# The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law

Fourth edition

by Björn Forssén

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# PREFACE

*The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Fourth edition* contains e.g., in Annex No.1 to its Part D, an example of empirical studies of law and language issues concerning the process of The Making of Tax Laws, namely regarding whether that process is functioning with respect of making Swedish national VAT rules that correspond with the rules of the VAT Directive (2006/112/EC). Annex No. 1 to Part D of this book makes a completion of the book's law and language perspective on the process of The Making of Tax Laws – not to be confused with the more classical topic of textbooks and studies on the making of tax law.

The empirical study of words and context in Swedish and EU tax laws is commented in the annex in relation to some questions from Part A, namely concerning suggestions about systematic aspects on the process of The Making of Tax Laws. By Annex No. 1 to Part D I also mention something about the continuation of my research project, where I comment planned analyses of method issues, with respect of Part D, and of the use of tax revenues, with respect of Part E. Thus, this book contains the following five parts, A-E:

- 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 how communication distortions may occur thereby, mainly due to poor texts being made by the legislator; and

- Part C is about consequences thereof for the entrepreneur, mainly concerning charges of tax surcharge and tax fraud. An Epilogue ties together parts A-C.

- Part D concerns the language issue itself causing such communication distortions. There is also, as mentioned, Annex No. 1 to Part D.

- Part E is about planned empirical studies of the use of tax revenues, which might lead to studies – with regard of Part D – about methods for discovering communication distortions in the process of The Making of Tax Laws.

Stockholm in November 2019
*Björn Forssén*

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# ABBREVIATIONS

AA, Administration Act
Alt., alternative
APA, Administration Procedural Act
art., article
ATF, Act on Tax Fraud
B, criminal case (Sw., *brottmål*)
BEPS, Base Erosion and Profit Shifting
BFL, *bokföringslagen* (1999:1078) – the Swedish Book-keeping Act (BKA)
BKA, Book-keeping Act
C, curia (about the CJEU)
CA, Companies Act, Act on *Handelsbolag* and *Enkla Bolag*
CF, Code fiscal
Ch., chapter
Cit., citation, cited
CJEU, Court of Justice of the EU
CJP, Code of Judicial Procedure
COM, the EU Commission
CTP, Code of Taxation Procedure
dnr, *diarienummer* – register number
EC, European Community
ECHR, European Convention of Human Rights
ECLI, European Case-Law Identifier
ECOSOC, The Economic and Social Council
ECtHR, European Court of Human Rights
EEC, European Economic Community
e.g., exempli gratia, for example
EKMR, *Europakonventionen* (ECHR)
Eng., English
et al., and others
etc., etcetera
EU, (the) European Union (or the Union)
EUCFR, the EU Charter of Fundamental Rights (also the Charter)
F, (in F-tax), *företagare* (i.e. entrepreneur)
FI, *Finansinspektionen* – the Swedish Financial Supervisory Authority
FS, fiscal sociology
FTT, Financial Transaction Tax
GAAP, Generally Accepted Accounting Principles
GML, *lag (1968:430) om mervärdeskatt* – replaced by the ML
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
IL, *inkomstskattelagen* (1999:1229) – the Swedish income tax act
Im, *indirekt skatt mervärdesskatt* (indirect tax VAT)
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
MF, *mervärdesskatteförordningen* (1994:223) – the Swedish VAT regulation
ML, *mervärdesskattelagen* (1994:200) – the Swedish VAT act
Moms, abbreviation of *mervärdesskatt* (compare: VAT)
NAFTA, North American Free Trade Agreement
NAIRU, Non accelerating inflation rate of unemployment
NJA, *Nytt juridiskt arkiv, avdelning I* (the HD's yearbook)
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
RF 1974, *regeringsformen (1974:152)* [one of the Swedish constitutional laws]
RSV, *Riksskatteverket*, the National Tax Board (nowadays the SKV – 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 the SFL/CTP 2011]
SE, Sweden
sec., section
sen., sentence
SFF, *skatteförfarandeförordningen* (2011:1261) – the regulation of taxation procedure
SFL, *skatteförfarandelagen* (2011:1244) – the Code of Taxation Procedure/CTP 2011
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
SRN, *Skatterättsnämnden* – the Board of Advance Tax Rulings
Sw., Sweden or Swedish
TAHVAT, Tax Authority's Handbook on VAT
TEU, Treaty of European Union
TFEU, the Treaty on the Functioning of the EU
TL, *taxeringslagen (1990:324)* [replaced by the SFL/CTP 2011]
TTIP (or T-TIP), The Transatlantic Trade and Investment Partnership
UCC, the Union Customs Code (Sw., *unionstullkodexen*)
UIF, *unionsinternt förvärv* – intra-Union acquisition
UK, United Kingdom
UN, United Nations
US, United States (i.e. the United States of America)
v., versus
VAT, value added tax (*mervärdesskatt*)
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 is also called, the sociology of taxation. However, the subject within the field I have chosen is not the usual concerning aspects of economics or sociology on fiscal sociology, i.e. I do not 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 on 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 do not 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 cannot 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**

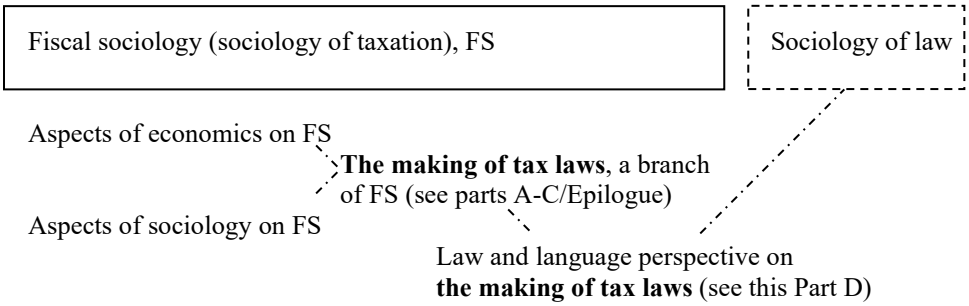
In the Epilogue I make some remarks tying the conclusions about the consequences mentioned in Part C together with those in parts A and B.

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

In Part D, I am 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 is any pedagogy to support a decrease of a risk of communication distortions between the legislator's intentions with a tax rule and how it is 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 am 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. About Annex No. 1 to Part D: see PREFACE.

**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 is 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 is 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 is 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 will not 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 do not 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 has 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 do not use a comparative method. However, I believe the issues I raise are not 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 do not 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 are not 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 *regeringsformen (1974:152)*, RF (i.e. one of the Swedish constitutional laws) – [RF 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 does not 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 is 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 RF 1974 and art:s 4(1) and 5(2) of the Treaty on EU (TEU).
[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 have 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 RF 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 are not 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 is a demand of a level playing field on the internal market so that the consumers will not 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 is 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 is 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) RF 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 is 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 do not 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 must not 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 do not 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 is 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 RF 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 (1), 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 was not neutral compared to what would apply to an employee owning stock market shares. To come to that conclusion, it was not 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 RF 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 is 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 is not supposed to be made in the preparatory work. However, there is another issue about the Swedish procedural system which adds to the problem described. Since the early 1970's there is 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 have found themselves in

[43] See Ch. 8 sec. 2 para. 1(2) RF 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 did not 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 do not 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 are not 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 is not 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 will get tax breaks. In my opinion it is 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 will not 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 did not 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 RF 1974.[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 is 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 is 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 RF 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 should not 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 is 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 RF 1974, 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 terms to register for F-tax. In other words, the secondary norm

[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.

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 will not 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 is also to consider that small enterprises are not 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) and Forssén 2006 (1), pp. 19-25.
[68] See Ch. 3 sec. 2 RF 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 would not 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 is 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 am suggesting leads to corporatism. That is 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 the system suggested balances that argument. It should be deemed

[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.

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 am 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 have 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 RF 1974.
[74] See Ch. 8 sec. 21 RF 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 is 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 is 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 RF 1974.
[76] See Ch. 8 sec. 1 RF 1974.
[77] See Ch. 8 sec. 2 para. 1(2) RF 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 is 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 is 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 is a taxable person is solved for VAT purposes by the reform of the 1st of July 2013, but it is 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 is 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 is 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 is 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 would like to add that I have also concluded there is 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 is 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.

[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.

in compliance with the main rule 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) were not 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 is 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 have 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 are not 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 has been stated that, unless the HFD is quite sure of wanting another solution and it is 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 have 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 is 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 do not – 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 (1), 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 (1), pp. 241 and 242.
[100] See sec. 2.2.
[101] See Forssén 2007 (1), 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 did not 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 are not 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 is considered reasonable.

- To my experience it is 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 is 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 has 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 do not 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 is 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 is 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 is 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 do not reach the HFD, I suggest a research effort to investigate legal uncertainties in this respect and e.g. how many entrepreneurs that has 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 is 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 is 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 is typically a matter of e.g. actually visiting the premises in the example above. Thereby unnecessary court procedures can be avoided. Furthermore it is 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 is 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 does not 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 (1), 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 is 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 have 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 is 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 is 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 was not questioned that the work had been carried out and there was not 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 was not 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 did not allow this. Then it is neither surprising that the court of appeal in its verdict has not 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 could not be deemed being in force, if the subcontractor did not have a properly done book-keeping. That is 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 were not 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 is 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 did not 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 is a demand of leave to appeal.[127] In B 447-02 (13 May 2002) the HD did not 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 did not 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 is 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 taxes. If the court of appeal had been urged to undertake that by a

[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 (1), pp. 271-274.
[131] See sec. 2.4.

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 is also called, the sociology of taxation, namely regarding the making of tax laws. Thereby I do not 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 have 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 is presupposed that the tax authority will give proper information for the purpose of application must in my opinion be abandoned altogether. I have 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 was not neutral compared to what would apply to an employee owning stock market shares. The tax authority's information and communication of the tax rule had not 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 RF 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 must not 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 concerning a tax rule. The protection of the

[136] See sec. 1.3.

legal rights of the individual demands this. Therefore, I have concluded that the tradition with the legislator stating in the preparatory work to a tax rule that it is 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 have answered the question about what influence the individual entrepreneur has on the making of tax laws that it is rather bleak.[138] I have 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 have 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 do not grow

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

big enough, you will not 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 is a democratic deficit to the disadvantage of the individual entrepreneur to consider. It is 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 is foremost necessary to look at the question from a perspective of the rights of the individual, i.e. from the constitutional perspective. That has 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 am 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 have 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 is 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 have 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 have 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 have 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 is 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 is 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 is 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 have 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 is 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 is undoubtedly counterproductive for the objective of an efficient tax collection, including tax control.[146]

## 4.2 CONCLUDING VIEWPOINTS

In the latter section I have 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 have come up with something new that fits well within existing research in the field in the broader sense.[147]

However, it is of the essence to note that the topic brought up by me does not concern the sociology of taxation in the broader sense meaning the use of taxation as a tool of public finance. It is 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 do not 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 is 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 is 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 have 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 have 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 RF 1974, conferred in general to the institutions of the European Union (EU).[155] This does not 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 does not 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 does not 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 2019 (1), sec:s 1.1.3 and 1.2.2.

[154] There are only a few EU directives on income tax: e.g. the Merger Directive (2009/133/EC), the Parent-Subsidiary Directive (2011/96/EU), the Council Directive on administrative cooperation in the field of taxation (2011/16/EU) 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 RF 1974 and art:s 4(1) and 5(2) TEU.

[156] See the weekly letter from the EU representation in Brussels no. 30, 2004. See also Forssén 2011, pp. 269 and 328; and Forssén 2019 (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 has not 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 have 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 have 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 2019 (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 2019 (1), sec. 1.2.1.
[163] See Forssén 2019 (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 2019 (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 is an obligation for the Member States' courts to conduct a directive conform – EU conform – interpretation as far as it is 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 is 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 am 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 2019 (1), sec. 1.5.
[168] See *von Colson & Kamann* (14/83) and para. 8 in *Marleasing* (C-106/89) and Forssén 2019 (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 will not 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 is 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 is not a taxable person according to that main rule, i.e. a consumer.

## 1.3 DELIMITATIONS, METHODOLOGY AND PRINCIPLES

As mentioned,[173] I have inter alia concluded in my theses of 2011 and 2013 that the Value Added Tax Act 1994 does not comply with the VAT Directive (2006/112) when using the concept tax liable instead of taxable person: That is 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 cannot rely on the main rule on the right of deduction in the Value Added Tax Act 1994,

[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.

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?[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 will not 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 am 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 am 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 2019 (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 2019 (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 is a demand of a level playing field on the internal market so that the consumers will not 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 is 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 2019 (1), sec. 1.1.3; and Forssén 2011, p. 46.
[181] See Terra & Kajus 2012, p. 6; Forssén 2019 (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 2019 (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 2019 (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 is 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 is also the efficiency of tax collection to consider. If those two principles do not work there will be consequences for the other law political mentioned: The Swedish VAT system will not be directive conform – EU conform – if the rules in the Value Added Tax Act 1994 are not 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 2019 (1), sec. 1.2.1.
[185] See Forssén 2019 (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 will not 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 does not 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 did not resolve the differences I have 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 cannot 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 will not 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 DOES NOT 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 is 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 is liable to register to VAT and named them side issue D and side issue E. These issues were not 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 is still an opening for the interpretation that there is 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 is not complying with the CJEU's case law and the interpretation means there is 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 is granted the right of deduction of input tax.[195] It was made *acte éclairé* by *Rompelman* (Case 268/83) that it is the purpose by a taxable person to create such transactions that is 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 2019 (1).
[195] See para. 23 in *Rompelman* (268/83). See also Forssén 2019 (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 have 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 is not 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) does not 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 is 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 is 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* are not 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 2019 (1), PAPER sec. 2.4; and Forssén 2011, pp. 39 and 40.
[197] See sec. 1.1.
[198] See Forssén 2019 (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 2019 (1), sec. 1.1.1 and sec. 1.1.
[202] See Forssén 2019 (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 2019 (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 would not comply with the main rule on who is a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), since it was made *acte éclairé* by EU case law that the criterion economic activity in the main rule also means a duration criterion for who is a taxable person, opposed to what is 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 have 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 is not in compliance with the directive rule mentioned on who is a taxable person.[207]

My interpretation of the representative rule has been decided by the question of what is 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 is 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 2019 (1), sec. 1.1.3.
[205] See Forssén 2019 (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 is 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 is 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 is tax liable (*betalningsskyldig*) in articles 2(1)(a), 2(1)(c) and 193. However, since the reform of the 1st of July 2013 did not 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 is 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 is 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 2019 (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 2019 (1), sec. 1.3.
[213] See Forssén 2019 (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 have 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* does not 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 is 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 have 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 are 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 have suggested the latter,

[214] See Forssén 2019 (1), PAPER sec. Ch. 3, and sec:s 6.2.2.3 and 6.2.2.4.

since I have concluded there is 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 cannot 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 will not 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 is 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 2019 (1), sec. 6.4.2.
[216] Se Forssén 2019 (1), sec:s 1.3 and 6.3.1 and also Forssén 2010, p. 60.
[217] See Forssén 2019 (1), PAPER Ch. 3.
[218] See Forssén 2019 (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 is not, 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 is not 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 is the purpose by a taxable person to create taxable transactions that is 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 is 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 not complying with the main rule on who is 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 is not 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 is a demand of a level playing field on the internal market so that the consumers will not

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

choose 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 is 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 is 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 cannot 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 has not 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 will not 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 2019 (1), sec. 2.4.1.2.
[233] See Sonnerby 2010, p. 285 and also Forssén 2019 (1), sec. 2.4.1.2.
[234] See Forssén 2019 (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 does not, 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 2019 (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 2019 (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 will not 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 is 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 is 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 is an opening for the interpretation that the use of the concept tax liability instead of taxable person there is 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 have 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 have 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 does not contradict such an order.[239] I have 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 is 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 did not 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 2019 (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 2019 (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 are not 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 is 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 is not unusual that the VAT in fact is a gross tax not granting the entrepreneurs a general right of deduction. That is 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 does not 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 does not 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 2019 (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 is the purpose by a taxable person to create taxable transactions that is 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) TEU 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 did not 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 has not 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 will not be deductible just because they are made before the property has begun leading to taxable transactions.[257] I have 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), was not mentioned at all in the preparatory work or in the final amendment, i.e. SFS 2013:368.[258]

- The EU Commission does not seem to recognize that the investigation SOU 2002:74 did not 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 is 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 is 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 is 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 2019 (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 has not 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 is 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 is 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 is 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 is 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 is 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 is 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 is no reason to exclude enterprises conducted by *enkla bolag* and *partrederier* from the ennobling chain of entrepreneurs under that article only because those figures are not legal persons. I have concluded that it is 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 is 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 is a need for such an alteration of the main rule

[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 2019 (1), sec. 2.4.2.
[267] See Forssén 2019 (1), sec. 7.1.3.2.

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

However, as long as there is no such clarification made as recently mentioned concerning the view on non-legal persons according to the main rule on who is 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 does not make an alter the main rule on who is a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), so that it is clarified that it comprises also non-legal persons, like *enkla bolag* and *partrederier*, if they fulfil the article's prerequisites of taxable person, it is 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 does not 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 is 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 is no corresponding directive rule to implement, compared to the main rule on deduction not being EU conform, where it is just a matter of the legislator eventually addressing that problem by correctly implementing article 168(a) of the VAT Directive (2006/112) by

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

changing tax liability 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 is 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 is 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 is sufficiently precise, clear and unconditional, thereby overriding a rule in the Value Added Tax Act 1994 that is 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 2019 (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 2019 (1), sec. 1.2.3.
[276] See Prechal 2005 pp. 99, 100 and 105; and van Dam & van Eijsden 2009, p. 28, where it is 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 2019 (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 is 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 is not 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 is 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 is 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 is of interest that an EU conform interpretation does not 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 is 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 2019 (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 2019 (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 2019 (1), sec. 1.2.2.
[281] See Ståhl et al. 2011, p. 37; and Ståhl 2005, p. 70. See also Forssén 2019 (1), sec. 1.2.2.
[282] See *Adeneler et al.* (C-212/04), para. 110. See also Sonnerby 2010, p. 66; and Forssén 2019 (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 RF 1974 and the principle of legality for taxation according to Ch. 8 sec. 2 sen. 1 no. 2 RF 1974 (*nullum tributumj sine lege*). See also Eka et al. 2012, pp. 95 and 278; Holmberg et al. 2012, p. 356; and Forssén 2019 (1), sec. 1.2.2.

