The VAT research in Sweden – where is it going?
Part 1

[Translation of the article *Momsforskningen i Sverige – vart är den på väg? Del 1*, by Björn Forssén, published in original in *Tidningen Balans fördjupningsbilaga* (The Periodical Balans Annex with advanced articles) 2/2021, pp. 22–28. Translation into English by the author of this article, Björn Forssén.]

Björn Forssén gets back in this article, of two parts, to the research on value-added tax (VAT) in Sweden. He refers to inter alia a couple of his previous articles in Balans fördjuping (The Periodical Balans Annex with advanced articles), and starts concerning method questions from his overview in Tidskrift utgiven av Juridiska Föreningen i Finland [The journal published by the Law Society of Finland (abbreviated JFT)], where the conclusion is that the VAT research might be going in a direction where it is no longer treated as a jurisprudential subject. Then the Swedish research results within the field of VAT law cannot be expected to be useful for the legislators in the various Member States of the European Union (EU) or for other appliers of law. Björn Forssén considers that it would totally have an injurious effect on the realization of the EU project, above all in Sweden.

In Part 1 I summarize my conclusions from my article *Momsforskningen i Sverige – metodfrågor* (The VAT research in Sweden – method questions), which was published in JFT 6/2020 pp. 716-757 (cit. Forssén 2020a).[1] The overall conclusion is about the choice of method for various research efforts about the subject of VAT law in Sweden. When to choose between using a law dogmatic method, a comparative method or a law dogmatic method completed with a comparative method, it is decisive for the research result to be expected to be useful for the legislators within the various Member States, for courts and tax authorities within the EU or for other appliers of law that the researcher is aware of what is meant with VAT according to the EU law. The material rules on VAT consist of rules on obligations and rights respectively according to the common VAT system of the EU, and it is the right of deduction for input tax on acquisitions and imports to the taxable person's economic activity (the right of deduction) which in the first place is decisive in the mentioned respect.

If the researcher does not take into consideration the importance of the right of deduction for the determination of what is meant by VAT according to the EU law, such a typical lack emerges at the choice of method for the research effort that the probability for a useful research result in the mentioned respects decreases. Such a research effort can even become totally useless for the appliers of law, where the judgment of the implementation question is concerned, that is the question whether the implementation into for instance *mervärdesskattelagen (1994:200)*, ML (i.e. the Swedish VAT act), of the rules in the EU's VAT Directive (2006/112/EC) is EU conform. With respect of the importance, in pursuance of the primary law article 113 of the Treaty on the Functioning of the European Union (the Functional Treaty), on harmonisation of the legislations in the Member States regarding turnover taxes, excise duties and other forms of indirect taxation, that is inter alia regarding VAT, to secure the internal market being established and functioningnd and to avoid competition distortion, it has an injurious effect on the realization of the EU project, above all in Sweden, if the VAT research in Sweden is going in a direction where the research results will be useless for the judgment of the implemenation question. In accordance with article 288 third paragraph of the Functional Treaty, it is namely binding for each Member State to carry

[1] Forssén 2020a is available in full text on www.forssen.com.

out (implement) directives like the VAT Directive as to the result to be ahieved with the directive.

Value-added is a concept not defined in the VAT Directive and neither in the ML. Instead the VAT principle according to the EU law is defined, and thereby what is meant by VAT according to the EU law, in article 1(2) of the VAT Directive: the principle of a general right of deduction is, together with the reciprocity principle and the principle of passing on the tax burden, a part of the VAT principle. Thereby, the right of deduction is not only a decisive criterion to determine what is meant by VAT according to the EU law, but also central for at all being able to make deeper reasoning on VAT according to the EU law (see Forssén 2020a, sections 2.1 and 4.6.1).

The Swedish doctor's theses and one licentiate's dissertation on the subject VAT law are so far the following:

- Björn Westberg, *Nordisk mervärdesskatterätt – behandlingen av utländska företag, varor eller tjänster inom ramen för nationella lagar* (Nordic VAT law – the treatment of foreign entrepreneurs, goods or services within the frame of national laws), Juristförlaget JF AB 1994 (cit. Westberg 1994).

