaty, if tax liable distorts the competition on the internal market, according to art. 113 TFEU, which also would be in conflict with the neutrality principle according to the preamble to the VAT Dir. and art. 1(2) of the VAT Dir. and with the aim of a cohesive VAT system (COUNCIL DIRECTIVE 2006/112/EC […] on the common system of VAT).

As long as the principle of the EU law's supremacy over national law isn't codified in an EU Constitution which comes into force,[292] Figure 1 may serve as a tool, a supplementary pedagogy structure to handle in practice the described and similar extreme interpretation results regarding the Value Added Tax Act 1994 compared to the VAT Directive (2006/112).

3.3.2.3 Suggestion for a tool to determine the tax subjects and to handle taxable transactions concerning enkla bolag *or* partrederier

In this section it's a matter of handling problems with the representative rule's voluntary part, i.e. Chapter 6 section 2 second sentence of the Value Added Tax Act 1994 referring also to Chapter 5 section 2 of the Code of Taxation Procedure 2011. In my doctor's thesis I created a

[291] Compare Forssén 2015 (1), sec. 2.8, and *Schema 2*, i.e. Figure 2, there.
[292] See sec. 1.1.

model – tool – which I called the ABCSTUXY-model. I set the ambition to firstly analyse the functioning for collection and control purposes of the voluntary rule in relation to the main rules on tax liability and right of deduction.[293] I concluded, as mentioned,[294] that the voluntary rule must be amended with so many rules on application that it would be in conflict with the legal rights of the individual and their demand on foreseeable decisions concerning the material rule of taxation. Therefore I concluded that the best solution would be the EU altering article 9(1) first paragraph of the VAT Directive so that it would be clarified that the concept taxable person in the article comprises also non-legal persons, e.g. *enkla bolag* and *partrederier*, if they fulfil the prerequisites for taxable person. It would be apt for Sweden to approach the EU in that matter together with Finland, who, as mentioned,[295] already treats certain non-legal persons, namely *sammanslutningar* and *partrederier* as tax subjects for VAT purposes. In the mean time the second best solution is to abolish the voluntary part of the representative rule and let the partners in *enkla bolag* or *partrederier* handle the collection of VAT regarding taxable transactions and purchases themselves, if they are fulfilling the prerequisites of taxable person according to the main rule, article 9(1) first paragraph of the Value Added Tax Act 1994.[296]

However, the recently mentioned belongs to the future and for now, i.e. as long as the representative rule exists in the Value Added Tax Act 1994 with both its mandatory and voluntary parts, the ABCSTUXY-model may serve as a supplementary pedagogy structure to handle in practice issues concerning relations between *enkla bolaget* or *partrederiet* and its customers and deliverers and concerning internal relations between its partners. It's a matter of using that model as a tool from a pedagogy perspective – like with PBL[297] – to analyse complex problems regarding the application of the main rules on tax liability and right of deduction on *enkla bolag* or *partrederier* and their partners. I name the persons in my model A, B, C, S, T, U, X and Y. The pedagogy point is to make it easier to remember each person in the model and their respective role by using the acronym A-B-C-STUXY (see Figure 2 below).[298] Based on Figure 2 and also Figure 3 below, which illustrates the relationship between the main rule on tax liability, its components, and the main rule on the right of deduction I draw up two basic examples below, where I assume that the partners A and B each have his own economic activity beside the activity in the *enkla bolaget* or

[293] See Forssén 2015 (1), sec:s 1.2.1, 3.2, 3.3 and 6.4.1.
[294] See sec. 2.3.3.
[295] See sec. 3.2.1.
[296] See Forssén 2015 (1), PAPER Ch:s 3 and 4.
[297] See sec. 1.3.
[298] See Forssén 2015 (1), sec:s 1.2.1 and 3.3.

partrederiet. Thus, I leave out the situation mentioned in the previous section, i.e. the issue about partners in *enkla bolag* or *partrederier* being deemed tax liable merely because of their status as such partners.

Figure 2[299]

Enkelt bolag/partrederi	
A –partner/representative **B** – partner A and B apply by the SKV for A to account for VAT in *enkla bolaget* or *partrederiet*	**S** – supplier to A or B in their capacities of partners in *enkla bolaget/partrederiet*
	T – customer to A or B in their capacities of partners in *enkla bolaget/partrederiet*
	U – person with an indirect relation to A or B in their capacities of partners in *enkla bolaget*
C Eventual additional partner in *enkla bolaget* or *partrederiet*. Alternatively may C be a non-partner, e.g. someone of S, T, U, X or Y	**X** – supplier to A or B regarding their other activities
	Y – customer to A or B regarding their other activities

Figure 3[300]

Persons			
(1) *Taxable person* (carries out independently an economic activity)			*Others are consumers/tax carriers*
Supply of goods or services			Not right of deduction/ reimbursement of input tax
(2) *Taxable*	*From taxation qualified exempted*	*From taxation unqualified exempted*	
(3) Right of deduction of input tax	Right of reimbursement of input tax	Not right of deduction/reim-bursement of input tax	
Purchase which is comprised by prohibition of deduction: Not right of deduction/reimbursement of input tax			

Since *enkla bolaget* or *partrederiet* are non-legal persons and not tax subjects according to the Value Added Tax Act 1994, but the partners

[299] Compare Forssén 2015 (1), sec. 3.3, and *Schema 4*, i.e. Figure 4, there.
[300] Compare Forssén 2015 (1), sec. 3.2, and *Schema 3*, i.e. Figure 3, there.

are tax liable, a test whether undesired cumulative effects or VAT evasion occur in an ennobling chain including *enkla bolag* or *partrederier* concerns the partners' situations. The question whether such communication distortions occur can be found out by comparing situations according to Figure 2 with the general rules in Figure 3, which concern what rules for entrepreneurs in an ennobling chain where the VAT is neutral and the collection of VAT works.[301] In Example 1 below I describe partner A's purchases of e.g. goods from X and sales to Y, where A's own economic activity, i.e. his activity beside the economic activity in *enkla bolaget* or *partrederiet*, is involved. I describe what rules regarding situations comprised by the main rules on tax liability and right of deduction. Example 1 shows the ideal situation in an ennobling chain of entrepreneurs not distorting the communication of the VAT principle according to the EU law to achieve a neutral VAT. In Example 2 I replace the deliverer X with a salesman (S) selling goods to A, now acting for the *enkla bolaget* or *partrederiet*, and I replace the purchaser Y with T, To whom A sells goods on behalf of *enkla bolaget* or *partrederiet*:

Example 1. The ennobling chain X – A – Y [see Figure 2]:
A carries out, as mentioned, beside the activity of the enkla bolaget with B, independently an economic activity [see (1) in Figure 3]. A makes in his economic activity a taxable transaction (supply) of goods or services [see (2) in Figure 3] to the customer Y. I assume, as mentioned, the supply concern goods. For the sales of goods to Y is A tax liable and shall levy output tax (25 per cent in accordance with the general tax rate in Chapter 7 section 1 of the Value Added Tax Act 1994) and account for it in his VAT return. A has purchased the goods from the also tax liable deliverer X, who has charged output tax (25 per cent) in his invoice to A. Since A is tax liable, he has a right to deduct [see (3) in Figure 3] in his VAT return as input tax the tax charged by X.

Example 2. The ennobling chain S – A – T [see Figure 2]:
The presuppositions from Example 1 are, as mentioned, changed so that A acts on behalf of the activity carried out by *enkla bolaget* or *partrederiet* instead of with regard of his own activity. The deliverer and the customer respectively in relation to A I now call S and T. S is, like X, liable to pay output tax, but the question is what rules in the present situation concerning the right of deduction of input tax and concerning the liability to charge output tax on the sales to T.

The problem with the representative rule in this situation is that both partners in e.g. the *enkla bolaget*, A and B, are tax liable for each his

[301] See sec. 3.2.1

share, but they can't share the same invoice from S to exercise their respective right of deduction of the VAT charged by S. An amendment of Chapter 8 section 5 of the Value Added Tax Act 1994 is required meaning that if A and B for example have appointed A as the representative for *enkla bolaget* for VAT purposes, A would alone be considered tax liable end entitled to deduct the VAT charged by S. Otherwise half the VAT charged by S becomes a cost due to the formal rules. Thus will A levy VAT on VAT when charging T. A so called cumulative effect occurs, which is in violation of the VAT principle according to article 1(2) of the VAT Directive (2006/112), since both A and B are entitled to deduction in a material sense, i.e. according to Chapter 8 section 3 first paragraph.[302]

In the material sense the existence of *enkla bolaget* in the ennobling chain shouldn't make any difference from what's the case with entrepreneurs who are legal entities, i.e. natural or legal persons: If they are taxable persons and their transactions are taxable (or from taxation qualified exempted), each entrepreneur would have the right of deduction of input tax. Compare (1), (2) and (3) in Figure 3. Barring the problem with the use of tax liable instead of taxable person in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994, i.e. the problem concerning when the right of deduction emerge,[303] the Value Added Tax Act 1994 is in compliance with the article 168(a) of the VAT Directive (2006/112) concerning the scope of the right of deduction. The present problem is that the representative rule isn't complying with article 178(a), if there won't be an amendment of Chapter 8 section 5 of the Value Added Tax Act 1994 making it formally possible to deduct all of the VAT charged by S. The situation is now the same as if *enkla bolaget* would instead make from taxation unqualified exempted transactions of goods or services, and that's just because of the formal rule, article 178(a) of the VAT Directive (2006/112), not applying to non-legal persons like *enkla bolag* or *partrederier*. The consumer will because of differences in application of the VAT on different forms of enterprises to purchase from a deliverer included in another ennobling chain, where the POTB-principle works ideally,[304] although they are making the same goods or services as the enterprises in the chain consisting of S, A and T in Figure 2. By comparing an ennobling chain containing persons described in Figure 2 with what should rule under general rules according to Figure 2 it's easier to find out cases of undesired communications

[302] See Forssén 2015 (1), sec. 6.4.2. See also sec. 2.3.3.
[303] See sec:s 2.2 and 3.2-3.2.2.
[304] See sec. 3.2.1.

distortions with rules in the Value Added Tax Act 1994 in relationship to what's intended with the rules in the VAT Directive (2006/112).

The presuppositions in the two basic examples described may then be varied further to find out other cases of communication distortions between the Value Added tax Act 1994 and the VAT Directive (2006/112), in the present meaning.[305] In my doctor's thesis I concluded, as mentioned,[306] that it would be necessary to make many amendments of rules on application to make the representative rule function for the purposes of control and an efficient tax collection, too many to justify retaining the rule with consideration of the legal rights of the individual and their demand on foreseeable decisions concerning the material rule of taxation.[307] In Figure 2 C and U respectively represents eventual additional partners and persons with an indirect relationship to the partners, who may cause certain problems. However, I choose here to review another situation concerning A and B, namely the risk of VAT evasion due to communication distortions in the present meaning from the transaction perspective of the representative rule, i.e. concerning internal relations between them as partners in *enkla bolaget* or *partrederiet*:

- In *EDM* (Case C-77/01), paragraph 91, the CJEU concluded that operations carried out by the members of a consortium, i.e. a non-legal person, in accordance with the conditions of a consortium contract and corresponding to the share assigned to each of them in that contract, don't constitute supplies of goods or services effected for consideration within the meaning of article 2(1) of the Sixth Directive (77/388) – nowadays article 2(1)(a) and article 2(1)(c) of the VAT Directive (2006/112) – nor, consequently, a taxable transaction under the directive. Thereby it's irrelevant whether such operations are carried out by the member of the consortium which manages it. On the other hand the CJEU held that where the performance of more of the operations than the share thereof fixed by the consortium contract for a consortium member involves payment by the other members against the operations exceeding that share, those operations – i.e. the internal extra work exceeding the members' obligations according to the consortium contract – constitute a supply of goods or services effected for consideration within the meaning of that presupposition. In other words such internal

[305] See sec. 1.2
[306] See sec:s. 2.3.3 and 3.3.2.3.
[307] See Forssén 2015 (1), PAPER Ch. 3.

extra work constitutes an internal taxable transaction between involved members of the consortium.[308]

- Thus, there's a risk of VAT evasion regarding the representative rule already by the voluntary rule leading to the misconception that it works like article 11 of the VAT Directive (2006/112) concerning so called VAT groups, where the members of such a group may be regarded as a single taxable person. Between partners of *enkla bolag* or *partrederier*, like A and B, extra work in excess of the internal obligations according to the agreement forming *enkla bolaget* or *partrederiet* must be subject to VAT, regardless if A and B have appointed e.g. A as a representative for the collection of VAT in the activity of *enkla bolaget* or *partrederiet*.

[308] See Forssén 2015 (1), sec. 4.3.

4. SUMMARY AND CONCLUDING VIEWPOINTS

4.1 SUMMARY

Introduction

The topic of this Part B is, like in Part A,[309] the sociology of taxation – or fiscal sociology – restricted to the meaning tax rules as tools for transmitting the intended taxation by a tax rule.[310] I still focus on the entrepreneur's situation, now regarding two instances of the use of the concept tax liable instead of taxable person in the Value Added Tax Act 1994, namely concerning the issues on:

1. the determination of the right of deduction of input tax and

2. the so called representative rule on tax liability in *enkla bolag* and *partrederier*.

In my licentiate's and doctor's theses of 2011 and 2013 I've concluded inter alia in those respects differences between the Value Added Tax Act 1994 and the VAT Directive (2006/112) with respect of the intended result of the directive. In this Part B, I analyse the two chosen instances of such differences as communication distortions in the sociology of taxation meaning mentioned regarding in the first place erroneous implementation thereby of the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), in the Value Added Tax Act 1994.[311]

My method to make the sociology of taxation analysis mentioned is to first describe the two chosen instances of concluded differences between the Value Added Tax Act 1994 and the VAT Directive (2006/112) from my theses. Then I comment them from the sociology of taxation perspective as communication distortions regarding what's intended according to the VAT Directive (2006/112). From my doctor's thesis I use or suggest some of the figures I used there for pedagogy purposes, now as models – tools – to make the sociology of taxation analyses of the two chosen examples from my theses, as communication distortions in the mentioned fiscal sociology meaning. Thereby I'm considering mainly the principles of a neutral VAT and an efficient VAT collection. In terms of consequences of communication distortions thereby, I regard

[309] See Part A and sec. 1.1.
[310] See sec:s 1.1 and 1.2.
[311] See sec. 1.1.

in the first place legal certainty. I raise a number of questions and make suggestions for alterations with regard of avoiding conflict with the legal rights of the individual and their demand on foreseeable decisions concerning the material rule of taxation at hand. Concerning the representative rule I suggest the figures as tools to handle the questions if the EU won't alter article 9(1) first paragraph of the VAT Directive (2006/112) and clarify that also non-legal persons like *enkla bolag* and *partrederier* could be considered taxable persons.[312] Below in this section I summarize the questions I've raised concerning the two chosen issues mentioned and the result of the analysis of them.

Issue No. 1

The main rule on the right of deduction in the Value Added Tax Act 1994 doesn't comply with the corresponding rule in the VAT Directive (2006/112)

By the use of the concept tax liability in the main rule on deduction of input tax, i.e. Chapter 8 section 3 first paragraph, the Value Added Tax Act 1994 opens for the interpretation that there's a demand for taxable transactions to have occurred in the economic activity, before the right of deduction emerge for input tax on acquisitions or imports. This isn't complying with the CJEU's case law, which according to *Rompelman* means that it is already the purpose by a taxable person to create taxable transactions that is decisive for the emergence of his right of deduction, according to the main rule on that right in the VAT Directive (2006/112), i.e. article 168(a). Thus, I've concluded that the Value Added Tax Act 1994 isn't directive conform in this respect.[313]

The concept tax liable and its use concerning the main rule on the right of deduction

Since the Value Added Tax Act 1994 isn't directive conform – EU conform – regarding the main rule on the right of deduction, with respect of the emergence of that right, a taxable person cannot rely on Chapter 8 section 3 first paragraph complying with the EU law, i.e. with article 168(a) of the VAT Directive (2006/112). If an entrepreneur cannot rely on the main rule on the right of deduction in the Value Added Tax 1994 complying with the EU law, there's a conflict with the VAT principle according to article 1(2) of the VAT Directive (2006/112), i.e. according to the EU law, which means the following:

[312] See sec:s 1.3 and 1.4.
[313] See sec. 2.2.

- If one or several in an ennobling chain of entrepreneurs are erroneously denied to exercise the right of deduction there will arise a so called cumulative effect, i.e. a tax on the tax effect, where the consumer won't choose the deliverer of the product or the service in question but choose to purchase from a deliverer included in an ennobling chain where the POTB-principle works ideally due to the right of deduction being granted entrepreneurs comprised by that right.

- Another problem would be that the costumer will choose a deliverer who's overcompensated with regard of the right of deduction before a deliverer included in an ennobling chain where the right of deduction is granted correctly to all entrepreneurs in the chain.

In both cases the VAT is treated in conflict with the fundamental principle of a neutral VAT, which follows of primary EU law and secondary EU law respectively by article 113 TFEU and by the recitals of the VAT Directive (2006/112) and the directive's article 1(2), and a thus erroneously applied right of deduction will consequently also be in conflict with the EU's ambition for the future that the tax authorities should increase their activities concerning collection of VAT: In the first situation the VAT collection will be too high and in the second situation it will be too low in relation to the VAT principle in the EU law meaning, i.e. in the meaning of article 1(2). With regard of the concluded existence of the first situation the main rule on the right of deduction in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994 should be altered so that that right will become determined by the use of the concept taxable person instead of today's tax liability, i.e. become in compliance with article 168(a) of the VAT Directive (2006/112).[314]

In accordance with the so called solidarity principle or loyalty principle and *Rompelman* making it *acte éclairé* that the right of deduction emerge already when the first investments are made with the purpose to create taxable transactions, and that there's no demand that they must have occurred before the right of deduction emerge, the EU Commission should be able to rely on the Swedish legislator addressing the problem with the use of the concept tax liable leading to an opposite interpretation. However, this communication distortion between the Value Added Tax Act 1994 and the VAT Directive (2006/112) was missed by the legislator in the reform of the 1st of July 2013. The preparatory work to the amendment SFS 2013:368 didn't even mention the problem. The explanation must be sought in a Governmental public

[314] See sec. 3.2.1.

investigation from 2002, namely the investigation SOU 2002:74, which the EU Commission referred to in its notification in 2008 to the Swedish Government about a breach of the EU law in the present respect. However, the EU Commission doesn't seem to recognize that the investigation SOU 2002:74 didn't separate the concepts *yrkesmässig verksamhet* – nowadays taxable person – and tax liability, and that it's the latter that erroneously determine the right of deduction in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994. *How* it is that the Swedish Government hasn't done anything yet, is therefore most likely to be explained by the Swedish Government probably believing that the implementation on the 1st of July 2013 of taxable person with regard of the tax subject automatically resolved also the issue concerning the determination of the right of deduction. In other words, concerning the described communication distortion by the Value Added Tax Act 1994 of the EU law intention of a neutral VAT, the Swedish Government and the EU Commission are speaking over each others' heads. Neither one of them are probably aware of it still existing due to Chapter 8 section 3 first paragraph still containing the concept tax liability instead of taxable person.[315]

There are also problems regarding tax control causing an ineffective collection of VAT by the use of the concept tax liable instead of taxable person concerning the liability to register to VAT. I've concluded that the CJEU's case law with inter alia *Rompelman* cannot be deemed expressing clearly that also taxable persons who only have the intention to make from taxation unqualified exempted transactions shall be VAT registered according to articles 213–216 of the VAT Directive (2006/112), but also that it doesn't contradict such an order either. I've also mentioned that control problems causing an inefficient tax collection may arise, if only taxable persons making taxable transactions or from taxation qualified exempted transactions (also called zero rated transactions) are comprised by the liability to register to VAT. Problems are likely to occur concerning control of altered circumstances compared to those at the filing of the application for registration, if not all taxable persons should be comprised from the beginning by the same control system for VAT purposes. Therefore I argue for the liability to register to VAT no longer being connected to the concept tax liable in Chapter 7 section 1 first paragraph numbers 3 and 4 of the Code of Taxation Procedure 2011. Instead it should be stipulated that the application to the tax authority shall be made for VAT purposes when any economic activity according to the Value Added Tax Act 1994 is started, altered or revoked by a taxable person.[316]

[315] See sec. 3.2.2.
[316] See sec. 3.2.1.

Issue No. 2

A partner being tax liable according to the representative rule

A major problem with the representative rule is, regarding the mandatory part of the representative rule, i.e. Chapter 6 section 2 first sentence of the Value Added Tax Act 1994, that I've construed its wording so that an ordinary private person can be deemed tax liable merely because of his role as partner in an *enkelt bolag* or a *partrederi* (shipping partnership). My interpretation has been decided by the question of what's the meaning of *enkla bolag* and *partrederier* according to Chapter 6 section 2 of the Value Added Tax Act 1994, which is decided by the civil law. The situation isn't in compliance with the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (206/112). It's in conflict with the principle of neutrality, since the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), is supposed to have the fundamental function of distinguishing the tax subjects, i.e. the entrepreneurs, from the consumers. Since the reform of the 1st of July 2013 didn't regard the representative rule at all, the described problem remains.[317]

The voluntary appointment of a representative for the purpose of tax collection

The voluntary part of the representative rule, i.e. Chapter 6 section 2 second sentence of the Value Added Tax Act 1994 referring also to Chapter 5 section 2 of the Code of Taxation Procedure 2011, gives the partners of an *enkelt bolag* or *partrederi* the possibility to appoint and register by the tax authority one of them as representative to answer for the VAT collection regarding the activity in the *enkla bolaget* or *partrederiet*. I've suggested that the voluntary rule should be abolished so that each partner always answers for his taxable transaction for the *enkla bolaget* or *partrederiet* in accordance with the mandatory part of the representative rule. I've concluded there's a vast need for precision by amendments of both the mandatory rule and the voluntary rule for an efficiency of collection being able to accomplish of the VAT in *enkla bolag* and *partrederier*, e.g. concerning two partners sharing tax liability according to the representative rule not being entitled to use the same invoice from a deliverer to account for their respective right of deduction of input tax. To achieve the latter an amendment is necessary regarding Chapter 8 section 5 of the Value Added Tax Act 1994, which corresponds to article 178(a) of the VAT Directive (2006/112), so that the formal rules won't lead to half the VAT becoming a cost in the described situation. However, the vast need of amendments means that

[317] See sec. 2.3.2.

they would be at the expense of the legal rights of the individual and their demand on foreseeable decisions concerning the material rule of taxation. Therefore I suggest that if the representative rule would be retained it should only consist of its present mandatory part.[318]

Alteration of the main rule on taxable person in the VAT Directive (2006/112) or tools to handle the conflict between the Value Added Tax Act 1994 and the VAT Directive (2006/112) caused by the use in that act of the concept tax liable regarding partners in enkla bolag *or* partrederier

The mandatory part of the representative rule, Chapter 6 section 2 first sentence of the Value Added Tax Act 1994, cause a communication distortion in relation to the VAT principle according to article 1(2) of the VAT Directive (2006/112) by the use of the concept tax liable opening for the interpretation that an ordinary private person could be included into an ennobling chain of entrepreneurs merely by owning a share in an *enkelt bolag* or *partrederi* with an economic activity. Therefore I suggest that if the representative rule would be retained the mandatory part should be altered so that the transaction criterion for tax liability is connected to the partner acting for the *enkla bolaget* or the *partrederiet*, by a partner's tax liability for the *enkla bolagets* or the *partrederiets* economic activity being determined with reference only to Chapter 4 section 5 first paragraph of the Companies Act 1980.[319]

Another problem is the implementation into the Value Added Tax Act 1994 of the main rules of tax liability and the right of deduction according to the VAT Directive (2006/112), where economic activities carried out by *enkla bolag* or *partrederier* is concerned. I refer to the recently mentioned vast need of amendments which would be at the expense of the legal rights of the individual and their demand on foreseeable decisions concerning the material rule of taxation. Therefore I suggest, as also mentioned, that if the representative rule would be retained it should only consist of its present mandatory part and the voluntary part, Chapter 6 section 2 second sentence of the Value Added Tax Act 1994, would be abolished.

There's a third alternative to keeping the representative rule with one or two of the mandatory and voluntary parts which would be better. That's making non-legal person such as *enkla bolag* and *partrederier* taxable persons. The problems with those figures and VAT would be resolved if the EU would alter article 9(1) first paragraph of the VAT Directive (2006/112) so that it would be clarified that the expression *any person*

[318] See sec. 2.3.3.
[319] See sec:s 2.3.3 and 3.3.1.

who in the article comprises also non-legal persons.[320] I've concluded with reference to the VAT principle according to article 1(2) of the VAT Directive (2006/112) there's no reason to exclude enterprises conducted by *enkla bolag* and *partrederier* from the ennobling chain of entrepreneurs under that article only because those figures aren't legal persons. That's in conflict with the principle of neutrality. Therefore my first suggestion is that Sweden should, preferably together with Finland who's already made some non-legal persons tax subjects for VAT purposes, approach the EU about an alteration of the main rule on taxable person to clarify that that concept should comprise also non-legal persons. That would make the representative rule obsolete.[321]

However, as long as there's no such clarification made as recently mentioned concerning the view on non-legal persons according to the main rule on who's a taxable person, I suggest, from a pedagogy and sociology of taxation point of view, models – tools – to handle the described two cases of communication distortions due to the existing representative rule.[322]

Below I begin with suggesting Figure 1 as a tool to handle the situation with the mandatory part of the representative rule, i.e. Chapter 6 section 2 first sentence of the Value Added Tax Act 1994, expanding the scope of who's a tax subject compared to what follows by the main rule on taxable person in article 9(1) first paragraph of the VAT Directive (2006/112). Thereafter I inter alia suggest Figure 2 as a tool, which I call ABCSTUXY, to determine the tax subjects and to handle taxable transactions concerning *enkla bolag* or *partrederier* in accordance with the voluntary part of the representative rule, i.e. Chapter 6 section 2 second sentence of the Value Added Tax Act 1994 referring also to Chapter 5 section 2 of the Code of Taxation Procedure 2011.[323]

I've made Figure 1 as a model – tool – to be used by inter alia national courts, the tax authority or individuals to handle communication distortions with extreme interpretation results regarding the Value Added Tax Act 1994 compared to the VAT Directive (2006/112), like the present with the mandatory part of the representative rule opening for the interpretation that ordinary private persons would be considered tax subjects for VAT purposes merely due to their status as partners in *enkla bolag* or *partrederier* with economic activities:

[320] See sec:s 2.3.3 and 3.3.1.
[321] See sec:s 3.2.1, 3.3.1 and 3.3.2.3.
[322] See sec. 3.3.1.
[323] See sec. 3.3.2.1.

Figure 1

Test	**Result**	**Relevance of aims for trial of the concept *tax liable* in the representative rule**
Tax liable in the rule complying with art. 9(1) first para. of the VAT Dir.?	Expanding {rule competition; also between the rule and 1:1 first para. 1 ML and art:s 2(1)(a) and (c) and 193 of the VAT Dir.}	EU conformity and legal certainty incl. legality according to the EU law aren't relevant: The rule has no equivalent in the VAT Dir. _____ **Note** If *tax liable* in the rule isn't made compatible with art. 9(1) first para. of the VAT Dir., procedural solutions are necessary: - The individual may invoke that art. 9(1) first para. has direct effect {extreme interpretation result that a private person (consumer) would be comprised by tax liable; in conflict with the basic principles in art. 1(2) of the VAT Dir.} - The state may invoke the principle of prohibition of abusive practice in accordance with Halifax et al. (Case C-255/02). _____ **Note.** COM or another Member State might go to the CJEU claiming breach of treaty, if tax liable distorts the competition on the internal market, according to art. 113 TFEU, which also would be in conflict with the neutrality principle according to the preamble to the VAT Dir. and art. 1(2) of the VAT Dir. and with the aim of a cohesive VAT system (COUNCIL DIRECTIVE 2006/112/EC […] on the common system of VAT).