(2006/112), have direct effect.[284] The representative rule does not 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 is 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 is a partner in another type of company form, e.g. in an *aktiebolag*, i.e. limited company, or in a *handelsbolag*, i.e. partnership, will not 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 is 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 is a matter of whether or not the tax system is given any protection. In my opinion this should be possible when it is 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 is 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 2019 (1), sec. 1.2.3.
[285] See sec:s 2.3.2 and 3.1.
[286] See Forssén 2019 (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 is 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 RF 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 2019 (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 are not relevant:<br>The rule has no equivalent in the VAT Dir.<br>_____<br>**Note** If *tax liable* in the rule is not made compatible with art. 9(1) first para. of the VAT Dir., procedural solutions are necessary:<br>- 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.}<br>- The state may invoke the principle of prohibition of abusive practice in accordance with Halifax et al. (Case C-255/02).<br>_____<br>**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 is not 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 is 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 2019 (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 is 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 2019 (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 2019 (1), PAPER Ch:s 3 and 4.
[297] See sec. 1.3.
[298] See Forssén 2019 (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<br>**B** – partner<br>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**<br>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*<br>(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)<br>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 2019 (1), sec. 3.3, and *Schema 4*, i.e. Figure 4, there.
[300] Compare Forssén 2019 (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 cannot 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 should not make any difference from what is 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 is not complying with article 178(a), if there will not 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 is 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 is easier to find out cases of undesired communications

[302] See Forssén 2019 (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 is 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, do not 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 is 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 2019 (1), PAPER Ch. 3.

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

- Thus, there is 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 2019 (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 have 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 is 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 is 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 am 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 will not 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 have 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 does not 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 is 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 is not 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 have concluded that the Value Added Tax Act 1994 is not 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 is not 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 is 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 will not 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 is 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 is 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 did not 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 does not seem to recognize that the investigation SOU 2002:74 did not separate the concepts *yrkesmässig verksamhet* – nowadays taxable person – and tax liability, and that it is 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 has not 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 have 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 does not contradict such an order either. I have 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 have 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 is 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 is not in compliance with the main rule on who's a taxable person, article 9(1) first paragraph of the VAT Directive (206/112). It is in conflict with the principle of neutrality, since the main rule on who is 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 did not 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 have 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 have concluded there is 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 will not 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 is a third alternative to keeping the representative rule with one or two of the mandatory and voluntary parts which would be better. That is 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 have concluded with reference to the VAT principle according to article 1(2) of the VAT Directive (2006/112) there is no reason to exclude enterprises conducted by *enkla bolag* and *partrederier* from the ennobling chain of entrepreneurs under that article only because those figures are not legal persons. That is in conflict with the principle of neutrality. Therefore my first suggestion is that Sweden should, preferably together with Finland who is 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 is no such clarification made as recently mentioned concerning the view on non-legal persons according to the main rule on who is 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 is 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 have 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 are not relevant:<br>The rule has no equivalent in the VAT Dir.<br>_____<br>**Note** If *tax liable* in the rule is not made compatible with art. 9(1) first para. of the VAT Dir., procedural solutions are necessary:<br>- 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.}<br>- The state may invoke the principle of prohibition of abusive practice in accordance with Halifax et al. (Case C-255/02).<br>_____<br>**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 is not 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 have 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

| ***Enkelt bolag/partrederi*** | |
|---|---|
| **A –**partner/representative<br>**B** – partner<br>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**<br>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*<br>(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)<br>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 | | | |

[326] See sec. 3.3.2.3.

Example 1 concerns the ideal situation in an ennobling chain consisting of X, A and Y who are not 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 have replaced the deliverer X with a salesman (S) selling goods to A, now acting for the *enkla bolaget* or *partrederiet*, and I have 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 cannot 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 have 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, do not 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 is 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 have 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 am 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 have 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 is 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 is 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 is 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 was not 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 have 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 is worth for the entrepreneurs to follow the rules.[337] In my opinion there is 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 2019 (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 have 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 have focused on the entrepreneur's situation. I have 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 have 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 is 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 am 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 is 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

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[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 2019 (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 am 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 will not 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 is 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 is 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 is 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

[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).

I have presented before.[355] *Högsta domstolen* (HD)[356] rejected a 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 is 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 did not 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 were not even mentioned in the

[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 (1), sec. 7.1.
[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 2019 (1), sec. 1.3 and Forssén 2011, sec. 1.5.

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 who is 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 is 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 was not 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 is already the purpose by a taxable person to create taxable transactions that is 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 have 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

[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 2019 (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.

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 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.

However, concerning the case regarding the Stockholm district court's verdict, 4 Dec. 2012, the anomaly regarding procedure has proven to be more decisively about the tax authority, the prosecutor and the courts setting aside decisive evidence for deeming the prosecutor's assertion against the defendant of issuing VAT returns with erroneous information for the company: That the defendant had made an open declaration of the circumstances regarding the VAT issues in the company, at a meeting by the tax authority initiated by the defendant, before filing the VAT returns was subdued in the tax auditors' report, which was invoked by the prosecutor about the objective prerequisite for criminal charges. In this respect it is of a major interest that the CJEU on the 15th of September 2016 concluded the following in a case, *Barlis 06* (Case C-516/14):

> "Article 178(a) of Directive 2006/112 must be interpreted as precluding the national tax authorities from refusing the right to deduct value added tax solely because the taxable person holds an invoice which does not satisfy the conditions required by Article 226(6) and (7) of that directive, even though those authorities have available all the necessary information for ascertaining whether the substantive conditions for the exercise of that right are satisfied".[369]

This means in my opinion that the tax authority has not had a right to subdue the circumstance of the open declaration by the defendant by the tax auditors leaving out this information in their report. Although they were arguing in their report about the right of deduction of input tax in relation to the registration issue, the tax auditors were obliged to produce a legally correct report. This was not done by them and the defendant got no response from the courts in this respect, instead they agreed with the prosecutor who disregarded the defendant's pointing out of the tax authority's notes from the meeting proving that the VAT return was filed openly and that it therefore could not – regardless of the judgement of the actual VAT issue – be considered that there existed erroneous information with regard of the VAT returns and thereby neither any foundation of criminal charges. Another appeal was made by the defendant/convicted, who invoked *Barlis 06* (Case 516/14), but the HD refused a new trial (the HD's case No. Ö 694-17) with the highly questionable motivation that no circumstance had been shown for a new trial.

In the next chapter I will not come back to the question about the tax authority, the prosecutor and the courts setting aside evidence in the defendant's/convicted's favour in the case regarding the Stockholm district court's verdict, 4 Dec. 2012. That is an obvious legal uncertainty by itself. Instead I will regarding that case focus on 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 in the Value Added Tax Act 1994.

[369] See the second para. of the verdict in *Barlis 06* (C-516/14).

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 did not 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).[370]

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).[371]

I regard in this part first and foremost the principle of legal certainty with regard of the legal rights of the individual. However, I also mention e.g. the principles of neutrality of taxation and efficient tax collection, including control, also mentioned in parts A and B.[372]

## 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, which 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 in the Value Added Tax Act 1994; 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 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 parts A and B.

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[370] See Part A, sec. 3.2.1.2; and Part B, sec:s 3.2.1 and 4.1.
[371] See Figure 3 in Part B, sec:s 3.3.2.3 and 4.1. See also Forssén 2019 (1), sec. 3.2, and *Schema 3*, i.e. Figure 3, there; and sec. 2.1.
[372] See e.g. Part A, sec. 1.3; and Part B, sec. 1.3.

# 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.[373]

<table>
<tr><td colspan="4">Persons</td></tr>
<tr><td colspan="3">(1) Taxable person<br>(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><td></td></tr>
<tr><td>(3)<br>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><td></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><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

[373] See Figure 3 in Part B, sec:s 3.3.2.3 and 4.1. See also Forssén 2019 (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 did not resolve, e.g. concerning the determination of the right of deduction of input tax.[374]

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.[375] Therefore there is still an opening for the interpretation that there is 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.[376] I have concluded that this is not a directive conform – EU conform – interpretation result, since it was made *acte éclairé* by *Rompelman* that it is 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 is 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 is a demand that the tax subject must have made taxable transactions, i.e. being liable to account for output tax (tax liable), before he is granted the right of deduction of input tax.[377]

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.[378] By virtue of *Rompelman* a taxable person [see (1) in the figure above] whose purpose is to make taxable transactions

[374] See Part B, sec. 2.1.
[375] See Part B, sec. 2.2.
[376] 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 2019 (1). See also Part B, sec. 2.2.
[377] See para. 23 in *Rompelman* (268/83). See also sec. 1.3; Part B, sec. 2.2; Forssén 2019 (1), PAPER sec. 2.4; and Forssén 2011, pp. 39, 40, 215, 216, 262 and 320.
[378] See sec. 1.3, where I also mention interesting aspects on evidence in this case.

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].[379] If the taxable person intends to make from taxation unqualified exempted transactions or if he is an ordinary private person, i.e. a consumer, he has no right of deduction of input tax on his purchases.[380] 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 did not 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).[381] 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.[382]

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.[383] In this chapter I come back to that topic, which I have presented before,[384] 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

[379] See also Part B, sec. 3.3.2.3.
[380] 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.
[381] See Part A, sec. 3.2.1.2; and Part B, sec:s 3.2.1 and 4.1. See also sec. 1.3.
[382] See Part A, sec. 3.3.2. See also sec. 1.3.
[383] See sec. 1.3.
[384] 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 (1), sec. 7.1. See also sec. 1.3.

decision rejecting an application of a new trial that the court did not 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.[385] Thereby it is 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).[386]

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,[387] it was 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 is a similarity between the two cases insofar as the courts are not 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[388] and of coarse book-keeping crime[389] against two partners of a company within the building business.[390] 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.[391] The anomaly was that opposite to the district court the court of appeal did not recognize the rules on F-

[385] See sec. 1.3.
[386] See Prop. 2012/13:124, pp. 84, 85 and 94. See also sec. 1.3.
[387] See B 5292-01 et al. (20 Dec. 2001). See also Part A, sec. 3.3.2.
[388] See sec:s 2 and 4 ATF 1971.
[389] See Ch. 11 sec. 5 PC 1962.
[390] See sec. 1.3.
[391] 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 is not 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.[392] 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 was not 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.[393]

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 cannot be disputed, there is 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 has 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.[394] I focus on the

[392] 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).
[393] See sec. 1.3.
[394] See sec. 2 ATF 1971.

issue of incorrect 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 is 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 was not registered to VAT until late August 2009. They considered the company not being tax liable before filing the registration form.[395] 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.[396]

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

It is 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

[395] See sec. 1.3.
[396] 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 was not 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 have 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 did not 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.[397] 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).[398]

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

[397] 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.
[398] 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?[399]

- 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.[400] 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 is tax liable (*betalningsskyldig*) in articles 2(1)(a), 2(1)(c) and 193.[401]

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 did not stipulate exemption from taxation for supply of fine gold,[402] but at the time the VAT legislation of Luxemburg did.[403]

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

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

conform interpretation of the national rules.[404] Thereby the supply of fine gold by the vendor in Luxemburg could not 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 was not 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 did not 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

[404] 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 RF 1974 and the principle of legality for taxation according to Ch. 8 sec. 2 sen. 1 no. 2 RF 1974 (*nullum tributumj sine lege*). See also Eka et al. 2012, pp. 95 and 278; Holmberg et al. 2012, p. 356; and Forssén 2019 (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 am 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 are not 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 is 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 will not be judged by influence of non-harmonised income tax law.[405] My idea in relation to the criminal proceedings is that the prosecutor thereby may be able to regard such communication

[405] 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 is 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 would like to mention also the *ne bis in idem*-principle with regard of double proceedings on tax surcharge and tax fraud respectively.[406] The HD has ruled for and against in this matter: In two earlier verdicts, 31 Mar. 2010,[407] the HD considered that it was not against that principle to be tried twice for the same deed, but in a later verdict, 11 Jun. 2013,[408] the HD established that it is 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 is 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), will not be disregarded e.g. like what was 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.[409]

[406] See art. 4(1) of Protocol No. 7 to ECHR and art. 50 EUCFR. See also SOU 2013:62.
[407] See NJA 2010 p. 168 I and II (31 Mar. 2010).
[408] See NJA 2013 p. 502 (11 Jun. 2013).
[409] 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,[410] 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 am 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.[411] Those consequences concern first and foremost tax surcharge (*skattetillägg*) and charges of tax fraud (*skattebrott*).[412]

I review the Stockholm district court's verdict, 4 Dec. 2012,[413] and – mostly by comparison to that case – the court of appeal's verdict, 20 Dec. 2001,[414] 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.[415]

I also review another verdict from the court of appeal, 29 May 1997,[416] 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

[410] See also sec. 1.1.
[411] See sec:s 1.1 and 1.2.
[412] See sec. 1.3.
[413] See B 1490-11 (4 Dec. 2012).
[414] See B 5292-01 et al. (20 Dec. 2001).
[415] See sec:s 1.3, 2.1 and 2.2.
[416] 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.[417]

I also make some procedural remarks in connection to the review of the mentioned consequences.[418]

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.[419]

*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 could not 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 is 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 is 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,

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

concerning the liability to register to VAT, that has 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 would not 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.[420]

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

In summary I have 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 did not 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

[420] See sec. 2.2.

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 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).[421]

*Procedural remarks*

By the examples mentioned from the case law I am 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 is no general EU regulation or directive on criminal law,[422] my suggestion would probably increase the legal certainty with regard of the individual's

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

legal rights concerning the VAT law and its consequences in terms of 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.[423]

## 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.[424]

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 is 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

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

Commission the EU has an ambition for the future meaning that the tax authorities should increase their activities concerning collection of VAT.[425] 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,[426] conducted without registration issues even being mentioned in the preparatory work.[427]

- 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 have 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.[428]

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.

[425] 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 2019 (1), sec. 2.2; Forssén 2011, pp. 80 and 223; and Part A, sec. 1.3.
[426] See Part A, sec. 2.3.
[427] See Prop. 2002/03:99. See also Part A, sec. 2.3.
[428] 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 cannot 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.[429] I have stated that the making of tax laws could be deemed a subject in its own right, which I would name sociology of tax laws.[430] 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

[429] See Martin, Mehrotra & Prasad 2009, p. 26; and Campbell 2009, p. 256.
[430] 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.[431]

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.[432] 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.[433]

*More research efforts regarding the VAT and the EU project*

I have 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 have mentioned that there is 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.[434] 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.[435]

- I have also stated that research on the tax laws as tools of effective communication between the legislator and the

[431] See Martin, Mehrotra & Prasad 2009, p. 26.
[432] See Part A, sec. 4.2.
[433] See Part B, sec. 4.2.
[434] See Forssén 2019 (1); and also Part B, sec. 1.1.
[435] See sec. 3.2.

individual is of importance to avoid unnecessary difficulties for a future introduction of an EU tax.[436]

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 is not codified in an EU Constitution which comes into force,[437] 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.[438] It is 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.[439] I have 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 have considered this not compatible with RF 1974 and its principle of legality for taxation.[440] 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 have also mentioned paragraph 11 in *Lyckeskog* (Case C-99/00), where it is 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.[441]

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 is 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.[442] Russia is one example of interest in that

[436] See Part B, sec. 4.2.
[437] See Nergelius 2009, p. 58; and Part B, sec. 1.1.
[438] See Part B, sec:s 3.3.2.2 and 4.1.
[439] See Part B, sec. 3.3.2.2.
[440] See Part A, sec. 2.2 regarding RÅ 2004 ref. 2 (30 Jan. 2004).
[441] See Part A, sec. 2.2.
[442] 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.[443]

[443] 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 have mentioned in parts A-C that the topic of the making of tax laws borders e.g. the disciplines linguistics and pedagogy.[444] 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 am 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 am 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 is 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

[444] 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);[445] 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.

[445] 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.[446] That is 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 RF 1974 means that interpretations of such rules must not be made in conflict with their wordings, i.e. an interpretation must not be made *contra legem*.[447] However, laws are not 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".[448] That is important to remember when reading this part of my book, since I am *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 is 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 am 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.

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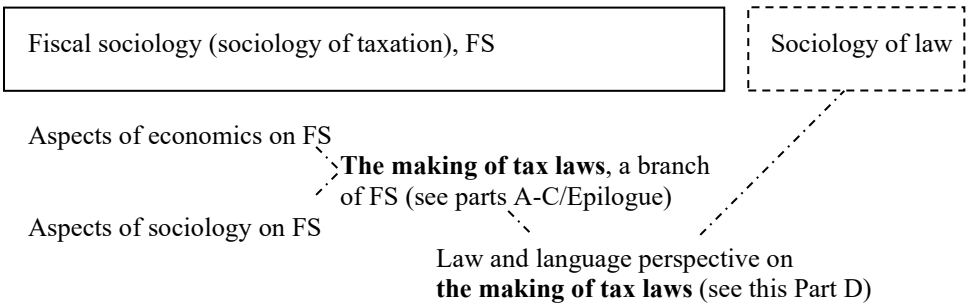
[446] Compare Ståhl et al. 2011, p. 41. See also Forssén 2011, p. 68.
[447] See Part A, sec. 1.3.
[448] See Endicott 2014, sec. 2.1.

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 am 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 would name it sociology of tax laws. Thus, I do not 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 is not the case with law dogmatic studies.[449] By the figure below I elucidate the position of the making of tax laws in the respects mentioned:




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

In section 2.2 I am mentioning problems in general with the use of language in law and in section 2.3 I am 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 am reasoning about whether there is any method to support a decrease of a risk of the described communication distortions occurring. Thereby it is in this part of the book still not a matter of any law dogmatic analysis of the current law meaning of a tax rule,[450] 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 am 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 is not created by the use of signs, namely the rule that *that* text is to be treated as setting out the constitution. Therefore, law is not an assemblage of signs, but – in the sense that is 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.[451]

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 is not 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 is thereby using signs to make law that law is a standard for conduct – not an assemblage of signs.[452]

[450] See INTRODUCTION, concerning part B.
[451] See Endicott 2014, sec. 2.1.
[452] 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.[453] 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".[454]

- 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 is also presumed, since the magistrates' reasons are not 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

[453] See Endicott 2014, sec. 2.2. See also Charnock 2007, sec. 6.2.
[454] 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*.[455]

- 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 did not 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.[456]

- To resolve the apparent paradox, it is 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* could not 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.[457]

- 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

[455] See Endicott 2014, sec. 2.2.
[456] See Endicott 2014, sec. 2.2.
[457] 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.[458]

- Endicott 2014 notes that it is 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 is 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.[459]

- 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 of language that arise – partly – as a result of its context-dependence.[460]

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

[458] See Endicott 2014, sec. 2.2.
[459] See Endicott 2014, sec. 2.2.
[460] 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 is 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 am 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 am reasoning in the next chapter from the pedagogy viewpoint about whether there is 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 am 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 is 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 will not get loose, not only when he is causing such damages actually driving the tractor towing the chicken coop.
>
> There is 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.[461] 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.[462]

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

[461] See www.trafikverket.se, i.e. the website of the Swedish Transport Administration.
[462] 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 have also suggested models – tools – in that respect to use to handle those communication distortions, which I will get back to in the next chapter.[463]

- 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,[464] 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 is 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,[465] with

[463] See Part B, Ch. 2.
[464] Forssén 2011.
[465] Forssén 2019 (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 is liable to register to VAT, i.e. the side issues D and E. These issues were not 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.[466]

- 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 is 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 is a taxable person.[467]

- The first mentioned example from Part B of the use of *tax liable* instead of *taxable person* shows that the legislator does not 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 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.[468] The second example shows that the legislator also in a situation were it is 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

[466] See Part B, sec. 2.2.
[467] See Part B, sec. 2.3.2.
[468] See Prechal 2005, pp. 32 and 33 and van Doesum 2009, p. 20. See also Forssén 2019 (1), sec. 2.4.2.

on who is 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.[469] 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 was not 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 will not 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 does not 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 have suggested a research effort to investigate legal uncertainties in relation to this phenomenon.[470] 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. will not 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 am focusing in this Part D on the *context of use* of words in the process of the making of tax

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

laws and I am 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 is 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 have concluded, with reference to the VAT principle according to article 1(2) of the VAT Directive, that there is 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 are not legal persons. I have concluded that it is 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.[471] 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 should not 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,

[471] See Part B, sec. 3.3.1.