- Jesper Öberg, *Mervärdesbeskattning vid obestånd Andra upplagan* (Value-added taxation at insolvency Second edition), Norstedts Juridik AB 2001 (cit. Öberg 2001).[2]

- Eleonor Alhager (nowadays Kristoffersson), *Mervärdesskatt vid omstruktureringar* (Value-added tax at reconstructions), Iustus förlag 2001 (cit. Alhager 2001).

- Oskar Henkow, Financial Activities in European VAT A Theoretical and Legal Research of the European VAT System and the Actual and Preferred Treatment of Financial Activities, Kluwer Law International 2008 (cit. Henkow 2008).[3]

- Pernilla Rendahl, Cross-Border Consumption Taxation of Digital Supplies, IBFD 2009 (cit. Rendahl 2009).[4]

- Mikaela Sonnerby, *Neutral uttagsbeskattning på mervärdesskatteområdet* (Neutral withdrawal taxation in the field of VAT), Norstedts Juridik AB 2010. (cit. Sonnerby 2010).

- Björn Forssén, *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen* (Tax liability for VAT – an analysis of Ch. 4 sec. 1 of the ML), Jure Förlag AB 2011 (licentiate's dissertation, cit. Forssén 2011).[5]

- Björn Forssén, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier* [Tax and payment liability to VAT in (approximately) joint ventures and shipping partnerships], Örebro Studies in Law 4/2013 (cit. Forssén 2013).[6]

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[2] The thesis is from 2000. In this book I refer to the published book: Öberg 2001.
[3] The thesis s from 2007. In this book I refer to the published book: Henkow 2008.
[4] The thesis is from 2008. In this book I refer to the published book: Rendahl 2009.
[5] The thesis is available in full text in the database DiVA (www.diva-portal.org) and on www.forssen.com.
[6] The thesis is available in full text in the database DiVA (www.diva-portal.org) and on www.forssen.com.

- Marta Papis-Almansa, Insurance in European VAT On the Current and Preferred Treatment in the Light of the New Zealand and Australian GST Systems, Lund University 2016 (cit. Papis-Almansa 2016).

- Mikael Ek, *Leveranser och unionsinterna förvärv i mervärdesskatterätten* (Deliveries and intra-Union acquisitions in the VAT law), Iustus Förlag AB 2019 (cit. Ek 2019).

- Giacomo Lindgren Zucchini, Composite Supplies in the Common System of VAT, Örebro Studies in Law 14/2020 (cit. Lindgren Zucchini 2020).[7]

In Forssén 2020a I divided the review of the theses into two main tracks with respect of the question of the choice of method for the study of the VAT law issue: 1) application of only a comparative method or of a law dogmatic method completed with a comparative method as support and 2) application of only a law dogmatic method.

About Westberg 1994, Öberg 2001 and Sonnerby 2010

In both of the first two theses on the subject of VAT law in Sweden, Westberg 1994 and Öberg 2001 respectively, a comparative method and a law dogmatic was used respectively. I deem Öberg 2001 to be of a less importance in the present respect, since the analysis therein is limited regarding the EU law. However, Westberg 1994 is of great importance for the VAT research. There was current law in the field of VAT in all Nordic countries reviewed, whereby also the EC law rules were regarded, despite that thesis is from April 1994 and thus from the time before the ML replaced on the 1 July, 1994 *lagen (1968:430) om mervärdeskatt* (GML) and the time before Sweden's EU-accession in 1995. The method applied for the study was the comparative, and it was emphasized that with that method the essential with the study will be the placement of the rules in their legal context. This is meaningful not least for the researcher's suggestions *de lege ferenda* to the legislator, that is about changing a certain rule in the ML based on an analysis of the nearest corresponding rule of the VAT Directive (the implementation question). The EC law in the field influenced the Swedish VAT legislation already at the introduction of the GML in 1969. Westberg 1994 should in my opinion be regarded as a basis for other Swedish research efforts in the field of VAT to be expected to give useful research results on the theme EU conformity for the legislator concerning the implementation question, regardless whether the concepts and expressions concerned are used or defined by the EU law in the field, that is in the first place by the VAT Directive (see Forssén 2020a, section 4.4). In this context, I may also mention from Sonnerby 2010 (p. 30), where the analysis of the question of a neutral withdrawal taxation in the field of VAT was made by application of a law dogmatic method, that also a comparative method was used to get a further perspective of the question on implementation of the VAT Directive into the ML, and that it thereby is stated in Sonnerby 2010 that *a comparative method is conducive to the understanding of the own legal system and to see new possibilities* (see Forssén 2020a, section 4.5.2).