Figure 1 may, as long as the principle of the EU law's supremacy over national law isn't codified in an EU Constitution which comes into force, serve as a tool, a supplementary pedagogy structure to handle in practice the described and similar extreme interpretation results regarding the Value Added Tax Act 1994 compared to the VAT Directive (2006/112).[324]

The model in Figure 2, i.e. the ABCSTUXY-model, is supposed to function as a tool from a pedagogy perspective – like with PBL[325] – to analyse complex problems regarding the application of the main rules on tax liability and right of deduction on *enkla bolag* or *partrederier* and their partners. I name the persons in my model A, B, C, S, T, U, X and Y and by creating the acronym A-B-C-STUXY the pedagogy point is to make it easier to remember each person in the model and their

[324] See sec. 3.3.2.2.
[325] See sec. 1.3.

respective role. By using along with Figure 2 also Figure 3 below, which illustrates the relationship between the main rule on tax liability, its components, and the main rule on the right of deduction, I've drawn up the basic examples 1 and 2 below, where I assume that the partners A and B each have his own economic activity beside the activity in the *enkla bolaget* or *partrederiet*. By the way, I thereby leave out the issue about partners in *enkla bolag* or *partrederier* being deemed tax liable merely because of their status as such partners.[326]

Figure 2

<table>
<tr><td>Enkelt bolag/partrederi</td><td></td></tr>
<tr><td rowspan="3">A –partner/representative
B – partner
A and B apply by the SKV for A to account for VAT in enkla bolaget or partrederiet</td><td>S – supplier to A or B in their capacities of partners in enkla bolaget/partrederiet</td></tr>
<tr><td>T – customer to A or B in their capacities of partners in enkla bolaget/partrederiet</td></tr>
<tr><td>U – person with an indirect relation to A or B in their capacities of partners in enkla bolaget</td></tr>
<tr><td rowspan="3">C
Eventual additional partner in enkla bolaget or partrederiet. Alternatively may C be a non-partner, e.g. someone of S, T, U, X or Y</td><td>X – supplier to A or B regarding their other activities</td></tr>
<tr><td>Y – customer to A or B regarding their other activities</td></tr>
</table>

Figure 3

<table>
<tr><td colspan="3">Persons</td></tr>
<tr><td colspan="3">(1) Taxable person
(carries out independently an economic activity)</td><td>Others are consumers/tax carriers</td></tr>
<tr><td colspan="3">Supply of goods or services</td><td>Not right of deduction/ reimbursement of input tax</td></tr>
<tr><td>(2) Taxable</td><td>From taxation qualified exempted</td><td>From taxation unqualified exempted</td></tr>
<tr><td>(3)
Right of deduction of input tax</td><td>Right of reimbursement of input tax</td><td>Not right of deduction/reim-bursement of input tax</td></tr>
<tr><td colspan="2">Purchase which is comprised by prohibition of deduction: Not right of deduction/reimbursement of input tax</td><td></td></tr>
</table>

[326] See sec. 3.3.2.3.

Example 1 concerns the ideal situation in an ennobling chain consisting of X, A and Y who aren't distorting the communication of the VAT principle according to the EU law to achieve a neutral VAT. A is supposed to be acting as a purchaser and seller regarding his own economic activity. In Example 2 I've replaced the deliverer X with a salesman (S) selling goods to A, now acting for the *enkla bolaget* or *partrederiet*, and I've replaced the purchaser Y with T, To whom A sells goods on behalf of *enkla bolaget* or *partrederiet*. The problem with the representative rule in Example 2 is that both partners in e.g. the *enkla bolaget*, A and B, are tax liable for each his share, but they can't share the same invoice from S to exercise their respective right of deduction of the VAT charged by S. An undesired cumulative effect occurs due to the formal rules. The presuppositions in the basic examples 1 and 2 may then be varied further to find out other cases of communication distortions between the Value Added tax Act 1994 and the VAT Directive (2006/112). In my doctor's thesis I concluded thereby, as mentioned, that it would be necessary to make many amendments of rules on application to make the representative rule function for the purposes of control and an efficient tax collection, too many to justify retaining the rule with consideration of the legal rights of the individual and their demand on foreseeable decisions concerning the material rule of taxation. In Figure 2 C and U respectively represents eventual additional partners and persons with an indirect relationship to the partners. That may cause certain problems, but I've chosen to review another situation concerning A and B, namely the risk of VAT evasion due to communication distortions in the present meaning from the transaction perspective of the representative rule, i.e. concerning internal relations between them as partners in *enkla bolaget* or *partrederiet*.[327]

It follows by *EDM* that operations carried out by the members of a consortium, i.e. a non-legal person, in accordance with the conditions of a consortium contract and corresponding to the share assigned to each of them in that contract, don't constitute supplies of goods or services effected for consideration within the meaning of article 2(1) of the Sixth Directive (77/388) – nowadays article 2(1)(a) and article 2(1)(c) of the VAT Directive (2006/112) – nor, consequently, a taxable transaction under the directive. On the other hand *EDM* also means that where the performance of more of the operations than the share thereof fixed by the consortium contract for a consortium member involves payment by the other members against the operations exceeding that share, those operations – i.e. the internal extra work exceeding the members' obligations according to the consortium contract – constitute a supply of

[327] See sec. 3.3.2.3.

goods or services effected for consideration within the meaning of that presupposition. Such internal extra work constitutes an internal taxable transaction between involved members of the consortium. There's a risk of VAT evasion regarding the representative rule and such extra work between partners of *enkla bolag* or *partrederier*, like A and B, already by the voluntary rule leading to the misconception that it works like article 11 of the VAT Directive (2006/112) concerning so called VAT groups, where the members of such a group may be regarded as a single taxable person.[328]

4.2 CONCLUDING VIEWPOINTS

In this Part B, I've only analysed two of the instances from my theses of 2011 and 2013.[329] However, they should be enough to urge the Swedish Government to initiate a more holistic review of the use of the concept tax liable in the Value Added Tax Act 1994.[330] The implementation on the 1st of July 2013 of the concept taxable person from the VAT Directive (2006/112) for the determination of the tax subject has not resolved e.g. the two examples of differences between the Value Added Tax Act 1994 and the VAT Directive (2006/112) with respect of the intended result of the directive. By this Part B, I'm arguing for such differences being acknowledged as communication distortions without necessarily providing a foregoing law dogmatic analysis. I argue for the sociology of taxation being used concerning the making of tax laws, where the central issue concerns sociology aspects regarding the making of tax laws in the meaning how to make a tax rule communicate effectively between the legislator and the individual.[331]

Problems concerning the legislator conveying the intentions behind a tax rule should be of an international comparative interest.[332] Regarding the EU law and the concept taxable person in relationship to non-legal persons I've mentioned that Sweden should approach the EU together with Finland with respect of the scope of article 9(1) first paragraph of the VAT Directive (2006/112). As long as that's not resolved by a clarification of that directive rule meaning that non-legal persons may be considered tax subjects, if they fulfil the prerequisites of taxable person, there's inter alia a risk of tax evasion already due to a misconception that *enkla bolag*, *sammanslutningar* and *partrederier* are comprised by article 11 of the VAT Directive (2006/112) concerning so called VAT groups, whose members may be regarded as a single taxable person.[333]

[328] See sec. 3.3.2.3.
[329] See sec. 4.1.
[330] See sec. 1.1.
[331] See sec. 1.2.
[332] See sec. 1.1.
[333] See sec. 4.1.

In this context it's of interest that the EU Commission has filed a complaint meaning that Chapter 6 a section 2 of the Value Added Tax Act 1994 is a breach of article 11 by limiting in practice the possibility to group registration to enterprises within the finance and insurance sectors. In *Commission v. Sweden* (Case C-480/10), paragraph 39, the CJEU ruled in favour of Sweden and held that the EU Commission had failed to show convincingly that, in the light of the need to combat tax evasion and avoidance, the measure of the limitation wasn't well founded.[334] However, in my opinion it would be an advantage if this issue would be treated by the EU again and then together with the mentioned issue concerning non-legal persons in general, e.g. regarding the Swedish figures *enkla bolag* and *partrederier* and perhaps also regarding the Finnish figures *sammanslutningar* and *partrederier*.

One of the general reflections from my work with this Part B is the need for fiscal sociology analyses in the present meaning to regard also other disciplines than tax law, where pedagogy is of the essence to educate the powers, e.g. the legislator and the courts. To discover and handle communication distortions in the present sense models – tools – are necessary and *the models* which I've presented may in that respect be compared to above all PBL within pedagogy.[335] Thereby I deem it more likely for e.g. the national courts to rid themselves of the tradition of loyalty to preparatory work to the tax rule at hand, where instead they are obliged to make as far as possible a directive conform – EU conform – interpretation of e.g. the Value Added Tax Act 1994.[336] Another reflection from the work with this Part B concerns a resulting question in Part A, namely whether the economists at the Treasury should be allowed at all to make tax tables without a foregoing sociology of taxation analysis of what it's worth for the entrepreneurs to follow the rules.[337] In my opinion there's an apparent uncertainty concerning the legal rights of the individual regarding undiscovered communication distortions with respect of the making of tax laws in the meaning how to make a tax rule communicate effectively between the legislator and the individual, if the sociology of taxation aspects in the present meaning are disregarded. In consequence this means above all that the value in the legal certainty perspective is disregarded if the economists are allowed to make tax tables before evaluating in the present sociology of taxation meaning at least to some extent how the concerned tax rule in e.g. the Value Added Tax Act 1994 function with respect of communicating the intentions of the EU law in the field of VAT. In my

[334] See Forssén 2015 (1), sec. 1.2.3.
[335] See sec. 4.1.
[336] See sec. 3.3.2.2.
[337] See Part A, sec. 4.2.

opinion it also means unnecessary difficulties for a future introduction of an EU tax.[338] I suggest research efforts about this.

[338] See sec. 1.1.

Part C

Consequences of Communication Distortions of the EU's VAT Directive: A Sociological Study of the Swedish Experience

1. BACKGROUND, TERMINOLOGY, DELIMITATIONS, METHODOLOGY, PRINCIPLES AND OUTLINE

1.1 BACKGROUND

In Part A and Part B, I've written about fiscal sociology aspects on the making of tax laws and communications distortions in *mervärdesskattelagen (1994:200)* [the Value Added Tax Act 1994] of the EU's VAT Directive (2006/112/EC). In both respects I've focused on the entrepreneur's situation. I've argued for a concept building for the purpose of making tax laws within the field of enterprise taxation by the entrepreneurs themselves and their organizations. Concerning communication distortions I've commented such distortions with regard of the legislator's conveying of the intentions of EU law concerning VAT, based on differences concluded in my licentiate's dissertation of 2011 and in my doctor's thesis of 2013 regarding the intended result of the VAT Directive (2006/112),[339] where the concept *skattskyldig* – i.e. tax liable – is used in the Value Added Tax Act 1994, whereas taxable person is used instead in the directive. Thereby I e.g. explained that such distortions emanates from misconceptions by the legislator and the EU Commission concerning the meaning of the use in that act of the concept tax liable in the main rule on the determination of the right of deduction of input tax.[340]

In this Part C, I continue, still from a fiscal sociology point of view, by raising some examples of consequences due to e.g. that instance of communication distortion between on the one hand the Value Added Tax Act 1994 or *skatteförfarandelagen (2011:1244)* [the Code of Taxation Procedure 2011] and on the other hand the VAT Directive (2006/112). Those consequences concern e.g. tax surcharge (*skattetillägg*)[341] and tax fraud (*skattebrott*)[342] as resulting issues of communication distortions in the present respect. Thereby the focus is still set on the entrepreneur and, like in Part B, concerning such distortions between the Value Added Tax Act 1994 and the VAT Directive (2006/112). Therefore one should remember that by Sweden's

[339] See Forssén 2011 and Forssén 2013. See also Part B, sec. 1.1.
[340] See Ch. 8 sec. 3 para. 1 VATA 1994, where tax liability is used, and art. 168(a) of the VAT Directive (2006/112), where taxable person is used for the determination of the scope and emergence of the right of deduction of input tax. See also Part B, sec:s 3.2.2 and 4.1.
[341] See Ch. 49 sec:s 4 and 5 CTP 2011. Before the 1st of January 2012: Ch. 5 sec. 1 TL 1990 or Ch. 15 sec. 1 SBL 1997.
[342] See sec. 2 ATF 1971.

accession to the EU in 1995 the Value Added Tax Act 1994 is supposed to be harmonised with the VAT acts of the other Member States and the EU's VAT Directive (2006/112/EC) accordingly implemented by it, since the intended result with the VAT Directive (2006/112) is binding for the Member States and they are obliged to harmonise their VAT acts.[343] Since this Part C concerns the mentioned and other established cases of erroneous implementation into the Value Added Tax Act 1994 of rules in the VAT Directive (2006/112),[344] it's still not a matter of interpretation of the tax rules, but a review e.g. of the consequences mentioned of those cases of erroneous implementation as communication distortions with regard of conveying the intentions of EU law concerning VAT.

In Part A and Part B, I mentioned that the sociology of taxation in the present meaning borders e.g. the discipline pedagogy.[345] In Part B, I completed my method to make the sociology of taxation analysis of the issues by suggesting tools to handle communication distortions regarding the use of the concept tax liable in the Value Added Tax Act 1994, whereas taxable person is used in the VAT Directive (2006/112). In that respect I'm influenced by pedagogy and so called problem-based learning (PBL).[346] In this Part C, I review some cases of tax surcharge and charges of tax fraud as consequences of communication distortions dues to the use of the concept tax liable in the Value Added Tax Act 1994 or in the Code of Taxation Procedure 2011 when the VAT Directive (2006/112) is using the concept taxable person. By comparison to the PBL, and a holistic view rather than an atomistic approach to analyse the present complex problems concerning tax laws, deep analyses are possible. In that respect I look upon the legislator as a student: By reviewing the consequences of the communication distortions mentioned I hopefully encourage the legislator to make deep approaches on the problems of making the tax laws, e.g. concerning the rules in the Value Added Tax Act 1994 and the Code of Taxation Procedure 2011 complying with the nearest corresponding rules in the VAT Directive (2006/112). That's in line with the idea of good teaching, if you compare me with a teacher and the legislator with a student.[347] By reviewing the consequences of the communication distortions I might educate the powers concerning tax laws; thereby

[343] See art. 288 para. 3 and art. 113 TFEU. See also Prechal 2005, pp. 180 and 317; Stensgaard 2004, p. 25; Hiort af Ornäs & Kristoffersson 2012, p. 21; Forssén 2015 (1), sec:s 1.1.3 and 1.2.2; and Part B, sec. 1.1.
[344] See Part B, sec. 1.1.
[345] See Part A, sec. 1.2, Part B, sec. 1.3 (and, about linguistics and pedagogy, Part D).
[346] See Ramsden 2003, p. 141; Stigmar & Lundberg 2009, p. 248; and Schyberg 2009, p. 52. See also Sandgren 2009, pp. 64-66; Gunnarsson & Svensson 2009, p. 94; and Brusling & Strömqvist 2007, p. 8. See also Part B, sec. 1.3.
[347] See Ramsden 2003, pp. 84 and 85.

contributing to a good technocracy where the legislator's making of tax laws is concerned.[348] I mentioned in Part A and Part B that the purpose with my suggestions is firstly that good technocracy will be implemented into the Swedish tax system so that it will be built upon a fundament of an efficient charge and collection of taxes, e.g. VAT. Thereby the individual, i.e. meaning the consumer, as well as the entrepreneur will be increasingly ensured that the tax authority´s work really guarantees competition neutrality between enterprises and thereby also consumption neutrality with regard of the entrepreneurs' tax situation.[349]

1.2 TERMINOLOGY

The subject in this Part C lies, like in Part A and Part B, within the field of fiscal sociology, which is also named the sociology of taxation. The topic still concerns sociology aspects regarding the making of tax laws in the meaning of how to make a tax rule communicate effectively between the legislator and the individual. This time I'm focusing on some examples of consequences of communication distortions. Thereby I still use the expression communication distortions for the analysis in the sociology of taxation meaning of differences between the Value Added Tax Act 1994 and the VAT Directive (2006/112), when reviewing consequences of such distortions.[350]

As I stated in Part A and Part B the subject could be deemed a subject in its own right, which I would name sociology of tax laws.[351] To avoid confusion with the concept sociology of taxation I won't introduce such a special concept, why I use also in this Part C the concept sociology of taxation – or fiscal sociology – restricted to the meaning tax rules as tools for transmitting the intended taxation by a tax rule. I mean by taxable person such a person in the sense of the main rule on who's a taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). I mean by tax liable a taxable person making taxable transactions according to that directive, if not otherwise stated. I mean by the expression an ordinary private person a person who's not a taxable person according to that main rule, i.e. a consumer.[352]

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[348] Regarding my expression good technocracy: Compare with Backhaus 2013, p. 342, where he use the expression good governance when stating that (Vilfredo) Pareto's State can also be benign, enlightened, civilized and civilizing and not only Leviathan. See also Part A, sec. 2.4.
[349] See Part A, sec:s 2.4 and 4.1.
[350] See also Part B, sec. 1.2.
[351] See Part A, sec. 1.2; and Part B, sec. 1.2.
[352] See also Part B, sec. 1.2.

1.3 DELIMITATIONS, METHODOLOGY AND PRINCIPLES

In this Part C, I make a review of consequences consisting of first and foremost charges on tax surcharge and tax fraud, where the concept tax liable is used in the Value Added Tax Act 1994 or in the Code of Taxation Procedure 2011 when the concept taxable person is used instead in the VAT Directive (2006/112). Thus, it's a matter of the courts having to deal with the legislator not successfully implementing the VAT Directive (2006/112) into the Value Added Tax Act 1994 or into the Code of Taxation Procedure 2011. I delimit the review to two main topics, namely:

- the use of the concept tax liable instead of taxable person in the main rule on the right of deduction, i.e. Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994, and in the rule on registration to VAT, i.e. Chapter 7 section 1 first paragraph number 3 of the Code of Taxation Procedure 2011; and

- the former use of the concept tax liable instead of taxable regarding the vendor in the main rule on intra-Community acquisitions (nowadays intra-Union acquisitions) of goods, i.e. Chapter 2 a section 3 first paragraph number 3 of the Value Added Tax Act 1994.

I give some examples of what the described communication distortion between the Value Added Tax Act 1994 and the VAT Directive (2006/112) in practice may lead to in terms of tax surcharge and tax fraud as resulting consequences thereof. I base the review on the following cases:

- The Stockholm district court's verdict, 4 Dec. 2012, where one of the defendants was sentenced to three years imprisonment mainly for coarse tax fraud and coarse book-keeping crime.[353] This verdict will be reviewed in relation to the first of the two mentioned main topics.

- The court of appeal's verdict, 29 May 1997,[354] on coarse tax fraud, which is one of a couple of cases on the second topic that I've presented before.[355] *Högsta domstolen* (HD)[356] rejected a

[353] See B 1490-11 (4 Dec. 2012). This verdict was in principle confirmed by the court of appeal's (*Svea hovrätt*) verdict 26 Jun. 2014 (case B 200-13). After appeal the HD decided not to grant a review permit – decision 29 Sep. 2015 (case B 3446-14).
[354] See B 1378-96 (29 May 1997).
[355] See Forssén 2000 (2), pp. 69-83; Forssén 2001 (1), sec:s 3.2.2 and 4.5 in Appendix (*Bilaga*) 3; Forssén 2001 (2); Forssén 2005 (1), pp. 66-85; Forssén 2005 (2), pp. 118-133; and Forssén 2007, sec. 7.1.

petition for a new trial concerning the court of appeal's verdict, 29 May 1997.[357]

My method of reviewing the two main topics mentioned is to compare the two mentioned cases by the Stockholm district court and the court of appeal. The latter case concerns the second main topic and is of a particular interest from an issue of law point of view: The defendant was sentenced for coarse tax fraud for not fulfilling his company's tax liability regarding the accounting of calculated output tax on the company's intra-Community acquisition of goods, despite Chapter 2 a section 3 first paragraph number 3 of the Value Added Tax Act 1994 at the time used the concept *skattskyldig*, i.e. tax liable, about the vendor in the other involved EU Member State and that state, Luxemburg, at the same time, opposite to the Value Added Tax Act 1994, stipulated in its VAT legislation exemption from taxation for supply of the goods in question, so called fine gold.[358] It's also of interest from that point of view that alterations were made in the mentioned rule and its second paragraph on the 1st of July 2013, by SFS 2013:368, meaning inter alia that tax liable regarding the vendor was replaced with the concept *beskattningsbar person*, i.e. taxable person,[359] but in the preparatory work to SFS 2013:368 this was merely commented as Chapter 2 a section 3 first paragraph number 3 and second paragraph of the Value Added Tax Act 1994 thereby getting an improved formal correspondence with article 2(1)(b)(i) of the VAT Directive (2006/112).[360]

The issue on the former use of tax liable instead of taxable person about the vendor in Chapter 2 a section 3 first paragraph number 3 of the Value Added Tax Act 1994 didn't fit into my theses,[361] but it has a value as a comparison to the issue on the use of tax liability and tax liable instead of taxable person as prerequisites for the right of deduction in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994 and the liability to register to VAT in Chapter 7 section 1 first paragraph number 3 of the Code of Taxation Procedure 2011. In my licentiate's dissertation in 2011 I raised these two aspects as side issue D and side issue E. However, they weren't even mentioned in the preparatory work leading to the reform of the 1st of July 2013, by SFS 2013:368, which meant an implementation of *beskattningsbar person*, i.e. taxable person, making the general determination of the tax subject in the Value Added Tax Act 1994 complying with the main rule on

[356] The Supreme Court.
[357] The HD's decision Ö 257-99.
[358] See art. 44c and also art. 49 CF 1992.
[359] See Part A, sec. 3.2.1.2; and Part B, sec. 1.1 etc.
[360] See Prop. 2012/13:124, pp. 84, 85 and 94.
[361] See Forssén 2015 (1), sec. 1.3 and Forssén 2011, sec. 1.5.

who's a taxable person in article 9(1) first paragraph of the VAT Directive (2006/112). This is particularly conspicuous regarding side issue D, i.e. concerning the main rule on the right of deduction of input tax in the Value Added Tax Act 1994, since that topic caused the EU Commission to notify Sweden already on the 26th of June 2008 of breaching the EU law.[362] Would, concerning the first main topic, the legislator also describe a future reformation of Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994, meaning a replacement of tax liability with taxable person, merely as a formal improvement in relation to article 168(a) of the VAT Directive (2006/112)?

Concerning the first main topic it's of interest that in the case regarding the Stockholm district court's verdict, 4 Dec. 2012, the tax fraud issue emanated from a VAT audit, where the tax authority's auditors claimed in their report that the defendant's company wasn't tax liable before the registration to VAT. The case concerned input tax on renovation works from mid 2007 and further on a hotel building, where the company filed a registration to VAT in late August 2009. The tax authority's auditors argued in their report against the company being granted deduction of input tax on the building services purchased during 2007-2009, since they considered the company not being tax liable before filing the registration form. Thereby a communication distortion in the present sense exist regarding the first main topic, namely in relation to *Rompelman* (Case 268/83), where it was made *acte éclairé* by the CJEU that it's already the purpose by a taxable person to create taxable transactions that's decisive for the emergence of his right of deduction.[363] In this context my method to analyse the communication distortions with regard of the consequences tax surcharge and tax fraud also contains some references to a criminal case which I commented in Part A,[364] namely the court of appeal's verdict 20 Dec. 2001,[365] where I've concluded that the court of appeal disregarded current law when trying the case at hand.[366] The case concerned charges of coarse tax fraud[367] and of coarse book-keeping crime,[368] where the defendants were two partners of a company within the building business. In my opinion the court of appeal set aside current tax law under the proceedings, which rendered convictions, despite that it was undisputed that the persons' company had a properly done book-keeping. The verdict was based on the court of appeal making erroneous assumptions

[362] See sec:s 1.3 and 2.2.
[363] See Part B, sec. 2.2, where I refer to para. 23 in *Rompelman* (268/83) and Forssén 2015 (1), PAPER sec. 2.4; and Forssén 2011, pp. 39, 40, 215, 216, 262 and 320.
[364] See Part A, sec. 3.3.2.
[365] See B 5292-01 et al. (20 Dec. 2001) and Part A, sec. 3.3.2.
[366] See Part A, sec. 3.3.2.
[367] See sec:s 2 and 4 ATF 1971.
[368] See Ch. 11 sec. 5 PC 1962.

concerning the tax law, and merely as a consequence thereof the court established the existence of a book-keeping crime. If the court of appeal had had a common perspective of checks and balances concerning the application of the rules on book-keeping and taxes, the anomaly of a verdict on book-keeping crime, despite an undisputed properly done book-keeping, would not have been possible.

Concerning the registration issue in particular, i.e. one of the aspects on the first main topic, I also make some references to both Part A and Part B, mainly because the reform by SFS 2013:368 didn't mention that tax liable is still used in Chapter 7 section 1 first paragraph number 3 of the Code of Taxation Procedure 2011 to determine the obligation to register to VAT, instead of taxable person, which is used for that purpose in article 213 of the VAT Directive (2006/112).[369]

In connection to the two main topics I make some procedural remarks. For pedagogy purposes I once again present initially in the next chapter one of the figures I used as tools in Part B to handle problems due to communication distortions between the Value Added Tax Act 1994 and the VAT Directive (2006/112).[370]

I regard in this Part C first and foremost the principle of legal certainty with regard of the legal rights of the individual. However, I may also mention e.g. the principles of neutrality of taxation and efficient tax collection, including control. I've also mentioned them in Part A and Part B.[371]

1.4 OUTLINE

In the next chapter I continue by making the review of consequences in terms of tax surcharge and charges of tax fraud with regard of the two main topics mentioned in the previous section. Those reviews firstly concern:

- the Stockholm district court's verdict, 4 Dec. 2012, and the use of the concept tax liable instead of taxable person in the main rule on the right of deduction and in the rule on registration; and

- the court of appeal's verdict, 29 May 1997, regarding Chapter 2 a section 3 first paragraph number 3 of the Value Added Tax Act

[369] See Part A, sec. 3.2.1.2; and Part B, sec:s 3.2.1 and 4.1.
[370] See Figure 3 in Part B, sec:s 3.3.2.3 and 4.1. See also Forssén 2015 (1), sec. 3.2, and *Schema 3*, i.e. Figure 3, there; and sec. 2.1.
[371] See e.g. Part A, sec. 1.3; and Part B, sec. 1.3.

1994 and the former use in that rule of the concept tax liable instead of taxable person.

I also make some procedural remarks in connection to the reviews of those topics. In the chapter thereafter I give summary and concluding viewpoints regarding that review.

In the Epilogue I make some concluding remarks tying this Part C together with Part A and Part B.