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

- However, as long as there is no such clarification made as recently mentioned concerning the view on non-legal persons according to the main rule on who is 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.[472] There I also mention some more situations regarding the compliance of the Value Added Tax Act 1994 with the EU law.

[472] 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. will not 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 am 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;[473] parsing is used in computer science,[474] 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.[475]

Thus, I refer problems to be resolved by parsing in the first place to the procedural law. Thereby, I am not saying that parsing will not 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 am leaving out parsing in the further presentation of models – tools – to detect risks of communication distortions in the present meaning.

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[473] See www.merriam-webster.com/dictionary/parse.
[474] See Beal.
[475] 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.[476] Since they are built by using it,[477] 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 am 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.[478] 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;

[476] See e.g. Seipel 2010, pp. 197, 198 and 235.
[477] 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.
[478] 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 is 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 is tax liable, Chapter 1 section 2 first paragraph number 1, refers.[479]

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.

[479] 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 have 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 are not relevant:<br>The rule has no equivalent in the VAT Dir.<br>_____<br>**Note** If *tax liable* in the rule is not made compatible with art. 9(1) first para. of the VAT Dir., procedural solutions are necessary:<br>- 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.}<br>- The state may invoke the principle of prohibition of abusive practice in accordance with Halifax et al. (Case C-255/02).<br>_____<br>**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

<table>
<tr><td>Enkelt bolag/partrederi</td><td></td></tr>
<tr><td rowspan="3">A –partner/representative<br>B – partner<br>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="2">C<br>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="2">(1) Taxable person<br>(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)<br>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>

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 is 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 has not 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 is 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 is 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 is not compatible with the main rule on

who is 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 have mentioned in my doctor's thesis that besides registered *enkla bolag* there is 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 is 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 is not 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 must not violate the constitutional principle of legality for taxation in the meaning that it is made in conflict with the wording of a tax rule; the interpretation must not – as mentioned – be made *contra* legem.[480] Thus, that constitutional principle – of RF 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 are not obliged to interpret the national law *contra legem*.[481] In the mean time I am 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 am 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).[482] However, these are not 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.

[480] See sec. 2.1 and Part A, sec. 1.3.
[481] See para. 110 in *Adeneler et al*. (C-212/04). See also Part A, sec. 1.3 and Forssén 2013, p. 38.
[482] See Forssén 2019 (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 have 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 is 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.[483]

   - 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

[483] See Part A, sec. 3.2.1.2.

to the concept *tax liable* in Chapter 7 section 1 first paragraph numbers 3 and 4 of the Code of Taxation Procedure 2011.

- 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.[484] 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

[484] 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).

reformation of Chapter 8 section 3 first paragraph of the Value Added Tax Act 1994 in that respect merely as a formal 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 is making *taxable transactions* (2), a *taxable person* making *from taxation qualified or unqualified exempted transactions* is not *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 is also Chapter 6 section 8, but since it is 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 does not 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, is not used at all in business parlance. Businessmen in various sectors are not even aware of the special rule existing and usually do not 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 is not 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 is 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 is 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 is 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.[485] 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.[486] 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.[487]

- Thus, in my opinion there is 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 is 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.[488]

  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.[489] 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 would 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*

[485] See Dictionary of Norstedts 1993, p. 776.
[486] See Forssén 2007 (1), pp. 276, 277 and 287.
[487] See Forssén 2007 (1), p. 277.
[488] 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.
[489] See Part B, sec:s 3.3.2.3 and 4.1 (Issue No. 2).

(and *partrederier*) concerning the representative rule before my doctor's thesis.[490]

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, 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 have concluded in my doctor's thesis that there is 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.).[491]

   - 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

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

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 should not 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 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.[492] 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 is already the purpose by a taxable person to create taxable transactions that is 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

[492] See Forssén 2007 (1), sec. 6.3.

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 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 is not 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 was not 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 is 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 does not 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 does not 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."[493] 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".[494]

**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

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

Input 2 are 0 or one of either is 0 the Output is 0 (no tax liability).

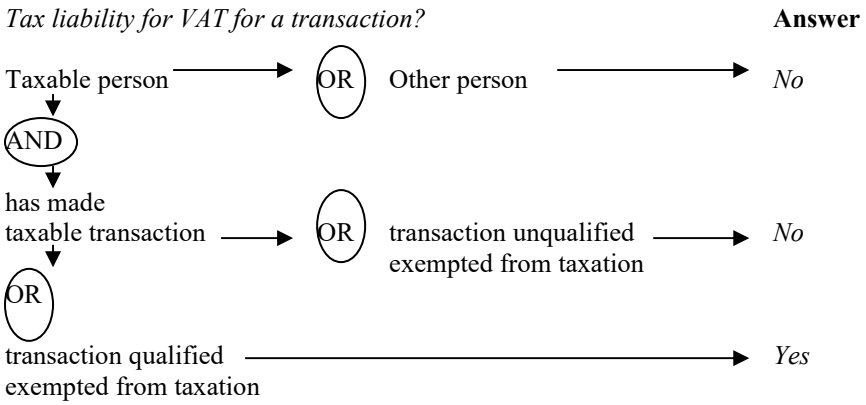
Compare the OR gate with (2) and (3) of Figure 3:

- 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 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.[495] 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)

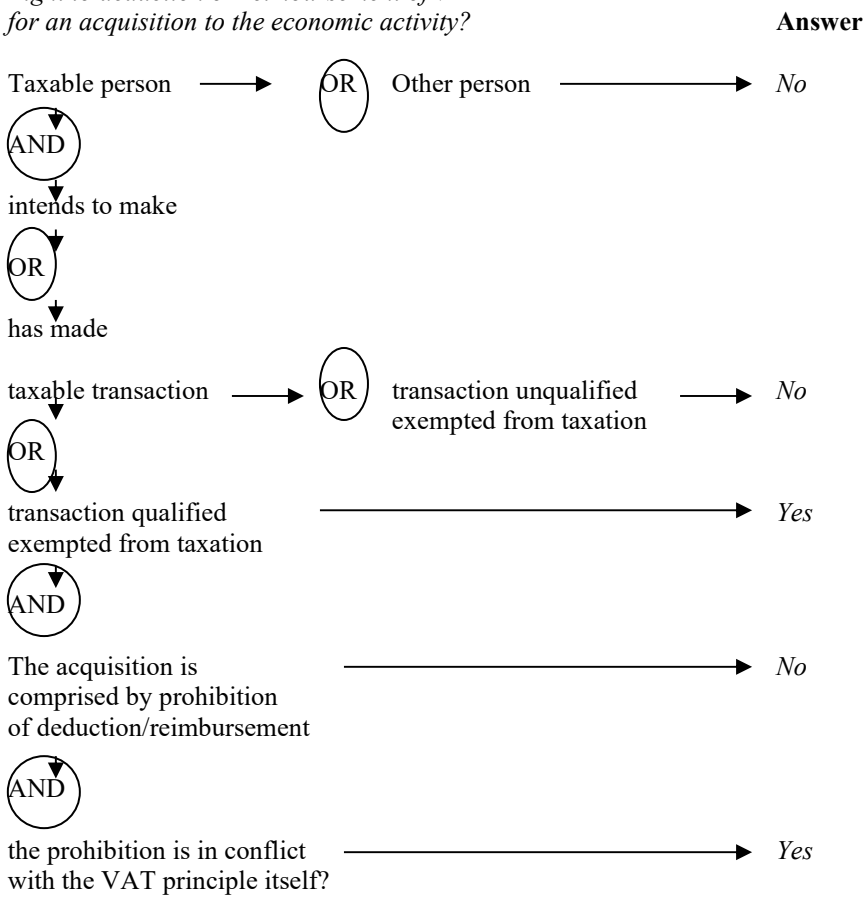
**Question**




[495] 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:[496]

- 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 is an attempt to combine Figure 3 with Figure 4 concerning the main rule of the right of 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 would 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 is 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.[497] 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.[498] Regarding VAT the EC's First Directive did not 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.[499]

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[496] Compare Blaauw et al. 1991, sec. 4.1
[497] See Lyles 2007, p. 74. See also Forssén 2019 (1), sec. 1.2.1.
[498] See Forssén 2019 (1), sec. 1.2.1.
[499] See Forssén 2019 (1), sec. 1.2.1.

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 is not the motivation in the law sources that is of interest, like with a law dogmatic analysis, but the motives which have given rise to the existence of the present rule.[500]

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 am 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 is 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 am 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

[500] See Lyles 2007, pp. 79, 80 and 87.

income tax act of 1928.[501] Thus, the concept I am 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 is considered that the main task of law dogmatic is to interpret and systematize current law.[502] To get a special fiscal sociology concept for the relevant systematic purpose of the 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 am 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.[503] 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

[501] See Ch. 2 sec. 1 and sec. 24 ITA 1999.
[502] See Forssén 2019 (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.
[503] By art. 113 TFEU there is 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.)

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 am not saying that such a figure as the one above is something new, but I am 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.

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 is 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 is 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 is 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 is *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 is a mistake to use a concept regarding the result of the activities by the tax subject instead of the concept determining who is 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 is 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.[504]

- 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

[504] See Forssén 2019 (1), sec. 2.4 of its annex.

> 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.

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 is 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.[505] 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

[505] 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).

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 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.[506]

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 is 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.

[506] See Forssén 2011, p. 213.

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 does not distinguish VAT according to the EU law from other taxes called VAT, and the OECD also mention that their number includes countries with GST. I mention this in my licentiate's dissertation.[507] 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.[508]

## 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.

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[507] 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).

[508] 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.

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.

*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 is time to go 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 notes 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.

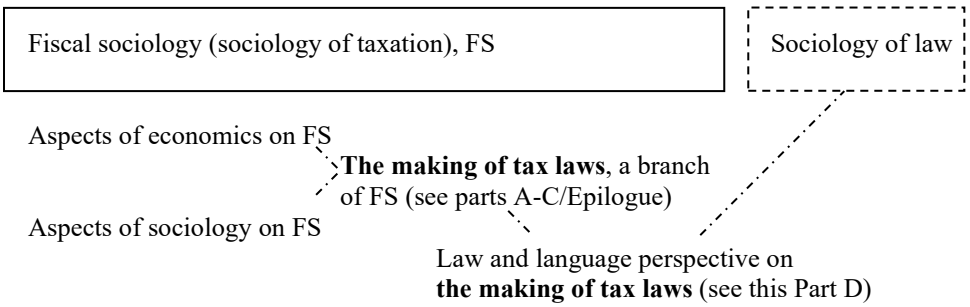
Thus, by processing some or all of the questions on the checklist, i.e. by carrying out the LGS-flow-analysis regarding various problems, the entrepreneur or the organization will get a preview of the VAT situation concerning the aspects subject to the VAT audit. If it is a rather simple VAT problem the LGS-flow-analysis might be sufficient to resolve it. If it is 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 is 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 have elucidated the position of the making of tax laws in the respects mentioned:[509]




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

[509] 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 am 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 is any pedagogy to support a decrease of a risk of communication distortions between the legislator's intentions with a tax rule and how it is 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 am 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.[510]

- 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.[511]

    - Language has a context-dependence.[512]

- 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.

[510] See Ch. 1.
[511] See sec. 2.1.
[512] See sec. 2.2.

- I am not emphasizing 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 is 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 have concluded that proper grammar etc. will not 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 am 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.[513]

- Thus, I reason in Chapter 3 from the pedagogy viewpoint about whether there is 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. will not, 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 am 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.[514]

- 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

[513] See sec:s 2.2 and 2.3.
[514] 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.[515]

- 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*.[516]

- 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.[517]

- 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.[518]

- 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.[519]

- 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

[515] See sec. 3.2.
[516] See sec. 3.3.
[517] See sec. 3.4.
[518] See sec. 3.5.
[519] 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.[520]

## 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 is 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 is 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 is 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,[521] 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 does not exist and that the expenses instead have occurred in his economic activity, an undesired cumulative effect – tax on

[520] See sec. 3.7.
[521] 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).[522]

- 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.[523]

- 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 have suggested a research effort to investigate legal uncertainties in relation to this phenomenon.[524]

- 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

[522] See sec. 3.4.
[523] See sec:s 3.5 and 4.1.
[524] See sec. 2.3 and Part A, sec. 3.3.1.

illustrated by Figure 2 serve as an inspiration.[525] 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.[526]

- 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 am 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.[527] I have 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.[528] Here I would 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

[525] See sec. 3.3, item 3.
[526] See sec. 3.3, item 4.
[527] See sec. 3.6.
[528] 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 would not be conform with the EU's Excise Duty Directive. This may also cause problems concerning the VAT and input tax by the buyer, due to 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 have mentioned inter alia these problems about excise duty in another book,[529] 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 is 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 is 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 am arguing for a system where it is 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.

[529] See Forssén 2019 (3), sec:s 2.3 and 4.2. See also Forssén 2019 (4), Ch. *Tull och punktskatter*.

- 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.[530] By the way, the latter would – if done on the EU level too – provide well for the introduction of an EU tax.[531]

- The lack of tools is probably also why the legislator neither seems to realize there is 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*.[532]

For procedural law aspects on evidence about the determination of the tax subject in corporate taxation, I have mentioned in my theses accounting questions in relation to the question whether the evidence is affecting that determination.[533] 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 is a tradition of loyalty to preparatory work in Swedish law source law,[534] 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 is 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.[535]

> 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 have recommended in my licentiate's dissertation to compare the own language version of the verdict with the French so-

[530] See Forssén 2011, sec:s 2.2.5 and 8.2.
[531] Compare the Epilogue to parts A-C, Forssén 2011, pp. 269, 327 and 328 and Forssén 2019 (1), sec. 1.2.3.
[532] See Part A, sec. 3.2.1.2 and Forssén 2013, pp. 209 and 222 and PAPER, p. 47.
[533] See Forssén 2011, pp. 33, 79, 80, 81 and 176–181 and Forssén 2013, PAPER, p. 20.
[534] See Part B, sec. 3.3.2.2.
[535] See sec. 3.1.

called original version and, if possible, with the language of the case.[536] 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,[537] 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).[538] 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.[539]

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.[540] Thereby I remind too about previously mentioning Russia concerning research about difficulties to introduce a Financial Constitution and to raise taxes.[541]

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,[542] 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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[536] See Forssén 2011, p. 69 with references to Bernitz 2010 and to Mulders 2010.
[537] See Forssén 2011, p. 69.
[538] See Part A, sec. 1.3; Part B, sec. 1.1; and Part C, sec. 1.1.
[539] See Forssén 2011, pp. 92, 93, 94, 247, 248 and 304.
[540] See sec. 3.6.
[541] See in that respect suggestions of research efforts also in the Epilogue to parts A-C.
[542] 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 have not gone into this broader sense. Instead I have 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.

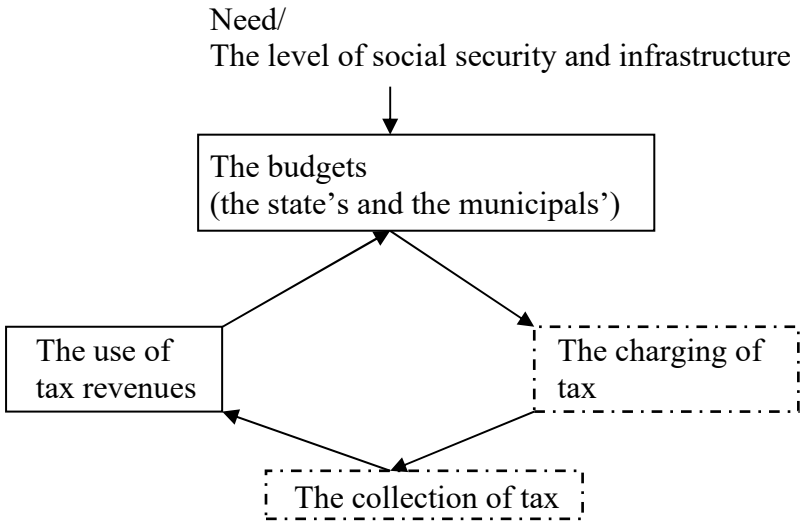
- Chapter 3, SUGGESTIONS OF RESEARCH ON FISCAL SOCIOLOGY WITH ASPECTS ON ECONOMICS OR SOCIOLOGY.

About more ideas, with respect of parts D and E, to continue the research project: see also sec. 3.8.3 and Ch. 4 in Annex No. 1 to Part D.

# 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 is 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 have 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 am 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 cannot 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 do not 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 do not perceive taxes as only a burden.

With respect of the recently mentioned, it is necessary to create the equilibrium mentioned without making the individual, e.g. the entrepreneur, perceive that the level of taxation does not 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 will not 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.[543] 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 is 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.

[543] 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 would 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 have restricted my approach on fiscal sociology to concern the topic of the making of tax laws per se I have 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 is 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?[544]

  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 is 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 is 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 have already mentioned that it is considered a big deal regarding research efforts in the field of fiscal sociology in

[544] Compare Part B, sec. 4.2 and the Epilogue to parts A-C.

the 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.[545] 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 have criticized in Part A the abolishment on the 1st of November 2010 of auditing duty especially for small enterprises.[546] 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.[547] 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. are not 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

[545] See Part D, sec. 4.2.
[546] See Part A, sec. 2.4.
[547] See Forssén 2007 (1), 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 would 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.[548] The SAC (HFD) consider this a form of continuous consultation activity from the tax authority which is not regulated in the Code of Taxation Procedure 2011 or in any other statute regarding the taxation procedure.[549] 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 their own lawyer resources.

- 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).[550] Sweden is not following but does neither object to other EU countries introducing it. In my opinion an FTT would not 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.[551]

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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[548] See Johansson 2010.
[549] 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 2019 (2), sec. 6.2.2.3.
[550] See Elliot 2013.
[551] 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 is 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 do not earn much as employee or inherit property etc. Article 16 EUCFR states: "The freedom to conduct business in accordance with union law and national laws and practices is recognised." In another book I have reasoned about the relationship between the right to property and the freedom to conduct business with respect of RF 1974, the EUCFR and the ECHR.[552] 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 EUCFR.