From Forssén 2020a, I may, about the theses of the two main tracks etc., mention the following.

[7] Lindgren Zucchini 2020 is available in full text in the database DiVA (www.diva-portal.org).

About main track 1 with Alhager 2001, Rendahl 2009, Sonnerby 2010 and Papis-Almansa 2016 and about Westberg 1994, Forssén 2011 and Forssén 2013

In the third Swedish thesis about the subject VAT, Alhager 2001, it is stated (on page 26) that it is disposed in the same way as Westberg 1994. In Alhager 2001 a comparison is made between Swedish law and German law regarding the implementation question. Such a comparative analysis from an internal EU-perspective for the study of that question increases in my opinion the probability for the research result to become useful for the appliers of law, since the thesis is aiming at trying precisely how the implementation of the VAT Directive's rules on reconstruction has been made in the national VAT legislations in question (see Forssén 2020a, section 4.5.2). Professor Eleonor Kristoffersson (previously Alhager)[8] was the main supervisor at my work with Forssén 2011 and Forssén 2013, and thereby Alhager 2001 served as a model for my work, precisely like Westberg 1994 served as a model for how the work with Alhager 2001. The method in Westberg 1994 was, as mentioned above, comparative, and a comparative method was also used in Rendahl 2009. In Alhager 2001 and Papis-Almansa 2016 was, like in Sonnerby 2010, a law dogmatic method completed with a comparative method applied. In Rendahl 2009 and Papis-Almansa 2016 the comparative method with only an external perspective on the EU law in the field of VAT was used.

In Forssén 2011, I reasoned about the relevance of completing the law dogmatic method with a comparative method. The international outlook and my inquiry to tax authorities and treasuries in a number of countries, which I made in that work, showed, concerning the main question on the EU conformity with the determination of the tax subject, that the connection to the non-harmonised income tax law for the determination of the tax subject in Ch. 4 sec. 1 no. 1 of the ML was unique for Sweden [see Forssén 2011 pp. 71, 72, 279-297 [*Bilaga 2 – Internationell utblick* (Appendix 2 – International outlook)] and 349 and also Forssén 2020a, section 4.3]. Therefore, I deemed that for the question on the EU conformity with that connection it was sufficient to make a law dogmatic analysis. That led to my suggestion in Forssén 2011 meaning that the concept *yrkesmässig verksamhet* (professional activity) regarding the determination of the tax subject in Ch. 4 sec. 1 no. 1 of the ML should be adapted to the concept *beskattningsbar person* (taxable person) according to article 9(1) first paragraph of the VAT Directive. By SFS 2013:368 was thereafter also a revision of the law made, so that the determination of the tax subject according to Ch. 4 sec. 1 of the ML no longer connects to Ch. 13 of *inkomstskattelagen (1999:1229)*, i.e. to the Swedish income tax act. Thereby was instead the determination of who is taxable person according to the main rule in article 9(1) first paragraph of the VAT Directive literally implemented into Ch. 4 sec. 1 first paragraph first sentence of the ML.