2. TWO MAIN TOPICS ON CONSEQUENCES OF COMMUNICATION DISTORTIONS BETWEEN THE VALUE ADDED TAX ACT 1994 AND THE VAT DIRECTIVE (2006/112) REGARDING THE CONCEPT TAX LIABLE

2.1 INTRODUCTION

In Part B, I presented some tools to handle problems due to communication distortions between the Value Added Tax Act 1994 and the VAT Directive (2006/112), inter alia the figure below.[372]

<table>
<tr><td colspan="3">Persons</td></tr>
<tr><td colspan="2">(1) Taxable person
(carries out independently an economic activity)</td><td>Others are consumers/tax carriers</td></tr>
<tr><td colspan="2">Supply of goods or services</td><td>Not right of deduction/ reimbursement of input tax</td></tr>
<tr><td>(2) Taxable</td><td>From taxation qualified exempted</td><td>From taxation unqualified exempted</td></tr>
<tr><td>(3)
Right of deduction of input tax</td><td>Right of reimbursement of input tax</td><td>Not right of deduction/reim-bursement of input tax</td></tr>
<tr><td colspan="2">Purchase which is comprised by prohibition of deduction: Not right of deduction/reimbursement of input tax</td><td></td></tr>
</table>

This figure gives an overview of the presuppositions for the emergence of tax liability and the material rights connected thereto, according to the Value Added Tax Act 1994. After the reform of the 1st of July 2013, by SFS 2013:368, the act is complying with the main rule on taxable person in article 9(1) first paragraph of the VAT Directive (2006/112), where the determination of the tax subject is concerned, since the connection to *inkomstskattelagen (1999:1229)* [the Income Tax Act 1999] and its concept *näringsverksamhet* – i.e. business activity – was replaced by a proper implementation into Chapter 4 section 1 of the Value Added Tax Act 1994 of the directive's taxable person. First and

[372] See Figure 3 in Part B, sec:s 3.3.2.3 and 4.1. See also Forssén 2015 (1), sec. 3.2, and *Schema 3*, i.e. Figure 3, there.

foremost this means that legal persons no longer already as such are deemed tax subjects with regard of value added tax law. Although, there are still differences between the Value Added Tax Act 1994 and VAT Directive (2006/112) which the reform didn't resolve, e.g. concerning the determination of the right of deduction of input tax.[373]

In Part B, I mentioned that although the tax subject is nowadays determined in accordance with the EU law, Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994, i.e. the main rule on the right of deduction, still contains the concept tax liability to define the emergence and scope of the right of deduction.[374] Therefore there's still an opening for the interpretation that there's a demand for taxable transactions to have occurred in the economic activity before the right of deduction emerges for input tax on acquisitions or imports.[375] I've concluded that this is not a directive conform – EU conform – interpretation result, since it's made *acte éclairé* by *Rompelman* that it's the purpose by a taxable person to create taxable transactions that's decisive for the emergence of his right of deduction, and the main rule on the right of deduction, article 168(a) of the VAT Directive (2006/112), contains the concept taxable person for that determination – not tax liable. Thus, there's a communication distortion between the Value Added Tax Act 1994 and the VAT Directive (2006/112) because tax liability is used in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994 to determine the scope of the right to deduct input tax, which opens for the interpretation there's a demand that the tax subject must have made taxable transactions, i.e. being liable to account for output tax (tax liable), before he's granted the right of deduction of input tax.[376]

In this chapter I will review the Stockholm district court's verdict, 4 Dec. 2012, concerning first and foremost consequences of tax surcharge, handled by the administrative courts, and the verdict's sentence on tax fraud with regard of the right of deduction of input tax and the liability to register to VAT, in connection to the concept tax liable or tax liability.[377] By virtue of *Rompelman* a taxable person [see (1) in the figure above] whose purpose is to make taxable transactions

[373] See Part B, sec. 2.1.
[374] See Part B, sec. 2.2.
[375] See the main rule on the right of deduction, Ch. 8 sec. 3 para. 1 VATA 1994, and the possibility to register new enterprises according to Ch. 10 sec. 9 VATA 1994 and Forssén 2011, sec:s 2.4.2, 6.1, 6.2 and 8.1.6. See also the sec. The conclusions concerning the side issues D and E – certain questions about the concept *skattskyldighet* in Forssén 2011 and PAPER sec. 2.4 in Forssén 2015 (1). See also Part B, sec. 2.2.
[376] See para. 23 in *Rompelman* (268/83). See also sec. 1.3; Part B, sec. 2.2; Forssén 2015 (1), PAPER sec. 2.4; and Forssén 2011, pp. 39, 40, 215, 216, 262 and 320.
[377] See sec. 1.3.

or from taxation qualified exempted transactions, also called zero rated transactions, of goods or services [see (2) in the figure above] have the right of deduction of input tax on purchases [see (3) in the figure above].[378] If the taxable person intends to make from taxation unqualified exempted transactions or if he's an ordinary private person, i.e. a consumer, he has no right of deduction of input tax on his purchases.[379] The Stockholm district court's verdict, 4 Dec. 2012, concerns both the material and formal rules on the right of deduction, i.e. Chapter 8 section 3 first paragraph and Chapter 8 section 5 of the Value Added Tax Act 1994. Furthermore it also concerns the registration issue, which is of interest regarding the present consequences in connection to the concept tax liable or tax liability since the reform by SFS 2013:368 didn't lead to a change of Chapter 7 section 1 first paragraph number 3 of the Code of Taxation Procedure 2011 using that concept to determine the obligation to register to VAT, instead of taxable person, which is used for that purpose in article 213 of the VAT Directive (2006/112).[380] Opposite to the case mentioned initially in section 1.3 from Part A the present case is more specifically about the accounting of VAT and the book-keeping without involvement of the so called F-tax.[381]

The second main topic in this Part C concerns tax surcharge and charges of tax fraud with regard of the use before the 1st of July 2013 of the concept *skattskyldig* – i.e. tax liable – in Chapter 2 a section 3 first paragraph number 3 of the Value Added Tax Act 1994 about the vendor in the other involved EU Member State concerning an intra-Union acquisition of goods, instead of the concept taxable person, which is used in article 2(1)(b)(i) of the VAT Directive (2006/112) regarding both the purchaser and the vendor involved in such a transaction.[382] In this chapter I come back to that topic, which I've presented before,[383] and I choose, as mentioned, to analyse that topic by reviewing the court of appeal's verdict 29 May 1997, which concerned Chapter 2 a section 3 first paragraph number 3 of the Value Added Tax Act 1994 and the question of intra-Community acquisition – nowadays intra-Union acquisition – of so called fine gold to Sweden from Luxemburg. This case is of a particular issue of law interest, since the HD stated in a

[378] See also Part B, sec. 3.3.2.3.
[379] Opposed to unqualified exempted transactions are transactions which are taxable or zero rated comprised by the right of deduction in the art:s 168(a) and 169 of the VAT Directive (2006/112). See also Part B, sec. 3.2.1.
[380] See Part A, sec. 3.2.1.2; and Part B, sec:s 3.2.1 and 4.1. See also sec. 1.3.
[381] See Part A, sec. 3.3.2. See also sec. 1.3.
[382] See sec. 1.3.
[383] See Forssén 2000 (2), pp. 69-83; Forssén 2001 (1), sec:s 3.2.2 and 4.5 in Appendix (*Bilaga*) 3; Forssén 2001 (2); Forssén 2005 (1), pp. 66-85; Forssén 2005 (2), pp. 118-133; and Forssén 2007, sec. 7.1. See also sec. 1.3.

decision rejecting an application of a new trial that the court didn't find reason to obtain a preliminary ruling from the CJEU – although Luxemburg, i.e. the vendor's country, at the time stipulated, in opposition to the Value Added Tax Act 1994, an exemption from taxation in its VAT legislation regarding supply of fine gold.[384] Thereby it's also interesting that the proper implementation by SFS 2013:368 of *beskattningsbar person* – i.e. taxable person – was only briefly commented in the preparatory work as being a mere formal improvement of the correspondence between Chapter 2 a section 3 first paragraph number 3 and second paragraph of the Value Added Tax Act 1994 and article 2(1)(b)(i) of the VAT Directive (2006/112).[385]

In connection to the reviews of the consequences regarding the mentioned topics I also make some procedural remarks in this chapter.

2.2 CONSEQUENCES OF THE CONCEPT TAX LIABLE USED INSTEAD OF TAXABLE PERSON IN THE MAIN RULE ON THE RIGHT OF DEDUCTION AND IN THE RULE ON REGISTRATION

Opposite to the case from Part A, mentioned initially in section 1.3 and also in section 2.1,[386] it's not undisputed in the Stockholm district court's verdict, 4 Dec. 2012, that the defendant's company had a properly done book-keeping. However, there's a similarity between the two cases insofar as the courts aren't making a trial of the special circumstances regarding the emergence of the right of deduction of input tax:

- The first mentioned case concerned charges of coarse tax fraud[387] and of coarse book-keeping crime[388] against two partners of a company within the building business.[389] The court of appeal set aside in its verdict, 20 Dec. 2001, current tax law regarding the so called F-tax, which was relevant for the company's eventual responsibility for taxes etc. concerning the hired subcontractor.[390] The anomaly was that opposite to the district court the court of appeal didn't recognize the rules on F-

[384] See sec. 1.3.
[385] See Prop. 2012/13:124, pp. 84, 85 and 94. See also sec. 1.3.
[386] See B 5292-01 et al. (20 Dec. 2001). See also Part A, sec. 3.3.2.
[387] See sec:s 2 and 4 ATF 1971.
[388] See Ch. 11 sec. 5 PC 1962.
[389] See sec. 1.3.
[390] By the way the F-tax institute has – as mentioned in Part A, sec. 2.3 – been altered on the 1st of January 2012 (see Ch. 9, Ch. 10 sec:s 11-14 and Ch. 59 sec:s 7-9 CTP 2011). Nowadays an F-tax-card isn't issued to the entrepreneur. Instead the acknowledgement of his status as such for F-tax purposes consists only of the tax authority making a registration of approval for F-tax.

tax, which rendered convictions, despite that it was undisputed that the persons' company had a properly done book-keeping. By making erroneous assumptions concerning the tax law in that respect, and thereby establishing the existence of tax fraud, the court of appeal considered there was also a book-keeping crime, despite, despite an undisputed properly done book-keeping. By lumping together the topic of VAT with income tax and in particular the F-tax the court of appeal did neither make any discrimination of the judgement of the issue on deduction of input tax, i.e. of the VAT issue, when deeming that tax fraud was committed.

- In the case by the Stockholm district court, 4 Dec. 2012, the prosecutor was vague about whether the book-keeping crime should be judged on the book-keeping per se or merely as a consequence of the alleged tax fraud.[391] The tax fraud issue, which only concerned VAT, emanated, as mentioned, from a VAT audit, where the tax authority's auditors claimed in their report that the defendant's company wasn't tax liable before the registration to VAT in late August 2009 and therefore not entitled to deduct input tax on costs of renovation works from mid 2007 and further on a hotel building.[392]

Common for the two cases is the lack of a trial of the right of deduction of input tax based on the Value Added Tax Act 1994 as legislation under the EU law. If the purchase of goods or services can't be disputed, there's no basis for denying the right of deduction if the presuppositions according to article 226 of the VAT Directive (2006/112) concerning the requirement of contents of an invoice are fulfilled. The right to exercise the material right of deduction emerged in accordance with the main rule on the scope of deduction, i.e. article 168(a) of the VAT Directive (2006/112), follows then by article 178(a) of the VAT Directive (2006/112). What's happened in the book-keeping is not decisive for the right to exercise the material right of deduction, if the received invoices are fulfilling the requirements of content and the amount of input tax in them for the accounting period at hand is corresponding with the input tax noted in the tax return. The necessary prerequisites for tax fraud are intent covered by incorrect information in the tax return filed to the tax authority which leads to a risk of erroneous approval of the accounted input tax.[393] I focus on the issue of incorrect

[391] See B 1490-11 (4 Dec. 2012). The verdict was, as mentioned in sec. 1.3, confirmed, regarding coarse tax fraud and coarse book-keeping crime, by the court of appeal's (*Svea hovrätt*) verdict 26 Jun. 2014 (case B 200-13). After appeal of that verdict the HD decided not to grant a review permit – decision 29 Sep. 2015 (case B 3446-14).
[392] See sec. 1.3.
[393] See sec. 2 ATF 1971.

information, where the evidence value of received invoices from the deliverers of goods or services shall be deemed for VAT purposes under Chapter 8 section 5 and Chapter 11 section 8 of the Value Added Tax Act 1994 and not under Chapter 5 section 7 of *bokföringslagen (1999:1078)* [the Book-keeping Act 1999], since the Value Added Tax Act 1994 rules as special law over the Book-keeping Act 1999 as general law. This means in both of the cases that the evidence concerning the input tax on purchases should have been deemed under the Value Added Tax Act 1994 and not as a consequence of what might have been considered regarding the income tax and the order of the book-keeping.

Furthermore, it's conspicuous concerning the Stockholm district court's verdict, 4 Dec. 2012, that the case is built by the prosecutor inter alia on a report from the tax authority's auditors containing apparent erroneous assumptions with regard of the Value Added Tax Act 1994 and the Code of Taxation Procedure 2011 and their application under articles 168(a), 178(a) and 213 of the VAT Directive (2006/112). The tax authority's auditors argue in their report against the company being granted deduction of input tax on the building services purchased during 2007-2009 because the company wasn't registered to VAT until late August 2009. They considered the company not being tax liable before filing the registration form.[394] This is not in compliance with the EU law, which governs the subject VAT:

- *Rompelman* means that the intention by a taxable person to make taxable transactions gives him the right to deduct input tax on the purchases to his economic activity in accordance with article 168(a) of the VAT Directive (2006/112), regardless whether such transactions have occurred before the purchases, i.e. regardless of whether tax liability has occurred before that.[395]

- According to article 213 the registration to VAT is based on the tax subject defined as a taxable person, not as tax liable.

It's not far-fetched that the erroneous use of the concept tax liable in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994, concerning the scope of the right of deduction, and in Chapter 7 section 1 first paragraph number 3 of the Code of Taxation Procedure 2011, concerning the liability to register to VAT, has influenced the tax authority to report the defendant to the prosecutor. Furthermore, it was not noted by them in their report that the defendant had a documented meeting with the tax authority previous to the investigation, where the

[394] See sec. 1.3.
[395] See sec. 2.1.

defendant raised material and formal issues on the company's VAT situation:

- The material issues concerned inter alia the purchases of goods and services made by the defendant's company during 2007-2009 and the fact that the company had not made any taxable transactions before filing the registration form to the tax authority in late August 2009.

- The formal issues concerned inter alia the suppliers' sometimes noting the name of the subject owning the building in question instead of the company's name in their invoices to the company.

Since the investigation started on the initiative of the defendant also was noted by the defendant in the tax returns in question filed by the company to the tax authority, the accounting of VAT should be considered open, which objectively should rule out the prerequisite incorrect information. However, the company was charged tax surcharge, which wasn't abolished by the administrative court, and the Stockholm district court considered inter alia that tax fraud was committed. The prerequisite incorrect information, which is a necessary prerequisite in both respects, is in my opinion thus based on erroneous application of the EU law in the field of VAT, and that would be my judgement even if the company had not made its open accounting of the VAT. Although, by thus raising both the material and the formal VAT issues a conviction should have been ruled out regardless of whether the received invoices fulfil the requirements of content according to article 226 of the VAT Directive (2006/112). In my opinion the company cannot even be deemed to have exercised the right of deduction before getting the tax authority's answer to the issues raised by the defendant on behalf of the company. It was namely on the defendant's initiative an investigation of the VAT issues came up, not on the tax authority's initiative – which also has been acknowledged by the tax authority's auditors during the court proceedings.

2.3 CONSEQUENCES OF THE CONCEPT TAX LIABLE USED INSTEAD OF TAXABLE PERSON IN A RULE ON INTRA-UNION ACQUISITIONS OF GOODS

I've also chosen the court of appeal's verdict 29 May 1997, since it concerned intra-Community acquisitions of goods (nowadays intra-Union acquisitions of goods), since it concerned such acquisitions of fine gold, since the HD stated in a decision to reject an application to be granted a new trial that the court didn't find reason to obtain a preliminary ruling from the CJEU, despite the apparent question whether such an acquisition could be deemed occurring when Chapter 2

a section 3 first paragraph number 3 of the Value Added Tax Act 1994 at the time named the vendor in the other involved EU Member State tax liable and the other state in question, Luxemburg, stipulated – in opposition to the Value Added Tax Act 1994 – an exemption from taxation in its VAT legislation regarding supply of fine gold.[396] Alterations were made in the mentioned rule in the Value Added Tax Act 1994 and also in the second paragraph of the rule on the 1st of July 2013, by SFS 2013:368, which inter alia meant the replacement of the concept *skattskyldig*, i.e. tax liable, regarding the vendor with the concept *beskattningsbar person*, i.e. taxable person, but they were commented in the preparatory work to SFS 2013:368 merely as Chapter 2 a section 3 first paragraph number 3 and second paragraph of the Value Added Tax Act 1994 thereby getting an improved formal correspondence with article 2(1)(b)(i) of the VAT Directive (2006/112).[397]

In this section I review the court of appeal's verdict, 29 May 1997, mainly with regard of the issue of law about the court of appeal concluding tax fraud when the intra-Community acquisition rule in question at the time only used the concept *näringsidkare*, i.e. taxable person, about the purchaser and named the vendor in the other EU Member State involved tax liable. I raise the following questions:

- Was the defendant's company really tax liable in the sense that it was liable to account for calculated output tax on its purchase of fine gold from Luxemburg, despite that the intra-Community acquisition rule in question in the Value Added Tax Act 1994 at the time used the prerequisite tax liable about the vendor and Luxemburg stipulated in its VAT legislation exemption from taxation regarding supply of fine gold?

- Are the present alterations in the Value Added Tax Act 1994 on the 1st of July 2013, by SFS 2013:368, making Chapter 2 a section 3 first paragraph number 3 and second paragraph of the Value Added Tax Act 1994 in compliance with article 2(1)(b)(i) of the VAT Directive (2006/112) by implementing *beskattningsbar person*, i.e. taxable person, both for the purchaser and the vendor, thereby replacing the concept tax liable with taxable person about the vendor, only, which is stated in the preparatory work to SFS 2013:368, to be considered an improved formal correspondence with the directive rule and not

[396] See B 1378-96 (29 May 1997). The HD rejected a petition for a new trial, Ö 257-99. See also sec:s 1.3 and 2.1.
[397] See Prop. 2012/13:124, pp. 84, 85 and 94. See also sec:s 1.3. and 2.1.

a material change of Chapter 2 a section 3 first paragraph number 3 and second paragraph of the Value Added Tax Act?[398]

- What does the recently mentioned mean regarding the issue of tax fraud?

- In this context the question is also the following with regard of the issue mentioned in the previous section: Would the legislator describe a future replacement in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994 of tax liability with taxable person too as only a formal improvement in relation to the VAT Directive (2006/112), i.e. to its article 168(a)?

The reform of the 1st of July 2013 made the general definition of the tax subject conform with taxable person in article 9(1) first paragraph of the VAT Directive (2006/112) by the implementation of *beskattningsbar person* (taxable person) into Chapter 4 section 1 of the Value Added Tax Act 1994.[399] This means that the main rule on tax liable (*skattskyldig*), i.e. Chapter 1 section 2 first paragraph number 1 referring to section 1 first paragraph number 1 containing inter alia the prerequisite *beskattningsbar person* (taxable person), is complying with the directive's main rule on who's tax liable (*betalningsskyldig*) in articles 2(1)(a), 2(1)(c) and 193.[400]

However, the problem with the former use of the concept tax liable in Chapter 2 a section 3 first paragraph number 3 of the Value Added Tax Act 1994 concerned the necessary prerequisite taxable transaction, i.e. the tax object, to establish tax liability. Chapter 3 of the Value Added Tax Act 1994 didn't stipulate exemption from taxation for supply of fine gold,[401] but at the time the VAT legislation of Luxemburg did.[402]

This means that according to the principle of legality for taxation there could not exist any intra-Community acquisition of goods with regard of the defendant's company purchase of fine gold from Luxemburg. The national procedural law and the constitutional law with the therein stipulated principle of legality for taxation may namely limit the EU

[398] See Prop. 2012/13:124, p. 94, where it's stated that the alterations in question in Chapter 2 a section 3 first para. no. 3 and second para. of the VATA 1994 aren't intended to mean any material change.
[399] See Part B, sec:s 2.1, 2.2 and 2.3.2.
[400] See Part B, sec. 2.3.2.
[401] That was in compliance with art. 13 of the Sixth Directive (77/388), nowadays art:s 132-137 of the VAT Directive (2006/112).
[402] See art. 44c and also art. 49 CF 1992. See also sec. 1.3.

conform interpretation of the national rules.[403] Thereby the supply of fine gold by the vendor in Luxemburg couldn't be deemed a taxable transaction, which in its turn means that the prerequisite tax liable in Chapter 2 a section 3 first paragraph number 3 with reference to the vendor in the other EU Member State, i.e. Luxemburg, could neither be deemed fulfilled and thus the defendant's company either be deemed tax liable for its purchase of fine gold from Luxemburg as for an intra-Community acquisition, according to Chapter 1 section 2 first paragraph number 5 with reference to section 1 first paragraph number 2 of the Value Added Tax Act 1994.

Thus, in my opinion the answers to the first two questions are that the defendant's company wasn't tax liable for its purchase of fine gold from Luxemburg and the replacement on the 1st of July 2013 of tax liable with taxable person in Chapter 2 a section 3 first paragraph number 3 of the Value Added Tax Act 1994 cannot be considered only an improved formal correspondence with article 2(1)(b)(i) of the VAT Directive (2006/112). This alteration must be deemed a material change of the law, regardless whether the legislator didn't intend it to be more than a formal change. Regarding the resulting third question of what this means regarding the issue of tax fraud, I consider that the fact that an alteration finally was made indicates that the court of appeal's convicting verdict, 29 May 1997, was made under the false assumption of an incorrect information in the company's tax return insofar as it should have accounted for an intra-Community acquisition regarding the purchase of fine gold from Luxemburg. Therefore it would be interesting if another petition for a new trial would be made by the defendant, since the whole process was conducted without even the mentioning of the fact that fine gold was exempted from taxation in Luxemburg.

The fourth question is raised by me with reflection on the issues in the previous section with regard of the Stockholm district court's verdict, 4 Dec. 2012, which also contains obvious issues of law concerning the present use of tax liable instead of taxable person in the Value Added Tax Act 1994. If the legislator also would describe a future replacement in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994 of tax liability with taxable person as only a formal improvement in relation to article 168(a) of the VAT Directive (2006/112) it would in my opinion be in conflict with the principle of legality for taxation. The same rules for a future change of tax liable to taxable person in Chapter

[403] The national legal certainty principles for taxation measures is above all expressed in the prohibition of retroactive tax legislation according to Ch. 2 sec. 10 sen. 2 SC 1974 and the principle of legality for taxation according to Ch. 8 sec. 2 sen. 1 no. 2 SC 1974 (*nullum tributumj sine lege*). See also Eka et al. 2012, pp. 95 and 278; Holmberg et al. 2012, p. 356; and Forssén 2015 (1), sec. 1.2.2. See also Part B, sec. 3.3.2.2.

7 section 1 first paragraph number 3 of the Code of Taxation Procedure 2011, to make it in compliance with article 213 of the VAT Directive (2006/112). If the legislator's view on the alteration made regarding Chapter 2 a section 3 first paragraph number 3 as only a formal change in relation to the VAT Directive (2006/112) would become a so to speak standard procedure I see great problems concerning the principle of legal certainty with regard of the legal rights of the individual.

2.4 PROCEDURAL REMARKS

By the examples on the sections 2.2 and 2.3 I'm aiming to show that communication distortions between the Value Added Tax Act 1994 or the Code of Taxation Procedure 2011 and the VAT Directive (2006/112) are very important to observe as early as possible in the taxation procedure and the court proceedings. If the issues of law are sorted out properly from the issues of evidence during the taxation procedure or investigations by the tax authority, there may not be any foundation at all for charges of tax fraud or they can be dismissed by the prosecutor:

- For example there might be a situation where there are flaws within the book-keeping, but they aren't affecting the issue on incorrect information in the tax subject's tax return. Under the assumption that the transactions accounted for in the tax return are real the tax issue just concerns the interpretation of an issue of law, which may have been raised by notification in the tax return. Then it's a matter of an open accounting of e.g. input tax and thereby cannot incorrect information be considered for either the tax surcharge issue or the tax fraud issue. Moreover, a book-keeping crime can under the described circumstances not be considered a consequence of tax fraud since the latter is ruled out. The status of the book-keeping is then irrelevant with regard of the tax fraud issue and eventual charges of book-keeping crime should be tried without any regard of the tax issue, i.e. the issue of law at hand.

To avoid unforeseeable consequences of charges of tax surcharge and tax fraud due to communication distortions between the Value Added Tax Act 1994 or the Code of Taxation Procedure 2011 and the VAT Directive (2006/112), I suggest that the EU introduce a separate taxation procedure for taxes comprised by the EU's competence, so that e.g. a VAT issue won't be judged by influence of non-harmonised income tax law.[404] My idea in relation to the criminal proceedings is that the prosecutor thereby may be able to regard such communication

[404] See Part A, sec:s 1.3 and 2.2; and Part B, sec:s 1.1 and 3.3.2.2.

distortions already from the beginning of a criminal investigation. Thereby a distinction may be possible to make between tax fraud and book-keeping crime so that e.g. tax fraud might be dismissed already by the prosecutor due to the VAT issue perhaps being considered an issue of law not presenting any incorrect information in the tax return. That will in my opinion, since there's no general EU regulation or directive on criminal law, increase the legal certainty with regard of the individual's legal rights concerning the VAT law and its consequences in terms of not just value added taxation, but also charges of tax surcharge as well as charges of tax fraud.

In the recently mentioned respect I'd like to mention also the *ne bis in idem*-principle with regard of double proceedings on tax surcharge and tax fraud respectively.[405] The HD has ruled for and against in this matter: In two earlier verdicts, 31 Mar. 2010,[406] the HD considered that it wasn't against that principle to be tried twice for the same deed, but in a later verdict, 11 Jun. 2013,[407] the HD established that it's against the *ne bis in idem*-principle to be tried twice for tax surcharge and tax fraud regarding the same deed. However, I deem the range of the latter verdict as somewhat unclear. That's in my opinion, for the sake of increasing legal certainty, another argument for the introduction of a separate taxation procedure for taxes comprised by the EU's competence, so that an issue of law concerning a communication distortion e.g. due to the use in the Value Added Tax Act 1994 of the concept tax liable, whereas taxable person is used in the VAT Directive (2006/112), won't be disregarded e.g. like what's in my opinion the case in the mentioned verdicts by the Stockholm district court, 4 Dec. 2012, and the court of appeal, 29 May 1997.[408]

[405] See art. 4(1) of Protocol No. 7 to ECHR and art. 50 CFREU. See also SOU 2013:62.
[406] See NJA 2010 p. 168 I and II (31 Mar. 2010).
[407] See NJA 2013 p. 502 (11 Jun. 2013).
[408] See sec:s 2.2 and 2.3.

3. SUMMARY AND CONCLUDING VIEWPOINTS

3. 1 SUMMARY

Introduction

The topic of this Part C is, like in Part A and Part B,[409] the sociology of taxation – or fiscal sociology – restricted to sociology aspects regarding the making of tax laws in the meaning of how to make a tax rule communicate effectively between the legislator and the individual. This time I'm focusing on some examples of consequences for the entrepreneur of communication distortions in that respect due to some instances of differences between the Value Added Tax Act 1994 and the VAT Directive (2006/112) regarding the use in that act and in the Code of Taxation Procedure 2011 of the concept tax liable or tax liability, whereas the concept taxable person is used in the directive.[410] Those consequences concern first and foremost tax surcharge (*skattetillägg*) and charges of tax fraud (*skattebrott*).[411]

I review the Stockholm district court's verdict, 4 Dec. 2012,[412] and – mostly by comparison to that case – the court of appeal's verdict, 20 Dec. 2001,[413] as example of the mentioned consequences with respect of the use of the concept tax liable in the main rule on the right of deduction, Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994, and in the rule on the liability to register to VAT, Chapter 7 section 1 first paragraph number 3 of the Code of Taxation Procedure 2011. The concept taxable person is used in the corresponding rules in the VAT Directive (2006/112), i.e. articles 168(a) and 213, for those situations – not tax liable.[414]

I also review another verdict from the court of appeal, 29 May 1997,[415] as an example on the same consequences regarding earlier use of the concept tax liable about the vendor in the other involved EU Member State concerning the transaction corresponding to an intra Union-acquisition of goods, i.e. regarding the wording before the 1st of July 2013 of Chapter 2 a section 3 first paragraph number 3 of the Value

[409] See also sec. 1.1.
[410] See sec:s 1.1 and 1.2.
[411] See sec. 1.3.
[412] See B 1490-11 (4 Dec. 2012).
[413] See B 5292-01 et al. (20 Dec. 2001).
[414] See sec:s 1.3, 2.1 and 2.2.
[415] See B 1378-96 (29 May 1997).

Added Tax Act 1994. This was not in compliance with nearest corresponding rule in the VAT Directive (2006/112), i.e. article 2(1)(b)(i), where taxable person is used about both the purchaser and the vendor.[416]

I also make some procedural remarks in connection to the review of the mentioned consequences.[417]

Furthermore, after the summary and concluding viewpoints in this chapter regarding the mentioned review of consequences I make in the Epilogue some concluding remarks tying this Part C together with Part A and Part B.[418]

Consequences of the concept tax liable used instead of taxable person in the main rule on the right of deduction and in the rule on registration

In summary I deem that the case that led to the Stockholm district court's verdict, 4 Dec. 2012, is at least partly built by the prosecutor on a report from the tax authority's auditors containing erroneous application of certain issues of law governed by the EU law. These issues of law regard the Value Added Tax Act 1994 and the Code of Taxation Procedure 2011 and their application under articles 168(a), 178(a) and 213 of the VAT Directive (2006/112). The erroneous assumptions in that sense made by the tax authority's auditors are that the defendant's company couldn't be tax liable before filing the registration form and thereby neither entitled to deduct input tax on its purchases before the registration to VAT. Thus, the conviction is in conflict with the EU law in the field of VAT, where *Rompelman* means that it's already the intention by a taxable person to make taxable transactions that gives him the right to deduct input tax on the purchases to his economic activity in accordance with article 168(a) of the VAT Directive (2006/112), regardless whether such transactions have occurred before the purchases, i.e. regardless of whether tax liability has occurred before that. Moreover, according to article 213 of the VAT Directive (2006/112) the registration to VAT is based on the tax subject defined as a taxable person, not as tax liable.