- 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 do not 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 is 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

[552] See Forssén 2019 (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 do not qualify for conventional bank loans.[553] 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 am 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.[554] 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 is 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.[555]

- 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 does not invite indies to the conference table which is crucial for the improvement of the conditions for new and small enterprises.[556] In a global perspective it is 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?

[553] See Lovgren 2006, about the Bangladeshi economist Muhammad Yunus.
[554] *Dynamic effects*: compare e.g. SOU 1989:33 Part 1, p. 35 and SOU 1989:38, p. 10.
[555] See Infocheese 2008.
[556] See Part D, sec. 3.3, item 3.

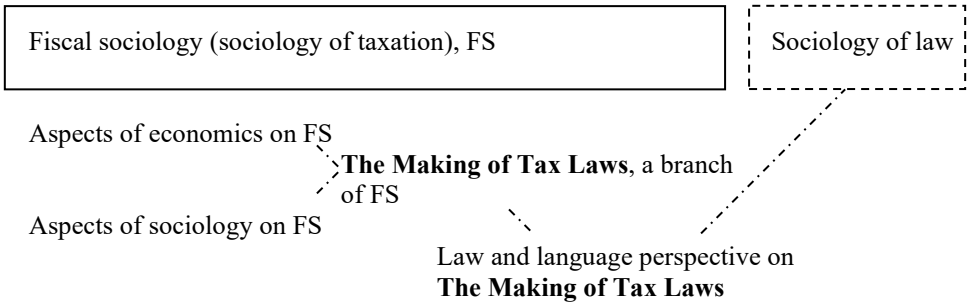
*Annex No. 1 to Part D*

*Law and language: Words and context in Swedish and EU tax laws*

# LIST OF CONTENTS

# 1. OUTLINE OF ANNEX NO. 1 TO PART D

In this annex I present in Chapters 2 and 3 the summary and concluding viewpoints from *Ord och kontext i EU-skatterätten: En analys av svensk moms i ett law and language-perspektiv*,[557] where I suggest how research on law and language issues concerning tax law may be conducted regarding The Making of Tax Law***s*** – not to be confused with the making of tax law – as a branch within the field of fiscal sociology. In Chapter 4 I comment those conclusions in relation to some questions in Part A. Thereby this annex makes a continuation to Part A and to Part D. This annex is together with Forssén 2019 (5) my suggestion of how to do, by an empirical method, a thesis on the topic of the process of The Making of Tax Laws. By the figure below I describe my conception of the position of The Making of Tax Laws in relation to fiscal sociology etc.:[558]




In this Chapter I mention the topic, purpose, method, material and questions of Forssén 2019 (5):[559]

- *The topic* is an investigation of Swedish value added tax (VAT) – *mervärdesskatt* (*moms*) – in a *law and language*-perspective, that consists of the perspective *ord och kontext i EU-skatterätten*, i.e. the perspective words and context in the EU tax law.

- *The purpose* is to analyse examples of a need to change the Swedish legislation procedure where corporate taxation is concerned, in the first place regarding the VAT. Also other rules on taxes and fees are mentioned, but only when influencing the VAT issues mentioned in this book.

[557] Compare Ch. 5 of *Ord och kontext i EU-skatterätten*: *En analys av svensk moms i ett law and language-perspektiv*, av Björn Forssén [Cit. Forssén 2019 (5)].
[558] Compare Part A, INTRODUCTION and Part D, sec:s 2.1 and 4.1.
[559] See Forssén 2019 (5), sec. 5.1.1.

- *The method* – i.e. the way of conducting the investigation – is that I by an empirical study based on my experience has gone through a number of examples where something has failed on the legislator's behalf in the process of the making of a tax rule regarding certain material or procedural issues on VAT. I name such failures *communication distortions*.

- *The material* I have collected partly from precedents by the Supreme Administrative Court, *Högsta förvaltningsdomstolen* (HFD), or preliminary rulings from the Court of Justice of the EU (CJEU), which express current law in a true meaning, partly from cases that actually have occurred but where no trial have taken place in the administrative courts. In the latter respect can an actual current law have been developed or risking to be developed by the tax authority's – i.e. *Skatteverket* (SKV) – handbooks on VAT or so-called standpoints (Sw., *ställningstaganden*) on the subject. Then it is a matter of cases of which I am familiar with the problems that they present. I mention cases that I have brought up in the text- and handbook *Momsrullan Andra upplagan*,[560] where I have made a number of presentations of examples of *communication distortions* regarding tax rules containing lacks concerning language (words) and context. Furthermore I have fetched some examples from *IMPAKT – Avtal och momsavdrag*,[561] and from my theses.[562]

- In Chapter 2 of Forssén 2019 (5) I have given, in sec:s 2.2-2.4, examples of semantic, syntactic and logical interpretation problems that may occur in the VAT legislation, regardless whether they shall be tried on the theme of EU-conformity. The summary in sec. 2.5 of that chapter of Forssén 2019 (5) has to a certain extent formed a comparison for the continuing investigation in that book, by me thereby sometimes making comparisons with those examples of interpretation problems.

- In Chapter 3 and Chapter 4 of Forssén 2019 (5) I have analysed the examples of *communication distortions* regarding material

[560] Cit. Forssén 2019 (6).
[561] Cit. Forssén 2019 (3).
[562] See my licentiate's dissertation, *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen* (Cit. Forssén 2011).
See my doctor's thesis, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier*, its *third edition* Tax and payment liability to VAT in enkla bolag (approx. joint ventures) and partrederier (shipping partnerships) [Cit. Forssén 2019 (1)].

> and procedural rules on in the first place VAT that I have mentioned in sec. 1.3.3 of that book. In sec:s 3.1 and 4.1 of Forssén 2019 (5) I have specified the questions that I have analysed in that respect. In the first place it is, as mentioned in sec. 1.3.1 of Forssén 2019 (5), in these instances a matter of the problem of having to regard two sets of rules when determining current law concerning VAT issues: the national, with *mervärdesskattelagen* (1994:200), ML (i.e. the Swedish VAT act) and *skatteförfarandelagen* (2011:1244), SFL (the Code of Taxation Procedure), and from the EU law – in the first place – the EU's VAT Directive (2006/112/EC) [the VAT Directive (2006/112)]. That the legislator in that respect has failed in making a tax rule (words) for the reality (context) of which it is meant to stipulate taxation or exemption from taxation etc. I name *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules* (Sw., *betänkligheter från lagstiftarens sida på temat ord och kontext i samband med tillkomsten av skatteregler*).

In Chapter 2 of this annex I refer to the conclusions from Chapters 3 and 4 of Forssén 2019 (5).

In Chapter 3 of this annex I refer to the concluding viewpoints of Forssén 2019 (5), where I also have mentioned something about legal certainty and my continuing research project on fiscal sociology and given some general reflections concerning the tax law research.

In Chapter 4 of this annex I comment the concluding viewpoints from Forssén 2019 (5) in relationship to some questions in Part A. In Chapter 4 I also mention more about the continuation of the research project.

# 2. THE CONCLUSIONS FROM CHAPTERS 3 AND 4 OF FORSSÉN 2019 (5)

## 2.1 The use of the concept tax liability in the main rule on the right of deduction and the right of deduction's influence on circumstances by the tax liable's counterpart[563]

In Forssén 2011 I mentioned regarding side issue D that the use of the concept tax liability (Sw., *skattskyldighet*) in the main rule for the determination of the right of deduction of input tax, Ch. 8 sec. 3 first para. ML, may lead to a limitation of the emergence of the right of deduction which is not conform with art. 168(a) of the VAT Directive (2006/112), due to the use of the concept tax liability meaning that the emergence of the right of deduction according to the ML would presuppose that the tax subject first has made taxable transactions. That problem was not resolved by the VAT reform of the 1st of July 2013 (SFS 2013:368), since the legislator only focused on what in Forssén 2011 was the main issues A, i.e. that it in Ch. 4 sec. 1 item 1 ML existed a connection to the non-harmonised income tax rules.

The legislator did neither at the VAT reform of the 1st of July 2013 regard that I in Forssén 2011 also raised that the problem of determining the tax subject by a connection to the concept *näringsverksamhet* (Eng., business activity) in Ch. 13 *inkomstskattelagen* (1999:1229), IL (the Swedish income tax act), not only exist concerning the VAT, but also in certain instances in the field of excise duties. By sec. 3.2.2.1 in Forssén 2019 (5) follows that I inter alia in Forssén 2011 refer to that it in the preparatory work to the law on tax on energy, etc. is mentioned as a tradition that excise duties have followed the VAT where the determination of the tax subject by a connection to the IL is concerned. In sec. 3.2.2.1 of Forssén 2011 I mention that the connection to the IL still exists in *lagen (1994:1776) om skatt på energi* (the law on tax on energy) and *lagen (1972:266) om skatt på annonser och reklam* (the law on advertising tax), despite that it was revoked in the ML on the 1st of July 2013.

By ignoring that the connection to the IL for the determination of the tax subject still exists in certain laws on excise duties the legislator also ignores that it may affect the VAT. The legislator has in my opinion thereby not acknowledged the context in which the determination of the right of deduction exists. That can cause the following problems:

[563] See Forssén 2019 (5), sec. 5.1.2.

- An erroneous tax assessment value for VAT concerning a taxable transaction for VAT and excise duties purposes can occur if the levying of an excise duty becomes erroneous because of the connection to the non-harmonised income tax rules concerning certain excise duties, since Ch. 7 sec. 2 first para. second sen. ML stipulates that excise duty in applicable cases shall be included in the tax assessment value for the purpose of calculating the VAT supposed to be accounted for and paid for a taxable transaction of goods or services. The consequence for a buyer is that an erroneous excise duty by the seller in this way can indirectly affect the right of deduction of input tax according to Ch. 8 sec. 3 first para. ML. The input tax can namely become higher due to an enhanced tax assessment value becoming the result by the seller of the charging of excise duties in the ennobling chain, which should not have been charged if the connection to the concept *näringsverksamhet* in Ch. 13 IL would not have existed in the law on tax on energy and in the law on advertising tax for the determination of the tax subject.

Another example of the importance of putting the right of deduction according to Ch. 8 sec. 3 first para. ML in the right context I s that the right of deduction can become lower, by goods having been placed in certain warehouses according to Ch. 9 c ML. In my opinion it is namely so that motives are lacking with respect of the VAT Directive (2006/112) for asserting that the tax assessment value at the withdrawal of goods from a certain warehouse should be determined regardless of a discount for fast payment: There is nothing in the directive that would disqualify that such a discount would be based on a matching of tax free transaction of goods during the time actual goods have been placed in a certain warehouse against a tax free financial service. The legislator has not regarded that the seller and the buyer, by virtue of the special rules in Ch. 9 c, can avoid the case law concerning the general rules of the ML meaning that the tax assessment value for the goods must not be lowered by it being matched by a discount for fast payment. That is in my opinion another example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

Yet another example of the importance of putting the right of deduction in the right context concerns on of the special rules in Ch. 8 sec. 4 which expand the right of deduction of input tax in relationship to the main rule in Ch. 8 sec. 3 first para., namely Ch. 8 sec. 4 item 4 ML. That rule concerns right of deduction of input tax at the buyer's purchase of real estate from a building business activity, when the seller of such real estate has accounted for or shall account for output tax on withdrawal from his building business activity in pursuance of Ch. 2 sec. 7 ML. The

analysis of Ch. 8 sec. 4 item 4 ML shows that it is possible to avoid the second indent of Ch. 1 sec. 2 first para. item 4 b, which shall prevent temporary persons being put into a chain of entrepreneurs to avoid the regime with reverse charge within the building sector. By the way I have mentioned that phenomenon in two articles already in 2007.[564]

The analysis in the mentioned respects are examples of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*, where the legislator's ability to put the right of deduction of input tax in the right context partly concerning the rules in the ML taken by itself, partly concerning the rules in the ML in relationship to the rules on excise duties. By the way the legislator should, where the question regarding the special rules in Ch. 9 c ML is concerned, bring up with the EU Commission, the European parliament and the Council to introduce rules in the VAT Directive (2006/112), for the purpose of avoiding the described risk of avoidance of the case law concerning the general rules in the ML meaning that the tax assessment value must not be lowered by matching of a discount for fast payment, which thereafter can be implemented in the ML.

### 2.2 The special rule on tax liability for intermediary services – Ch. 6 sec. 7 ML[565]

In sec:s 3.3-3.3.4 of Forssén 2019 (5) I have treated one of the special rules on tax liability (Sw., *skattskyldighet*) in special cases in Ch. 6, namely the special rule on tax liability for intermediary services in Ch. 6 sec. 7 ML, which does not have any precise equivalent in the VAT Directive (2006/112). I have treated Ch. 6 sec. 7 ML as a semantic interpretation problem,[566] and therefore I sometimes use the expression *6:7-cases* to emphasize that the issue here concerns in the first place which situations that rule can comprise.[567]

> A middleman – an intermediary – concerning goods or services is regarded as a vendor according to Ch. 6 sec. 7 ML, if he is acting in his own name and also receive the payment of the goods or services from the customer. Thereby the intermediary is not considered an ordinary agent for VAT purposes. Instead he is deemed to have made an acquisition from his mandator, who is deemed to supplied the goods or services to the intermediary. The intermediary is in his turn deemed to have made the same transaction (supply) to the buyer of the goods or services. The tax assessment value for VAT purposes thereby becomes

[564] See Forssén 2007 (2) and Forssén 2007 (3).
[565] See Forssén 2019 (5), sec. 5.1.3.
[566] See Forssén 2019 (5), sec. 2.2.
[567] Regarding *6:7-cases*, i.e. Ch. 6 sec. 7 ML-cases (Sw., "6:7-fall"), see also item 3 of Part D, sec. 3.3.

the price to the customer (buyer), instead of a commission like for an ordinary agent.

The rule in Ch. 6 sec. 7 ML lacks, as mentioned, a precise equivalent in the VAT Directive (2006/112). The closest corresponding rules therein are art. 14(2)(c) and art. 28 of the VAT Directive (2006/112).

I have come to two conclusions regarding Ch. 6 sec. 7 ML:

- In the first place I consider that it exist regarding Ch. 6 sec. 7 ML an actual current law – without support of a true current law (i.e. without support of the case law of the HFD or the CJEU) – insofar that the SKV use to invoke the extreme interpretation result that *6:7-cases* include taxation situations which do not correspond to real business relationships within the business world. In my opinion it lacks in that respect a specific (second) para. in Ch. 6 sec. 7 that would refer to general rules on tax liability in the ML. Thereby would not the concept tax liable be expanded for *6:7-cases* compared with the main rule in Ch. 1 sec. 2 first para. item 1, by Ch. 1 sec. 2 last pa. ML stating that special rules about who is tax liable in certain cases are to be found inter alia in Ch. 6 ML. Such a second para. exists concerning VAT groups in Ch. 6(a) sec. 1 ML, and by the way I have suggested the same regarding the so-called representative rule in Ch. 6 sec. 2 ML.[568]

- I have also found support for the existence of a need of a trial in case law of the scope of Ch. 6 sec. 7 ML regarding whether *6:7-cases* can be deemed to comprise non-taxable persons like ordinary private persons including employees. That such persons would be given the character of tax subjects for VAT purposes does not comply with the determination of taxable person in the main rules of Ch. 4 sec. 1 ML and art. 9(1) first para. of the VAT Directive (2006/112).

The expression *6:7-cases* is not a word, but I have treated the rule Ch. 6 sec. 7 ML as a semantic interpretation problem. It is as a concept something that cannot be deemed complying with the VAT Directive (2006/112) in either of the two respects above mentioned, i.e. when the SKV considers that *6:7-cases* includes taxation situations which do not correspond to real business relationships within the business world or if Ch. 6 sec. 7 ML would be deemed giving ordinary private persons (consumers) including employees the status of tax subjects for VAT purposes.

[568] See Forssén 2019 (1), sec. 7.1.3.2.

The described problems with Ch. 6 sec. 7 ML depend in my opinion on the legislator not having regarded, when the rule was transferred to Ch. 6 sec. 7 when the ML on the 1st of July 1994 replaced the former Swedish VAT act of 1969[569] that it originate from another context than that existing since Sweden's EU accession in 1995, namely from the general tax on goods of 1959. That is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

### 2.3 Agencies hiring out workers and their VAT status in relationship to the rule on exemption from taxation of social care – Ch. 3 sec. 7 ML[570]

The relationship between the determination of the tax subject and the determination of the tax object is not EU conform for VAT purposes in the field of social care. It depends on the expression *other comparable social care* (Sw., "*annan jämförlig social omsorg*") in Ch. 3 sec. 7 ML making the scope of exemption from taxation according to the ML to vast compared with the VAT Directive (2006/112).

I have come to two conclusions regarding Ch. 3 sec. 7 ML:

- In the first place it should be clearly expressed in Ch. 3 sec. 7 that it is the taxable person's (Sw., *den beskattningsbara personens*) transaction that is up for judgement on the theme taxation or exemption from taxation, not what character a transaction has if it is judged based on the status of the entrepreneur's employees themselves.

  In its standpoint of 2016-03-31 (dnr 131 156230-16/111) the SKV did not regard that the CJEU in the case C-594/13 ("go fair" Zeitarbeit) starts its trial of an *Agency hiring out workers* and the exemption from taxation in art. 132(1)(g) of the VAT Directive (2006/112) by excluding the employees in such an enterprise from the concept taxable person already due to their status as employees. By not regarding that part of the EU case C-594/13 ("go fair" Zeitarbeit) the SKV came to the erroneous conclusion that an *agency hiring out workers* could be comprised by the exemption from taxation in Ch. 3 sec. 5 ML regarding health care, if it is a matter of hiring out licensed health care personnel that shall perform health care services by the mandator within their license. The SKV's conclusion was

[569] *Lag (1968:430) om mervärdeskatt* (GML).
[570] See Forssén 2019 (5), sec. 5.1.4.

erroneous for the following reason: It is not the licensed nurse employed by the agency who is the taxable person – it is the agency. This has also been confirmed by an advance ruling of the SAC, HFD 2018 ref. 41, where references are made to inter alia the EU case C-594/13 (”go fair” Zeitarbeit). With references to inter alia HFD 2018 ref. 41 the SKV has also changed its standpoint by two standpoints of 2018-10-25, where one of them meant that the standpoint of 2016-03-31 was revoked on the 1st of July 2019. The question of taxation or exemption from taxation shall be tried based on the transaction made by the agency itself, according to the following:

- If the *agency hiring out workers* supply health care, the exemption from taxation according to Ch. 3 sec. 5 ML applies.

- If the agency instead hires out health care personnel, i.e. constitutes an *agency hiring out workers*, it is a matter of taxable hiring out of personnel according to the main rule stating that the supply of goods or services is taxable, i.e. according to Ch. 3 sec. 1 first para. ML, regardless whether the health care personnel are licensed or not.