In Forssén 2013, I did, regarding the representative rule concerning VAT in *enkla bolag* (joint ventures) and *partrederier* (shipping partnerships), as a support to the law dogmatic method, a comparative analysis from an internal EU-perspective of the implementation question and thus with Alhager 2001 serving as a model, whereby I compared that rule in the ML with the treatment of *sammanslutningar* and *partrederier* according to *finska mervärdesskattelagen (1501/1993)*, i.e. the Finnish VAT act. Since non-legal entities are treated differently in Sweden and Finland concerning the determination of who is a tax subject for VAT purposes, I suggested in Forssén 2013 (pp. 225 and 226) that Sweden should bring up the question on EU level in consultation with Finland. In Forssén 2020a, section 4.3, I also state that I have

[8] Professor Eleonor Kristoffersson: professor of tax law at Örebro University (JPS) and guest professor at Linköping University.

iterated the problem and my suggestion in an article in the JFT during the year of 2019 and in a commentary to a proposition of legislation in JFT 2020.[9]

Since the right of deduction is a decisive criterion to determine what is meant by VAT according to the EU law, and thereby also central for at all being able to make deeper reasoning on VAT in this meaning, I state in Forssén 2020a, regarding Rendahl 2009 and Papis-Almansa 2016, that only an external perspective on the EU law in the field of VAT should not be made when applying a comparative method, but some Member State ought to be included too, so that an internal perspective makes it more likely that the research result will be useful for the appliers of law concerning the implementation question. If also an external perspective shall exist, it should be carefully investigated, like I do in Appendix 2 (pp. 279-297) of Forssén 2011, whether the third country in question has VAT according to what is meant by VAT according to the EU law, whereby absence of the principle of a general right of deduction disqualifies the country in question as material for a comparative study of the implementation question. If a third country is lacking a general right of deduction in the system described as a VAT system or a system of Goods and Services Tax (GST), it is namely not a matter of VAT according to the EU law, but of some gross tax like excise duty. Otherwise, I emphasize in the present context as something very important from Rendahl 2009 that it is stated therein (pp. 50 and 51) that risks exist with comparisons with third countries due to fundamentally constitutional differences, whereby it is emphasized that it is only within the EU that freedom of movement for inter alia goods and services exists (on the internal market), which I also mention on page 282 of Forssén 2011 (see Forssén 2020a, sections 4.5.1, 4.5.2 and 5.2).

By the way, I hold Papis-Almansa 2016 before Rendahl 2009, since the GST systems of New Zealand and Australia have been chosen for the comparison in the first mentioned thesis, whereas the GST systems of Australia and Canada have been chosen in Rendahl 2009 and Canada, unlike Australia – and New Zealand – is way apart from the EU law in the field of VAT as a third country lacking a uniform VAT, that is a common VAT system for the countries various parts. That a cohesive VAT system, a uniform VAT is a law political aim with the VAT according to the EU law follows already by the VAT Directive's complete title, that is that it is a directive *on a common system of value added tax*.

About main track 2 with Henkow 2008, Ek 2019 and Lindgren Zucchini 2020 and about the other mentioned Swedish theses on the subject of VAT law

In Henkow 2008, Ek 2019 and Lindgren Zucchini 2020 a law dogmatic method is applied. I denote the methods in Henkow 2008 and Lindgren Zucchini 2020 and as purely law dogmatic, since it is stated therein that a purely technical comparison would be especially suitable for VAT and the choice of the law dogmatic method is made unconditionally. In Ek 2019 a law dogmatic method is also used, but, in opposition to Henkow 2008 and Lindgren Zucchini 2020, it is not stated as the only suitable for the study, why I do not denote the method in Ek 2019 as purely law dogmatic. In Ek 2019 can namely an awareness of that the