In my opinion it's the communication distortions consisting of the use of the concept tax liable instead of the directive's taxable person in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994, concerning the scope of the right of deduction, and in Chapter 7 section 1 first paragraph number 3 of the Code of Taxation Procedure 2011,

[416] See sec:s 1.3, 2.1 and 2.3.
[417] See sec:s 1.3, 2.1 and 2.4.
[418] See sec. 1.4 and Epilogue.

concerning the liability to register to VAT, that's influenced the tax authority to report the defendant to the prosecutor. Thus, the tax authority's auditors in consequence failed to mention that the defendant had a documented meeting with the tax authority previous to the investigation, where the defendant raised material and formal issues on the company's VAT situation, and also failed to mention that the defendant had noted in the company's tax returns that an investigation was started. I gather that the prosecutor wouldn't have brought the case to the Stockholm district court, if that open accounting of circumstances had been mentioned by the tax authority's auditors in the report of their investigation, which was a vital evidence invoked by the prosecutor.[419]

Consequences of the concept tax liable used instead of taxable person in a rule on intra-Union acquisitions of goods

In summary I've made the following conclusions concerning the former use of the concept tax liable in Chapter 2 a section 3 first paragraph number 3 of the Value Added Tax Act 1994 instead of taxable person about the vendor in the other involved EU Member State regarding an intra-Community acquisition (nowadays intra-Union acquisition) of goods in relation to statements in the preparatory work to SFS 2013:368 and the replacement in that respect of tax liable with taxable person:

- The replacement on the 1st of July 2013 of tax liable with taxable person in Chapter 2 a section 3 first paragraph number 3 of the Value Added Tax Act 1994 cannot be considered only an improved formal correspondence with article 2(1)(b)(i) of the VAT Directive (2006/112). It must be deemed a material change of the law, regardless whether the legislator didn't intend it to be more than a formal change.

- Thereby I consider that the fact that an alteration finally was made in the mentioned respect of Chapter 2 a section 3 first paragraph number 3 indicates that the court of appeal's convicting verdict, 29 May 1997, on coarse tax fraud was made under the false assumption of an incorrect information in the company's tax return insofar as it should have accounted for an intra-Community acquisition regarding the purchase of fine gold from Luxemburg, where supply of fine gold was exempted from taxation at the time.

I see great problems concerning the principle of legal certainty with regard of the legal rights of the individual, if the legislator's view on the alteration made regarding Chapter 2 a section 3 first paragraph number

[419] See sec. 2.2.

3 as only a formal change in relation to the VAT Directive (2006/112) would become some kind of a standard procedure. With regard of the Stockholm district court's verdict, 4 Dec. 2012, which also contains obvious issues of law concerning the present use of tax liable instead of taxable person in the Value Added Tax Act 1994, such problems would namely arise if the legislator also would describe a future replacement in Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994 of tax liability with taxable person as only a formal improvement in relation to article 168(a) of the VAT Directive (2006/112). That would in my opinion be in conflict with the principle of legality for taxation and the same would be the case with a similar opinion by the legislator on a future change of tax liable to taxable person in Chapter 7 section 1 first paragraph number 3 of the Code of Taxation Procedure 2011, to make it in compliance with article 213 of the VAT Directive (2006/112).[420]

Procedural remarks

By the examples mentioned from the case law I'm aiming to show that communication distortions between the Value Added Tax Act 1994 or the Code of Taxation Procedure 2011 and the VAT Directive (2006/112) are very important to observe as early as possible in the taxation procedure and the court proceedings. Therefore, I suggest that the EU introduce a separate taxation procedure for taxes comprised by the EU's competence.

By the introduction of such a separate taxation procedure unforeseeable consequences of charges of tax surcharge and tax fraud due to communication distortions between the Value Added Tax Act 1994 or the Code of Taxation Procedure 2011 and the VAT Directive (2006/112) would more likely be avoided. Thus, e.g. a VAT issue would not be judged by influence of non-harmonised income tax law. In relation to the criminal proceedings my idea is that the prosecutor thereby may be able to regard such communication distortions already from the beginning of a criminal investigation, which would make it possible to distinguish between tax fraud and book-keeping crime so that e.g. tax fraud might be dismissed already by the prosecutor due to the VAT issue perhaps being considered an issue of law not presenting any incorrect information in the tax return. Since there's no general EU regulation or directive on criminal law,[421] my suggestion would probably increase the legal certainty with regard of the individual's legal rights concerning the VAT law and its consequences in terms of

[420] See sec. 2.3.
[421] See Prop. 1994/95:19 Part 1, p. 472, where it's inter alia stated that the competence on general criminal law is exclusively national.

not just value added taxation, but also charges of tax surcharge and tax fraud.

Another argument for the EU to increase the legal certainty by introducing a separate taxation procedure for taxes comprised by the EU's competence is problems that may arise concerning the *ne bis in idem*-principle with regard of tax surcharge and tax fraud. With a separate taxation procedure for e.g. VAT issues an issue of law concerning a communication distortion e.g. due to the use in the Value Added Tax Act 1994 of the concept tax liable, while taxable person is used in the VAT Directive (2006/112), would less likely be disregarded in contrast to what I think was the case e.g. in the mentioned verdicts by the Stockholm district court, 4 Dec. 2012, and the court of appeal, 29 May 1997.[422]

3.2 CONCLUDING VIEWPOINTS

I suggest that the EU should introduce a separate taxation procedure for taxes comprised by the EU's competence, e.g. concerning the VAT. Thereby the legal certainty would probably increase with regard of the individual's legal rights concerning the VAT law and its consequences in terms of the value added taxation itself and consequently also with regard of charges of tax surcharge and tax fraud. Communication distortions between the Value Added Tax Act 1994 and the VAT Directive (2006/112) would typically be detected earlier in the procedure regarding such distortions concerning the mentioned use in several cases in that act of the concept tax liable, whereas taxable person is used in the directive.[423]

By making it more likely to discover communication distortions in the present meaning the Swedish tax system will, in addition to an improved legal certainty, also become more efficient with respect of tax collection. This will in its turn positively influence the principle of neutrality: An increased legal certainty will promote loyalty to the VAT system, which in its turn typically leads to a more efficient VAT collection and thereby a more neutral VAT in practice due to that same improved loyalty. A poor communication functioning of tax rules typically leads to poor efficiency with regard of tax collection and it's important both for the state and the entrepreneur that the tax collection by the tax authority is efficient. You cannot create the level playing field provided for a neutral VAT, if competition will be distorted due to tax collection not functioning efficiently. According to the EU Commission the EU has an ambition for the future meaning that the tax

[422] See sec. 2.4.
[423] See sec. 3.1.

authorities should increase their activities concerning collection of VAT.[424] In that respect I would also like to add the importance of an increased VAT control already at the registration:

- The reform leading to a single tax authority with a nation-wide coverage that came into effect in 2004 was, as mentioned,[425] conducted without registration issues even being mentioned in the preparatory work.[426]

- In my opinion the legislator should have initiated an investigation leading to a proper reform of the organization of the tax authority with the focus set on where the control resources are most useful. Instead of letting too many enter the VAT system and investigate ongoing businesses, the efficiency would increase by reducing the risks of tax evasion already by the gate so to speak, rather than investigating those after registration when they've caused problems by interacting with proper entrepreneurs. The efficiency of the tax authority's auditing activities should typically become increased, if a lot of the rotten examples were sifted out already at the registration stage.[427]

Thus, a combination of efforts consisting of the EU introducing a separate taxation procedure for taxes comprised by the EU's competence, e.g. concerning the VAT, and an increased VAT control already at the registration stage will probably promote the principle of legal certainty, with regard of the individual's rights, and the principles of neutrality of taxation and efficient tax collection, including control. Of course, I suggest research efforts about these issues.

[424] See COM(2010) 695 final, concerning the future for the common VAT system within the EU, and the following up in COM(2011) 851 final. See also Šemeta 2011, p. 3; Forssén 2015 (1), sec. 2.2; Forssén 2011, pp. 80 and 223; and Part A, sec. 1.3.
[425] See Part A, sec. 2.3.
[426] See Prop. 2002/03:99. See also Part A, sec. 2.3.
[427] See Part A, sec. 2.3.

Epilogue

Concluding remarks tying Part A, Part B and Part C together

The main thread in Part A, Part B and Part C of this book

The main thread in Part A, Part B and Part C of this book is the making of tax laws with focus set on the entrepreneur's situation:

- In Part A, I argued for a systematic change regarding the making of tax laws specifically concerning the entrepreneurs. In short I argue for a system where the texts in the tax laws are made from the ground up by involvement of the entrepreneur and his organizations, instead of the making of tax laws being imposed on the entrepreneurs from the top-down by politicians.

- In Part B, I give some examples from the Value Added Tax Act 1994 of communication distortions with regard of the use of the concept tax liable, whereas taxable person is used in the VAT Directive (2006/112). By such distortions I mean distortions of the taxation intended by the directive. In that respect I suggest models – tools – to use to handle those communication distortions.

- In Part C, I review the consequences that may occur if the tax authority and the courts can't deal with the communication distortions mentioned, where I set focus on charges of tax surcharge and tax fraud as consequences that the entrepreneur may suffer.

The making of tax laws – not just a subfield to fiscal sociology

I hope by this work and its fiscal sociology aspects restricted to the making of tax laws to have introduced something new that fits well within existing research in the field of fiscal sociology in the broader sense. In The New Fiscal Sociology: Taxation in Comparative and Historical Perspective fiscal sociology is mentioned as growing rapidly and being on the verge of a renaissance.[428] I've stated that the making of tax laws could be deemed a subject in its own right, which I would name sociology of tax laws.[429] However, I avoid this inter alia to avoid confusion with the sociology of taxation, which is synonymous with fiscal sociology. I neither see the making of tax laws as a subfield to fiscal sociology. Instead I regard it as a bridge between aspects of economics and sociology on the fiscal sociology, i.e. as a so to speak certain aspect on fiscal sociology fitting within the subject in those broader senses, e.g. regarding the use of tax revenues for social

[428] See Martin, Mehrotra & Prasad 2009, p. 26; and Campbell 2009, p. 256.
[429] See Part A, sec. 1.2; Part B, sec. 1.2; and sec. 1.2.

spending, which is considered a big deal concerning research efforts in this field.[430]

Thus, further research efforts with respect of the restricted aspects on the subject applied in this book, i.e. the making of tax laws, are of course of interest taken by itself, but may as well serve as completion of research efforts in the mentioned broader sense of fiscal sociology, i.e. with regard of aspects of economics or sociology. This work should be considered input for e.g. researchers or politicians to work on prudent adjustments of the Swedish tax system or to start on a new footing by revising it altogether.[431] As such an input may the following conclusion from Part B serve: The value in the legal certainty perspective of existing tax laws might be disregarded if the economists are allowed to make tax tables before evaluating in the fiscal sociology meaning at least to some extent how the concerned tax rule in e.g. the Value Added Tax Act 1994 function with respect of communicating the intentions of the EU law in the field of VAT.[432]

More research efforts regarding the VAT and the EU project

I've given a review of the use in the Value Added Tax Act 1994 of the concept tax liable causing communication distortions in relation to the VAT Directive (2006/112), where taxable person is used in the directive. However, there are more issues to deal with regarding the use of the concept tax liable and I've mentioned that there's a need of a more holistic reform of the Value Added Tax Act 1994 in that respect, why I refer to the third edition of my doctor's thesis.[433] In Part C, I set that focus concerning future issues on the Swedish tax system's relationship to the EU law on VAT on the following:

- I argue for a combination of efforts consisting of the EU introducing a separate taxation procedure for taxes comprised by the EU's competence, e.g. concerning the VAT, and an increased VAT control by the Swedish tax authority already at the registration stage. I consider that this will probably promote the principle of legal certainty, with regard of the individual's rights, and the principles of neutrality of taxation and efficient tax collection, including control.[434]

- I've also stated that research on the tax laws as tools of effective communication between the legislator and the individual is of

[430] See Martin, Mehrotra & Prasad 2009, p. 26.
[431] See Part A, sec. 4.2.
[432] See Part B, sec. 4.2.
[433] See Forssén 2015 (1); and also Part B, sec. 1.1.
[434] See sec. 3.2.

> importance to avoid unnecessary difficulties for a future introduction of an EU tax.[435]

Regardless of different political opinions on the latter topic I argue for research to make the existing system work. As long as the principle of the EU law's supremacy over national law isn't codified in an EU Constitution which comes into force,[436] communication distortions between the Value Added Tax Act 1994 and the VAT Directive (2006/112) may cause undesired consequences such as charges of tax fraud due to the legal system not properly recognizing the individual's rights established by e.g. the EU law in the field of VAT.[437] It's a matter of making a clean break with the Swedish tradition of using the preparatory work to a tax rule for the purpose of interpretation.[438] I've mentioned that *Högsta förvaltningsdomstolens* (HFD) referred to three sets of preparatory work to a so called close company rule on income tax to make its decision, which was to the individual's disadvantage although the HFD stated that various interpretations could be made of the wording of the tax rule in question. I've considered this not compatible with the Swedish Constitution 1974 and its principle of legality for taxation.[439] Therefore, I suggest concerning VAT, to ensure the legal certainty with regard of the individual's rights under the EU law, that an introduction of a separate taxation procedure for e.g. VAT will be combined with an abolishment in that field of the demand for leave to appeal to the HD and the HFD. I've also mentioned paragraph 11 in *Lyckeskog* (Case C-99/00), where it's stated that the Danish government considered that the demand for leave to appeal would risk leading to a domestic Swedish case law in conflict with the EU law in fields where the EU has the competence, e.g. concerning VAT.[440]

However, the work must carry on making the Swedish tax system under existing EU law as legally certain as possible, regardless of my suggestions. In my opinion there's no other way to relate to the EU law and at the same time ensuring the individual's legal rights, whether or not the future brings an EU Constitution or an EU tax or both. Comparative studies including countries outside the EU should also be of interest concerning problems regarding the legislator conveying the intentions behind a tax rule.[441] Russia is one example of interest in that

[435] See Part B, sec. 4.2.
[436] See Nergelius 2009, p. 58; and Part B, sec. 1.1.
[437] See Part B, sec:s 3.3.2.2 and 4.1.
[438] See Part B, sec. 3.3.2.2.
[439] See Part A, sec. 2.2 regarding RÅ 2004 ref. 2 (30 Jan. 2004).
[440] See Part A, sec. 2.2.
[441] See Part B, sec:s 1.1, 3.2.1 and 4.2.

respect, since the 89 Russian Republics have tremendous difficulty to introduce a Financial Constitution and to raise taxes.[442]

[442] See Backhaus 2013, p. 337.

Part D

Communication Distortions within tax rules and Use of language in law

1. OUTLINE OF PART D

Previously I've mentioned in parts A-C that the topic of the making of tax laws borders e.g. the disciplines linguistics and pedagogy.[443] In this part, Communication Distortions within tax rules and Use of language in law, the focus is set on the language itself, where I analyse the issue on *how* communication distortions occur between the legislator's intentions with tax rules and the perception of them within a general context of the use of language in law. Thereby this part D connects mainly to Part B and concerns linguistics and pedagogy with respect of the topic law and language. Thus, in this part of the book I'm mainly leaving out systematic imperfections concerning the making of tax laws and consequences of communication distortions, which are dealt with in parts A and C.

In this part I'm reasoning from the linguistic law and language perspective about *why* a text containing e.g. an imperative to pay tax may as such make a poor tool to convey that intention of the legislator to the tax subject, e.g. to an entrepreneur. A resulting question thereby is whether there's any pedagogy to support a decrease of a risk of the described communication distortions occurring by way of a method of text processing that makes the final text – making the present tax rule – more likely to correspond in terms of communicative precision with the legislator's intention. Thus, this part of the book chiefly concerns avoiding the described communication distortions by first and foremost avoiding textual imperfections in the communicative respect recently mentioned regarding the making of tax laws.

This Part D contains the following:

- Chapter 2, LAW AND LANGUAGE AND THE MAKING OF TAX LAWS, with sections: 2.1, Introduction; 2.2, The use of language in law; and 2.3, Communication distortions within tax rules.

- Chapter 3, PEDAGOGY TO DETECT IMPERFECTIONS WITHIN TAX RULES INCREASING RISKS OF COMMUNICATION DISTORTIONS, with sections: 3.1, Introduction; section 3.2, Suggested models for detection of risks of communication distortions regarding the use of the concept tax liable instead of taxable person in the main rule on VAT deduction and in the representative rule (which I often

[443] See Part A, sec:s 1.2 and 4.2, Part B, sec. 1.3 and Part C, sec. 1.1.

refer to as the models);[444] 3.3, Some more examples for using the models in the process of the making of tax laws regarding communication distortions caused by the use of the concept tax liable instead of taxable person; 3.4, Example of the use of the models to detect risks of communication distortions regarding restrictions of rights in the VAT Directive allowed by the EU law if such restrictions are in conflict with the VAT principle itself; 3.5, The models described as logic function trees; 3.6, Seriation as a supplementation to the models; and 3.7, Tax audit or the process of the making of tax laws supported by software based on the models adapted into logic function trees.

- Chapter 4, SUMMARY AND CONCLUDING VIEWPOINTS, with sections: 4.1, Summary; and 4.2, Concluding viewpoints.

[444] See sec. 3.2 and also Part B, sec:s 3.3.2.2, 3.3.2.3, 4.1 and 4.2.

2. LAW AND LANGUAGE AND THE MAKING OF TAX LAWS

2.1 INTRODUCTION

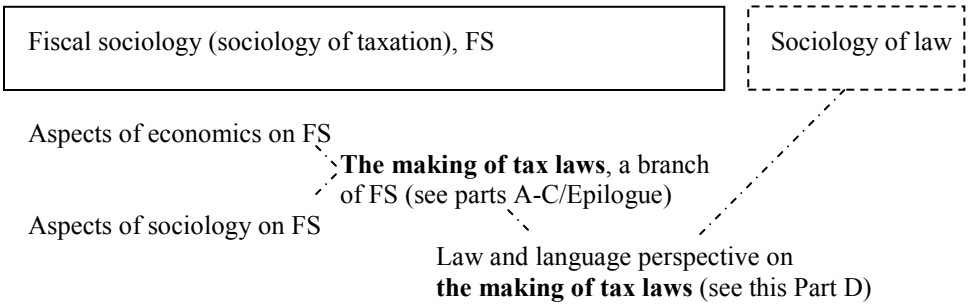
A legal theorist may argue for all interpretation beginning with a text.[445] That's true – at least were the EU and e.g. Sweden are concerned – about tax rules being rules that are required to be determined by texts, since the principle of legality for taxation measures of the Swedish Constitution 1974 means that interpretations of such rules mustn't be made in conflict with their wordings, i.e. an interpretation mustn't be made *contra legem*.[446] However, laws aren't generally written norms. Thereby I refer to Endicott 2014, where inter alia the following is stated: "Laws are not linguistic acts, or even communicative acts. They are standards of behaviour that can be communicated (and may be made) by using language".[447] That's important to remember when reading this part of my book, since I'm *not* reasoning here about problems with establishing the current law meaning of a tax rule, but instead first and foremost about the conveying of the legislator's intentions with a tax rule establishing obligations or rights regarding taxation and distortions occurring concerning the individual's perception of the present rule. Such communication distortions may be detected by legal theorists or courts interpreting the current law meaning of the present tax rule, but that's not the only way of identifying them. Communication distortions may also be discovered by those applying the rule and they may – or may not – raise the problems before or without going to court, e.g. in the press or by addressing trade unions or employers' organizations. This calls for fiscal sociology studies in the meaning of this book, i.e. the concept sociology of taxation (fiscal sociology) restricted to the meaning tax rules as a proper tool for the purpose of transmitting the legislator's intentions with a tax rule.

In the latter meaning of fiscal sociology the previous parts of this book have been about *how* communication distortions occur between the legislator's intentions with tax rules and the perception of them. However, in this Part D of the book I'm restricting my fiscal sociology reasoning another step to an analysis of such distortions within a general context of the use of language in law, where in the first place comments in the latter respect from Endicott 2014 serve as underpinning reasons to *why* a text making a tax rule may poorly convey the legislator's intentions with it to the tax subject.

[445] Compare Ståhl et al. 2011, p. 41. See also Forssén 2011, p. 68.
[446] See Part A, sec. 1.3.
[447] See Endicott 2014, sec. 2.1.

The latter mentioned language question – i.e. *why* etc. – exists regardless of the system in which those making the tax laws are working. Therefore, this Part D of the book leaves out questions about systematic imperfections concerning the making of tax laws (Part A) and consequences of communication distortions (Part C), but connects instead to Part B, where I mention experiences of *how* communication distortions in the meaning of this book occur.

This book is, as mentioned, about sociology aspects on the tax rules as such and presents thereby a new branch of fiscal sociology, which I name the making of tax laws. I'm not introducing it as a new subject, since that might cause confusion with the broader concept sociology of taxation, i.e. fiscal sociology, but if I would deem the making of tax laws a subject in its own right I'd name it sociology of tax laws. Thus, I don't regard the making of tax laws a subfield to fiscal sociology, but a bridge between aspects of economics and of sociology on fiscal sociology in these broader senses. Issues mentioned in this Part D, i.e. aspects on the making of tax laws from a perspective of law and language, may be referred under the subject of sociology of law. Since fiscal sociology is a subject in its own right and primarily dealing with aspects of economics and sociology regarding it, not necessarily with laws on taxation, I distinguish fiscal sociology from sociology of law. I consider, as mentioned, the making of tax laws a branch of fiscal sociology, but the law and language perspective on the making of tax laws should of course also be deemed a topic within sociology of law. Sociology of law seeks universal knowledge on the causality between legal and society factors. Thereby the law is examined partly as a product of society factors, partly as a factor that itself influences society. Sociology of law uses empirical methods which in general isn't the case with law dogmatic studies.[448] By the figure below I elucidate the position of the making of tax laws in the respects mentioned:



[448] See Forslund 1978, p. 59. See about the law dogmatic method: Part A, sec. 1.3.

In section 2.2 I'm mentioning problems in general with the use of language in law and in section 2.3 I'm reasoning from the linguistic law and language perspective about *why* a text containing e.g. an imperative to pay tax may as such make a poor tool to convey the legislator's intentions with a tax rule to the tax subject, e.g. to an entrepreneur. In Chapter 3 I'm reasoning about whether there's any method to support a decrease of a risk of the described communication distortions occurring. Thereby it's in this part of the book still not a matter of any law dogmatic analysis of the current law meaning of a tax rule,[449] but only a matter of reasoning about a pedagogy for the sake of a text processing that makes the final text – making the present tax rule – more likely to correspond in terms of communicative precision with the legislator's intention.

2.2 THE USE OF LANGUAGE IN LAW

In this section I'm mentioning, based in the first place on Endicott 2014, some problems in general with the use of language in law.

No legal system consists only of linguistic acts, A written act may be giving legal force to the civil code and to the criminal code in a civil law system. However, the validity of the written constitution will depend on a norm which isn't created by the use of signs, namely the rule that *that* text is to be treated as setting out the constitution. Therefore, law isn't an assemblage of signs, but – in the sense that's relevant here – law is the systematic regulation of the life of a community by standards treated as binding the members of the community and its institutions.[450]

Another conclusive reason not to say that a law is an assemblage of signs is that when a lawmaking authority does use language to make law the resulting law isn't an assemblage of signs. A general fact about communication is namely that a communicative act is the *use* of an assemblage of signs to some effect. The law made by an authority using words to make law is a standard or standards whose existence and content are determined by the legal effect that the law ascribes to that use of words. Thus, when a law is made by a lawmaking authority – as when a legislature uses a lawful process to pass an enactment that is within its powers – and it's thereby using signs to make law that law is a standard for conduct – not an assemblage of signs.[451]

[449] See INTRODUCTION, concerning part B.
[450] See Endicott 2014, sec. 2.1.
[451] See Endicott 2014, sec. 2.1.

Thus, as mentioned in the previous section, laws are not linguistic acts, or even communicative acts. They are standards of behaviour that can be communicated (and may be made) by using language. In e.g. Endicott 2014 a case from the UK in the mid 1900's, *Garner v. Burr*, is used to illustrate the problems with language and interpretation in the present respect.[452] I summarize those problems here and get back to it for comparison in the next section:

- The subject of *Garner v. Burr* was the definition of *vehicle*. A farmer had strapped wheels to his chicken coop and towed it along the road with his tractor. However, those wheels were ordinary iron tyres, not pneumatic tyres, and therefore liable to damage the roads. This was considered contrary to a rule in the *Road Traffic Act* 1930, forbidding the use of vehicles without rubber tyres on the public highway. When prosecuted, the farmer's successful defence was that his chicken coop was not a *vehicle*, and on those grounds the magistrates acquitted him. On appeal, the appeal court reversed that decision. The Lord Chief Justice accepted that a *vehicle* is primarily a means of conveyance with wheels or runners used for the carriage of persons or goods, and noted that neither persons nor goods were being carried in the poultry shed at the relevant time. He nevertheless held that an offence had been committed, and considered that the magistrates: "[...] ought to have found that this poultry shed was a vehicle within the meaning of s1 of the Road Traffic Act of 1930".[453]

- The magistrates and the appeal court disagreed over the effect of principles, namely a principle that the purposes for which Parliament passed the statute ought to be pursued and a principle that statutes ought only to be read as imposing criminal liability if they do so unequivocally. Assuming those principles are *legal* principles, in the sense that a decision in accordance with the law must respect them, the tension between the principles might be resolved in two ways according to Endicott 2014. There it's also presumed, since the magistrates' reasons aren't known, that the magistrates resolved the tension in the first way (1.) and that the appeal court resolved it in the second way (2.), namely:

  1. by concluding that Parliament's purposes can be respected appropriately while still construing the prohibition strictly, so that it is no offence to use something on the road that is not unequivocally within the meaning of the term *vehicle*, or

[452] See Endicott 2014, sec. 2.2. See also Charnock 2007, sec. 6.2.
[453] See Endicott 2014, sec. 2.2 and Charnock 2007, sec. 6.2.