Furthermore should Ch. 3 sec. 7 also correspond with the demand in art. 132(1)(g) of the VAT Directive (2006/112) on the services having to be supplied by a taxable person who is *a body recognised by the Member State concerned as being devoted to social wellbeing* (Sw., *ett av medlemsstaten erkänt organ av social karaktär*). In my opinion should therefore the expression *other comparable social care* (Sw., *annan jämförlig social omsorg*) be abolished from Ch. 3 sec. 7 ML, and the rule be altered so that it, for the determination of social care (social wellbeing) for VAT purposes, refers to art. 132(1)(g) and (h) of the VAT Directive (2006/112). Thereby it would be emphasized that the concept social care in Ch. 3 sec. 7 ML has a certain EU law meaning.

The problem is also in the present respects that the legislator has not regarded that Sweden’s EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). That the legislator has not correctly written the determination of social care in Ch. 3 sec. 7 ML in relation to art. 132(1)(g) and art. 132(1)(h) of the VAT Directive (2006/112) is in my opinion an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*. The two rules art. 132(1)(g) and art. 132(1)(h) of the VAT Directive (2006/112) should have been

implemented in Ch. 3 sec. 7 ML already when Sweden became an EU Member State in 1995.[571]

By abolishing the expression *other comparable social care* (Sw., *annan jämförlig social omsorg*) from Ch. 3 sec. 7 ML and instead refer in the rule to art. 132(1)(g) and (h) of the VAT Directive (2006/112) it would, as mentioned, be emphasized that the concept social care in Ch. 3 sec. 7 ML has a certain EU law meaning. I propose for the same reason also the same concerning Ch. 3 sec. 4 ML. This means that the expression *health care, dental care or social care and other services* (Sw., *sjukvård, tandvård eller social omsorg samt tjänster av annat slag*) therein would be altered to *health care, dental care or social care* (Sw., *sjukvård, tandvård eller social omsorg*), i.e. that the expression *other services* (Sw., *tjänster av annat slag*) would be abolished from Ch. 3 sec. 4, and that the rule instead would refer to the corresponding rules of the VAT Directive (2006/112) – art. 132(1)(b)-(e) and (g) and (h).[572]

Furthermore should the same technique as I suggest for Ch. 3 sec. 7 be used in certain other rules on exemption from taxation in Ch. 3 ML to avoid uncertainties at a systematic interpretation. Above all should also the concept determinations in Ch. 3 sec. 9 third para. item 1 (trade with securities – Sw. *värdepappershandel*) and Ch. 3 sec. 10 (insurance services – Sw., *försäkringstjänster*) be made by reference to the closest corresponding rules of the VAT Directive (2006/112), i.e. art. 135(1)(f) and art. 135(1)(a).[573] These measures would simplify to maintain on a national basis the CJEU's case law meaning that exemptions from taxation shall be given a restricted interpretation and application. The scope of rules on exemption from taxation in Ch. 3 ML shall namely, as mentioned inter alia in sec. 3.4.2 of Forssén 2019 (5), be interpreted restrictively, since the CJEU's case law states so regarding art. 131-137 of the VAT Directive (2006/112) about exemption from taxation for certain transactions.[574]

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[571] Art. 132(1)(g) and art. 132(1)(h) were corresponded by art. 13 A(1)(g) and art. 13 A(1)(h) of the Sixth Directive (77/388), where it – although by the use of a somewhat different expression – also were stated that it is who makes the transaction who is presupposed to be one by the Member State recognised body devoted to social wellbeing, for the exemption from taxation to become applicable.

[572] Regarding dental care and Ch. 3 sec. 6 ML: compare also sec. 2.8.

[573] Regarding bank- and financial services or trade with securities and Ch. 3 sec. 9 ML: compare also sec. 2.4.

[574] See e.g. the EU cases 235/85 (Commission v. the Netherlands), para. 7; 348/87 (SUFA), para:s 10 and 13; C-186/89 (Van Tiem), para. 17; C-2/95 (SDC), para. 20; C-358/97 (Commission v. Ireland), para. 52; C-150/99 (Stockholm Lindöpark); para. 25; C-269/00 (Seeling), para. 44; and C-275/01 (Sinclair Collins), para. 23. See also Forssén 2019 (6), 12 210 010 and Forssén 2019 (1), sec. 2.4.1.4.

### 2.4 The relationship between the determination of the tax subject and the determination of the tax object – i.e. the exemptions from taxations regarding bank- and financial services or trade with securities according to Ch. 3 sec. 9 ML[575]

Concerning the exemptions from taxation regarding bank- and financial services and trade with securities in Ch. 3 sec. 9 ML I have analysed the determination of the tax subject in relation to the determination of the tax object, i.e. the question whether the object is taxable or comprised by exemption according to that rule. I suggest an equilibrium solution to that problem, where in the first place monetary political and finance political considerations are met by the following measures:

1. An amendment should be made in Ch. 3 sec. 9 ML meaning that exemption from taxation for bank- and financial services or trade with securities do not comprise exchange services regarding virtual currencies like *bitcoins*, if not a *report duty* (Sw., *anmälningsplikt*) as financial activity is fulfilled and permit thereby is received from the Swedish Financial Supervisory Authority [Sw., *Finansinspektionen* (FI)]. As a consequence thereof should the concept virtual currency also be inserted in Ch. 3 sec. 23 item 1 ML – beside bills and coins – and with the same determination of what is meant as I suggest for Ch. 3 sec. 9 ML. Thus, the concept *legal* (Sw., *lagligt*) means of payment in Ch. 3 sec. 23 item 1 should continue to be reserved for bills and coins. By those measures the problem that it is not possible for VAT purposes to distinguish between legal or illegal activity with so-called bitcoins will be resolved. However, that presupposes that the legislator brings up with the EU Commission, the European parliament and the Council that corresponding alterations will be made in art. 135(1)(b)-(f) of the VAT Directive (2006/112).

2. To the extent that an activity with bitcoins or a similar virtual currency is carried out without report duty to the FI being fulfilled, it should, like today, not be considered an illegal activity where VAT is concerned. Thereby should instead, which I also deem to be the case already today – despite that *Skatterättsnämnden*, SRN (the Board of Advance Tax Rulings) and the HFD by their simplified view on the topic do not mention it in the advance ruling HFD 2016 ref. 6 (2 Feb. 2016) – such an activity be comprised by the principle of general taxation of supplies of goods or services according to Ch. 3 sec. 1 first para. ML. The governmental official report SOU 1998:14 [*E-pengar – näringsrättsliga frågor* (Eng., E-money – business law issues) expressed the need of measures for protection against double spending

[575] See Forssén 2019 (5), sec. 5.1.5.

and similar manipulations at the use of e-money (Sw., *e-pengar*).[576] I have described that there is a risk that bitcoins will be used without permit from the FI e.g. for the purpose of hiding barter transactions or exchange of assets (Sw., *byteshandel*) which are taxable. It is not possible to discriminate such an activity by characterizing it as illegal for VAT purposes. However, it is still a phenomenon that should be opposed for monetary political as well as finance political considerations. Therefore should a special VAT rate be introduced for activities concerning bitcoins carried out without permit from the FI and to a substantially higher VAT rate than the general of 25 per cent, e.g. 50 per cent. Such a special enhanced VAT should be constituting an incitement for the consumers to refrain from choosing deliverers of goods or suppliers of which are trying to hide taxable trade 'behind bitcoins' (Sw., '*bakom bitcoins*').

Also the present question should be brought up by the legislator with the EU institutions mentioned. An equilibrium solution that in that case must be made is in the first place against what would be characterized as such an excessiv tax rate that would be in conflict with the principle of protection of property in art. 1 of Protocol No. 1 to the European Convention of Human Rights (ECHR). By the way would a special and enhanced VAT rate not be in conflict with the principle of prohibition of double procedures (*ne bis in idem*), since it taken by itself could not be characterized as such a charge similar to a criminal charge as tax surcharge (Sw., *skattetillägg*). If tax surcharge is not levied, would also a procedure above all about tax fraud (Sw., *skattebrott*) be an actuality for he who has not accounted for to the SKV taxable trade 'behind bitcoins'.[577]

To not do anything is not an alternative, since the SRN and the HFD in HFD 2016 ref. 6 (2 Feb. 2016) have left it open to hide trade taxable for VAT purposes 'behind bitcoins'. That the SRN at all states that bitcoins *is a means of payment* (Sw., *är ett betalningsmedel*) that *shows great similarities with electronic money* (Sw., *visar stora likheter med elektroniska pengar*) seems to have been meant to give the impression of an equilibrium solution and thereby a judgement of legal certainty in the case at hand. However, there is only an illusion of underpinning reasons in HFD 2016 ref. 6 (2 Feb. 2016). If the suggestions that I present here are not carried out by the legislator, it is necessary with a new and in that case complete trial of bitcoins where VAT is concerned. I state here what is lacking in HFD 2016 ref. 6 (2 Feb. 2016) and the thereto belonging preliminary ruling from the CJEU, the case C-264/14 (Hedqvist):

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[576] Compare SOU 1998:14 p. 31.

[577] Compare, regarding *ne bis in idem* etc., also *Skatteförfarandepraktikan – med straff- och europarättsliga aspekter* [Cit. Forssén 2019 (2)], sec:s 8.8.1 and 10.1-10.4.

- The HFD and the CJEU should in the advance ruling HFD 2016 ref. 6 (2 Feb. 2016) and in the preliminary ruling C-264/14 (Hedqvist) have regarded also the subject issue and not only the object issue.

- The analysis of the question of the treatment of the virtual currency bitcoins according to Ch. 3 sec. 9 and Ch. 3 sec. 23 item 1 ML shows that there is a lack in the underpinning reasons of the decisions in question, since neither the HFD nor the CJEU regard that it is not possible to make bitcoins illegal means of payment due to that also an illegal activity constitutes an economic activity (Sw., *ekonomisk verksamhet*) for VAT purposes and can give a person the character of taxable person (Sw., *beskattningsbar person*).

- By not addressing that aspect is also the fundamental problem with bitcoins subdued, namely that such a to ordinary currency competing currency creates a dilemma where monetary political as well as finance political considerations are concerned. In other words, in my opinion has the question of EU conformity with Ch. 3 sec. 9 ML regarding the relationship between the determination of the tax subject (taxable person – Sw., *beskattningsbar person*) and the determination of the tax object (bank- and financial services or trade with securities – Sw., *bank- och finansieringstjänster eller värdepappershandel*) not yet been thoroughly analysed.

- This is something that both the legislator (in Sweden) and the EU Commission, the European parliament and the EU Council should take into consideration and come back on the theme of words and context in connection with The Making of Tax Laws. In the present case it would namely not have helped if Ch. 3 sec. 9 referred to the corresponding rules in the VAT Directive (2006/112), since the CJEU apparently has not been able to contribute to a – in the broad perspective – reasonable interpretation by the SRN and the HFD.

Despite the CJEU's inability in the latter respect, I consider that the legislator without awaiting a new treatment of bitcoins on the EU level should alter the expression *trade with securities or thereby similar activity* (Sw., *värdepappershandel eller därmed jämförlig verksamhet*) in Ch. 3 sec. 9 first para. into *trade with securities* (Sw., *värdepappershandel*), i.e. the expression *thereby similar activity* (Sw., *därmed jämförlig verksamhet*) should be abolished from the rule, so that the scope of the exemption from taxation is not expanded in relationship

to the VAT Directive (2006/112). Instead should – which is also suggested concerning *trade with securities* (Sw., värdepappershandel) in sec. 2.3 – Ch. 3 sec. 9 ML refer, concerning the determinations of the concepts *bank- and financial services and trade with securities* (Sw., *bank- och finansieringstjänster och värdepappershandel*), to the corresponding rules in the VAT Directive (2006/112) [art. 135(1)(b)-(f)]. Thereby it is emphasized the concepts in questions have a certain EU law meaning, and uncertainties will not arise at a systematic interpretation of them.

> I have by the way for the same reasons as recently mentioned also suggested – in sec. 2.3 – that the same measures that I am suggesting concerning Ch. 3 sec. 9 should be made regarding the exemption for insurance services in Ch. 3 sec. 10 ML. This means that the expression *insurance brokers or other intermediaries* (Sw., *försäkringsmäklare eller andra förmedlare*) therein should be altered to *insurance brokers/insurance agents* (Sw., *försäkringsmäklare*), i.e. that the expression *other intermediaries* (Sw., *andra förmedlare*) should be abolished from Ch. 3 sec. 10, so that the rule instead refers to the corresponding rule in the VAT Directive (2006/112) – art. 135(1)(a).

As an information may I mention that Ch. 3 sec. 9 third para. item *2* ML, which concerns *management of funds of securities* (Sw., *förvaltning av värdepappersfonder*), does not have to refer to the VAT Directive (2006/112), since art. 135(1)(g) of the VAT Directive (2006/112) stipulates exemption from taxation for *the management of special investment funds as defined by Member* States (Sw., *förvaltning av särskilda investeringsfonder såsom dessa definieras av medlemsstaterna*).

Thus, my suggestion is that the legislator changes Ch. 3 sec. 9 and Ch. 3 sec. 10 ML, so that the rules, for the determinations of the concepts *bank- and financial services and trade with securities* (Sw., *bank- och finansieringstjänster och värdepappershandel*) and *insurance brokers/insurance agents* (Sw., *försäkringsmäklare*), refer to the corresponding rules in the VAT Directive (2006/112), i.e. to art. 135(1)(b)-(f) and art. 135(1)(a). Besides should the legislator bring up the question of bitcoins with the EU Commission, the European parliament and the EU Council, so that it will be given an equilibrium solution, where in the first place monetary political and finance political considerations are taken. The ambition should thereby be to avoid that bitcoins are used to hide taxable barter transactions or exchange of assets (Sw., *byteshandel*) where VAT is concerned.

If the suggestions I present here do not lead to measures by the legislator, it is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*. It would in the first place mean that the legislator does not regard

the importance of the concepts in the ML having a certain EU law meaning, i.e. the legislator would thereby not respect that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). Concerning the question on bitcoins would a lack of interest on behalf of the legislator to bring up that problem with the EU commission, the European parliament and the EU Council prove that the legislator is uninterested in making the EU project as a whole to work, i.e. in the present case with regard of how monetary political issues may affect the finance political issues, like concerning the VAT.

Compare also regarding investment gold: sec. 2.8.

### 2.5 Semantic interpretation problem concerning the word upstream (Sw., *uppströms*) in the rule on exemption from taxation of import of gas – Ch. 3 sec. 30 fifth para. item 1 b) ML[578]

By SFS 2010:1892 was Ch. 3 sec. 30 fifth para. item 1 b) ML introduced on the 1st of January 2011 concerning exemption from taxation regarding import of gas transferred from a ship transporting gas to a nature-gas system or to a system of pipelines *upstream* (Sw., *uppströms*). By (on page 63 of the Government bill – prop. 2010/11:28) referring regarding the word upstream to *trade parlance* (Sw., *branschspråkbruk*) and not commenting what the word means in a true context, the legislator makes a simplification which cause a risk of an interpretaion result that – in relationship to the corresponding EU directive's purpose with the rule – means that the wording of the rule is misguiding, i.e. that what I name *communication distortions* exist.

The described risk for a misguiding interpretation result of the rule in question in the ML in relationship to the purpose with it according to the VAT Directive (2006/112) would have been avoided, if the legislator had regarded the recitals – i.e. the motives – to the rule in question that follows by the preamble to the present directive. By item 3 of the preamble to the Council's directive 2009/162/EU, whereby art. 143(1)(l) of the VAT Directive (2006/112) was altered, follows namely that the exemption from taxation according to Ch. 3 sec. 30 fifth para item 1 b) ML, wherein art. 143(1)(l) shall be implemented, is motivated by neutrality reasons in relation to exemption for gas imported – i.e. importation from a third country (place outside the EU) – by pipelines. By instead referring to trade parlance concerning the meaning of the word *uppströms* (Eng., upstream), the legislator is omitting to describe in the preparatory work that it is the transport of gas by ship to where the

[578] See Forssén 2019 (5), sec. 5.1.6.

re-gas process takes place that must be exempted from taxation at import, so that the equivalent length of transportation that otherwise takes place of gas imported via pipelines will not be favoured for tax purposes.

The legislator's simplified description in the preparatory work of the meaning of the word *uppströms* (Eng., upstream) leads to someone conducting application of the law having to go further to the EU directive 2009/162/EU and the recitals following by item 3 of its preamble where the theme of neutrality is concerned. Otherwise he who is conducting application of the law is risking to make an interpretation of the rule in question in the ML that is not supported by the relevant motives for the directive rule. Thus, the legislator has created a risk for someone conducting application of the law making a non-EU conform interpretation of the word *uppströms* (Eng., upstream) in Ch. 3 sec. 30 fifth para. item 1 b) ML.

With respect of the loyalty to preparatory work existing in Swedish legal sources theory the legislator has in my opinion, by his simplified description in the Government bill of the meaning of the word *uppströms* (Eng., upstream), caused a semantic interpretation problem insofar that the reference to trade parlance for the interpretation of the word *uppströms* (Eng., upstream) leading to the risk that those conducting application of the law stay by the preparatory work and do not go further to the EU directive. There is the true context of the word *uppströms* (Eng., upstream) to be found. Thus, the legislator's simplified description in the preparatory work mentioned can lead to an erroneous interpretation of the word *uppströms* (Eng. upstream) in Ch. 3 sec. 30 fifth para. item 1 b) ML.

In my opinion the legislator causing the risk of a non-EU conform interpretation result depends rather on lacking knowledge in science and technology than on a lacking respect of two sets of rules having to be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). I thereby make a pendant to the example of a semantic interpretation problem in Forssén 2019 (5), sec. 2.2, where I state that the word *energialstring* (Eng., energy production) existed for some time in the GML: Energy production is not even possible according to the laws of physics , since energy can be changed between different energy forms. Thus, the legislator's lacking knowledge in science and technology constitutes an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

## 2.6 Import and an assumed gap in the law with respect of two determinations of taxable person (Sw., *beskattningsbar person*) – Ch. 4 sec. 1 and Ch. 5 kap. Sec. 4 ML[579]

Concerning *tullagen (2016:253)* – i.e. the Swedish customs act – I have regarding the rule Ch. 5 sec. 11 a first para. items 1 and 2 notified the Treasury that there is a risk for constructed activities that can give an unjustified right of deduction of input tax. To rectify that risk I have suggested to the Treasury to propose a legislation meaning that Ch. 5 sec. 11 a first para. item 1 and 2 *tullagen* will be altered, so that item 2 will refer to *beskattningsbar person* (Eng., taxable person) according to the ML except in the special meaning the concept is given in Ch. 5 sec. 4 ML (Sw., *utom i den särskilda betydelse begreppet ges i 5 kap. 4 § ML*). That this expression is lacking in Ch. 5 sec. 11 a first para. item 2 *tullagen* is in my opinion meaning that a gap exists in the law, i.e. a gap in *tullagen*. That gap *can* in my opinion give an unjustified right of deduction of input tax on import according to Ch. 8 sec. 3 first para. ML. The interpretation problem here concerns the *subject issue* in the way that there are two relevant determinations of *beskattningsbar person* (Eng., taxable person) in the ML to which the present rule in *tullagen* can be considered referring, namely Ch. 4 sec. 1 and Ch. 5 sec. 4: In Ch. 5 sec. 4 is with *beskattningsbar* (Sw., taxable) meant not only persons which are carrying out economic activity (Sw., *ekonomisk verksamhet*) etc., but also e.g. holding companies and non-profit-making organisations (Sw., *allmännyttiga ideella föreningar och registrerade trossamfund*) which have not an economic activity (Sw., *ekonomisk verksamhet*) according to Ch. 4 sec. 1 ML.