[9] See Björn Forssén, *Om rättsliga figurer som inte utgör rättssubjekt – den finska och svenska mervärdesskattelagen i förhållande till EU-rätten* (On legal figures not constituting legal entities – the Finnish and Swedish VAT acts in relation to the EÙ law), JFT 1/2019, pp. 61–70, 69 and 70, (cit. Forssén 2019) and Björn Forssén, *Synpunkter på vissa regler i förslaget till en ny mervärdesskattelag i Sverige – SOU 2020:31* (Viewpoints on certain rules in the proposal to a new VAT Act in Sweden – SOU 2020:31), JFT 3/2020, pp. 388–399, 392 and 393 (cit. Forssén 2020b). Both Forssén 2019 and Forssén 2020b are available in full text on www.forssen.com.

law dogmatic method is not the only suitable for jurisprudential studies in VAT law be read out, by the law dogmatic method therein being described as *traditional* only *in the sense that a law dogmatic method or basis is not unusual in VAT law theses* (see Forssén 2020a, sections 4.6.1 and 4.6.2).

In Henkow 2008 *a traditional method of jurisprudence* was applied for the analysis of financial activities in relation to the EU's common VAT system, and there it was stated, as a notorius fact, that the VAT systems which have been adopted all over the world are similar to each other, which means that a purely technical comparison would be especially suitable for VAT. Thus, I denote the method in Henkow 2008 as a purely law dogmatic method. In Lindgren Zucchini 2020 was also only a law dogmatic method ("legal dogmatics") used for the analysis of composite transactions ("composite supplies") for VAT purposes, but therein was not any such motive as in Henkow 2008 presented for the choice of the law dogmatic method. Since a comparative method to support the law dogmatic is neither used in Lindgren Zucchini 2020, and the choice of the law dogmatic method is made unconditionally, I denote also the law dogmatic method used in Lindgren Zucchini 2020 as purely law dogmatic (see Forssén 2020a, section 4.6.1).

The choice of method in Lindgren Zucchini 2020 is in line with the choice of method in Henkow 2008, but in Lindgren Zucchini 2020 it should have been noted that already Rendahl 2009 may be considered to have dismissed the motive in Henkow 2008 to choose a purely law dogmatic method. What is stated thereby in Henkow 2008 is actually not correct, that is that the VAT systems adopted all over the world would be so similar to each other that a purely technical comparison would be especially suitable for VAT. In Forssén 2020a, I reminded of what I am mentioning above from Rendahl 2009, namely that it concerning third countries exist fundamentally constitutional differences, insofar that it is only within the EU that freedom of movement inter alia for goods and services exists. The freedom of movement is fundamental for a neutral VAT to function on the EU's internal market and secure that the internal market is established and functioning. Therefore, the differences constitutionally, that is with respect of competition distortion being avoided on the internal market according to article 113 of the Functional Treaty, may not be neglected for methodological purposes. Rendahl 2009 should have been a strong incentive to complete the law dogmatic method with a comparative method in Lindgren Zucchini 2020 (see Forssén 2020a, section 4.6.1). Furthermore, I note that it in Lindgren Zucchini 2020 – without any explanation – is disregarded not only from Forssén 2011 and Forssén 2013, but also from Westberg 1994, Öberg 2001, Alhager 2001 and Sonnerby 2010. References to Swedish theses about the subject of VAT are made in Lindgren Zucchini 2020 only to Henkow 2008, Rendahl 2009, Papis-Almansa 2016 and Ek 2019. Professor Eleonor Kristoffersson was the main supervisor at the work with both my theses, at the work with Sonnerby 2010 and at the work with Lindgren Zucchini 2020.