2. by concluding that Parliament's purpose is sufficiently clear that it can be pursued without jeopardising the principle that criminal liabilities ought to be clearly spelled out, even if someone might reasonably claim that a chicken coop on wheels is not a *vehicle*.[454]

- This is a common sort of disagreement in law and it shows that language might be of no particular importance in law, since the two courts didn't disagree over any question of language, but only over whether they ought to give effect to Parliament's evident purpose (of protecting roads) by convicting, or whether it would be unfair to the farmer. Instead they disagreed over the legal effect of the *use* of a word, i.e. *vehicle*. This sort of disagreement is common and according to Endicott 2014 we seem to find a paradox: competent speakers of the English language presumably share a knowledge of the meaning of the word *vehicle*, yet they disagree over how to *use* the word.[455]

- To resolve the apparent paradox, it's suggested in Endicott 2014 that what speakers of the English language share is an ability to use a word like *vehicle* in a way that depends on the context. Endicott 2014 argues for that a question of whether a chicken coop on wheels counts as a *vehicle* would be a different question – and might have a different answer – if another statute or regulation e.g. imposed a tax on *vehicles*. The Lord Chief Justice was right that a dictionary definition of *vehicle* couldn't conclude the question of whether the chicken coop was a *vehicle* in *Garner v. Burr*, since the purpose of a dictionary definition is to point the reader to features of the *use* of the word that can be important in a variety of more-or-less analogical ways in various contexts. Furthermore Endicott 2014 argues for that a definition of *vehicle* as a mode of conveyance offers the reader one central strand in the *use* of that word, but does not tell the reader whether a more-or-less analogical extension of the word to a chicken coop on wheels is warranted or unwarranted by the meaning of the word.[456]

- Endicott 2014 also offers another way of stating the mentioned resolution of the apparent paradox, namely to distinguish between the meaning of a word (which the magistrates and the appeal judges all knew) and a decision about how to interpret a

[454] See Endicott 2014, sec. 2.2.
[455] See Endicott 2014, sec. 2.2.
[456] See Endicott 2014, sec. 2.2.

communicative act *using* the word (over which they disagreed): What the courts in *Garner v, Burr* shared was a knowledge of the meaning of the word *vehicle*, and what they disagreed over was the effect of the statute.[457]

- Endicott 2014 notes that it's the importance of the *context of* the word's *use* that requires anyone addressing the problem in *Garner v. Burr* to make evaluative judgments, just to apply the putatively descriptive term *vehicle*. The *context of use* is a criminal prohibition imposed for a presumably good public purpose of protecting road surfaces. To determine in that context whether the word *vehicle* extends to a chicken coop on wheels, it's necessary to address and to resolve any tension between the two principles mentioned above: The importance of giving effect to the statutory purpose, and the importance of protecting people from a criminal liability that has not been unequivocally imposed. The importance of that context means that the question of the meaning and application of the language of the statute cannot be answered without making judgments on normative questions of how those principles are to be respected.[458]

- Endicott 2014 also notes inter alia that the dependence of the effect of legal language on context is an instance of a general problem about communication, which philosophers of language have approached by distinguishing semantics from pragmatics, thereby trying to distinguish the meaning of a linguistic expression from the effect that is to be ascribed to the *use* of the expression in a particular way, by a particular user of the language, in a particular context. Language has a context-dependence, and I agree that the distinction mentioned is of interest for the work of legal scholars and theorists in defending particular interpretations of legal language. Of course, I too agree to the conception mentioned in Endicott 2014 amongst philosophers, meaning that law has one special feature that distinguishes it from ordinary conversation, namely that legal systems need institutions and processes for adjudication of the disputes about the application language that arise – partly – as a result of its context-dependence.[459]

Although agreeing with Endicott 2014 in the senses recently mentioned, note that I'm not emphazising interpretation of language when reasoning about fiscal sociology in the meaning of this book, i.e. when

[457] See Endicott 2014, sec. 2.2.
[458] See Endicott 2014, sec. 2.2.
[459] See Endicott 2014, sec. 2.2.

reasoning about *how* communication distortions occur between the legislator's intentions with tax rules and the perception of them. It's not a matter of any law dogmatic analysis of the current law meaning of a tax rule, but communication distortions may, as mentioned, also be discovered by those applying the rule and they may – or may not – raise the problems before or without going to court. Therefore, I'm making comparisons in the next section with the ideas mentioned from Endicott 2014, but first and foremost for the sake of reasoning about *why* a text containing e.g. an imperative to pay tax may be a poor tool to convey the legislator's intentions with a tax rule to the tax subject. The experiences mentioned from Endicott 2014 about the *context of use* of words in the perspective of language and interpretation of law show in my opinion that answers to the mentioned question *why* must be based on methodology regarding the use of words for the making of laws, e.g. tax laws. Therefore, I'm reasoning in the next chapter from the pedagogy viewpoint about whether there's any method to support a decrease of a risk of the described communication distortions occurring.

2.3 COMMUNICATION DISTORTIONS WITHIN TAX RULES

Comparing with the general aspects on the use of language in law mentioned in the previous section and with some of the experiences mentioned in Part B about *how* communication distortions in the meaning of this book occur where the making of tax laws is concerned, I'm reasoning in this section from the linguistic law and language perspective about *why* a text making a tax rule may as such make a poor tool to convey the legislator's intentions with it to the tax subject, e.g. to an entrepreneur.

To have made the rule in the *Road Traffic Act* 1930 more precise regarding its scope in order to fulfil the Parliament's evident purpose of protecting roads, the *context of use* of the word *vehicle* should have been more clarifying already by the wording of the rule itself. Thereby the magistrates would most probably have reached the same conclusion as the appeal court in *Garner v. Burr*. A dictionary definition is of course not the solution to the problem of a sufficient precision of the rule. The situations which would be fair to take to court prosecution must be covered by language with respect of language having a context-dependence as described in the previous section in relation to *Garner v. Burr*. Thus, the rule should prohibit the use of any vehicle or means of transport (transport facilities) on wheels not made of rubber on the public highway, regardless whether any carriage of persons or goods actually takes places with the vehicle or the means of transport when in traffic or parked.

> The latter could e.g. refer to a situation were there's no person at all involved when the public road is damaged by the iron tyres on the chicken coop, namely if the farmer's tractor towing the chicken coop or the chicken coop itself moves (rolls) but not voluntarily. For e.g. insurance purposes the tractor or the chicken coop could then be deemed being in traffic. Therefore, it would not be unfair to make the farmer responsible also for damages to the public road caused by him parking without making sure that the tractor with the chicken coop or the chicken coop won't get loose, not only when he's causing such damages actually driving the tractor towing the chicken coop.
>
> There's also an issue whether the prohibition in question is relevant at all during winter time when roads – in the UK as well as in Sweden – could be covered with snow and therefore the snow would protect the public road from the iron tyres used on the chicken coop.

However, even the above mentioned precision with respect of the language having a context-dependence might not be a sustainable solution over time, since the context in terms of reality undergoes changes over time. The case *Garner v. Burr* concerns the reality in the UK in the mid 1900's. Today the 1930's rule in the *Road Traffic Act* should take in consideration the protection of the environment and risks of pollution damaging people (and animals) – not only the protection of the public roads themselves. The use of iron tyres will of course break loose particles from a road's surface and such particles come out into open air and damage the lungs of people breathing polluted air. In that respect the rule protecting public roads would be in my opinion also fair to apply to the use of e.g. studded tyres today, not only to iron tyres. I refer thereby to several Swedish cities working today for the introduction of local prohibitions against the use of studded tyres. According to the Swedish Transport Administration studded tyres contribute the most to particles from rubbed off asphalt: Particles from local sources represent up to 85 per cent of the so called PM10-release (particulate matter 10-release), i.e. microscopic small particles (less than 10 micrometer in diameter) likely to get into the lungs of people; and studded tyres cause ten times more PM10-release than not studded tyres for winter use.[460] In other words, today it would be a whole other scope of protection worthy situations to consider both when making the rule in question and when construing it. Diverse reactions to violations of it would also be necessary. The incitement not to violate a prohibition of the use of studded tyres is, e.g. according to the County Administrative Board of Stockholm, supposed to be an economical one, by taxes or fees – not by prosecution.[461]

Thus, I see two major conditions for the sake of making the conveying of a legislator's intentions with a certain rule more likely to be

[460] See www.trafikverket.se, i.e. the website of the Swedish Transport Administration.
[461] See LSt Stockholm Report 2012:34, pp. 7 and 17.

sufficiently precise, where the individual's perception of the text is concerned. The text must be made:

- with respect of language having a context-dependence; and

- with respect of the scope of what the text is supposed to describe becomes sustainable over time, considering that context in terms of reality undergoes changes over time.

These conditions also apply for the making of tax laws and I compare with some of the experiences mentioned in Part B:

- In Part B, I give two examples from the Value Added Tax Act 1994 of communication distortions with regard of the use of the concept tax liable, whereas taxable person is used in the VAT Directive (2006/112), i.e. distortions of the taxation intended by the directive and its rules occurring at the implementation by the Swedish legislator in the process of making of tax laws. I've also suggested models – tools – in that respect to use to handle those communication distortions, which I will get back to in the next chapter.[462]

- The experiences in Part B about *how* communication distortions occur where the making of tax laws is concerned show the importance of upholding the respect of language having a context-dependence also in the process of the making of tax laws. In my opinion, the answer to the question *why* a text making a tax rule may as such make a poor tool to convey the legislator's intentions with it must be sought in that process, not in the first place by study of grammar etc. Of course the legislator is anxious to use proper language in that respect. The two examples mentioned from Part B prove instead that the legislator is lacking where the *context of use* of words is concerned:

  - In my licentiate's dissertation 2011,[463] I raised as the main problem of making the general determination of the tax subject in the Value Added Tax Act 1994 complying with the main rule on who's a *taxable person* in article 9(1) first paragraph of the VAT Directive (2006/112). This was resolved by the reform of the 1st of July 2013, but not, as mentioned in the third edition of my doctor's thesis,[464] with

[462] See Part B, Ch. 2.
[463] Forssén 2011.
[464] Forssén 2015 (1).

regard of the two side issues in my licentiate's dissertation, namely concerning the use in that act of the concept *tax liable* to determine the right of deduction and to determine who's liable to register to VAT, i.e. the side issues D and E. These issues weren't even mentioned in the preparatory work leading to the reform mentioned by SFS 2013:368, although side issue D concerned the same phenomenon causing the EU Commission already in 2008 to notify Sweden of breaching the EU law.[465]

- An important establishment in my licentiate's dissertation, which I came back to in my doctor's thesis 2013, is that an ordinary private person cannot be considered having the character of *taxable person* according to the main rule article 9(1) first paragraph of the VAT Directive. Therefore, it's a major problem with the mandatory part of the so called representative rule in the Value Added Tax Act 1994 containing the concept *tax liable* in a text leading to the interpretation that an ordinary private person, i.e. a consumer, can be deemed tax liable merely because of his role as partner in an *enkelt bolag* (approximately translated joint venture) or a *partrederi* (shipping partnership). This is namely not in compliance with the directive rule mentioned on who's a taxable person.[466]

- The first mentioned example from Part B of the use of *tax liable* instead of *taxable person* shows that the legislator doesn't respect the importance of the language having a context-dependence when implementing the rule on the right of deduction in article 168(a) of the VAT Directive into used into Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994. The legislator should e.g. consider that an EU law rule – like article 168(a) – must be placed in its context and interpreted in the light of the EU law as a whole.[467] The second example shows that the legislator also in a situation were it's not a matter of implementing a certain rule in the VAT Directive into the Value Added Tax Act 1994 uses tax liable in a context where the concept leads to a breach of the principle of neutrality in the VAT Directive: An ordinary private person being able to be comprised by the VAT is in conflict with the principle of neutrality, since the main rule

[465] See Part B, sec. 2.2.
[466] See Part B, sec. 2.3.2.
[467] See Prechal 2005, pp. 32 and 33 and van Doesum 2009, p. 20. See also Forssén 2015 (1), p. 76.

on who's a taxable person, article 9(1) first paragraph of the VAT Directive, is supposed to have the fundamental function of distinguishing the tax subjects, i.e. the entrepreneurs, from the consumers.[468] Thus, in both situations described by the two examples from Part B the problem is that the legislator is disregarding the *context of use* of the concept *tax liable*.

- Since the *context of use* of words wasn't respected by the legislator, the help was neither to be sought in the first place in matters of grammar etc. Instead models to detect risks of communication distortions should have been in place in the process of the making of laws. Matters of grammar won't resolve the communication distortions in question if the *context of use* of words and concepts is disregarded, i.e. the legislator may have used proper grammar when using the concept *tax liable*, but nevertheless causing such distortions by using it out of context – instead of using *taxable person* and thereby using the proper concept for the relevant context.

- Problems strictly from a grammar perspective are in my opinion in the first place to be referred to procedural law, but a respect of matters of grammar may of course support the process of the making of tax laws. In the proceedings there may, as mentioned in Part A, occur misconceptions between the parties' about circumstances in the case at hand and they might be caused e.g. by the civil servant at the tax authority not making a proper enough distinction between nouns and verbs when writing the tax authority's decision. The rule of thumb should in my opinion be that the civil servant doesn't try to use a concept, label or some kind of noun before knowing more about the relevant verbs in the case at hand, since taxation usually is about activities. I've suggested a research effort to investigate legal uncertainties in relation to this phenomenon.[469] This should preferably be made in the perspective of law and language mentioned in this Part D. The mentioned grammar aspects are of course also important to respect in the process of the making of tax laws. However, proper grammar etc. won't resolve the problem of communication distortions in the present meaning occurring, if the *context of use* of words and concepts is disregarded anyway. Therefore, I'm focusing in this Part D on the *context of use* of words in the process of the making of tax

[468] See Part B, sec. 2.3.2.
[469] See Part A, sec. 3.3.1.

laws and I'm thereby considering matters of grammar etc. only as supporting issues in that process.

- With regard of the second condition mentioned above, i.e. that the text making a rule must be made taking in consideration that the scope of what e.g. a tax rule is supposed to describe will be sustainable over time, I refer to the above mentioned about the *Road Traffic Act* 1930 becoming out of date due to context in terms of reality undergoing changes over time. A taxable person may, according to the main rules of defining the tax subject for VAT purposes, i.e. Chapter 4 section 1 of the Value Added Tax Act 1994 and article 9(1) first paragraph of the VAT Directive, be any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. Thus, the number of persons comprised by the concept taxable person are countless. Therefore, I deem it proper to talk about an entrepreneur in common parlance when describing the scope of who's a taxable person, and to reserve taxable person as an expression for legal parlance used in more formal situations – e.g. in writs to the tax authority or to courts, in decisions and verdicts made by authorities and courts or in textbooks. However, I've concluded, with reference to the VAT principle according to article 1(2) of the VAT Directive, that there's no reason to exclude enterprises conducted by *enkla bolag* (joint ventures) and *partrederier* (shipping partnerships) from the ennobling chain of entrepreneurs under that article only because those figures aren't legal persons. I've concluded that it's in conflict with the principle of neutrality to do so. In my opinion, the problems with those figures and VAT would be resolved if the EU would alter article 9(1) first paragraph of the VAT Directive so that it would be clarified that the expression *any person who* in the article comprises also non-legal persons, if they fulfil the prerequisites of taxable person in that article.[470] It would also resolve the problem with making the making of tax laws sustainable over time; as long as the fundamental function of the recently mentioned directive rule distinguishing the tax subjects, i.e. the entrepreneurs, from the consumers is upheld, there shouldn't be any difference between entrepreneurs who are non-legal persons and entrepreneurs who are legal entities, i.e. natural or legal persons, where the determination of the scope of the concept taxable person is concerned. Thus, by the suggested alteration of article 9(1) first paragraph of the VAT Directive (and implementation into Chapter 4 section 1 of the Value Added Tax Act 1994) would over time various, unforeseeable

[470] See Part B, sec. 3.3.1.

forms of figures conducting business be more likely to be covered by the concept taxable person.

- However, as long as there's no such clarification made as recently mentioned concerning the view on non-legal persons according to the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive, I suggest in Part B e.g. tools to handle cases of communication distortions regarding the representative rule and I will get back to those tools below in Chapter 3.[471] There I also mention some more situations regarding the compliance of the Value Added Tax Act 1994 with the EU law.

[471] See Part B, sec. 3.3.1.

3. PEDAGOGY TO DETECT IMPERFECTIONS WITHIN TAX RULES INCREASING RISKS OF COMMUNICATION DISTORTIONS

3.1 INTRODUCTION

In the previous section I conclude that matters strictly of grammar character may only serve as support in a process of decreasing risks of communication distortions in the present meaning occurring. Proper grammar etc. won't resolve the problem of communication distortions occurring in the process of the making of tax laws, if the *context of use* of words and concepts is disregarded anyway by the legislator. Therefore, I only mention here that e.g. so called parsing may serve as such a support and I'm focusing instead on models to detect risks of communication distortions, where the legislator's intentions with a text making a rule in e.g. the Value Added Tax Act 1994 in relation to the VAT Directive is concerned. Thereby I come back here to models – tools – from Part B to detect such risks and try to develop them further.

> In the latter mentioned respect, parsing may serve as a support and therefore I will only mention (very) shortly the following: Parse is Latin meaning part of speech (*pars orationis*) and parsing means to divide a sentence into grammatical parts and identify the parts and their relations to each other;[472] parsing is used in computer science,[473] and a natural language parser is a program that works out the grammatical structure of sentences, for instance which groups of words go together (as *phrases*) and which words are the subject or the object of a verb.[474]

Thus, I refer problems to be resolved by parsing in the first place to the procedural law. Thereby, I'm not saying that parsing won't be supportive to the models presented for the process of the making of tax laws; depending on the development of these models parsing and computer science might be suitable to attach to them in the future. However, for the reasons mentioned I'm leaving out parsing in the further presentation of models – tools – to detect risks of communication distortions in the present meaning.

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[472] See www.merriam-webster.com/dictionary/parse.
[473] See Beal.
[474] See The Stanford NLP Group. I also recommend a lecture (of 10,5 minutes) via the Internet: Dependency Parsing Introduction, given by Christopher Manning at Stanford University.

Note that you are in fact using parsing when searching on the Internet for electronic libraries etc. and information to your research etc. Search engines like e.g. Google contain algorithms.[475] Since they are built by using it,[476] parsing is of course supporting when using IT, e.g. the Internet, for research efforts concerning fiscal sociology in the meaning of this book.

Thus, in this chapter I'm trying to make a pedagogy reasoning about models – tools – to function as methods to support a decrease of risks of communication distortions occurring in the process of the making of tax laws by detecting such risks. The focus is still on rules in the Value Added Tax Act 1994; the models aim to support the detection of imperfections within certain rules of that act in relation to supposedly corresponding rules in the VAT Directive (2006/112) or to the intentions following by the principles of the VAT Directive – e.g. mentioned in the recitals of its preamble.[477] That correspondence is meant to increase by way of the use of such models as a method of text processing making the final text – making the present tax rule – more likely to correspond in terms of communicative precision with the legislator's intention determined as the intentions following by the rules or principles of the VAT Directive, which the legislator is supposed to implement into the Value Added Tax Act 1994.

I begin with the issues from Part B mentioned in the previous section and the models used in that respect, i.e. concerning communication distortions regarding the use of the concept *tax liable* in the rules on the right of deduction, Chapter 8 section 3 first paragraph, and on the so called representative rule for VAT in *enkla bolag* (joint ventures) and *partrederier* (shipping partnerships), Chapter 6 section 2 of the Value Added Tax Act 1994 instead of the concept *taxable person* in article 9(1) first paragraph of the VAT Directive (see below section 3.2).

In section 3.3 below, I give, to elucidate further the necessity of models (tools) to detect risks of communication distortions in the present meaning, some more examples of the use of *tax liable* in the Value Added Tax 1994 and in the Code of Taxation Procedure 2011, where the supposedly corresponding rules of the VAT Directive use *taxable person*, namely:

1. the rule on the liability to register to VAT, Chapter 7 section 1 first paragraph number 3 of the Code of Taxation Procedure 2011;

[475] See e.g. Seipel 2010, pp. 197, 198 and 235.
[476] See e.g. Kegler 2014, presenting his new parser algorithm, Marpa, and thereby also giving a historic overview of parsers (algorithms), from Ned Irons publishing his ALGOL parser in 1961 to e.g. Jay Earley's parser algorithm (from 1968), i.e. Earley's parser or Earley's algorithm, which is – for requests of today – mentioned as a powerful parser algorithm.
[477] See Part A, sec. 1.3 and Part B, sec. 1.1.

2. the rule on so called intra-Union acquistions of goods, Chapter 2 a section 3 first paragraph number 3 of the Value Added Tax Act 1994;

3. the special rules on intermediaries and on producers' enterprises (selling at auctions), Chapter 6 section 7 and Chapter 6 section 8 of the Value Added Tax Act 1994; and

4. the special rule in Chapter 9 section 1 of the Value Added Tax Act 1994 on voluntary tax liability for letting out of business premises etc.

   Regarding 3. and 4.: There are 'special rules on who's tax liable in certain cases' (*särskilda bestämmelser om vem som i vissa fall är skattskyldig*) in Chapter 6, Chapter 9 and Chapter 9c of the Value Added Tax Act 1994 (which follows by Chapter 1 section 2 last paragraph). These three cases are about tax liability beside the main rule, Chapter 1 section 1 first paragraph number 1, to which the main rule on who's tax liable, Chapter 1 section 2 first paragraph number 1, refers.[478]

In section 3.4 below, I mention rules on prohibition of deduction for certain entrepreneurs acquisitions of e.g. vehicles in the Value Added Tax Act 1994 in relationship to the VAT Directive, where risks of communication distortions may also occur concerning implementing of rules with restrictions allowed by the EU if they cause application in conflict with the intentions of the VAT principle itself.

In section 3.5 below, I propose some use of so called logic function trees when structuring the process of the making of tax laws by using the suggested models to detect risks of communication distortions.

In section 3.6 below, I suggest so called seriation as a supplementation to the models and compare thereby with law history etc.

In section 3.7 below, I suggest development of software based on the models adapted into logic function trees for the purpose of supporting tax audits and/or detection of risks of communication distortions in the process of the making of tax laws.

[478] See also Part B, sec. 2.3.2.

3.2 SUGGESTED MODELS FOR DETECTION OF RISKS OF COMMUNICATION DISTORTIONS REGARDING THE USE OF THE CONCEPT TAX LIABLE INSTEAD OF TAXABLE PERSON IN THE MAIN RULE ON VAT DEDUCTION AND IN THE REPRESENTATIVE RULE

In sections 3.3.2.2 and 3.3.2.3 in Part B I present some models that I've used in my licentiate's dissertation (2011) and in my doctor's thesis (2013), see figures 1-3 below (Figure 3 used in both theses; Figures 1 and 2 used in the doctor's thesis). See also Figure 4 below, which illustrates the essentials of the VAT principle according to article 1(2) of the VAT Directive, i.e. the VAT principle according to the EU law, presented in section 3.2.1 in Part B and also in my mentioned theses. I often refer to figures 1-4 below as the models.

Figure 1

Test	**Result**	**Relevance of aims for trial of the concept *tax liable* in the representative rule**
Tax liable in the rule complying with art. 9(1) first para. of the VAT Dir.?	Expanding {rule competition; also between the rule and 1:1 first para. 1 ML and art:s 2(1)(a) and (c) and 193 of the VAT Dir.}	EU conformity and legal certainty incl. legality according to the EU law aren't relevant: The rule has no equivalent in the VAT Dir. _____ **Note** If *tax liable* in the rule isn't made compatible with art. 9(1) first para. of the VAT Dir., procedural solutions are necessary: - The individual may invoke that art. 9(1) first para. has direct effect {extreme interpretation result that a private person (consumer) would be comprised by tax liable; in conflict with the basic principles in art. 1(2) of the VAT Dir.} - The state may invoke the principle of prohibition of abusive practice in accordance with Halifax et al. (Case C-255/02). _____ **Note.** COM or another Member State might go to the CJEU claiming breach of treaty, if tax liable distorts the competition on the internal market, according to art. 113 TFEU, which also would be in conflict with the neutrality principle according to the preamble to the VAT Dir. and art. 1(2) of the VAT Dir. and with the aim of a cohesive VAT system (COUNCIL DIRECTIVE 2006/112/EC […] on the common system of VAT).

Figure 2

Enkelt bolag/partrederi	
A –partner/representative **B** – partner A and B apply by the SKV for A to account for VAT in *enkla bolaget* or *partrederiet*	**S** – supplier to A or B in their capacities of partners in *enkla bolaget/partrederiet*
	T – customer to A or B in their capacities of partners in *enkla bolaget/partrederiet*
C Eventual additional partner in *enkla bolaget* or *partrederiet*. Alternatively may C be a non-partner, e.g. someone of S, T, U, X or Y	**U** – person with an indirect relation to A or B in their capacities of partners in *enkla bolaget*
	X – supplier to A or B regarding their other activities
	Y – customer to A or B regarding their other activities

Figure 3

Persons			
(1) *Taxable person* (carries out independently an economic activity)			*Others are consumers/tax carriers*
Supply of goods or services			Not right of deduction/ reimbursement of input tax
(2) *Taxable*	*From taxation qualified exempted*	*From taxation unqualified exempted*	
(3) Right of deduction of input tax	Right of reimbursement of input tax	Not right of deduction/reim-bursement of input tax	
Purchase which is comprised by prohibition of deduction: Not right of deduction/reimbursement of input tax			

In Figure 3 the prerequisites are numbered for tax liability and right of deduction respectively regarding the main rules in Chapter 1 section 1 first paragraph number 1 and Chapter 8 section 3 first paragraph respectively in the Value Added Tax Act 1994. By (1) and (2) in Figure 3 the structure of the prerequisites for tax liability in the Value Added Tax Act 1994 and the VAT Directive respectively is shown. It confirms that the main rule for tax liability in that act, Chapter 1 section 1 first paragraph number 1, are conform with the corresponding main rules in that respect in the directive, i.e. with articles 2(1)(a) and (c) and 193

(compare the mid column in Figure 1). However, it's not directive conform – EU conform – that the act's main rule on the right of deduction, Chapter 8 section 3 first paragraph, use the concept *tax liable* (tax liability), instead of taxable person as in the corresponding main rule of the directive, article 168(a), which I mentioned as side issue D in my licentiate's dissertation and come back to below.

In e.g. section 3.3.2.3 in Part B I use by examples the ennobling chain projected on the VAT principle according to the EU law and the thereof deriving principles, i.e. the principle of a general right of deduction, the principle of reciprocity and the passing on the tax burden principle (the POTB-principle), where problems concerning the representative rule, Chapter 6 section 2 of the Value Added Tax Act 1994. I illustrate the mentioned ennobling chain by Figure 4 below.

Figure 4

Entrepreneur 1	→ **Entrepreneur 2 and so on**	→ **The consumer**
Entrepreneur 1 charges VAT,	…which will be deducted by Entrepreneur 2 who in his turn charges VAT (and so on).	The sum of VAT in the ennobling chain burdens the consumer.

If one or several of the entrepreneurs in the ennobling chain is erroneously denied to exercise the right of deduction there will arise a so called cumulative effect, i.e. a tax on the tax effect, and the problem with the use of *tax liable* in the main rule on the right of deduction of VAT, Chapter 8 section 3 first paragraph of the Value Added Tax Act would probably have been identified by the legislator, if the legislator had tried the concept tax liable in the context of concepts following by the structure illustrated in Figure 3 compared to the prerequisites for the right of deduction in article 168(a) of the VAT Directive. If so the legislator would easily have realized that it is *taxable person* (1) which is *préjudiciel* to the determination of *the right of deduction* of VAT (3) in the corresponding rule in the VAT Directive, i.e. in article 168(a). *Tax liable* is instead used in the VAT Directive for the liability to pay VAT, where the presuppositions are that the *taxable person* (1) makes a *taxable transaction*, i.e. a taxable supply of goods or services (2). I conclude in section 4.1 (Issue No.1) in Part B that the reason why the Swedish Government hasn't done anything yet most likely is that it believes that the problem in question was resolved by the reform of the 1st of July 2013 implementing taxable person into Chapter 4 section 1 of the Value Added Tax Act 1994, where the determination of the tax subject is concerned. The EU Commission, who raised the issue in 2008, is probably of the same notion, i.e. the Swedish Government and

the EU Commission are speaking over each others' heads. Neither one of them are probably aware that the problem still exists.

Thus, the issue about the main rule on the right of deduction shows that the use of models – tools – representing the proper context for the use of tax concepts would decrease risks of communication distortions in the present meaning, i.e. where the making of rules in the Value Added Tax Act 1994 are concerned for the sake of conveying the intentions following by the rules or principles of the VAT Directive. Compare section 2.3 concerning language having a context-dependence: Tax liable was used out of its proper context and Figure 3 would have revealed this for the legislator, if e.g. that figure would have been used in the process of the making of laws by the legislator.

Concerning the problems with the representative rule, Chapter 6 section 2 of the Value Added Tax Act 1994, Figure 1 and Figure 2 could serve as pedagogy models to decrease risks of communication distortions in the process of the making of tax laws, if the legislator would at all address those problems:

- Regarding the mandatory part of the representative rule, i.e. Chapter 6 section 2 first sentence, the problem is that it can be interpreted as giving an ordinary private person the character of tax subject, disregarding the fundamental function of the VAT principle distinguishing taxable persons (entrepreneurs) from consumers like ordinary private persons.

- I made Figure 1 as a model – tool – to be used by inter alia national courts, the tax authority or individuals to handle this or similar communication distortions with extreme interpretation results regarding the Value Added Tax Act 1994 compared to the VAT Directive.