I sent an e-mail to the Treasury 2014-12-12, where I pointed out for the Treasury the assumed gap in *tullagen*. The Treasury replied 2014-12-16 (Dnr. Fi2014/4452). What is an obscurity in my opinion is that the Government refers to rather awaiting case law than act upon my suggestions of alterations in the present rule in *tullagen*. That the legislator in this way is uninterested of reducing the risk of constructed activities with respect of VAT based on the of me assumed gap in the law is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*. The egislator had e.g. the chance to easily rectify the gap on the 1st of May 2016 in connection with *tullagen* (2016:253) replacing *tullagen* (2000:1281).

[579] See Forssén 2019 (5), sec. 5.1.7.

## 2.7 The use of the concept tax liable (Sw., *skattskyldig*) in the main rule on intra-Union acquisitions before the 1st of July 2013 – Ch. 2 a sec. 3 first para. item 3 ML[580]

Concerning the determination of what is constituting an intra-Community acquisition – nowadays intra-Union acquisition [Sw., *unionsinternt förvärv av vara* (UIF)] – it existed an erroneous wording in the main rule Ch. 2 a sec. 3 first para. item 3 and second para. ML, more precisely in first para. item 3. The erroneous wording consisted of that it therein was stated concerning the status of the seller in the other involved EU country that he was presupposed to be *skattskyldig* (Eng., tax liable) there for the transaction to the buyer who made the importation of the goods to Sweden. That was an erroneous wording in relation to art. 2(1)(b)(i) in the VAT Directive (2006/112) [and the predecessor art. 28a(1)(a) first para. of the Sixth Directive (77/388)], and on the 1st of July 2013 Ch. 2 a sec. 3 first para. item 3 ML was altered, by SFS 2013:368, so that *skattskyldig* (Eng., tax liable) in the mentioned respect was replaced with *beskattningsbar person* (Eng., taxable person). Thus, this means that he who is making a UIF to Sweden nowadays becomes liable to account for calculated output tax on the acquisition, even if the other involved EU country, unlike Sweden, exempts the goods in question from taxation and the seller in that country is not *skattskyldig* (Eng., tax liable) for supplies there.

The erroneous wording that may be deemed to have existed in Ch. 2 a sec. 3 first para. item 3 ML before the 1st of July 2013, by the use of the word *skattskyldig* (Eng. tax liable) in the rule, is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*. I state thereby the following:

- On the 1st of July 2013 the legislator took the opportunity to alter *skattskyldig* (Eng. tax liable) to *beskattningsbar person* (Eng., taxable person) in the rule in question, and stated then that it was only a formal matter. According to the legislator it was only a matter of achieving that Ch. 2 a sec. 3 first para. item 3 ML would get an improved *formal* (Sw., *formell*) correspondence with what is stipulated about UIF of goods in art. 2(1)(b) of the VAT Directive (2006/112).[581] However, the legislator did not mention that the concept *skattskyldig* (Sw., tax liable) in the previous wording of Ch. 2 a sec. 3 first para. item 3 ML had been a decisive matter in a number of tax- and tax fraud cases from the time before the 1st of July 2013. Thus, the description

[580] See Forssén 2019 (5), sec. 5.1.8.
[581] See prop. 2012/13:124 p. 94.

of the alteration in the rule as merely a formal matter is proof of a complete ignorance on behalf of the legislator about the context in which the question regarding the importance of the use of the concept *skattskyldig* (Eng., tax liable) in Ch. 2 a sec. 3 first para. item 3 ML existed. In my opinion the legislator is guilty of a directly erroneous description of reality, i.e. a directly erroneous description of the context that had existed around the rule in the present respect.

- The legislator's attitude is particularly obscure with respect of the legislator himself stating already at the introduction of the ML on the 1st of July 1994 that *skattskyldighet* (Eng., tax liability) only meant the liability to pay tax to the state. However, the legislator disregarded that on the 1st of January 1995 when Ch. 2 a was introduced in the ML. The legislator used *skattskyldig* (Eng., tax liable) about the seller's status in Ch. 2 a sec. 3 first para. item 3 instead of *skattskyldig person* (Eng., taxable person), which was used in the Swedish translation of the Sixth Directive (77/388) and which in this way should have been used in the rule in question from 1995. The legislator let the concept *skattskyldig* (Eng., tax liable) remain in the rule until the 1st of July 2013, despite that *beskattningsbar person* (Eng., taxable person) in the Swedish language version of the VAT Directive (2006/112) should have been used from 2007 when the VAT Directive (2006/112) replaced inter alia the Sixth Directive (77/388).

### 2.8 The determinations of goods and services – Ch. 1 sec. 6 ML[582]

The review in sec:s 3.9.2.1-3.9.2.3 of Forssén 2019 (5), of the examples investment gold, dental care and electronic services, all show that Ch. 1 sec. 6 should, based on the thereby from a systematic viewpoint made comparison of the rule with the VAT Directive (2006/112), be abolished from the ML. The same rule technique – systematics – should consistently be used in the ML as in the VAT Directive (2006/112) for the determination of the tax object or exemptions from taxation, which means the following:

- The determination of the object for taxation or exemption should be made based on what constitutes *omsättning* (Eng., supply/transaction) of goods or services according to Ch. 2 ML and on whether an actual supply is comprised by exemption from taxation according to anyone of the rules in Ch. 3 ML. If the latter is not the case, the transaction is taxable according to the general

[582] See Forssén 2019 (5), sec. 5.1.9.

principle of transaction of goods or services being taxable according to Ch. 3 sec. 1 first para. ML.

- Such systematics in the ML would comply with the VAT Directive (2006/112): compare the main rule on what is considered *supply of goods* in art. 14(1) and the main rule on what is considered *supply of services* in art. 24(1) of the VAT Directive (2006/112).

By implementing the same systematics in the present respect as in the VAT Directive (2006/112) the determination of the tax object or an exemption from taxation is made in two steps instead of three. The person making an application of the law then will not need to regard Ch. 1 sec. 6 ML, unlike what is the case today. Instead he can – in step 1 – judge the supply issue in Ch. 2 ML and thereafter – in step 2 – go to Ch. ML and the determination there of whether an established *supply* is taxable or exempted from taxation.

Thus, in my opinion the rule with the definitions of goods and services, Ch. 1 sec. 6 ML, is obsolete, since it is adding an extra step to the described trial and constitutes a breach of the systematics in the VAT Directive (2006/112).

Especially concerning electronic services I furthermore argue for the legislator to bring up with the EU Commission, the European parliament and the EU Council about introducing a rule that states that supply of electronic services shall for VAT purposes be treated analogical with what applies for supply of goods or services within other sectors, like consultant services, financial services, health care, social care and education. A method of analogism can namely be used based on what is known within the business world about different products and what is needed in terms of innovations. The casuistry determination that is made now by examples in annex II to the VAT Directive (2006/112) and in art. 7 of the implementing regulation (EU) No. 282/2011 is risking to lead astray due to lacking technical or business world insights in the topic by the legislator and the EU institutions and is risking with respect of the technological development regarding electronic services to soon become out of date.

The legislator should not await the treatment on EU level of suggestions presented there concerning electronic services and VAT. The legislator should already before, in pursuance of what I state regarding investment gold and dental care, abolish Ch. 1 sec. 6 from the ML, so that the same rule technique – systematics – concerning the determination of the tax object or exemptions from taxation will apply in the ML as in the VAT

Directive (2006/112). That measure is necessary in general on the theme of EU conformity.

> The example dental care, more precisely the problem concerning the older wording of Ch. 3 sec. 4 second para. second indent ML, which was expressing that the exemption for dental care also comprises supply of dental-technical products and of services regarding such products, shows in my opinion that risk of waiting with abolishing Ch. 1 sec. 6 ML is that the legislator in the mean time e.g. makes a tax rule in the ML which is breaching the principle that it is the seller's transaction that shall be expressed as taxable or exempted from taxation, whereby the buyer's status lacks importance for the determination of the tax object or the exemption from taxation.

By the way should for systematic reasons, and without awaiting a treatment of the question whether Ch. 1 sec. 6 shall be abolished from the ML, the rules on investment gold be transferred from Ch. 3 sec:s 10 a-10 c to special para:s in the rule regarding inter alia financial services, i.e. Ch. 3 sec. 9 ML.[583] Investment gold belongs in practice with the category of financial services. Thus, it becomes more clear that industry gold is comprised of the general tax liability for supply of goods or services in Ch. 3 sec. 1 first para. ML. However, the rules on reverse charge for investment gold and the definition of investment gold van remain in Ch. 1 sec. 2 first para. item 4 a and Ch. 1 sec. 18 ML.

Already when the ML replaced the GML on the 1st of July 1994 the legislator made an EU adjustment of Ch. 1 sec. 6 ML insofar that it is stipulated in Ch. 1 sec. 6 that real estates also constitute goods. However, the legislator should have followed up with a for systematic reasons more complete EU adjustment at Sweden's EU accession in 1995 and then abolished Ch. 1 sec. 6 from the ML, so that the rule no longer means that the ML determines the tax object or the exemption from taxation in three steps, unlike the Sixth Directive (77/388) and later on the VAT Directive (2006/112) where the determination is made in only two steps. That the legislator did not make that measure already when alterations were made in the ML on the 1st of January 1995, by SFS 1994:1798, at Sweden's EU accession, is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

> By the way was on the 1st of January 2017, by SFS 2016:1208, Ch. 1 sec. 11 ML altered so that that rule for the determination for VAT purposes of the concept *fastighet* (Eng., real estate) nowadays refers to the concept *fast egendom* (Eng., immovable property) according to art.

[583] Compare sec. 2.4.

13(b) of the implementing regulation (EU) No. 282/2011, instead of to *jordabalken* (1970:994) – i.e. instead of to the Swedish Land Code.[584] I do not mention this again, since I deem that the questions that I raise in connection with the use of the concept *fastighet* (Eng., real estate) in the ML remain also after the alteration mentioned in Ch. 1 sec. 11 ML.[585]

### 2.9 The limitation of the concept economic activity (Sw., *ekonomisk verksamhet*) for non-profit-making organisations (Sw., *allmännyttiga ideella föreningar och registrerade trossamfund*) – Ch. 4 sec. 8 ML[586]

The value added taxation for non-profit-making organisations (Sw., *allmännyttiga ideella föreningar och registrerade trossamfund*) is limited, by Ch. 4 sec. 8 ML, based on the determination instead of – as in the VAT Directive (2006/112) – with respect of the object, i.e. the supply of goods or services. Thus, this means that Ch. 4 sec. 8 ML constitutes a systematic breach of the VAT Directive (2006/112), and causes a risk for competition distortions emerging regarding the VAT in relationship to other enterprise- and association-forms. This is in conflict with art. 113 of the Treaty on the Functioning of the EU (TFEU) and item 4 of the preamble to the VAT Directive (2006/112), i.e. with respect of both primary and secondary EU law. The rule Ch. 4 sec. 8 ML is furthermore referring for the purpose of limiting the value added taxation to the non-harmonised income tax rules. Thereby there is a risk of an emergence of a meaning of *allmännyttiga ideella föreningar* and *registrerade trossamfund* (non-profit-making organisations) which above all is not complying with the EU law meaning of the concept *organisationer utan vinstsyfte* (Eng., *non-profit-making organisations*).

The EU Commission made on the 26th of June 2008 a notification about starting a procedure about breach of the EU treaty regarding Ch. 4 sec. 8 ML constituting a breach of the VAT Directive (2006/112): The EU Commission's formal notification of the 26th of June 2008 on the treatment of *ideella föreningar* and *registrerade trossamfund* in Ch. 4 sec. 8 ML arrived at Sweden's permanent representation in Brussels on the 27th of June 2008[587] Thereby the question is whether a breach of the VAT Directive (2006/112) exists due to the mentioned circumstances concerning Ch. 4 sec. 8 ML, which is a question that eventually will be decided by the CJEU, if the EU Commission would go further with it and sue Sweden at the CJEU. Such a suit has not been filed at the CJEU. After the legislator's (the Government's) exchange of notes with

[584] Compare also prop. 2016/17:14 p. 46. See also Forssén 2019 (5), sec. 3.11.1.
[585] See Forssén 2019 (5), sec. 3.11.1.
[586] See Forssén 2019 (5), sec. 5.1.10.
[587] See 2007/2311 K(2008) 2803.

the EU Commission is therefore the question about the eventual breach of the EU treaty an open issue since the end of 2011.

That the legislator is letting the question whether Ch. 4 sec. 8 ML constitutes a breach of the EU law in the field of VAT, i.e. a breach of treaty, remain an open question is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*. In my opinion can namely the legislator (the Government) in its exchanging of notes with the EU Commission not be deemed to have clarified that there is no risk of a development of a national case law concerning the use of the concepts *allmännyttiga ideella föreningar* and *registrerade trossamfund* in Ch. 4 sec. 8 which is not EU conform compared with the meaning and the use of the concept *organisationer utan vinstsyfte* (Eng., non-profit-making organisations) in the VAT Directive (2006/112). That follows in my opinion already of the negative determination of *ekonomisk verksamhet* (Eng., economic activity) in Ch. 4 sec. 8 ML for *allmännyttiga ideella föreningar* and *registrerade trossamfund* being made by reference to the non-harmonised income tax rules.

By the way may also be mentioned that in Forssén 2019 (5), sec. 3.10.3 is Ch. 4 sec. 8 ML also mentioned especially concerning the field of sports. Then it is about *allmännyttiga ideella föreningar* (Eng., non-profit associations with a purpose of public benefit), apart from *registrerade trossamfund* (Eng., registered religious communities), being comprised by exemption from taxation for admittance to sport events or to the opportunity to practice sports, according to Ch. 3 sec. 11 a first para. ML. That rule comprises *allmännyttiga ideella föreningar*, the state (Sw., *staten*) and the municipalities (Sw., *kommunerna*). If Ch. 4 sec. 8 would be abolished from the ML, would no longer the determination of exemption and application of the reduced VAT rate of 6 per cent, for the mentioned kinds of supply of services within the field of sports, be tied to the association form *allmännyttig ideell förening* by today's reference in Ch. 3 sec. 11 a to Ch. 4 sec. 8 or the reference in Ch. 7 sec. 1 third para. item 10 to Ch. 3 sec. 11 a.

- If Ch. 4 sec. 8 would be abolished from the ML, would the limitation of the value added taxation with respect of the tax subject for certain legal persons be made in accordance with art. 13 of the VAT Directive (2006/112) also in the field of sports, i.e. only comprise states, regional and local authorities and other public bodies – not *allmännyttiga ideella föreningar* (Eng., non-profit associations with a purpose of public benefit).

- Furthermore may be noted that it is also a lack of support for a special treatment of *allmännyttiga ideella föreningar* (Eng., non-

profit associations with a purpose of public benefit) concerning the VAT rate issue. If Ch. 4 sec. 8 would be abolished from the ML, are *allmännyttiga ideella föreningar* comprised, provided that they fulfil the prerequisites for *beskattningsbar person* (Eng., taxable person) in accordance with the main rule in Ch. 4 sec. 1 and in this way can be subject to value added taxation, by the reduced VAT rate of 6 per cent in the field of sports – like e.g. limited companies (Sw., *aktiebolag*) and *registrerade trossamfund* (Eng., registered religious communities) and other associations than those with a purpose of public benefit. It is namely so that item 13 and item 14 of annex III to the VAT Directive (2006/112) do not make any difference between forms of enterprises or associations concerning the application of reduced VAT rate for admittance to sport events and for using installations for the opportunity to practice sports.[588] The VAT rates vary between the different EU Member States. That works actually against the harmonisation demand stipulated in art. 113 TFEU, but that lack of harmonisation is supported by item 7 of the preamble of the VAT Directive (2006/112). However, the EU Member States may not arbitrarily apply the reduced VAT rates on goods and services or make a distinction between different forms of enterprises or associations without support of annex III to the VAT Directive (2006/112).

### 2.10 The use in the ML of the concept *fastighet* (Eng., real estate) in certain respects[589]

The concept *fastighet* (Eng., real estate) is used in the ML and is contained in Ch. 1 sec. 6, which is treated in sec. 2.8 concerning whether Ch. 1 sec. 6 should be abolished from the ML. Here I also state that regardless whether that would be the case, should the concept fastighet itself be abolished from the ML, since the VAT Directive (2006/112) is using the broader concept *fast egendom* (Eng., immovable property). The use of the concept *fastighet* (Eng., real estate) in the ML causes in my opinion the following problems:

- I have concluded that the possibilities of voluntary tax liability for letting of real estate according to Ch. 9 sec:s 1 and 2 ML could be applied also by an ordinary private person (a consumer). If so, it is in conflict with the facultative art. 137(1)(d) of the VAT Directive (2006/112) clearly stipulating that the voluntary taxation of transactions concerning leasing or

[588] Annex III to the VAT Directive (2006/112) is: ”List of supplies of goods and services to which the reduced rates referred to in article 98 may be applied”.
[589] See Forssén 2019 (5), sec. 5.1.11.

letting of immovable property is limited to apply for *beskattningsbara personer* (Eng., taxable persons), and thus not for ordinary private persons.

- Besides I have mentioned that the legislator does not make own empirical analyses concerning the existence of an actual current law established by the SKV. An example that I have mentioned thereby is the handling of VAT in a bankrupt's estate of building contract works (Sw., *byggnadsentreprenader*) interrupted due to the building entrepreneur (Sw., *byggnadsentreprenören*) being declared in bankruptcy. That an actual current law which can lead to an erroneous application of the rules in e.g. such cases occurring due to the legislator having a tradition of relying on being able to judge current law based on e.g. the SKV's opinion on a government official report.

  That the legislator has a tradition of relying in the preparatory work on the SKV's description of current law concerning a certain taxation issue is thus in my opinion not valid where fields governed by the EU law are concerned. Two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). That the legislator due to the tradition mentioned can be led to base law proposals on an erroneous perception of current law is risking to lead to *communication distortions*.