I state that if what I describe as a purely law dogmatic method becomes a track for further application and influence of the VAT research, the risk is obvious that this entails a development of the research that in the end means that the VAT law no longer will be treated as a jurisprudential subject. With such a development the reserach in the field of VAT will become more like research within natural science – as if the VAT Directive contains something similar to a physical object that shall be discovered and analysed. Then it is no longer a matter of jurisprudential studies being carried out within the VAT law. If Henkow 2008 and Lindgren Zucchini 2020 will serve as models for the VAT research, it leads to a regressive development of the VAT research in Sweden (see Forssén 2020a, section 5.2). In

Forssén 2020a (section 5.2), I also mention that I have brought up the risk of an application of a purely law dogmatic method, which thus is not completed with neither a comparative method nor empiric surveys in form of inquiries (which can seize what is not to be found in the literature in the field of tax etc.), leading the researcher into what I call the trap of mathematics (see my article *Matematikfällan i forskningen – avseende mervärdesskatterätten*, The Trap of Mathematics in the Research – regarding the VAT law, *Tidningen Balans fördjupningsbilaga* (The Periodical Balans Annex with advanced articles) 2/2020, pp. 17–27 (cit. Forssén 2020c). To *find a legal rule within the legal rule*, and similar methodical deduction, is only expressions of law genetics, that is in the meaning of *counting with legal rules*, whereby the researcher in the subject of VAT goes into *the trap of mathematics*. Although I do not denote Ek 2019 as purely law dogmatic, it is in the present respect disquieting for the development of the VAT research in Sweden that Mikael Ek in an article in *Skattenytt* (Tax news) 1-2/2021 refers to Lindgren Zucchini 2020 as a thesis that would *contain a thorough review and analysis* of *how* composite transactions should be treated *within the frame of the VAT system*.[10]

What is especially problematic with Lindgren Zucchini 2020 is that the work has been done not only by disregarding the importance for the choice of method of the principle of a general right of deduction, but by being carried out under the premise that it would be acceptable in a thesis on the subject of VAT law to delimit the right of deduction for the study. In Lindgren Zucchini 2020 it is namely stated that the focus for the analysis of composite transactions for VAT purposes is set on output tax, whereby the right of deduction for input tax is left to future research on the subject.

The delimitation, and thereby the limitation of the subject, is made despite that it at the same time is expressed an awareness in sections 1.3 and 8.5 in Lindgren Zucchini 2020, with the headlines *Delimitations* and *Future Research Opportunities*, of the connection between the right of deduction of input tax on the acquisitions that a taxable person makes and the taxable transactions that the person is making, and for which the taxable person shall account for and pay output tax, that is for which the person in question is tax liable. To consider the right of deduction should in Lindgren Zucchini 2020 have been deemed as central regardless of the choice of method, since the principle of a general right of deduction is, as mentioned above, one of the parts of the VAT principle according to article 1(2), and the right of deduction thus is central for at all being able to make deeper reasoning on VAT according to the EU law. This should have been considered as especially important, since Lindgren Zucchini 2020 furthermore concerns an expression, composite supplies (Sw., *sammansatta transaktioner*), which neither is defined in nor used in the VAT Directive, and nor is defined in the so-called implementing regulation (EU) No 282/2011, where implementing measures for certain rules in the VAT Directive are established,[11] nor in a primary law rule. With respect of the right of deduction's decisive importance for the determination of what is meant by VAT according to the EU law, I may emphasize as especially problematic, that Lindgren Zucchini 2020 for the study of composite supplies for VAT purposes is not regarding the right of deduction (see Forssén 2020a, section 4.6.1). Therefore, as a Part 2, I will come back next, in The Periodical Balans Annex with advanced articles, to Lindgren Zucchini 2020 and lacks in that work

[10] See p. 14 in *Skattenytt* 1-2/2021 (pp. 4-17), *Förhållandet mellan användning av vara och vederlagsfritt tillhandahållande av tjänst i mervärdesskatterätten* (The relationship between the usage of goods and supply of service free of charge in the VAT law), by Mikael Ek.

[11] The implementing regulation's complete title is: Council implementing regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

inherent to the research effort of the subject VAT inter alia as a result of the right of deduction being totally disregarded therein. In this context, it may also be mentioned that the implementing regulation, as precisely a regulation from the EU, is directly applicable in each Member State according to article 288 second paragraph of the Functional Treaty, and thus, unlike the VAT Directive, does not need to be implemented into for instance the ML.

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