- Figure 1 may serve as such a tool – a supplementary pedagogy structure – to handle in practice the described and similar extreme interpretation results regarding the Value Added Tax Act 1994 compared to the VAT Directive. The interpretation result regarding the main rule on who's a taxable person according to Chapter 4 section 1 of that act before the reform of the 1st of July 2013 was extreme compared to the main rule on who's a taxable person according to the VAT directive, i.e. article 9(1) first paragraph, since it opened for ordinary private persons, i.e. consumers, to be comprised by the VAT. In the far right column of Figure 1, I mention what can be done in practice if tax liable (tax liability) in the representative rule in the Value Added Tax Act 1994 isn't compatible with the main rule on

who's a taxable person, article 9(1) first paragraph of the VAT Directive. This might also inspire the legislator to some effort in the sense of the making of tax laws regarding the representative rule. I've mentioned in my doctor's thesis that besides registered *enkla bolag* there's an undiscovered number of them, which I consider are reason enough for fiscal sociology studies in the present sense rather than waiting for case law to deal with problems concerning *enkla bolag* and *partrederier*.

- In this context it's also of interest that Figure 1 may serve as such a tool as recently mentioned only as long as the principle of the EU law's supremacy over national law isn't codified in an EU Constitution which comes into force. Until then an interpretation result that is directive conform – EU conform – may still be restricted by the wording of a rule in the Value Added Tax Act, since an interpretation mustn't violate the constitutional principle of legality for taxation in the meaning that it's made in conflict with the wording of a tax rule; the interpretation mustn't – as mentioned – be made *contra* legem.[479] Thus, that constitutional principle – of the Swedish Constitution 1974 – may limit also an EU conform interpretation of a national tax rule governed by EU law, since the CJEU has established that the Member States aren't obliged to interpret the national law *contra legem*.[480] In the mean time I'm suggesting in another book a constitutional model that also considers certain procedural implications and which I call *Europatrappan* (the European staircase or the European stepladder), by which I'm aiming to structure constitutional problems etc. concerning issues on Swedish rules on tax law and criminal law in relation to European law, i.e. to both the EU law and the ECHR (and its Protocols).[481] However, these aren't of interest here, since e.g. the present problems with communication distortions concerning the conveying of the legislator's intentions would exist also if EU law's supremacy over national law would become codified in an EU Constitution; the present problems would still concern the relationship between the Value Added Tax Act 1994 and the VAT Directive as long as the process of the making of tax laws in this respect are about implementing rules in the directive into that act.

[479] See sec. 2.1 and Part A, sec. 1.3.
[480] See para. 110 in *Adeneler et al*. (C-212/04). See also Part A, sec. 1.3 and Forssén 2013, p. 38.
[481] See Forssén 2015 (2), sec. 10.4, which section – with my trial to make the mentioned constitutional model – was inspired first and foremost by Nergelius 2009 and Nergelius 2012.

- Regarding the voluntary part of the representative rule, i.e. Chapter 6 section 2 second sentence, I've created what I call the ABCSTUXY-model, illustrated by Figure 2, which may serve as a supplementary pedagogy structure to handle in practice issues concerning relations between *enkla bolaget* or *partrederiet* and its customers and deliverers and concerning internal relations between its partners. Thereby, it's a matter of using that model as a tool from a pedagogy perspective – like with PBL – to analyse complex problems regarding the application of the main rules on tax liability for VAT and right of deduction of VAT on *enkla bolag* or *partrederier* and their partners. The pedagogy point, with naming the persons in my model A, B, C, S, T, U, X and Y, is to make it easier to remember each person in the model and their respective role by using the acronym A-B-C-STUXY.

3.3 SOME MORE EXAMPLES FOR USING THE MODELS IN THE PROCESS OF THE MAKING OF TAX LAWS REGARDING COMMUNICATION DISTORTIONS CAUSED BY THE USE OF THE CONCEPT TAX LIABLE INSTEAD OF TAXABLE PERSON

From Part C I remind about questions about *tax liable* used instead of the VAT Directive's *taxable person* concerning the liability to register to VAT and concerning the liability to account for so called intra-Union acquistions of goods (formerly intra-Community acquisitions of goods), which are of interest for comparison with the same question regarding the main rule on the right of deduction of VAT (Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994):

1. In my licentiate's dissertation (2011) the liability to register to VAT, which today is to be found in Chapter 7 section 1 first paragraph number 3 of the Code of Taxation Procedure 2011, were, along with the mentioned question about the right of deduction of VAT as side issue D, a side issue, E.

   - Chapter 7 section 1 of the Code of Taxation Procedure 2011 should for the registration liability refer to *taxable person* instead of *tax liable*, which would be in accordance with article 213 of the VAT Directive.[482]

   - Mainly for control reasons I argue in section 4.1 (Issue No.1) in Part B for the liability to register to VAT no longer connecting to the concept *tax liable* in Chapter 7 section 1 first paragraph numbers 3 and 4 of the Code of Taxation Procedure 2011.

[482] See Part A, sec. 3.2.1.2.

- I compare with Figure 3 in the previous section and *taxable person* determining the emergence of the right of deduction due to what character of transactions the taxable person intends to make with his acquisitions. Since the liability to register to VAT is determined in the VAT Directive by article 213 using the concept *taxable person*, the concept *tax liable* in Chapter 7 section 1 first paragraph numbers 3 and 4 of the Code of Taxation Procedure 2011 should be replaced by *taxable person*.

- However, the legislator does not seem to be aware of this issue either. A model like Figure 3 with its illustration of the material rules would most likely be supportive in the process of the making of tax laws so that the legislator identifies the problem of the use of the concept *tax liable* in the context of the taxation procedure issue about the liability to register to VAT.

2. Regarding the issue on intra-Union acquisitions of goods, *tax liable* was used in the main rule for such acquistions, Chapter 2 a section 3 first paragraph number 3 of the Value Added Tax Act 1994, until the mentioned reform of the 1st of July 2013 by SFS 2013:368.

   - Thereby, alterations were, as mentioned, made in that rule and its second paragraph meaning inter alia that *tax liable* regarding the vendor was replaced with the concept *taxable person*. However, in the preparatory work to SFS 2013:368 this was merely commented as Chapter 2 a section 3 first paragraph number 3 and second paragraph of the Value Added Tax Act 1994 thereby getting an improved formal correspondence with article 2(1)(b)(i) of the VAT Directive.

   - In my opinion, the fiscal sociology question to be asked regarding the recently mentioned assertion in the preparatory work to SFS 2013:368 is whether the legislator would have identified at all a necessity to replace *tax liable* with *taxable person* in Chapter 2 a section 3 first paragraph number 3 and second paragraph of the Value Added Tax Act 1994, if the problems had not been raised in the courts.[483] This is, as mentioned, particularly conspicuous when compared with the issue regarding the use of *tax liable* in the main rule on the right of deduction of VAT: Would the legislator also describe a future reformation of Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994 in that respect merely as a formal

[483] See Part C, sec. 1.3, where I mention e.g. case B 1378-96 (29 may 1997) and a lecture I gave in 2001, Forssén 2001 (2).

improvement in relation to article 168(a) of the VAT Directive? Probably not, and my point is that the legislator would most likely have made a better tax rule of Chapter 2 a section 3 first paragraph number 3 and second paragraph already at Sweden's EU accession in 1995, i.e. by respecting that *taxable person* was the proper concept for this context, if a model like Figure 3 would have been available then: *Tax liable* is a *taxable person* (1) who's making *taxable transactions* (2), a *taxable person* making *from taxation qualified or unqualified exempted transactions* isn't *tax liable*.

3. In e.g. Chapter 6 of the Value Added Tax Act 1994 there are more special rules which, like the mandatory part of the representative rule (Chapter 6 section 2 first sentence), contain the concept *tax liable* (or *tax liability*). Thereby the special rules on tax liability for intermediaries and on producers' enterprises selling at auctions, i.e. Chapter 6 section 7 and Chapter 6 section 8 of the Value Added Tax Act 1994, are of interest by comparison here, since they can be said sharing a common history with the representative rule. It would carry to far to make an analysis of the special rules for intermediaries and producers' enterprise. Instead I will give som reflections over the issue of language concerning those special rules in the Value Added Tax Act 1994.

   - The VAT Directive extends the supply of goods or the supply of services in relation to the main rules in articles 14(1) and 24(1) to comprise e.g. the transfer of goods pursuant to a contract under which commission is payable on purchase or sale [article 14(2)(c)] and by stating that where a *taxable person* acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself [article 28].

   - Articles 14(2)(c) and 28 have a supposedly corresponding rule in the Value Added Tax Act 1994, namely Chapter 6 section 7. There's also Chapter 6 section 8, but since it's essentially referring to section 7 I will only mention Chapter 6 section 7, which I name the rule on *6:7-cases*.

   - The special rule on tax liability for *6:7-cases* comprise the situations of articles 14(2)(c) and 28, but the tax authority also uses to argue for this special rule to apply to intermediaries only because the invoice issued by an intermediary not revealing the identity of his. Then the tax authority has been known to assert that it doesn't matter if a commission contract exists or if the intermediary instead shall be considered an ordinary agent

comprised by the ordinary rules in the Value Added Tax Act 1994; according to them the content of the invoice makes the situation a *6:7-case*, i.e. application of that special rule instead of the main rule on tax liability, Chapter 1 section 1 first paragraph number 1.

- The tax authority's opinion means that the content itself of the invoice would be a sufficient prerequisite for the intermediary also being deemed making the mandator's sale of the goods or services in question and not just supplying the intermediary service. Assuming a commission of 10 on a sale of goods or services of 100, the intermediary's tax base increases by ten times, if the tax authority's opinion would rule.

- My opinion is that *6:7-cases* or similar expressions supposedly extending the intermediaries being equalled with commission cases in a civil law sense, and thereby equalled with vendors selling their own goods or services, isn't used at all in business parlance. Businessmen in various sectors aren't even aware of the special rule existing and usually don't know at all what the tax authority is meaning when referring to Chapter 6 section 7 of the Value Added Tax Act 1994 e.g. in an auditing memorandum.

- Thus, I suggest fiscal sociology research about *6:7-cases* in the respects mentioned: Why make tax laws by using a language which isn't part of the parlance of businessmen? That would most likely not have been the case at all, if the entrepreneurs and their organizations would – in the way I suggest in section 2.4 of Part A – have taken active part in the making of the rules in the Value Added Tax Act 1994. Today it's usually only the big players who are asked for their opinion by the Government presenting them a government official report on various topics before proposing laws in a Government bill. In my opinion, there's a democratic deficit that should be examined in this respect and this is one reason for me to suggest research efforts by fiscal sociology studies about the making of tax laws. In other words: A systematic change of the process of the making of tax laws – as I suggest in Part A – is necessary to make the legislator inviting also indies to take part in that process, otherwise I believe it's hard to achieve a democratic playing field.

  By the way, I recommended a systematic change in line of my ideas in section 2.4 of Part A already in 2007, where I mention 'the spirit of Saltsjöbaden' (*saltsjöbadsandan*) as an expression of corporatism working against a level and thereby democratic playing field for small entrepreneurs as well as for the big players; 'the spirit of Saltsjöbaden', the spirit of a meeting at which lasting agreement was reached in 1938 on the labour-

market.[484] In political parlance the expression means in short that the big players on the employer-side and their organizations dominate that market together with the trade unions.[485] In my opinion, this – still existing Swedish political spirit – is not benefitting today's demands on flexibility in society. It presents instead a harmful obstacle for an influence on the process of the making of tax laws by new players on the market, naturally often starting as small enterprises. Therefore, along with my suggestions on research efforts, I remember about mentioning in 2007, as one topic of interest to the issue of corporatism, the question how lobbying has influenced the process of the making of tax laws in the field of corporate taxation, e.g. regarding VAT.[486]

- Thus, in my opinion there's a need to go through and to abolish or update concepts established in the tax laws before Sweden's EU accession in 1995. Thereby, it's of interest especially for fiscal sociology research purposes concerning Chapter 6 section 7 of the Value Added Tax Act 1994 that this special rule can, as mentioned, be said sharing the same history as another special rule, namely the representative rule, i.e. Chapter 6 section 2 of the same act. Both rules originate from legislation preceding the first Swedish VAT act of 1969, i.e. from the general goods tax (*allmänna varuskatten*) of 1959.[487]

  Figure 2 about the representative rule could perhaps inspire to research on *6:7-cases*: Why not try such cases for the persons in Figure 2, e.g. for the characters C and U, as intermediaries belonging to the *6:7-cases*? In Figure 2 C and U respectively represents eventual additional partners and persons with an indirect relationship to the partners in *enkla bolag* and *partrederier*, and who may – as mentioned – cause certain problems regarding the representative rule.[488] Already by using the ABCSTUXY-model to try the representative rule in relation to the main rules I proved in my doctor's thesis that the complexity concerning that rule should be considered more than enough for the legislator to do something about it. When suggesting research efforts concerning *6:7-cases*, where Figure 2 perhaps may serve as an inspiration, I'd also like to mention another common historical denominator of interest for *6:7-cases* and the representative rule, namely that civil law books on intermediary issues contain – at least to my knowledge – nothing about *6:7-cases*, which also was the situation regarding *enkla bolag* (and *partrederier*) concerning the representative rule before my doctor's thesis.[489]

4. In section 3.3.1 of Part A, I mention another special rule using the concept *tax liable* (tax liability) in the Value Added Tax Act 1994,

[484] See Dictionary of Norstedts 1993, p. 776.
[485] See Forssén 2007, pp. 276, 277 and 287.
[486] See Forssén 2007, p. 277.
[487] See, for comparison with Chapter 6 section 2 and Chapter 6 section 7 of the VATA 1994, section 12 item 2 and the third paragraph first sentence of the instructions to section 12 of the *Kungl. Maj:ts förordning (1959:507) om allmän varuskatt*, which came into force in 1960.
[488] See Part B, sec:s 3.3.2.3 and 4.1 (Issue No. 2).
[489] In e.g. Mattsson 1974 is the representative rule according to the VAT regulation of 1968 (SFS 1968:430) mentioned only once, by a brief commentary in a note on p. 137.

Chapter 9 section 1, which cause communication distortions regarding the relationship to the concept *taxable person* in the VAT Directive, in this case not in the main rule but in the facultative articles 12 and 137(1)(d). The voluntary rule in article 137(1)(d) applies to *taxable persons*, who may choose to become *tax liable* for the leasing or letting of immovable property.

- I've concluded in my doctor's thesis that there's no support by articles 12 and 137(1)(d) of the VAT Directive for the existing Chapter 9 section 1 of the Value Added Tax Act 1994 to open for also an ordinary private person, i.e. a consumer, being comprised by the possibility for voluntary tax liability (for letting out of business premises etc.).[490]

- In this case the facultative rule article 12 concerns the tax subject and is in fact extending the scope of the VAT to comprise other persons than taxable person (compare Figure 3), e.g. ordinary private persons. However, the voluntary tax liability described by the Value Added Tax Act 1994 goes to far anyway, by opening for voluntary tax liability also for e.g. ordinary private persons, since the facultative rule article 137(1)(d) concerning the tax object is restricted to apply for taxable persons. Because of the rule on the tax object the legislator must do something to make Chapter 9 section 1 of the Value Added Tax Act 1994 complying with the main rule on taxable person, article 9(1) first paragraph; article 137(1)(d) is redirecting legislators of the Member States to that main rule by the use of the concept *taxable persons*, which, if not otherwise stated, must be considered referring to the general meaning of taxable person in article 9(1) first paragraph of the VAT Directive and thereby not including others than taxable persons in that sense – not in the meaning of article 12. In other words, the legislator has been redirected to the limitations of the scope of the VAT according to the directive's main rules, which are – as mentioned – corresponding with the prerequisites of the main rule on tax liability in Chapter 1 section 1 first paragraph number 1 of the Value Added Tax Act 1994, and would perhaps have realized this by structuring the process of the making of tax laws by models like those represented by Figure 1 and Figure 3.

  Compare section 2.3, where I refer to procedural experiences in practice mentioned in section 3.3.1 in Part A and suggest as a rule of thumb that a civil servant writing a tax decision shouldn't use a concept, label or any noun before having enough information about the situation at hand to be able to use the relevant verbs. Such *parse thinking* is in fact made when sorting out

[490] See Forssén 2013, pp. 159, 160, 215 and 216.

article 12 as referring to the tax subject and article 137(1)(d) referring to the tax object while noting that the latter contains the noun taxable persons and concluding it must refer to the concept's general meaning etc. Thus, although I refer problems to be resolved by parsing in the first place to the procedural law, parse is in order as support for the use or making of models for the process of the making of tax laws (see also section 3.1).

- Thus, in my opinion, Chapter 9 section 1 is – as mentioned in Part A – another topic for reformation of the Value Added Tax Act 1994 missed by the legislator. I suggest research efforts also regarding this topic and both law dogmatic and fiscal sociology studies might be appropriate – e.g. with support of parsing.

3.4 EXAMPLE OF THE USE OF THE MODELS TO DETECT RISKS OF COMMUNICATION DISTORTIONS REGARDING RESTRICTIONS OF RIGHTS IN THE VAT DIRECTIVE ALLOWED BY THE EU LAW IF SUCH RESTRICTIONS ARE IN CONFLICT WITH THE VAT PRINCIPLE ITSELF

In this section I mention problems where the VAT Directive allows restrictions of the right of deduction of input tax (see the box at the bottom of Figure 3). There might occur communication distortions also in that respect, so that the implementation of such rules into the Value Added Tax Act 1994 cause such unintended distortions in relation to the principles of the VAT Directive. In 2007 I also mentioned the rules on prohibition of deduction in the Value Added Tax Act 1994.[491] In this section I come back to a CJEU case mentioned then, which elucidates the present problem with rules allowed by the VAT Directive to restrict the general right of deduction but which might cause conflict with the VAT principle itself, described by Figure 4 above, namely *Ampafrance et al.* (Cases C-177/99 and C-181/99).

In parts B and C I mention *Rompelman* (Case 268/83), whereby it was made *acte éclairé* by the CJEU – construing the predecessor to article 168(a) of the VAT Directive – that it's already the purpose by a taxable person to create taxable transactions that's decisive for the *emergence* of his right of deduction. The communication distortion that exists in relation thereto, due to the use of the concept tax liable instead of taxable person in the main rule on the right of deduction in the Value Added Tax Act 1994, Chapter 8 section 3 first paragraph, raise – as mentioned in section 3.2 and in my licentiate's dissertation (side issue D) – a demand of the legislator addressing that distortion. That problem could by the model Figure 3 be described as The right of deduction or reimbursement of input tax, i.e. (3), not correlating to Taxable person, i.e (1). The issue with regard of *Ampafrance at al.* concerns instead the

[491] See Forssén 2007, sec. 6.3.

prohibition of deduction or reimbursement although a taxable person intends to make taxable or from taxation qualified exempted transactions – compare (2) and the box at the bottom of Figure 3.

Prohibition of deduction (or reimbursement) of VAT is possible to retain in the Value Added Tax Act 1994 for the time being after Sweden's EU accession in 1995 according to article 176 second paragraph of the VAT Directive. The Value Added Tax Act 1994 contains mainly the following prohibitions in that respect, namely concerning:

- acquisitions referable to permanent dwelling, Chapter 8 section 9 first paragraph number 1;

- expenses for the purpose of entertainment and similar for which the tax liable isn't entitled to deduction at the income taxation (according to Chapter 16 section 2 of the Income Tax Act 1999), Chapter 8 section 9 first paragraph 2; and

- acquisitions of passenger cars and motor cycles, Chapter 8 section 15 number 1.

In *Ampafrance et al.* the CJEU considered that national French legislation wasn't EU conform, since therein, with support of article 27(1) of Sixth Directive (77/388) – nowadays article 395(1) of the VAT Directive – for avoidance of tax evasion and tax loss, exemption from the general right of deduction in article 17 of the Sixth Directive – nowadays article 168(a) of the VAT Directive – was introduced concerning the tax subject's acquisitions for entertainment of goods and services. Divergence from the rules in the directive can according to the CJEU not be accepted, if they mean that a limitation of the right of deduction is based on the objective character of an acquisition without respect of whether it in the actual case can be proven that it's concerning expenses which have occurred in the economic activity. If the individual at application of the deduction limiting rule has no possibility to prove that tax evasion or avoidance doesn't exist, and thereby not being able to exercise the right of deduction, the rule constitute, "as Community law now stands", as the CJEU put it, not a mean which, according to the so called principle of proportionality, stands in proportion to the aim to prevent tax evasion and avoidance, and influence then the aim and principles of the Sixth Directive – nowadays the VAT Directive – in a far too large extension.

The CJEU's interpretation of article 27 was made in comparison to article 17(6) second paragraph of the Sixth Directive, nowadays article 176 second paragraph of the VAT Directive, where the court inter alia

stated: ”It is settled case-law that the right of deduction provided for in Article 17 et seq. of the Sixth Directive is an integral of the VAT scheme and in principle may not be limited”. According to the CJEU is the Common law rules concerning the VAT scheme only compatible with the principle of proportionality if the rules in the directive or regulation is necessary for the achievement of the specific aims of the directive or regulation and if they ”have the least possible effect on the objectives and principles of the Sixth Directive”, i.e. inter alia the POTB-principle and neutrality principle. The prohibitions of deduction may thus not limit the otherwise general right of deduction in a non-EU conform way so that the basic VAT principles are set aside.

I mentioned in 2007 some problems regarding the prohibition of deduction with Chapter 8 section 9 first paragraph 2 of the Value Added Tax Act 1994 connecting to the income taxation (Chapter 16 section 2 of the Income Tax Act 1999); the main issue thereby is still whether a non-EU conform evolution of the case law and actual practice concerning inter alia the right of deduction for entertainment and similar due to that connection. For research efforts on this topic the models of Figure 3 and Figure 4 can work together for the purpose of structuring the testing of whether the prohibition rule limits the general rule on deduction, which is fundamental for the VAT principle itself. Thereby, I suggest the following test:

- If research proves that the application of the present prohibition rule entails that a taxable person has no possibility to prove that tax evasion or avoidance doesn’t exist and that the expenses instead have occurred in his economic activity, an undesired cumulative effect – tax on the tax effect – will occur in the ennobling chain and by this test result the prohibition rule should be considered obsolete with regard of the EU law in the field of VAT.

Since the test should consider application according to both case law and an actual current law (i.e. with regard of verdicts by courts of lower instances or decisions by the tax authority), I suggest that the research efforts on this topic should be done by both law dogmatic and fiscal sociology studies.

3.5 THE MODELS DESCRIBED AS LOGIC FUNCTION TREES

In this section I propose some use of so called logic function trees (LFT) to further structure the use of the suggested models to detect risks of communication distortions in the process of the making of tax laws. Thereby I come back to Figure 3 and Figure 4 from section 3.2 and some of my remarks there about them and also to section 3.4.

"There are seven basic logic gates: AND, OR, XOR, NOT, NAND, NOR, and XNOR."[492] Models like those in section 3.2 could be described by such logic gates. Since I use AND and OR functions in LFT adaptations below of the models according to Figure 3 and Figure 4, I mention here – for comparison – the AND gate and the OR gate:

- In the AND gate 0 is "false" and 1 is "true", and the output is "true" when both inputs are "true". If not both inputs are "true", the output is "false".

- In the OR gate the output is "true" if either or both of the inputs are "true". If both inputs are "false", the output is "false".[493]

AND gate

Input 1	Input 2	Output
0	0	0
0	1	0
1	0	0
1	1	1

OR gate

Input 1	Input	Output
0	0	0
0	1	1
1	0	1
1	1	1

Compare the AND gate with the part of Figure 3 describing the tax liability:

- By (1), Taxable person; and (2), a Taxable or from taxation qualified exempted transaction the tax liability for VAT is determined according to the main rules in the Value Added Tax Act 1994 and the VAT (see section 3.2).

- The latter equals Input 1 being 1 AND Input 2 being 1 in the AND gate to give the Output 1 (tax liability). If both Input 1 and Input 2 are 0 or one of either is 0 the Output is 0 (no tax liability).

Compare the OR gate with (2) and (3) of Figure 3:

- If a taxable person intends to make taxable or from taxation qualified exempted transactions (Input 1) OR has made such transactions (Input 2) the taxable person has the right to

[492] See The Electronics glossary.
[493] See The Electronics glossary.

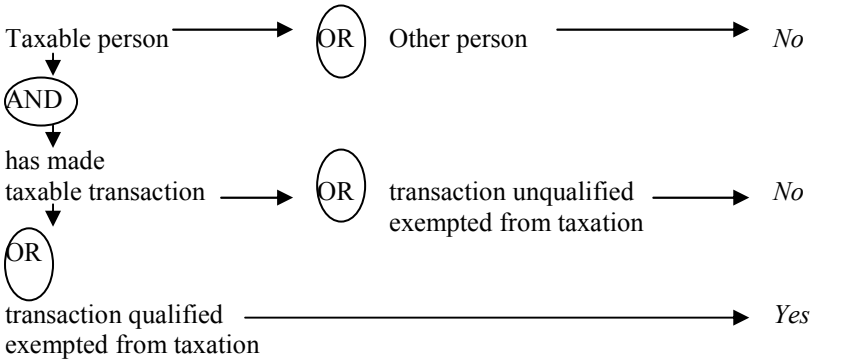
deduction/reimbursement of VAT on his acquisitions (Output). If both Inputs are false (0) the Output is false (0), i.e. no right to deduction/reimbursement. [Note the regard of CJEU case law by consideration of the mentioned intention.]

However, I suggest a combined structure for the models in Figure 3 and Figure 4, by splitting them and making LFT:s which give a more holistic overview of the complexity of the liabilities and rights regarding the VAT.[494] Thereby I use, as mentioned, as nodes AND and OR functions, which gives the following LFT:s for Figure 3 and Figure 4:

LFT 1, Tax liability (main rule)

Question

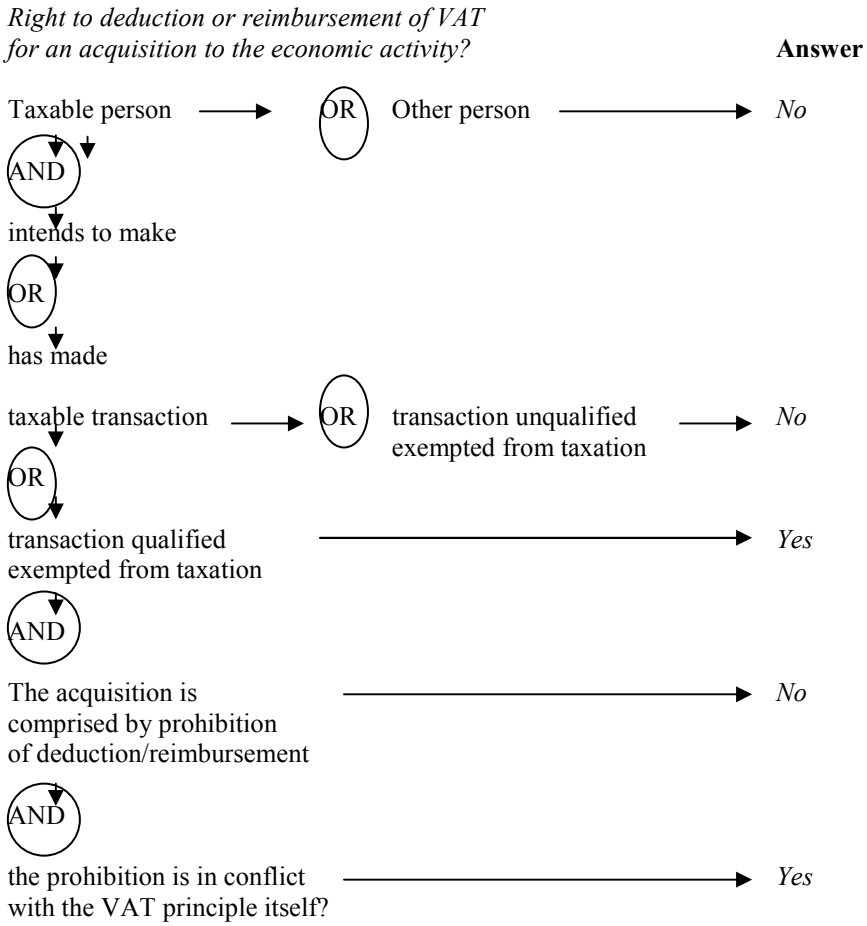
Tax liability for VAT for a transaction? **Answer**



[494] Compare Blaauw et al. 1991, sec. 4.1

LFT 2, The right of deduction or reimbursement (main rule with regard of the rules on prohibition of deduction/reimbursement)

Question



These two examples of suggestions to adapt the models of figures 3 and 4 by LFT are of course not to be regarded as complete or final, but show only an idea of how to go further and develop useful tools for the process of the making of tax laws, i.e. to develop the models to detect risks of communication distortions in that process by adding logic analysis to them:[495]

- LFT 1 is rather simple as LFT and contains the upper part of Figure 3, which concerns the main rule on tax liability.