- Furthermore I have, concerning real estate constituting capital goods (Sw., *investeringsvaror*), concluded that it should be stated in Ch. 8 a ML that the liability to draw up such a document that shall be issued at transfer of capital goods according to Ch. 8 a sec:s 15-17 ML, so that liability of adjustment of input tax will not emerge, comprise a bankrupt's estate. A bankrupt's estate should be imposed to by the receiver in bankruptcy issuing such a document for the bankrupt's estate (Sw., *konkursboet*) or for the bankrupt person (Sw., *konkursgäldenären*), i.e. the owner of the real estate (Sw., *fastighetsägaren*), who lacks right of disposition (Sw., *rådighet*) due to the decision of bankruptcy. Otherwise, the risk is that it would be possible for the bankrupt person at a transfer before the decision of bankruptcy to negotiate away the SKV's possibility to impose liability of adjustment of input tax on the person buying the real estate from the bankrupt's estate.

The problems concerning voluntary tax liability for letting of real estate and whether Ch. 9 sec:s 1 and 2 ML are EU conform should have been

addressed by the legislator already at Sweden's EU accession in 1995. That the legislator still has not treated the question whether those two rules are compatible with art. 137(1)(d) of the VAT Directive (2006/112) is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*. The legislator thereby disregards that two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112).

The legislator's tradition relying in the preparatory work on the SKV's description of current law concerning a certain taxation issue leads to that an actual current law established by the SKV can become developed. This can in its turn lead to that the legislator may base law proposals on an erroneous perception of current law, so that the purpose with a certain rule in the VAT Directive (2006/112) will not be expressed by the wording of the rule in the ML wherein the directive rule shall be considered implemented. That is an example of what I call *communication distortions* in the process of the making of tax laws. Also by maintaining the tradition mentioned the legislator disregards that two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). That too is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

If the legislator does not raise the question on the bankrupt's estate's (Sw., *konkursboets*) – and thereby the receiver in bankruptcy's (Sw., *konkursförvaltarens*) – obligation to issue a document on adjustment of input tax at the sale of capital goods constituting real estate, the legislator is accepting that there is a risk of a possibility for the bankrupt person (Sw., *konkursgäldenären*) to negotiate away at the transfer of such a real estate before the decision of bankruptcy the SKV's possibility to impose liability of adjustment of deduction of input tax on the person buying the real estate from the bankrupt's estate. The legislator should, in the light of similar problems existing concerning the so-called certificate VAT (Sw., *intygsmomsen*) regarding sales of real estate comprised by voluntary tax liability, before a rule alteration was made in that system in connection with the ML replacing the GML on the 1st of July 1994, already have made the measure that I am suggesting concerning adjustment of deduction of input tax regarding real estate in a bankrupt's estate (Sw., *ett konkursbo*).

For example could the measure that I am suggesting have been made by the legislator when the system with certificate VAT was abolished

on the 1st of January 2001, by SFS 2000:500, which meant that nowadays only the adjustment system in Ch. 8 a applies in the present situations. In sec. 3.11.4 of Forssén 2019 (5) I state that I have in a book,[590] and also in an article[591] mentioned that similar negative effects for the public treasury (Sw., *statskassan*) that occurred in certain cases in the system with certificate VAT may occur in the existing system with adjustment (correction) of deduction of input tax, if a bankrupt person (Sw., *konkursgäldenär*) shall be able to negotiate away the SKV's possibility to impose liability of adjustment of deduction of input tax on the person buying the real estate from the bankrupt's estate.

That the legislator has not made the measure that I am suggesting concerning adjustment of deduction of input tax regarding real estate in a bankrupt's estate (Sw., *ett konkursbo*) is another example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

## 2.11 Procedure problems on value added taxation[592]

In sec:s 4.2-4.4 of Forssén 2019 (5) I have analysed certain procedure issues on VAT, namely the following.

In the first place I have in connection with the so-called resulting changes decisions (Sw., *följdändringsbesluten*) according to the SFL analysed the question whether the procedure rules on value added taxation may mean that they limit principles regarding material taxation issues, so that neutrality at the taxation with respect of the choice of legal form does not apply because of procedure rules.

The question about the resulting changes decisions is whether the papers should have to accept resulting changes decisions meaning that they shall repay a too high deduction of input tax. The question is caused by the SKV's standpoint of 2010-07-09 (dnr 131 355983-10/111) concerning current law regarding applicable VAT rate for printing shops due to the CJEU's verdict of the 11th of February 2010 in the case C-88/09 (*Graphic Procédé*). The CJEU's verdict has led to the printing shops' sales to the papers being considered comprised by the reduced VAT rate of 6 per cent, instead of by the general VAT rate of 25 per cent. This has led to decisions of resulting changes by the customers, the papers, meaning that they shall repay to the state a too high deduction of

[590] See *EG-rättskonformitet mellan vissa begrepp i ML och den nationella svenska inkomstskatterätten* [Cit. Forssén 2008], sec. 7.1.
[591] See *Gamla momsfrågor som nya – intygsmoms då, korrigeringsmoms nu*, article in Svensk Skattetidning 2006 p. 375-377 [Cit. Forssén 2006 (2)], p. 377.
[592] See Forssén 2019 (5), sec. 5.1.12.

input tax. The question is then in my opinion whether there is a difference between issues on a change of current law depending on whether a guiding decision is made by the CJEU instead of the HFD.

My opinion is that fundamental principles for the material rules on taxation cannot be limited by the procedure rules like what is recently described regarding the application of the resulting changes institute according to Ch. 66 se, 27 item 4 a) SFL, whereby I disregard cases of abusive practice (Sw., *förfarandemissbruk*). The legislator should in my opinion for legal certainty reasons address that it should be clarified in the SFL that resulting changes decisions cannot be enforced against the individual's will, if he is relying on current law as it is been able to perceive by the wording of the law and eventual precedents from the HFD, and the change of current law only depends on a preliminary ruling being made by the CJEU. Thereby the question is in my opinion whether the papers cannot be deemed having followed current law before the 11th of February 2010, i.e. before the CJEU's verdict in the case C-88/09 (*Graphic Procédé*). If the legislator does not address that question, it is in my opinion an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

In the second place I have analysed whether the legislator should contact the EU Commission, the European parliament and the EU Council about starting a work which inter alia clarifies what rules concerning the so-called rest competence (Sw., *restkompetens*) – which is expressed as form and methods (Sw., *form och tillvägagångssätt*) for the implementation of a directive – in art. 288 third para. TFEU. A question that has been mentioned thereby is whether an EU regulation, i.e. a secondary law legislation, should be introduced which contains general procedure rules for VAT.

I have concluded that it is necessary that a secondary law procedure legislation would be introduced for the VAT. It is decisive for the EU project that the internal market is working. Then must, in accordance with the primary law rule of art. 113 TFEU, harmonisation of the EU Member States' legislations in the field of indirect taxes be accomplished. Therefore it is of great importance that the level within the EU law that corresponds to the constitutional level in national law, i.e. the EU primary law, will have an impact also in the form of secondary law procedure rules about VAT. This should in my opinion be accomplished by an EU regulation on procedure rules for the VAT, since a regulation is directly applicable in the Member States according to art. 288 second st. TFEU.

Thus, the legislator should in my opinion bring up with the EU Commission, the European parliament and the EU Council about starting a work which inter alia clarifies what applies concerning the mentioned rest competence according to art. 288 third para. TFEU, and which shall lead to an EU regulation containing general procedure rules for VAT. That the legislator has not taken such measures constitutes in my opinion an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

In the third place I have in the recently mentioned context also treated especially the question whether the implementing regulation (EU) No. 282/2011, which concerns certain material issues in the VAT Directive (2006/112), should be revoked, so that the material VAT rules are mentioned in one set of rules from the EU, i.e. in the VAT Directive (2006/112), instead of in two. Those conducting application of the law should in my opinion not have to regard material VAT rules from the EU law in another set of rules beside the VAT Directive (2006/112), why I argue for the implementing regulation (EU) No. 282/2011 being abolished altogether. If the implementing regulation (EU) No. 282/2011 would be abolished, the risk of the development of a non-EU conform domestic case law regarding the concepts in the ML decreases. If the legislator does not bring up that question with the EU Commission, the European parliament and the EU Council, it is in my opinion an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

Finally I have in sec. 4.5 of Forssén 2019 (5), to the procedure rules on VAT, made a couple of connections regarding material and formal rules which have been mentioned in Ch. 3 of Forssén 2019 (5), in sec:s 3.11.2 and 3.11.4, and mentioned for the context something about Ch. 13 sec. 28 a ML and accounting for adjustment of deduction of input tax according to Ch. 8 a ML.

- Here I may in the first respect mentioned on the theme of connections between procedure rules and material rules mention from sec:s 3.11.2 and 3.11.5 of Forssén 2019 (5) and sec. 2.10 the material VAT rules on voluntary tax liability in Ch. 9 sec:s 1 and 2 ML. Thereby I state in sec. 4.5 of Forssén 2019 (5) that it should have been clearly mentioned by the legislator how the new material rules introduced in Ch. 9 sec. 1 ML by SFS 2013:954 in 2014 relate to the procedure rules in Ch. 7 sec. 4 SFL about obligation to inform regarding altered conditions compared to those existing at the registration to VAT. According to the new rules in Ch. 9 sec. 1 an owner of real estate etc. does not need to apply by the SKV for voluntary tax liability, but is

comprised by such liability merely by stating output tax in an invoice concerning the letting of real estate. The problem is in my opinion that it is not clearly expressed in the ML or the SFL whether it e.g. is sufficient for a 'deregistration' from voluntary tax liability that the owner of real estate etc. just ceases to state output tax in the invoice for the letting, and that it thereafter could continue as a from taxation exempted letting according to Ch. 3 sec. 2 ML.

My experience is that procedure issues concerning voluntary tax liability can be very complex. This should appear as clear someone who also has an experience of application issues on VAT. If the legislator does not raise the question of a clarification concerning whether the obligation to inform according to Ch. 7 sec. 4 SFL applies also for the case that an owner of real estate etc. wants that voluntary tax liability according to Ch. 9 sec. 1 ML cease, it is thus in my opinion an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

- On the theme of connections between procedure rules and formal rules I may mention from sec:s 3.11.4 and 3.11.5 of Forssén 2019 (5) and sec. 2.10 that therein have been mentioned formal rules in Ch. 8 a ML concerning a special question of adjustment of deduction of input tax in connection with bankruptcy, namely whether the bankrupt's estate (Sw., *konkursboet*) by the receiver in bankruptcy (Sw., *konkursförvaltaren*) should fulfil the formal rules in Ch. 8 a sec:s 15-17 ML to be able to handle a transfer of the bankrupt person's (Sw., *konkursgäldenärens*) rights and obligations regarding adjustment of deduction of input tax for his real estate that constitutes capital goods (Sw., *investeringsvaror*).

  I have stated that such an alteration of rules recently mentioned should be carried out in the formal rules on adjustment of deduction of input tax in Ch. 8 a ML. With respect of procedure I have thereby mentioned in sec. 4.5 of Forssén 2019 (5) that there is a special rule on liability to register someone who is liable to adjust deduction of input tax regarding capital goods according to Ch. 8 a or Ch. 9 sec:s 9-13 ML, namely *Ch. 7 sec. 1 first para. item 8 SFL*. That rule is deemed necessary, since to be liable to adjust is not the same as being tax liable.[593]

[593] Compare prop. 2010/11:165 Part 2 p. 718.

In sec. 3.11.4 of Forssén 2019 (5) I assumed, for the analysis of the question whether the bankrupt's estate (Sw., *konkursboet*) by the receiver in bankruptcy (Sw., *konkursförvaltaren*) should fulfil the formal rules in Ch. 8 a sec:s 15-17 ML, that the bankrupt's estate can become tax liable according to Ch. 6 sec. 3 ML. In sec. 4.5 of Forssén 2019 (5) I have for that context mentioned something about Ch. 6 sec. 3 ML especially in relationship to Ch. 13 sec. 28 a ML and accounting for (Sw., *redovisning*) of adjustment according to Ch. 8 a ML.

Thus, in my opinion it lacks underpinning reasons by the material rules in Ch. 6 sec. 3 and Ch. 8 a ML for the bankrupt's estate (Sw., *konkursboet*) to be liable to adjust deduction of input tax. To accomplish this I consider, as mentioned, that the formal rules in Ch. 8 a ML must be completed with a rule obligating the bankrupt's estate (Sw., *konkursboet*) to draw up, by the receiver in bankruptcy (Sw., *konkursförvaltaren*), at the bankrupt's estate's sale of real estate constituting capital goods, a document regarding input tax that can be subject to adjustment which fulfil the formal rules of Ch. 8 a sec:s 15-17 ML. In my opinion it is not complying with the principle of legality for taxation measures (Sw., *legalitetsprincipen för beskattningsåtgärder*) in Ch. 8 sec. 2 first para. item 2 *regeringsformen (1974:152)* (one of the Sw. constitutional laws), RF 1974, that the bankrupt's estate is made liable to pay the 'adjustment VAT' (Sw., '*jämkningsmomsen*') by an accounting rule (Sw., *redovisningsregel*), i.e. in this case Ch. 13 sec. 28 a ML. Although the legislator, as mentioned above, considers that the liability to adjust is not the same as being tax liable, it is in my opinion such a liability that constitutes a taxation measure according to RF 1974. Thus, in my opinion must the rule change that I am suggesting in the present respect be made and then it should for systematic reasons be inserted into Ch. 8 a ML.

In sec. 4.5 of Forssén 2019 (5) I mention for the present context that the report SOU 2002:74 gave proposals about the connections in Ch. 13 ML to what is considered Generally Accepted Accounting Principles (GAAP) – Sw., *god redovisningssed* – according to *bokföringslagen* (1999:1078), BFL (the Swedish Book-keeping Act), concerning when output tax and input tax shall be accounted for, should be revoked.[594] However, it has not led to any Government bill yet. The report stated namely that there was no space for an analysis of the material taxation questions in the ML. The focus of the report

[594] Compare SOU 2002:74 Part 1 p. 20.

was instead set on the accounting rules.[595] The rules on tax liability in special cases in Ch. 6 ML have not been analysed in the report SOU 2002:74 or in any other government official report yet.

The review of the special rule in Ch. 6 sec. 3 ML on bankrupt's estates (Sw., *konkursbon*) as tax liable and their relationship to the accounting rule Ch. 13 sec. 28 a ML concerning adjustment regarded in Ch. 8 a ML supports in my opinion that it is urgent to create special and cohesive rules for the bankrupt's estate's tax liability, obligation to adjust deduction of input tax, accounting liability and liability to register for VAT. That the legislator has not resumed the proposal in the report SOU 2002:74 of a revision of the accounting rules in Ch. 13 ML has in my opinion also curbed a review of the material rules and the procedure rules on VAT. Thus, that the legislator does not make such a holistic review of the VAT rules that I am suggesting is – in my opinion – an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

[595] Compare SOU 2002:74 Part 1 pp. 17 and 186.

# 3. THE CONCLUDING VIEWPOINTS OF FORSSÉN 2019 (5)

## 3.1 Introduction[596]

The present review of various examples of *communication distortions* in the process of The Making of Tax Laws shows that a change should be made in that respect. That review supports my previous suggestion in Part A that the process of The Making of Tax Laws should be altered, so that the entrepreneur is placed in the centre of it. By the entrepreneurs and their organizations participating in the process of the making of a corporate taxation rule will also the entrepreneur's concept world become expressed in the finished rule, rather than lawyers and others at the Treasury etc. choosing the words to it. Thereby is the risk minimized that there will emerge distortions between the legislator's purpose with a tax rule and how it can be perceived by anyone conducting application of the law (*communication distortions*), i.e. by the SKV, the courts and the tax subject, i.e. the entrepreneur. The alteration of the process of the making of tax laws that I have suggested presupposes that a second chamber would be installed in the Swedish Parliament, so that the entrepreneurs' organizations will be represented in the second chamber, whereby I inter alia have stated the following:

> "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".[597]

Thus, it is a matter of putting the entrepreneur in the centre of the process of the making of tax laws, and the review of various cases in Forssén 2019 (5) has shown that there is a need of such an alteration, that e.g. can be accomplished by my previous suggestions of alterations concerning systematics. In sec:s 3.2-3.7 I make some concluding viewpoints regarding the examples of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules* that I have referred to in sec:s 2.1-2.11 from Ch:s 3 and 4 of Forssén 2019 (5), namely the following:

[596] See Forssén 2019 (5), sec. 5.2.1.
[597] See Part A, sec. 2.4.

- the context question concerning the rules themselves in the ML, their relationship to other rules and lacking EU conformity, sec. 3.2;
- the problem with an actual current law established by the SKV, sec. 3.3;
- the problem that concepts in the ML should be relevant over time despite a dynamic technology development and development of online services, sec. 3.4;
- the problem with gaps in the law and repetitions of historical VAT problems, sec. 3.5;
- the problem that the rules in the ML should correspond with the systematics of the VAT Directive (2006/112), sec. 3.6; and
- the problem with certain procedure questions on VAT, sec. 3.7

In sec:s 3.8-3.8.3 I summarize the concluding viewpoints and mention in connection thereto something about legal certainty and something about the continuation of my research project and give some general reflections regarding the tax law research.[598]

### 3.2 The context question concerning the rules themselves in the ML, their relationship to other rules and lacking EU conformity[599]

In sec. 2.1 I have reviewed examples of the legislator's lacking ability to put the right of deduction of input tax in the right context partly concerning the rules themselves in the ML, partly concerning the rules in the ML in relationship to rules about excise duties. The legislator has not responded about that I have pointed out some of the problems in my licentiate's dissertation (2011)[600] and in two articles in 2007.[601]

In sec. 2.2 I give examples of the legislator not reacting on a rule from the GML being transferred to the ML, and that rule – Ch. 6 sec. 7 ML – emanating form another context than the VAT law, namely from the general tax on goods of 1959. A trial of that rule based on the EU law in the field of VAT has not been done in connection with Sweden's EU accession in 1995. It shows that the legislator does not regard Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). I have shown the same lack on behalf of the legislator in sec:s 2.3 and 2.4 concerning the concept social care in Ch. 3 sec. 7 ML and concerning the concepts bank- and financial services and trade with securities (Sw., *bank- och finansieringstjänster och*

[598] See Forssén 2019 (5), sec. 1.1.1.
[599] See Forssén 2019 (5), sec. 5.2.2.
[600] See Forssén 2011.
[601] See Forssén 2007 (2) and Forssén 2007 (3).

*värdepappershandel*) in Ch. 3 sec. 9 and insurance brokers/insurance agents (Sw., *försäkringsmäklare*) in Ch. 3 sec. 10 ML. The same applies concerning one of the questions in sec. 2.10, namely regarding voluntary tax liability for letting of real estate and whether Ch. 9 sec:s 1 and 2 ML are EU conform.