- LFT 2 is more complex, since it's an attempt to combine Figure 3 with Figure 4 concerning the main rule of the right of

[495] Compare Blaauw et al. 1991, sec. 4.1

deduction or reimbursement and the rule of prohibition of this right in accordance with the EU law in the field of VAT.

By the way, the development of the mentioned tools may also be *supported* by parsing. LFT:s or logic gates are used e.g. to construct algorithms in computer science, where parsing is used. By the same token a *parse thinking* may be *supportive*, as recently mentioned, in the present respect although the models (tools) – and not parsing taken by itself – are used in the first place to put a concept in a text making a rule in e.g. the Value Added Tax Act 1994 in its proper context with regard of the VAT Directive.

3.6 SERIATION AS A SUPPLEMENTATION TO THE MODELS

Where law history is concerned for the process of the making of tax laws, I'd like to come back to that I gave, in connection with the analysis in my doctor's thesis of the representative rule in the Value Added Tax Act 1994, a historical background to the rule, which form a simple review meant to give a background to how the representative rule has been written over the years. Thereby I referred to Lyles 2007, where it's stated that the historical task is to shed light on a development process, a stage during which the observed object changes and, if you will, develops.[496] That rule has namely, as mentioned under item 3 in section 3.3, its origin in a legislation from the time already before the first Swedish VAT act of 1969, i.e. in the general goods tax (*allmänna varuskatten*) of 1959.[497] Regarding VAT the EC's First Directive didn't come until 1967. Thus, the need was obvious to consider also law history when analysing the representative rule, although the analysis was primarily law dogmatic. By the same token the historical perspective was also necessary when making a comparative analysis of the rule – with e.g. the Finnish VAT law – and also for the purpose of an overview regarding *enkla bolag* and *partrederier* from a civil law perspective.[498]

A legal theorist using a law dogmatic analysis is interested in the fiction of current law as something static, i.e. an on-the-spot account of current law, whereas the law historian is interested in the continuous movement – the process – that has shaped the law as we know it today. The method to capture that process is the so called law generic method, according to which the legally relevant causes to the development of a legal institute, a principle, a theory or some other legally relevant fact shall be clarified. Thereby it's not the motivation in the law sources that's of

[496] See Lyles 2007, p. 74. See also Forssén 2015 (1), pp. 36 and 37.
[497] See Forssén 2015 (1), p. 37.
[498] See Forssén 2015 (1), p. 37.

interest, like with a law dogmatic analysis, but the motives which have given rise to the existence of the present rule.[499]

The case mentioned in section 2.2, *Garner v. Burr*, and my reflections, in section 2.3, about the purpose of protection of public roads having changed to be more about protection of people today due to changes in society since the time of the *Road Traffic Act* from 1930 and the time of the case, i.e. the mid 1900's, show, in my opinion, that the law generic method is necessary to use for the purpose of not only regarding case law when examining current law, but also for capturing the meaning of an actual current law (i.e. with regard of verdicts by courts of lower instances or decisions by the tax authority). What I'm suggesting in this Part D regarding models – tools – to improve the process of the making of tax laws is in line with the law generic method. By the systematic alterations suggested in Part A and by providing the recently mentioned tools, I aim to make that process more accessible for the legislator: It's a matter of means for the legislator to capture the relevant motives to uphold today a certain rule on e.g. VAT. Thereby what I'm suggesting is meant to improve the legislator's capacity to detect risks of communication distortions in relationship to the reasons for a corresponding rule in the VAT Directive or the principles of the VAT Directive. Thus, my objective is also to improve the legislator's capacity to capture the existence of an actual current law by the tax authority with regard of its application of a tax rule whose content might never be clarified in terms of current law expressed by case law. By the way, the mentioned tools may of course also be useful in procedural matters and for law dogmatic analyses.

The tools that I suggest for the process of the making of tax laws can be completed with law history, but I propose in the first place some additional component for my fiscal sociology approach, because a concept might be the same today as a long time ago, whereas society has changed and thereby altered today's motives for a rule. For example the Income Tax Act 1999 contains for some situations still the concept *rörelse* (business activity), which emanates from the original Municipal income tax act of 1928.[500] Thus, the concept I'm looking for has more to do with systematics. However, the latter as a concept may lead to the misconception that a study of the making of tax laws is supposed to be a law dogmatic analysis, since it's considered that the main task of law dogmatic is to interpret and systematize current law.[501] To get a special fiscal sociology concept for the relevant systematic purpose of the

[499] See Lyles 2007, pp. 79, 80 and 87.
[500] See Ch. 2 sec. 1 and sec. 24 ITA 1999.
[501] See Forssén 2015 (1), sec. 1.2.1. Compare also Part A, sec:s 1.3 and 3.2.1.2; Part B, sec:s 1.1, 1.3, 3.2.1 and 4.2; and sec:s 2.1, 2.2, item 4 in sec. 3.3 and sec. 3.4.

process of the making of tax laws, and thereby making a distinction in relation to both law history in general and systematics regarding law dogmatic, I borrow a concept from archaeology, namely *seriation*. Seriation means the arrangement of a collection of artifacts into a chronological sequence.

Thus, I propose *seriation* as a *supplementary mean* to the models – tools – that I'm suggesting for the process of the making of tax laws, where seriation in this fiscal sociology sense may function as a mean to capture the continuous movement of tax concepts. For instance could seriation concern concepts relevant for the determination of the tax subject in corporation taxation and be described by the following figure:

Seriation concerning Swedish corporate taxation and the tax subject in relation to the EU law [Note: This figure only concerns natural persons]

The VAT Directive (2006/112)		VATA 1994		ITA 1999		CTP 2011
Taxable person	→	Taxable person	→	Person carrying on a business	→	Person carrying on a business
		(Entrepreneur, abolished on the 1st of July 2013)				Entrepreneur

Instead of a chronological sequence, the figure describes a sequence of relevant laws with regard of issues concerning the determination of the tax subject for corporation taxation purposes. The order of the sequence from left to right is made with respect of the EU law, since this book as a whole is about the entrepreneur and the making of tax laws with regard of Swedish experiences of the EU law.[502] Other and more complex examples can of course be made, and with the figure above I only want to make the point that it would benefit the process of the making of tax laws to introduce seriation as a special fiscal sociology concept which is distinguished from concepts within law history in general and law dogmatic. This is not a method in its own right, but a supplementation to the suggested models – tools – for improvement of the process of the making of tax laws and, if you like, in line with the law generic method. I'm not saying that such a figure as the one above is something new, but I'm presenting a special fiscal sociology concept by borrowing the concept seriation and it might be developed and proven useful for the sake of decreasing the risk of communication distortions in the process of the making of tax laws.

[502] By art. 113 TFEU there's a demand of harmonisation of the Member States' legislations on VAT while art. 115 TFEU only stipulates approximation of laws with regard of e.g. income tax (see Part B, sec. 1.1.)

Based on the figure above I reason as follows about the aspects made previously, in section 3.2.1.2 in Part A, about the rule introduced in 2009 in the Income Tax Act 1999, giving a certain acknowledgement of what's agreed between the entrepreneur and the mandator for the purpose of judging whether someone is *a person carrying on a business* and thereby also an *entrepreneur* according to the predecessor to and – nowadays – the Code of Taxation Procedure 2011:

- The rule introduced in 2009 was, as mentioned, only a codification of the current case law of that time.

- Then the equivalent of *taxable person* in the Value Added Tax Act 1994 was determined by reference to the concept *business activity* in the Income Tax Act 1999, which integrated the non harmonized income tax law in the Value Added Tax Act 1994. This connection for the purpose of determining who's a taxable person was abolished on the 1st of July 2013, which was in line with what I recommended in my licentiate's dissertation.

- However, the legislator missed at the reform on the 1st of July 2013 what the EU commission was criticizing Sweden about in 2008 concerning the use of tax liable instead of *taxable person* for the determination of the emergence of the entrepreneur's right to deduct input tax, which was side issue D in my licentiate's dissertation 2011 (see section 3.2). The legislator should, as mentioned, rather have focused on this than working on problems already solved by the case law.

- Thus, the legislator has, as mentioned, missed the opportunity of making a reform to get the Value Added Tax Act 1994 fully conform with the VAT Directive (2006/112) concerning the determination of who's a *taxable person and* of the emergence of such a person's rights.

- At the reform of 2009 the legislator had, in my opinion, the wrong focus when zeroing in on the prerequisites for who's *a person carrying on a business* for income tax purposes: That issue was already solved in the case law. When reforming the legislation on taxation procedure and introducing the Code of Taxation Procedure 2011 in 2012 the legislator missed the problem with the use of the concept tax liable instead of taxable person concerning the determination of the emergence of the right of deduction of VAT again, and missed it once more on the 1st of July 2013, when reforming the Value Added Tax Act 1994 by introducing *taxable person* for the determination of the tax

subject and also abolishing *entrepreneur* – which was used e.g. for foreign entrepreneurs.

- If the legislator would have made the seriation of above it would probably have been clear that the determination of the tax subject for corporate taxation is *préjudiciel* for tax liability and the right of deduction etc. It's a mistake to use a concept regarding the result of the activities by the tax subject instead of the concept determining who's a tax subject; *taxable person* is *préjudiciel* to tax liable and to the right of deduction. In the same way the concept *entrepreneur* is the necessary prerequisite to be able to be registered for F-tax, according to the Code of Taxation Procedure 2011.

- By the same token the problem, which I mentioned as side issue E in my licentiate's dissertation, would probably also have been observed better by the legislator in 2012 or on the 1st of July 2013, if the legislator would have made something like the seriation of concepts above. In that respect should namely, as mentioned, also Chapter 7 section 1 of the Code of Taxation Procedure 2011, for the liability to register for VAT purposes, refer to *taxable person* instead of tax liable (see item 1 in section 3.3). Thereto is also the concept *person carrying on a business* still used in the rule stating that a person who's liable to register shall report for registration by the tax authority before the activity starts etc., Chapter 7 section 2 first paragraph of the Code of Taxation Procedure 2011: It should, in consequence of the recently mentioned, be used for other measures of registration than concerning the VAT.[503]

- The reform of 2009 was mainly motivated by RÅ 2001 ref. 25 (17 Jan. 2001), which, as mentioned, meant that a farmer temporarily helping another farmer with his or her work during absence on account of vacation or illness was deemed an entrepreneur. Since the rule introduced thereby was only a codification of the current case law of that time, there might occur, as also mentioned, a conflict with the intended current law. Instead of putting the issue on the determination of the tax subject in a broader process, where the making of tax laws is concerned, the legislator may only have increased the risk of communication distortions. This also proves the necessity to introduce seriation – or something similar – into the process of the making of tax laws.

[503] See Forssén 2015 (1), p. 292.

It was not wrong of the legislator in a law historic perspective to look at the conditions for a farmer when making the reform of 2009. Farmers have been equal to entrepreneurs for income tax purposes since the Municipal income tax act of 1928 and since the income tax reform of 1990 the concept *person carrying on a business* or *entrepreneur* comprise e.g. the concept farmer. For VAT purposes this is also in line one of the necessary prerequisites for taxable person according to article 9(1) first paragraph of the VAT Directive, namely the concept *economic activity* which according to article 9(1) second paragraph comprises inter alia agricultural activities, i.e. farmers. To compare with the mentioned case *Garner v. Burr*, which also happened to concern a farmer, and the concept vehicle, it's still relevant to look at farmers' conditions when reasoning about the tax subject for corporate taxation. However, the reform of 2009 should in the latter sense have had a broader perspective regarding the question of the determination of the tax subject, since the motives for it must be considered having changed, e.g. because of the introduction of VAT in Sweden in 1969, Sweden's EU accession in 1995 and the fact that farmers already before 2009 had come to represent a relatively small part of the enterprises in general in Sweden.[504] This may be compared with the purpose of protection of public roads having changed to be more about protection of people today.

Thus, I argue for the use of seriation before a law historic perspective in the process of the making of tax laws; a law historic perspective may still be relevant in that process but should typically be completed with seriation or something similar.

In conclusion, I propose seriation of tax concepts to bring out that continuous movement referred to about the law generic method also in the process of the making of tax laws; by seriation as a supplementation that process will probably become more living, which might not be the case if only e.g. the model represented by Figure 3 from section 3.2 or LFT 2 from section 3.5 are used as tools to detect a risk of communication distortions like the one concerning the right to deduct VAT. In other words, those tools will become more elucidating by the comparison with other taxes when using seriation supplemental.

To give an elucidating example of the recently mentioned, I refer to issue C in my licentiate's dissertation (2011), which concerned the tax

[504] According to Statistics Sweden (*Statistiska Centralbyrån*) the Swedish population was 9 804 082 on the 31st of July 2015 (www.scb.se). According to Statistics Sweden's register of enterprises the number of enterprises was 1 158 349 in 2014 (www.scb.se). According to the Swedish Board of Agriculture (*Jordbruksverket*) Sweden's farm labour force in 2013 was about 172 700, which was circa 6 000 less than in 2010 (www.jordbruksverket.se).

object's eventual influence for the determination of the tax subject. Until 2014 Chapter 3 section 3 first paragraph number 5 of the Value Added Tax Act 1994 contained the concept parking activity to describe letting of places for parking as taxable transactions, which according to the preparatory work to the VAT reform of 1991 could lead to the interpretation that the concept parking business activity from the income tax law was *préjudiciel* for the rule on the tax object (i.e. the recently mentioned rule on taxable transaction). Thus, the law historic connection in the rule on the tax object to the concept parking business activity could, due to the determination of the tax subject in Chapter 4 section 1 number 1 of the Value Added Tax Act 1994 connecting to the concept business activity in the Income Tax Act 1999 before the reform of the 1st of July 2013 (see section 3.2.1.2 in Part A), lead to the determination of the tax subject a second time because of the influence from the determination of the tax object, which was in conflict with the VAT Directive.[505]

A study of LFT 1 would probably have helped the legislator avoiding the risk of the recently mentioned communication distortion between the Value Added Tax Act 1994 in relation to the VAT Directive, since the arrows in LFT 1 point from the tax subject (taxable person) to the tax object (taxable or from taxation qualified exempted transactions), not in the opposite direction. By the way, compare with a *parse thinking*: It's a taxable person who makes a supply (transaction), not the other way around. Thus, an LFT trial shows that a sequence of concepts used for the tax subject transgressing into the boxes regarding the tax object (in Figure 3) cause a definite risk of communication distortions. In other words: If the legislator would have used LFT with a supplementation by seriation in the process of the making of tax laws, the legislator would probably have detected that risk long before the abolishment of the concept parking activity in Chapter 3 section 3 first paragraph number 5 of the Value Added Tax Act 1994 in 2014.

I propose the described approaches to detect a risk of communication distortions in the process of the making of tax laws concerning comparative law studies too. Also concerning the field of VAT may of course an international outlook from the Swedish horizon regard both other EU Member States and countries outside the EU. However, if such a comparison concerns VAT one should note that the OECD's information that almost 150 of the circa 200 countries of the world have VAT doesn't distinguish VAT according to the EU law from other taxes called VAT, and the OECD also mention that their number includes

[505] See Forssén 2011, p. 213.

countries with GST. I mention this in my licentiate's dissertation.[506] Thereby I also mention that the VAT principle according to article 1(2) of the VAT Directive makes the decisive distinction between on the one hand VAT according to the EU law and on the other hand GST, HST or other taxes actually called VAT but neither complying with the VAT principle according to article 1(2) of the VAT Directive which follow by legislations in countries outside the EU.[507]

3.7 TAX AUDIT OR THE PROCESS OF THE MAKING OF TAX LAWS SUPPORTED BY SOFTWARE BASED ON THE MODELS ADAPTED INTO LOGIC FUNCTION TREES

Since also the wordings of a tax rule is based on natural language you cannot break down all problems about the making of tax laws by processing symbols into an altogether computer science solution. The main problems thereby are the determination of the scope of tax concepts and the delimitations between them – compare also why parsing may serve only as support to the models of detecting risks of communication distortions in the process of the making of tax laws (see section 3.1). However, the models concerning the Value Added Tax Act 1994 in relation to the VAT Directive adapted into logic functions trees (LFT), as exemplified in section 3.5, may be used to make a software to support an audit of e.g. VAT problems in an enterprise or organization applying the Value Added Tax Act 1994. Such a software should, due to the limitations mentioned for the use of computer science in the present respect, aim to assist in finding the point of complexity that demands that the entrepreneur etc. go further by consulting tax consultants about the VAT problem at hand. In February 2005 I made such a checklist (program) for a VAT audit and I mention in short the main items here.

VAT audit by LGS-flow-analysis

Purpose

To find VAT specific problems in the enterprise – sector related or individual issues – the enterprise, i.e. the subject whose activity shall be VAT audited, does the audit without awaiting the yearly ordinary audit.

[506] See Forssén 2011, p. 279, where I refer to information under Consumption Tax on the OECD's website www.oecd.org (read on the 12th of November 2010).
[507] See Forssén 2011, pp. 71 and 279-297. See also Part A, sec. 3.2.1. Regarding the VAT principle according to art. 1(2) of the VAT Directive: see sec. 3.2 and Part B, sec. 3.2.1.

Aim

After having made the VAT audit the entrepreneur has a preview of the enterprise's VAT situation regarding the basic routines.

- The issues which may cause VAT problems can thereby be structured concerning:

  - the past, the present and the future.

- The entrepreneur (or organization) can judge whether it's time to further with a more detailed analysis of the necessity of measures concerning e.g.:

  - VAT registration or adjustment of the activity description by the tax authority and the Swedish Companies Registration Office;
  - request for a reconsideration or an appeal;
  - application for an advance ruling by the Swedish Board of Advance Tax Rulings;
  - guard of the development of case law and authorities et al., above all the tax authority's general guidelines;
  - lobbying, e.g. in co-operation or consultation with the entrepreneur's organization (employers' organizations etc.);
  - eventual problem solutions by the informal visiting form, where a dialogue takes place with the entrepreneur's local tax office and ends by the tax authority notifications being filed by the entrepreneur and the tax authority;
  - renegotiation and/or inserting a VAT clause in a contract, negotiate about invoicing in retrospect of VAT;
  - change invoicing routines; and
  - combinations of the above mentioned.

Method

VAT audit carried out by an LGS-flow-analysis, where L, G and S stands for flows in the enterprise of:

- **L**iquid assets, *material issues*, tax liability etc. and tempo issues, e.g. the invoicing frequency;
- **G**oods, *material issues* and *tempo issues*; and
- **S**ervices, *material issues* and *tempo issues*.

  - Those three – L, G and S – are basic on the checklist for testing whether tax liability has emerged by the entrepreneur or the organization or its counterpart etc., since the main rules, article

> 2(1)(a) and article 2(1)(c) of the VAT Directive, stipulate that the supply of goods (G) or services (S) for consideration (L) within the territory of a Member State by a taxable person acting as such shall be subject to VAT.

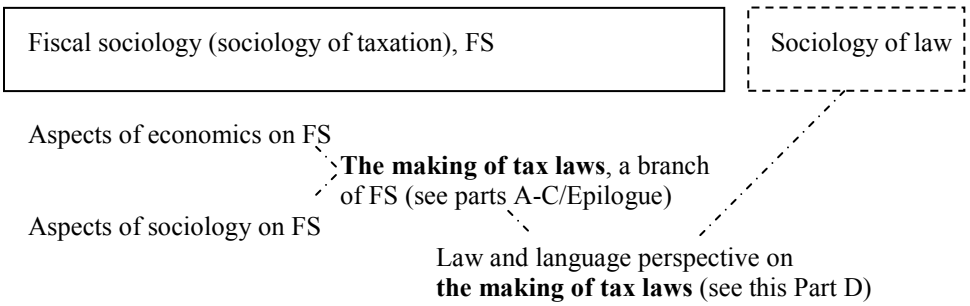
Thus, by processing some or all of the questions on the checklist, i.e. by carrying out the LGS-flow-analysis regarding various problems, the entrepreneur or the organization will get a preview of the VAT situation concerning the aspects subject to the VAT audit. If it's a rather simple VAT problem the LGS-flow-analysis might be sufficient to resolve it. If it's instead a more complex problem the LGS-flow-analysis may at least serve as a software aid for the entrepreneur or the organization to deem when it's time go further with the VAT problem at hand by consulting tax consultants. By the same token may such an aid also be used by the legislator to further refine the process of the making of tax laws for the purpose of detecting communication distortions.

I might update the program that I made in February 2005, but if not will hopefully others develop software to support tax audits or the process of the making of tax laws – like the LGS-flow-analysis described by the overview above and e.g. based on the models and LFT:s that I suggest.

4. SUMMARY AND CONCLUDING VIEWPOINTS

4.1 SUMMARY

Fiscal sociology is a subject in its own right and primarily dealing with aspects of economics and sociology regarding it, not necessarily with laws on taxation. Therefore, I distinguish fiscal sociology from sociology of law. I consider the making of tax laws a branch of fiscal sociology which forms a bridge between aspects of economics and of sociology on fiscal sociology in these broader senses. However, the law and language perspective on the making of tax laws should also be deemed a topic within sociology of law. Thus, by this figure I've elucidated the position of the making of tax laws in the respects mentioned:[508]



The overall conclusion in this Part D is that the legislator should put the concepts in their respective proper context before thinking about grammar etc, to decrease the risk of communication distortions in the process of the making of tax laws. Thereby the models presented in Chapter 3 by Figure 1, Figure 2, Figure 3 and Figure 4 (which I often refer to as the models) – and of course other similar models or tools – could in short be said offering a structure with boxes to aid the legislator in that process. Supportive to the process is also parsing or at least *parse thinking*. The models may also be adapted info logic function trees (LFT) to further structure the use of the suggested models to detect risks of communication distortions in the process of the making of tax laws. Thereby I give as examples LFT 1 and LFT 2 which are parts of or combinations of Figure 3 and Figure 4. In addition, I propose the introduction of so called seriation for the present topic and suggest also the use of checklists to make software that may aid application of tax laws by entrepreneurs or organizations and which may be used by the

[508] See sec. 2.1.

legislator too to further refine the process of the making of tax laws for the purpose of detecting communication distortions. In the latter respect I give a short overview about something I call an LGS-flow-analysis which I made in February 2005 for VAT purposes and perhaps will update. I summarize Part D in this section as follows and give some concluding viewpoints in the next section:

- This part D of the book mainly concerns avoiding the mentioned communication distortions by first and foremost avoiding textual imperfections in the communicative respect regarding the making of tax laws. I'm reasoning from the linguistic law and language perspective about *why* a text containing a tax rule may make a poor tool to convey the intention of the legislator to the tax subject, e.g. to an entrepreneur. A resulting question thereby is whether there's any pedagogy to support a decrease of a risk of communication distortions between the legislator's intentions with a tax rule and how it's perceived by the tax subject. Thereby this part D connects mainly to Part B and concerns linguistics and pedagogy with respect of the topic law and language, and I'm mainly leaving out systematic imperfections concerning the making of tax laws and consequences of communication distortions, which instead are dealt with in parts A and C.[509]

- Of importance for examining the topic in this Part D are these two presuppositions:

    - Laws are not linguistic acts or even communicative acts, but they are standards of behaviour that can be communicated (and may be made) by using language.[510]

    - Language has a context-dependence.[511]

- In section 2.3 I compare with the general aspects on the use of language in law mentioned in section 2.2 and with some of the experiences mentioned in Part B about *how* communication distortions in the meaning of this book occur where the making of tax laws is concerned, and reason from the linguistic law and language perspective about *why* a text making a tax rule may as such make a poor tool to convey the legislator's intentions with it to the tax subject, e.g. to an entrepreneur.

[509] See Ch. 1.
[510] See sec. 2.1.
[511] See sec. 2.2.

- I'm not emphazising interpretation of language when reasoning about fiscal sociology in the meaning of this book, i.e. when reasoning about *how* communication distortions occur between the legislator's intentions with tax rules and the perception of them. It's not a matter of any law dogmatic analysis of the current law meaning of a tax rule, but communication distortions may also be discovered by those applying the rule and they may – or may not – raise the problems before or without going to court. I've concluded that proper grammar etc. won't resolve the problem of communication distortions occurring in the process of the making of tax laws, if the *context of use* of words and concepts is disregarded anyway by the legislator. Instead the solution of communication distortions in the present sense lies in reasoning about *why* a text containing e.g. an imperative to pay tax may be a poor tool to convey the legislator's intentions with a tax rule to the tax subject. In conclusion I'm arguing for the answers to that question *why* being based on methodology regarding the use of words for the making of laws, e.g. tax laws, whereby matters strictly of grammar character may only serve as support in a process of decreasing risks of communication distortions in the present meaning occurring.[512]

- Thus, I reason in Chapter 3 from the pedagogy viewpoint about whether there's any method to support a decrease of a risk of communication distortions occurring in the process of the making of tax laws.

- In the previous section I conclude that Matters strictly of grammar character may only serve as support in a process of decreasing risks of communication distortions; proper grammar etc. won't, as mentioned, resolve that problem, if the *context of use* of words and concepts is disregarded anyway by the legislator. Therefore may e.g. so called parsing only serve as such a support and I'm focusing instead on models to detect risks of communication distortions, where the legislator's intentions with a text making a rule in e.g. the Value Added Tax Act 1994 in relation to the VAT Directive is concerned. Thereby I come back in Chapter 3 to models – tools – from Part B to detect such risks and try to develop them further.[513]

- I begin the work to develop the models with the models and issues from Part B, i.e. concerning communication distortions regarding the use of the concept *tax liable* in the rules on the

[512] See sec:s 2.2 and 2.3.
[513] See sec. 3.1.

right of deduction, Chapter 8 section 3 first paragraph, and on the so called representative rule for VAT in *enkla bolag* (approximately translated joint ventures) and *partrederier* (shipping partnerships), Chapter 6 section 2 of the Value Added Tax Act 1994 instead of the concept *taxable person* in article 9(1) first paragraph of the VAT Directive.[514]

- To elucidate further the necessity of models (tools) to detect risks of communication distortions in the present meaning, I give some more examples of the use of *tax liable* in the Value Added Tax 1994 and in the Code of Taxation Procedure 2011, where the supposedly corresponding rules of the VAT Directive use *taxable person*.[515]

- I also mention rules on prohibition of deduction for certain entrepreneurs acquisitions of e.g. vehicles in the Value Added Tax Act 1994 in relationship to the VAT Directive, where risks of communication distortions may occur too concerning implementing of rules with restrictions allowed by the EU if they cause application in conflict with the intentions of the VAT principle itself.[516]

- To further structure the use of the suggested models – tools – I propose, as mentioned, the use of LFT:s and base them, due to the examples mentioned regarding communication distortions, on Figure 3 and Figure 4 from section 3.2 and my remarks there and in section 3.4. Thereby I use the logic gates AND and OR as nodes to build two examples of LFT:s, namely LFT 1 and LFT 2 which, as mentioned, are parts of or combinations of Figure 3 and Figure 4.[517]

- I also suggest, as mentioned, seriation as a supplementation to the models and compare thereby with law history etc. I argue for the use of seriation before a law historic perspective in the process of the making of tax laws. Although a law historic perspective may still be relevant in that process, it should typically be completed with seriation or something similar.[518]

- Finally, I suggest development of software based on the models adapted into LFT:s for the purpose of supporting tax audits or further refining the process of the making of tax laws for the

[514] See sec. 3.2.
[515] See sec. 3.3.
[516] See sec. 3.4.
[517] See sec. 3.5.
[518] See sec. 3.6.

purpose of detection of risks of communication distortions in that process. Thereby I give, as mentioned, a short overview about something I call an LGS-flow-analysis which I made in February 2005 for VAT purposes and perhaps will update, where L, G and S stands for flows in the enterprise of **L**iquid assets, **G**oods and **S**ervices.[519]

4.2 CONCLUDING VIEWPOINTS

I restrict my concluding viewpoints about this Part D to some remarks with suggestions of first and foremost future fiscal sociology research based upon or inspired by it, where the overall purpose is to avoid communication distortions between the legislator's intentions with a tax rule and how it's perceived by e.g. the tax subject by working on how to minimize such distortions by avoiding textual imperfections in the communicative respect regarding the making of tax laws. Thereby may of course also the other parts of this book be regarded, i.e. parts A-C (including their Epilogue), where it should be noted that Part D mainly connects to Part B. Thus, from this Part D I repeat some suggestions for research efforts about the topic of the making of tax laws in the present respect and make the following additional remarks:

- Especially concerning the field of VAT in relation to the EU law the model in Figure 4 with the ennobling chain of entrepreneurs until the consumer illustrates the basic VAT principle according to article 1(2) of the VAT Directive. It's also basic for testing whether the intentions of the VAT Directive are expressed by a tax rule in the Value Added Tax Act 1994: If e.g. there's an undesired risk for the text making the rule in the act leading to an application causing a cumulative effect in the ennobling chain, i.e. a tax on the tax effect,[520] a communication distortion in the process of the making of the tax laws has been identified. About problems where the VAT Directive allows restrictions of the right of deduction of input tax, I suggest a test of whether a prohibition rule in the Value Added Tax Act 1994 limits the general rule on deduction in violation of the VAT principle itself, namely this:

  > If research proves that the application of the present prohibition rule entails that a taxable person has no possibility to prove that tax evasion or avoidance doesn't exist and that the expenses instead have occurred in his economic activity, an undesired cumulative effect – tax on

[519] See sec. 3.7.
[520] See sec:s 3.2 and 3.4.

the tax effect – will occur in the ennobling chain and by this test result the prohibition rule should be considered obsolete with regard of the EU law in the field of VAT.

- I suggest that the research efforts on this topic should be done by both law dogmatic and fiscal sociology studies, since that test should consider application according to both case law and an actual current law (i.e. with regard of verdicts by courts of lower instances or decisions by the tax authority).[521]

- By use of models – tools – like the model illustrated by Figure 3 the legislator would decrease the risk of communication distortions in the process of the making of tax laws: The erroneous use of the concept *tax liable* – instead of taxable person – in the main rule on the right of deduction of input tax would have been easily revealed as being out of context if the legislator would insert into that process the use of models like Figure 3 or better still the use of LFT:s based on such models, like LFT 1 and LFT 2 which are parts of or combinations of Figure 3 and Figure 4.[522]

- Since taxation usually is about activities and language has a context-dependence, the use of models or LFT:s should be used for research about e.g. the use of relevant verbs and nouns etc. in the process of the making of e.g. a rule in the Value Added Tax Act 1994, where the risk of communication distortions in the present meaning are concerned. The language's context-dependence affirms also the necessity of research in this sense suggested already in Part B. I've suggested a research effort to investigate legal uncertainties in relation to this phenomenon.[523]

- To continue on the theme of the use of the concept *tax liable* in the Value Added Tax Act 1994, I suggest research efforts about e.g. the special rules on tax liability for intermediaries and on producers' enterprises selling at auctions, i.e. Chapter 6 section 7 and Chapter 6 section 8. Thereby could my research about the representative rule in Chapter 6 section 2 be used by comparison, since those special rules can be said sharing a common history with the special rule Chapter 6 section 2. The problems about intermediaries and the VAT are rather complex and for a proper approach could the ABCSTUXY-model

[521] See sec. 3.4.
[522] See sec:s 3.5 and 4.1.
[523] See sec. 2.3 and Part A, sec. 3.3.1.

illustrated by Figure 2 serve as an inspiration.[524] Regarding the use of the concept *tax liable* (tax liability) in yet another special rule, Chapter 9 section 1 of the Value Added Tax Act 1994, I mention for research purposes that both law dogmatic and fiscal sociology studies might be appropriate.[525]

- Although a law historic perspective may still be relevant in the process of the making of tax laws, I argue for the use of seriation before a law historic perspective on that process; that process should typically be completed with seriation or something similar. I propose *seriation* as a *supplementary mean* to the models – tools – that I'm suggesting for the process of the making of tax laws, where seriation in this fiscal sociology sense may function as a mean to capture the continuous movement of tax concepts.[526] I've mentioned a number of issues that could have been discovered by the legislator if e.g. LFT and seriation would have been used in the process of the making of tax laws, and I refer to the reform of 2009 and later reforms, where the legislator, as mentioned, has missed e.g. side issues D and E about the use of the concept tax liable in the rules on the right of deduction of VAT and liability to register to VAT from my licentiate's dissertation. Thereby I make a figure illustrating seriation concerning Swedish corporate taxation and the tax subject in relation to the EU law.[527] Here I'd like to add another perspective on the same question – i.e. the determination of the tax subject – to my suggestion for research effort about also other indirect taxes than VAT, namely excise duties, to further show that the process of the making of tax laws should be completed by e.g. LFT and seriation to decrease the risk of communication distortions.

- The same problem as I mentioned as the main issue A in my licentiate's dissertation (2011) and which was adjusted by the reform of the 1st of July 2013, i.e. the abolishment of the connection to the concept *person carrying on a business* in the Income Tax Act 1999 for the determination of the tax subject for VAT purposes, still seems to exist concerning certain excise duties in the Swedish legislations, e.g. in the Energy Tax Act 1994 regarding the concept *professional activity*. In my opinion this calls for research about such connections to the Income Tax Act 1999 in relation to the EU's Excise Duty Directive

[524] See sec. 3.3, item 3.
[525] See sec. 3.3, item 4.
[526] See sec. 3.6.
[527] See sec. 3.6.

(2008/118), where it follows by paragraphs 16 and 22 of the preamble to that directive that the tax subject shall be a *trader*. In the same way as with the connection from Chapter 4 section 1 number 1 of the Value Added Tax Act 1994 before the reform of the 1st of July 2013 could the connection that still exists in e.g. Chapter 1 section 4 of the Energy Tax Act 1994 mean that legal persons – unlike natural persons – are deemed tax subjects already by their status as legal persons, which wouldn't be conform with the EU's Excise Duty Directive. This may also cause problems concerning the VAT and input tax by the buyer, due a too high base for calculation of output tax (VAT) by a vendor caused by an erroneous excise duty inserted into the ennobling chain. I've mentioned inter alia these problems about excise duty in another book,[528] and I mention them here as additional topics for research efforts.

The main conclusion is that I find it important to open up the topic of the making of tax laws by moving the individual into the centre of that process by the suggestions I make in Part A on systematic changes of the process of the making of tax laws, where the interest of entrepreneurs is concerned; in this Part D I suggest models etc. to improve that process with regard of legal certainty, i.e. by making the process easier to audit and thereby easier to influence by e.g. the individual entrepreneur concerned by a rule containing the imperative pay tax. It's not a matter of deconstruction, where I would suggest to break down the Swedish tax system without presenting alternative solutions; by moving the individual into the centre of the process of the making of tax laws and suggesting a consistent use of models – tools – to uphold as well as examine it, I present an alternative system that better brings to light the legislator's motives for a tax rule. You can ask a politician for his or her opinion about some issue, but it's not possible to ask the legislator e.g. about the contemporary law political aims – i.e. motives – for a tax rule. In other words, I'm arguing for a system where it's possible to study and identify if those motives – intentions – by the legislator have changed, i.e. so that fiscal sociology studies rather than law dogmatic studies alone will become a way to detect communication distortions causing frustration by those applying a tax rule which poorly conveys the legislator's intentions with it. In short, by consistently using models like those suggested for the process of the making of tax laws the proposed system for it will most likely better fulfil demands on legal certainty – that process will thus become reflected by the tools supporting it and susceptible to influences from e.g. the entrepreneur.

[528] See Forssén 2015 (3), sec:s 2.3 and 4.2. See also Forssén 2015 (4), p. 145.

- The recently mentioned will most likely also benefit the development of the EU system; e.g. would the use of LFT and seriation have made it clear for the legislator that case law made it possible already at the mentioned reform of 2009 to connect the income tax law to the VAT law regarding the determination of the tax subject for corporate taxation purposes.[529] By the way, the latter would – if done on the EU level too – provide well for the introduction of an EU tax.[530]

- The lack of tools is probably also why the legislator neither seems to realize there's a necessity to approach the EU about clarifying whether the concept taxable person in article 9(1) first paragraph of the VAT Directive applies or should apply also to non legal entities such as *enkla bolag* and *partrederier*.[531]

For procedural law aspects on evidence about the determination of the tax subject in corporate taxation, I've mentioned in my theses accounting questions in relation to the question whether the evidence is affecting that determination.[532] I suggest the development of software, like the LGS-flow-analysis described in section 3.7, based on LFT:s to support tax audits or the process of the making of tax laws, and thereby would most likely the procedural law benefit from i.e. the determination of the tax subject etc. being more closely integrated with the BKA 1999 and thus with the basis of evidence in enterprises.

The latter is also one way of breaking up the tradition of law dogmatic research in the field of taxation so that also fiscal sociology studies are used; there's a tradition of loyalty to preparatory work in Swedish law source law,[533] but for fiscal sociology studies in e.g. the field of VAT about detecting risks of communication distortions in the process of the making of tax laws it's more appropriate to first and foremost regard the intentions expressed by the VAT Directive's principles – e.g. mentioned in the recitals of its preamble.[534]

> If the CJEU has made a verdict concerning a topic at hand interpretation problems may occur due to differences between the language of the case and other authentic languages within the EU. Thereby I've recommended in my licentiate's dissertation to compare the own language version of the verdict with the French so called

[529] See Forssén 2011, sec:s 2.2.5 and 8.2.
[530] Compare the Epilogue to parts A-C, Forssén 2011, pp. 269, 327 and 328 and Forssén 2015 (1), sec. 1.2.3.
[531] See Part A, sec. 3.2.1.2 and Forssén 2013, pp. 209 and 222 and PAPER, p. 47.
[532] See Forssén 2011, pp. 33, 79, 80, 81 and 176–181 and Forssén 2013, PAPER, p. 20.
[533] See Part B, sec. 3.3.2.2.
[534] See sec. 3.1.

original version and, if possible, with the language of the case.[535] I mention this only to remind that causes to communication distortions in the present meaning perhaps are to be sought already in the fact that the EU has various authentic languages. However, when eventual language differences are regarded it still remains to analyse the process of the making of tax laws to answer the questions *how* and *why* communication distortions occur between the legislator's intentions with tax rules and the perception of them, e.g. when implementing a rule from the VAT Directive into the Value Added Tax Act 1994. Since the various language versions of the VAT Directive have the same structure,[536] the problems about conveying the legislators' intentions are the same in the different Member States, where the *context of use* of words and concepts is concerned. Nevertheless, the CJEU case law should be regarded too to begin with to determine the purpose of the VAT Directive, since the intended result with it is binding for the Member States (and they are obliged to harmonise their VAT acts).[537] For example the mentioned comparison of language versions led me, regarding *Gregg* (Case C-216/97) where the language of the case is English (and I compared the Swedish, English and French language versions of paragraph 20 in that verdict), to the conclusion that the VAT law principle of neutrality has a general determination of providing neutrality concerning legal form and the scope of the activity carried out by the tax subject.[538]

I also propose the described approaches to detect risks of communication distortions in the process of the making of tax laws concerning comparative law studies, where both EU Member States and countries outside the EU are of interest for a comparison with the Swedish experiences mentioned in this book.[539] Thereby I remind too about previously mentioning Russia concerning research about difficulties to introduce a Financial Constitution and to raise taxes.[540]

Finally, I consider, as mentioned, the topic of this book, i.e. sociology of law aspects on the tax rules as such, a new branch of fiscal sociology concerning certain aspects regarding the making of tax laws – a bridge between aspects of economics and sociology on the fiscal sociology. In the recently mentioned respects this topic concerns a certain aspect on fiscal sociology fitting within the subject in those broader senses, e.g. regarding *the use of tax revenues* for social spending. Since the latter is considered a big deal concerning research efforts in the field of fiscal sociology,[541] I come back to this in Part E, where I mention e.g. how the experiences from parts A-D may affect or inspire studies of economics and sociology about the fiscal sociology. By the way, Part D should per se – at least to some extent – have an influence upon studies on sociology of law.

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[535] See Forssén 2011, p. 69 with references to Bernitz 2010 and to Mulders 2010.
[536] See Forssén 2011, p. 69.
[537] See Part A, sec. 1.3; Part B, sec. 1.1; and Part C, sec. 1.1.
[538] See Forssén 2011, pp. 92, 93, 94, 247, 248 and 304.
[539] See sec. 3.6.
[540] See in that respect suggestions of research efforts also in the Epilogue to parts A-C.
[541] See the Epilogue to parts A-C.

Part E

Ideas about fiscal sociology studies by aspects on economics or sociology that may be influenced by the experiences from parts A-D

1. OUTLINE OF PART E

The topics within the field of fiscal sociology usually concern aspects of economics or sociology on fiscal sociology, i.e. fiscal sociology in the broader sense. In parts A-D I've not gone into this broader sense. Instead I've launched a new branch of fiscal sociology, namely fiscal sociology aspects on the tax rules as such. In this Part E I also make some reflections on fiscal sociology in the broader sense mentioned, where I restrict those in correspondence to that branch of fiscal sociology and mention only some ideas about how to go further with fiscal sociology studies by aspects on economics or sociology that may be influenced by the experiences from parts A-D. I firstly describe the tax system as a whole, where you have: The budgets, the tax authority and its work with charging and collection tax and finally other authorities and municipalities using the tax revenues, i.e. the big picture of the tax system. Secondly I suggest some research efforts on fiscal sociology with aspects on economics or sociology.

This Part E contains the following:

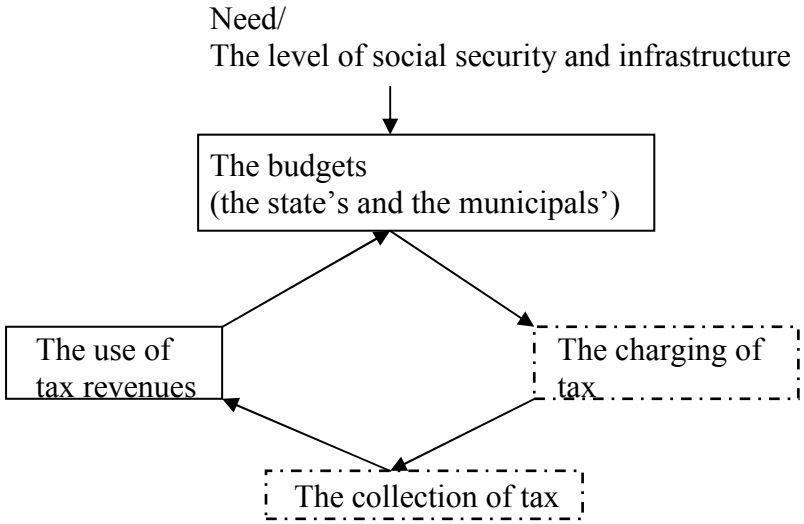
- Chapter 2, THE BIG PICTURE OF THE TAX SYSTEM.

- Chapter 3, SUGGESTIONS OF RESEARCH ON FISCAL SOCIOLOGY WITH ASPECTS ON ECONOMICS OR SOCIOLOGY.

2. THE BIG PICTURE OF THE TAX SYSTEM

I would describe the tax system as a whole as consisting of the budgets, the tax authority and its work with charging and collection tax and finally other authorities and municipalities using the tax revenues. I illustrate this big picture of the tax system by this figure:

The big picture of the tax system



There's a certain need for taxation determined by the state's and the municipals' budgets (hereinafter the budgets), i.e. a taxation necessary to cover public expenses for social security and investments in infrastructure and similar matters. The tax system, as a tool to realize this, is already invented, but is it effective enough or should it be altered to improve the tax system as a whole? I've made some suggestions about the systematic issues and how to improve the process of the making of tax laws in the previous parts of this book. Those belong first of all to the two boxes above about *The charging of tax* and *The collecting of tax*. Now I'm focusing on the two boxes above concerning *The budgets* and *The use of tax revenues*, and in the next chapter I make some reflections about how to go further with fiscal sociology studies by aspects on economics or sociology that may be influenced by the experiences from parts A-D.

The essentials of a tax system, i.e. the big picture here, is to create an equilibrium between the making of plenty and taxation. Therefore, the need and the level of social security and infrastructure shall be expressed by *The budgets* and interact with *The use of tax revenues* by authorities and municipalities etc. for the purpose of providing care,

schools and roads etc. The freedom of trade is a presupposition for the making of plenty and human rights demand a redistribution of wealth, where taxation is a mean to achieve that. You can't rely on the building of social security and infrastructure only as a result of gifts from the individual. A tax system is necessary to build and sustain the welfare state. Thereby I of course don't mean a society where the individuals primarily gets benefits entirely for free, rather that people will get benefits by co-operating with the state – in other words by a reciprocal exchange of individuals creating wealth and the state redistributing it by taxation to cover various needs within the society. However, that reciprocity between the individual and the state must be proportional, so that people don't perceive taxes as just a burden on the individual.

With respect of the recently mentioned, it's necessary to create the equilibrium mentioned without making the individual, e.g. the entrepreneur, perceive that the level of taxation doesn't improve the conditions for doing business in terms of investments in infrastructure. It would lead to a weak loyalty toward the tax system by the individual and to black-market transactions in the economy. The economy will weaken, since necessary infrastructure won't be created. Moreover, it will subdue the individual's creativity and cement class distinctions.

The overall point with taxation is to build and over time sustain society – at least to some degree – as a welfare state. I argue for systematic changes of the tax system etc. in the previous parts of this book in order to make tax collection work efficiently, which will hold back the necessity of big government and thereby work against a necessity of high charges of tax.[542] In the end, as the figure above illustrates, *The use of tax revenues* must tell the economists making *The budgets* something about the outcome in terms of coverage of the need in reality. Although I see in the first place issues about *The charging of tax* and *The collection of tax* as questions that must be dealt with in any tax system – and in that sense independent – they are influenced and influence the issues on *The budgets* and *The use of tax revenues*: If e.g. the collection of tax fail, there's no tax revenues to use regardless whether the charged taxes are high or low, and in the end the use of tax revenues and the budgets based on need must correspond so that unnecessary taxation of enterprises etc. is avoided as far as possible.

Thus, I make in the next chapter suggestions on how to go further with fiscal sociology studies by mentioning some aspects on economics or sociology that could be influenced by the experiences from parts A-D. The end goal is that the tax system as a whole will work for the common good with respect of the rights of the individual.

[542] Compare also about Pareto's State: see Part A, sec. 2.4 and Part C, sec. 1.1.

3. SUGGESTIONS OF RESEARCH ON FISCAL SOCIOLOGY WITH ASPECTS ON ECONOMICS OR SOCIOLOGY

In this chapter I mention some ideas about how to go further with fiscal sociology studies by aspects on economics or sociology that may be influenced by the experiences from parts A-D. I make this restriction, as mentioned, in correspondence with the making of tax laws being a branch of fiscal sociology, reminding of course also about the necessity of research on fiscal sociology in the broader sense, i.e. on economics and sociology without regard of the making of tax laws per se.

Thus, the research efforts I'd like to suggest that correspond to the previous parts of this book are the following:

- I deem the conditions for entrepreneurs and the issue of their loyalty to the tax system as the matter most affecting the national economy in the present respect, since enterprises are necessary for the making of plenty – wealth – which may be redistributed by taxation. Although I've restricted my approach on fiscal sociology to concern the topic of the making of tax laws per se I've also mentioned the following question as a resulting question in the broader sense of fiscal sociology: Should the economists at the Treasury make tax tables at all before analysing what it's worth for the entrepreneurs in terms of avoiding insecurity regarding the rights of the individual, if they make the effort of having a book-keeping in order?[543]

  The question concerns the order of making *The budgets* and should be answered regardless of whether the existing tax system will remain or be altered by my suggestions in parts A-D.

  It's relevant in both cases from the mentioned broader fiscal sociology sense, i.e. the economists should answer it to begin with to better judge whether there's any point at all to work with the present tax rule and make tax tables connected to it. Thus, the primary question should concern whether the entrepreneurs' loyalty to the tax system is likely to be low or high depending on whether they actually perceive a legal certainty value with regard of the tax rule communicating the legislator's intentions with it.

- Concerning the other main topic of this Part E, *The use of tax revenues*, I've already mentioned that it's considered a big deal regarding research efforts in the field of fiscal sociology in the

[543] Compare Part B, sec. 4.2 and the Epilogue to parts A-C.

broader sense mentioned. Thereby should the experiences from parts A-D serve as inspiration and especially so Part D. I suggest the development of software solutions, like the LGS-flow-analysis based on LFT:s, to support tax audits or the process of the making of tax laws.[544] Research in that sense should also be made in conjunction with research efforts to examine if similar or preferably corresponding tools can be developed for issues about *The use of tax revenues*, i.e. concerning cost analyses by hospitals, schools and other public financed activities.

In the latter respect I refer also to that I've criticized in Part A the abolishment on the 1st of November 2010 of auditing duty especially for small enterprises.[545] I did so already before that law was passed, stating that it would cause a risk of a development of a special GAAP for small enterprises beside GAAP according to the BKA 1999, which would cause legal uncertainty. I also warned for the introduction of standardized taxation, like in Italy and Spain, which has been discussed for e.g. hairdressers, small restaurants (pizzerias), sweetshops and the corporate forms of one-man businesses and partnerships.[546] My suggestion is to examine the necessity to reinstate the annual mandatory audit for small enterprises, by research efforts concerning whether the entrepreneurs' consider the annual audit only a burden or an advantage, e.g. as a procedural security and as a provision for a due diligence in the case of a sale of their businesses. Such research should be combined with the issue of *The use of tax revenues* so that the examination would comprise also questions concerning the demands on independent contractors hired by the state or municipals to carry out care or education assignments etc. For the sake of reassuring the citizens about quality in such activities also if they are outsourced to subcontractors the state and the municipals should develop special costing methods for them together with the SASB which should apply also to small enterprises in those sectors.

In the latter respect would a simple idea for the sake of avoiding adventurers e.g. be to insert, into the agreements between the state or a municipal and subcontractors, a clause stating that the contracts on care etc. aren't transferable, if the subcontractor's business would be sold to someone else.

These studies can and should be done regardless of arguments about insufficient methods of measuring e.g. the actual care

[544] See Part D, sec. 4.2.
[545] See Part A, sec. 2.4.
[546] See Forssén 2007, sec. 5.2.4.4.

rendered. Instead the latter will probably gain too from studies of cost accounting, relevant clauses in agreements etc.

In my opinion the development seems to move away from upholding a democratic tax system efficient and fair for both small and big enterprises. Therefore, I'd like to mention the following:

- The Swedish tax authority began in 2012 to make intention declarations with big corporations, chiefly the biggest groups, on so called deepened co-operation (nowadays deepened dialogue). The model is the so called risk classification introduced first by the Australian tax authority in the early 2000's, later implemented also by the UK, Ireland and the Netherlands and nowadays also by Sweden.[547] The SAC (HFD) consider this a form of continuous consultation activity from the tax authority which isn't regulated in the Code of Taxation Procedure 2011 or in any other statute regarding the taxation procedure.[548] Where does this leave the small or new enterprises? Such consultation activities from the tax authority toward the big corporations cause an obvious risk of leading to a democratic deficit to the disadvantage of small or new enterprises. Instead should the *tax revenues used* by the tax authority itself benefit for efficiency purposes also a new enterprise which might become a big corporation and thereby a big tax payer – let alone as the big corporations usually have lawyer resources of their own.

- On the EU level there are intentions to introduce so called Tobin taxes (after James Tobin), i.e. excise taxes on financial transactions: 11 EU Member States are planning to introduce such a Financial Transaction Tax (FTT).[549] Sweden isn't following but does neither object to other EU countries introducing it. In my opinion an FTT wouldn't be much better than basing the tax system on a Ponzi-scheme. Instead should the tax system continue to be based on economic activities and value added thereof – like with the VAT. This is also important to provide for the introduction of an EU tax in the future.[550]

Thus, I leave some suggestions on research to turn the development of the entrepreneurs' status into a more favourable direction on a global level, where I expect efforts first and foremost by the EU and the UN:

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[547] See Johansson 2010.
[548] See HFD 2013 ref. 48 (1 Jul. 2013), and the SKV guideline (for deepened dialogue) of the 10th of March 2014, where the SKV too calls its co-operation/dialogue with big corporations a consultation activity. See also Forssén 2015 (2), sec. 6.2.2.3.
[549] See Elliot 2013.
[550] Compare Part D, sec. 4.2.

- Article 17 of the UN's Universal Declaration of Human Rights reads:

  "(1) Everyone has the right to own property alone as well as in association with others.
  (2) No one shall be arbitrarily deprived of his property."

- It's all very well but what about the freedom to conduct a business (i.e. the freedom of enterprise)? To own property you must acquire it by conducting a business, if you don't earn much as employee or inherit property etc. Article 16 CFREU states: "The freedom to conduct business in accordance with union law and national laws and practices is recognised." In another book I've reasoned about the relationship between the right to property and the freedom to conduct business with respect of the Swedish Constitution 1974, the CFREU and the ECHR.[551] Here I will for the time being only suggest a third number inserted into article 17 of the UN's Universal Declaration of Human Rights by model of article 16 CFREU.

- The latter measure should be accompanied by preparations to install a body e.g. under the Bretton Woods institutions, i.e. the World Bank (IBRD and IDA) and the IMF, that would work for UN Member States not introducing FTT and neither introducing risk classification as described above, nor other measures working against the efficiency of tax systems or otherwise causing a democratic deficit on taxation for small enterprises.

- In the recently mentioned respects I also refer to section 2.2 in Part A, where I state that the tax system should basically work in the same way regardless of the choice of different types of economics, e.g. between Keynesian economics and Monetarism – i.e., if you like, between John Maynard Keynes and Milton Friedman. However, I don't deem the suggestions I make about article 17 of the UN's Universal Declaration of Human Rights etc. as any instigation of governmental intervention as a monetarist might accuse me. Instead my suggestions are aiming to strengthen both the individual and the state and also to restrain corporatism regardless whether it's a matter of the state or banks and other financial institutions exercising their power. An FTT would be detrimental to democracy, since it would leave in principle all the economic power to the state and banks and other financial institutions, thereby leaving the individual

[551] See Forssén 2015 (2), sec. 10.4.

without any checks and balances concerning the distribution of power regarding economy.

In my opinion should so called micro loans be made unnecessary in the future. Micro-credits are small loans to poor people who have no collateral and don't qualify for conventional bank loans.[552] Banks and other financial institutions should grant loans on the basis of a person's idea to start a business rather than on whether he or she has property to put up as collateral.

- Thus, I'm arguing for a third way, where it should be done research efforts on corporate taxation to examine whether my suggestions on optimizing 'The big picture of the tax system' would provide for lower taxes, causing positive dynamic effects for the economy.[553] Thereby might Sweden – and other UN Member States too who apply it – be able to above all rid *The budgets* of the so called NAIRU, which I deem contrary to the principles on human rights, since it presupposes a minimum level of unemployment.

  Milton Friedman introduced the concept of the NAIRU, i.e. Non accelerating inflation rate of unemployment. It's defined as the rate of unemployment when the rate of wage inflation is stable. The theory suggests that if the actual unemployment falls below the NAIRU the balance of power in the labour market tends to switch to employees rather than to employers, and the consequence can be that the economy experiences acceleration in pay settlements and growing average earnings.[554]

- I advocate good technocracy and to e.g. challenge the NAIRU, by instead moving the entrepreneur into the centre of the power over the tax system to release positive dynamic effects for the economy. This would benefit also the employees, since it would improve the conditions for starting new enterprises and also help small enterprises to grow – which create opportunities of employment. For the Swedish perspective, I remind especially about 'the spirit of Saltsjöbaden' not benefitting today's demands on flexibility in society; in short, it doesn't invite indies to the conference table which is crucial for the improvement of the conditions for new and small enterprises.[555] In a global perspective it's time for the UN to summon via ECOSOC a meeting, e.g. in conjunction with the EU, about what I mention on the topic of the entrepreneur and the making of tax laws – perhaps in Bretton Woods, New Hampshire?

[552] See Lovgren 2006, about the Bangladeshi economist Muhammad Yunus.
[553] *Dynamic effects*: compare e.g. SOU 1989:33 Part 1, p. 35 and SOU 1989:38, p. 10.
[554] See Infocheese 2008.
[555] See Part D, sec. 3.3, item 3.

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