### 3.3 The problem with an actual current law established by the SKV[602]

In sec. 2.10 I also state that the legislator has a tradition of relying on the SKV's description of current law regarding a certain taxation question. This leads to that an actual current law might be developed by the SKV, which in its turn can lead to the legislator basing law proposals on an erroneous conception of current law, so that the purpose with a rule in the VAT Directive (2006/112) will not be expressed by the rule in the ML in which the directive rule shall be deemed to be implemented. Thus, it is an example of what I call *communication distortions* in the process of the making of tax laws. The risk of such distortions is particularly apparent with respect of the loyalty to preparatory work at law interpretation existing in Swedish legal sources theory.[603] Also by maintaining the mentioned tradition the legislator disregards in my opinion that it is two sets of rules that must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112).

> In the present context I may also mention the importance of research starting in Sweden within the field of *fiscal sociology*, so that empirical studies at least will complete the tradition with law dogmatic studies within the tax law. Thereby can the doctrine, which the legislator also regards, to a certain extent decrease the risk of erroneous conceptions about current law concerning a certain taxation question coming into to the process of the making of tax laws.

### 3.4 The problem that concepts in the ML should be relevant over time despite a dynamic technology development and development of online services[604]

Concerning financial services in Ch. 3 sec. 9 ML I have in sec. 2.4 furthermore, regarding the virtual currency bitcoins, shown that there is a need for the legislator addressing the question of bitcoins with the EU Commission, the European parliament and the EU Council, so that it will get an equilibrium solution, where in the first place monetary political

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[602] See Forssén 2019 (5), sec. 5.2.3.
[603] Compare Forssén 2019 (5), sec:s 3.6.1 and 3.6.2.
[604] See Forssén 2019 (5), sec. 5.2.4.

and finance political considerations are met. Thereby the ambition should be to obstruct that bitcoins are used to hide barter transactions or exchange of assets (Sw., *byteshandel*) which are taxable. To accomplish such an equilibrium solution there is a demand of creating rules on the EU level, so that not just finance political considerations, but also monetary political considerations give the complete solution: That is not possible to achieve only by interpretation of the EU law in the field of VAT. If not the importance of the monetary political issue is raised, there is a risk reoccurring simplifications like in the case HFD 2016 ref. 6 (2 Feb. 2016), where the SRN stated that bitcoins *is a means of payment* (Sw., *är ett betalningsmedel*) that *shows great similarities with electronic money* (Sw., *visar stora likheter med elektroniska pengar*). That statement only gives an impression of a well-balanced judgement of the case and thereby a judgement based on legal certainty. Bitcoins differ in a decisive way from e-money, since bitcoins, apart from e-money issued by banks etc., is a competing currency to ordinary currencies.

In sec. 2.5 I have, concerning import of gas (transferred from a ship transporting gas to a nature-gas system or to a system of pipelines) and the use in the ML of the word *uppströms* (Eng., upstream), shown that the legislator due to lacking knowledge in science and technology can cause a risk of a non-EU conform interpretation of a rule in the ML. That is a major flaw in the process of the making of tax laws especially with respect of the fast development of online services etc. The only guarantee against such a risk is that the experts participate in the process of the making of tax laws, i.e. that the entrepreneur participates in that process and gives the legislator the right words for the right context.

Especially concerning electronic services I have furthermore in sec. 2.8 shown that legislator should address the EU Commission, the European parliament and the EU Council about the introduction of a rule that states that supply of electronic services should for VAT purposes be treated analogical with what applies for supply of goods or services within other sectors, like consultant services, financial services, health care, social care and education. This should improve the legal certainty concerning determination of supply of electronic services, since a method of analogism can be used based on what is known within the business world about different products and what is needed in terms of innovations. The casuistry determination that is made now by examples in annex II to the VAT Directive (2006/112) and in art. 7 of the implementing regulation (EU) No. 282/2011 is risking to lead astray due to lacking technical or business world insights in the topic by the legislator and the EU institutions. Furthermore is this order causing the concept determinations to soon become out of date, with respect of the technology development regarding electronic services. In that respect I also refer to what is stated above from sec. 2.5 concerning import of gas (transferred from a ship transporting gas to a nature-gas system or to a

system of pipelines) and the use in the ML of the word *uppströms* (Eng., upstream). Thereby I state that already rather traditional technology seems to cause that the legislator is not capable of finding the words relevant for the context applying to the tax rules that the legislator is making.

Concerning what is especially stated about electronic services in sec. 2.8 the legislator should contact the EU Commission, the European parliament and the EU Council about introducing a rule stating that supply of electronic services shall for VAT purposes be determined by analogy with what rules for supply of goods or services within other sectors, like consultant services, financial services, health care, social care and education. I may also refer to what is stated above regarding sec. 2.5: The fast development of online services etc. means that the only guarantee against a risk for *communication distortions* concerning the rules in the ML in that field is that experts are participating in the process of the making of tax laws, i.e. that the entrepreneur participates in that process and gives the legislator the right words for the right context. With respect of the electronic services been under a fast development and are probable to be so continuously is such an order important to introduce, so that the VAT rules become suited to so to speak meet a from a technological viewpoint dynamic reality.

### 3.5 The problem with gaps in the law and repetitions of historical VAT problems[605]

In sec. 2.6 I have shown that there is a surprising lack of interest on behalf of the legislator to take measures about a gap in *tullagen* (2016:253) – i.e. the Swedish customs act – which is risking to lead to constructed activities that can give an unjustified right of deduction of input tax. In an e-mail to the Treasury 2014-12-12 I pointed out for the Treasury the assumed gap in *tullagen*. The Treasury replied 2014-12-16 (Dnr. Fi2014/4452), and just stated that the Government will await case law rather than acting upon my suggestions of alterations in the present rule in *tullagen*. Thus, in the same way as with the deduction questions in sec. 2.1 it has been proven pointless to inform the legislator of problems with the legislation.

In sec. 2.7 I show that the legislator rather than making a simple investigation of what is existing in practice in the field of VAT motivates changes in the ML by presenting them as merely formal. According to the legislator would the alteration of the word *skattskyldig* (Eng., tax liable) in Ch. 2 a sec. 3 first para. item 3 ML to *beskattningsbar person* (Eng., taxable person) in connection with the

[605] See Forssén 2019 (5), sec. 5.2.5.

reform of the 1st of July 2013 only have been a matter of accomplishing a better formal (Sw., *formell*) correspondence with what is stipulated about intra-Union acquisitions (Sw., *unionsinternt förvärv*, UIF) of goods in art. 2(1)(b) of the VAT Directive (2006/112).[606] That is not fit to strengthen legal certainty, since the concept *skattskyldig* (Eng., tax liable) in the previous wording of Ch. 2 a sec. 3 first para. item 3 ML has been a decisive question in a number of tax- and tax fraud proceedings from the time before the 1st of July 2013. Above all is the legislator's attitude obscure since the legislator himself stated already at the introduction of the ML on the 1st of July 1994 that with *skattskyldighet* (Eng., tax liability) is only meant the liability to pay tax to the state. Thus, a taxation for UIF before the 1st of July 2013 of a purchaser of goods from other EU countries was in conflict with the principle of legality for taxation measures in Ch. 8 sec. 2 first para. item 2 RF 1974, when the seller in the other involved EU Member State was not *skattskyldig* (Eng., tax liable) due to the goods in question being exempted from taxation there, unlike what was the case in Sweden according to the ML.

In sec. 2.10 I have – besides what is mentioned in sec:s 3.2 and 3.3 – also proved that the legislator is lacking in regarding historical conditions at the making of new rules in the ML. In connection with the question on changing Ch. 8 a ML, so that a bankrupt's estate (Sw., *konkursbo*) by the receiver in bankruptcy (Sw., *konkursförvaltaren*) is made obligated to issue a document on adjustment of deduction of input tax at a sale of capital goods (Sw., *investeringsvaror*) constituting real estate (Sw., *fastighet*), I have made a comparison with the so-called certificate VAT (Sw., *intygsmomsen*) from older Swedish VAT law. I have in a book,[607] and also in an article[608] mentioned that similar negative effects for the public treasury (Sw., *statskassan*) that occurred in certain cases in the system with certificate VAT may occur in the existing system with adjustment (correction) of deduction of input tax, if a bankrupt person (Sw., *konkursgäldenär*) shall be able to negotiate away the SKV's possibility to impose liability of adjustment of deduction of input tax on the person buying the real estate from the bankrupt's estate. In the same way as with the deduction questions in sec. 2.1 and the question about the gap in tullagen in sec. 2.6 it has been proved pointless to inform the legislator – who is supposed to read periodicals on tax – of problems with the legislation.

[606] Compare prop. 2012/13:124 p. 94.
[607] See Forssén 2008, sec. 7.1.
[608] See Forssén 2006 (2) p. 377.

### 3.6 The problem that the rules in the ML should correspond with the systematics of the VAT Directive (2006/112)[609]

In sec. 2.8 I have in the first place, concerning the VAT rules on investment gold, dental care and electronic services, proved that the legislator disregards that the same rule technique – systematics – should be used in the ML as in the VAT Directive (2006/112) for the determination of the tax object or exemption from taxation. From that viewpoint should Ch. 1 sec. 6 ML be abolished from the ML, since that rule contains definitions of the concepts goods and services. Also in the present respect the legislator has disregarded that older Swedish VAT law concerning concepts and systematics may have been non-EU conform already at Sweden's EU accession in 1995, like what is stated above from sec. 2.2 regarding Ch. 6 sec. 7 ML. When the ML replaced the GML on the 1st of July 1994 the legislator made in fact an EU adjustment of Ch. 1 sec. 6 ML insofar as the concept goods was altered so that it is stated in Ch. 1 sec. 6 that real estate also constitutes goods. However, the legislator should have done a from a systematic viewpoint more complete adjustment at Sweden's EU accession in 1995. Already the should Ch. 1 sec. 6 ML have been abolished from the ML, so that that rule no longer means that the ML determines the tax object or exemption from taxation in three steps: In the Sixth Directive (77/388) and nowadays in the VAT Directive (2006/112) it is made in only two steps.

In sec. 2.9 I have shown that Ch. 4 sec. 8 ML – like with Ch. 1 sec. 6 ML – breaches from a systematic viewpoint against the VAT Directive (2006/112). This causes a risk for competition distortions emerging with respect of the VAT regarding non-profit-making organisations (Sw., *allmännyttiga ideella föreningar och registrerade trossamfund*) compared to other enterprise- and association-forms. Thereby the question is whether a breach of the EU treaty exists. This question was raised by the EU Commission making in 2008 a notification about starting a procedure about breach of the EU treaty regarding Ch. 4 sec. 8 ML. After the legislator's (the Government's) exchange of notes with the EU Commission is that question to be described as an open question since the end of 2011. However, it should be clear for the legislator that there is a risk of a development of a domestic case law concerning the use of the concepts *allmännyttiga ideella föreningar* (Eng., non-profit associations with a purpose of public benefit) and *registrerade trossamfund* (Eng., registered religious communities) in Ch. 4 sec. 8 which are non-EU conform compared to the meaning and use of the concept *organisationer utan vinstsyfte* (Eng., *non-profit-making organisations*) in the VAT Directive (2006/112). That follows in my

[609] See, Forssén 2019 (5) sec. 5.2.6.

opinion already of the negative determination of *ekonomisk verksamhet* (Eng., economic activity) in Ch. 4 sec. 8 ML for *allmännyttiga ideella föreningar* and *registrerade trossamfund* being made by reference to the non-harmonised income tax rules. However, the legislator does not seem to have any ambition to take measures about the situation by a change of law without awaiting whether the EU Commission will sue Sweden before the CJEU. Thus, the legislator is revealing a weak loyalty to the EU project, and that attitude works against the realization of the aim to create an internal market, which presupposes that the VAT legislations in the Member States do not distort the competition.

### 3.7 The problem with certain procedure questions on VAT[610]

In sec. 2.11 I have concerning certain procedure questions about the VAT concluded the following:

- For example must not the so-called resulting changes decisions (Sw., *följdändringsbesluten*) according to the SFL mean that they limit fundamental principles regarding the material taxation rules, so that e.g. neutrality at the taxation with respect of the choice of legal form does not apply as a consequence of procedure rules.

- Furthermore I state that the legislator should contact the EU Commission, the European parliament and the EU Council about starting a work which inter alia clarifies what rules concerning the so-called rest competence (Sw., *restkompetens*) – which is expressed as form and methods (Sw., *form och tillvägagångssätt*) for the implementation of a directive – in art. 288 third para. TFEU. There by I have concluded that it is necessary that a secondary law procedure legislation would be introduced for the VAT. It is decisive for the EU project that the internal market is working, which, in accordance with the primary law rule of art. 113 TFEU presupposes harmonisation of the EU Member States' legislations in the field of indirect taxes. Therefore it is of great importance that the level within the EU law that corresponds to the constitutional level in national law, i.e. the EU primary law, will have an impact also in the form of secondary law procedure rules about VAT. In my opinion should therefore secondary law procedure rules on VAT be introduced, which should be accomplished by an EU regulation, since a regulation is directly applicable in the Member States according to art. 288 second st. TFEU.

[610] See Forssén 2019 (5), sec. 5.2.7.

- In the recently mentioned context I have also treated especially the question whether the implementing regulation (EU) No. 282/2011, which concerns certain material issues in the VAT Directive (2006/112), should be revoked, so that the material VAT rules are mentioned in one set of rules from the EU, i.e. in the VAT Directive (2006/112), instead of in two. I argue for the implementing regulation (EU) No. 282/2011 being abolished altogether, so that those conducting application of the law will not have to regard material VAT rules from the EU law in another set of rules beside the VAT Directive (2006/112).

In sec. 2.11 I also refer from sec. 4.5 of Forssén 2019 (5) that I, to the procedure rules on VAT, have made a couple of connections regarding material rules and formal rules which have been mentioned in Ch. 3 of Forssén 2019 (5), in sec:s 3.11.2 and 3.11.4, and mentioned for the context something about Ch. 13 sec. 28 a ML and accounting for adjustment of deduction of input tax according regarding Ch. 8 a ML. Thereby I have concluded the following:

- On the theme of connections between procedure rules and material rules mention I mention from sec. 2.10 the material VAT rules on voluntary tax liability in Ch. 9 sec:s 1 and 2 ML. Thereby I state that it should have been clearly mentioned by the legislator how the new material rules introduced in Ch. 9 sec. 1 ML by SFS 2013:954 in 2014 relate to the procedure rules in Ch. 7 sec. 4 SFL about obligation to inform regarding altered conditions compared to those existing at the registration to VAT.

- On the theme of connections between procedure rules and formal rules I have in sec. 2.10 mentioned the need to make an alteration in Ch. 8 a ML, so that a bankrupt's estate (Sw., *konkursboet*) by the receiver in bankruptcy (Sw., *konkursförvaltaren*) would be obligated to issue a document on adjustment of deduction of input tax at a sale of capital goods (Sw., *investeringsvaror*) constituting real estate (Sw., *fastighet*). With respect of procedure I have mentioned in sec. 2.11 that there is a special rule on liability to register for someone who is liable to adjust deduction of input tax regarding capital goods according to Ch. 8 a or Ch. 9 sec:s 9-13 ML, namely *Ch. 7 sec. 1 first para. item 8 SFL*. That rule is deemed necessary, since to be liable to adjust is not the same as being tax liable.[611]

  In the latter respect I have mentioned something about Ch. 6 sec. 3 ML especially in relation to Ch. 13 sec. 28 a ML and

[611] Compare prop. 2010/11:165 Part 2 p. 718.

accounting (Sw., *redovisning*) for adjustment regarded in Ch. 8 a ML. Thereby I state that it is not complying with the principle of legality for taxation measures (Sw., *legalitetsprincipen för beskattningsåtgärder*) in Ch. 8 sec. 2 first para. item 2 RF 1974 that the bankrupt's estate is made liable to pay the 'adjustment VAT' (Sw., '*jämkningsmomsen*') by an accounting rule (Sw., *redovisningsregel*), i.e. in this case Ch. 13 sec. 28 a ML. Although the legislator, as mentioned above, considers that the liability to adjust is not the same as being tax liable, it is in my opinion such a liability that constitutes a taxation measure according to RF 1974. Therefore should the rule I am suggesting, meaning that the bankrupt's estate would be obligated to adjust if it is not issuing a document on adjustment of deduction of input tax at the sale of capital goods constituting real estate, be inserted for systematic reasons into Ch. 8 a ML, This supports in my opinion that it is urgent to create special and cohesive rules for the bankrupt's estate's tax liability, obligation to adjust deduction of input tax, accounting liability and liability to register for VAT.

In the present context I have mentioned that the report SOU 2002:74 gave proposals meaning that the connections in Ch. 13 ML to what is considered GAAP according to the BFL, concerning when output tax and input tax shall be accounted for, should be revoked.[612] However, it has not led to any Government bill yet. The report stated namely that there was no space for an analysis of the material taxation questions in the ML, why its focus instead was set on the accounting rules.[613] The rules on tax liability in special cases in Ch. 6 ML have not been analysed in the report SOU 2002:74 or in any other government official report yet. That the legislator has not resumed the proposal in the report SOU 2002:74 of a revision of the accounting rules in Ch. 13 ML has therefore in my opinion also curbed a review of the material rules and the procedure rules on VAT.

[612] Compare SOU 2002:74 Part 1 p. 20.
[613] Compare SOU 2002:74 Part 1 pp. 17 and 186.

## 3.8 Summary of concluding viewpoints, something about legal certainty and the continuation of the research project and some general reflections regarding the tax law research[614]

### *3.8.1 Summary of concluding viewpoints*[615]

I deem that the purpose of the book Forssén 2019 (5) according to its sec. 1.2 is fulfilled, namely that I have shown that there is a need to change the Swedish process of The Making of Tax Laws regarding in the first place the VAT and I have given the legislator suggestions to improve that process. I may thereby especially mention the following:

> My analysis of Swedish VAT in a law and language-perspective has shown so vast lacks on the theme words and context in the process of The Making of Tax Laws in the field of VAT that the legislator must be considered disregarding that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). That is the most serious conclusion I am making concerning *obscurities on behalf of the legislator regarding the theme of words and context in the EU law where the VAT rules are concerned*.[616]

> Thereafter I may mention, as the second most important conclusion supporting there is a need to change the process of the making of tax laws, that the legislator lacks an awareness that there is an actual current law established by the SKV and that that phenomenon causes a risk of *communication distortions* occurring in the process of the making of tax laws.[617] In Forssén 2019 (5) I have used the metaphor of an *iceberg*, to emphasize that I mean the existence of or the risk of development of an *actual current law* beside *current law in a true sense*. By the legislator lacking an awareness of that, the legislator does not know whether the description of current law in connection with the process of the making of tax laws is correct in relation to the purpose of a rule in the VAT Directive (2006/112). Thereby the legislator only sees the iceberg's part above the surface, i.e. precedents from the HFD and preliminary rulings from the CJEU, whereas references to the SKV's handbooks etc. are made without the legislator analysing whether the source is expressing an actual current law, and whether it is complying with the EU law in the field, or without the legislator even regarding that it can exist such an actual current law that lies in the

[614] See Forssén 2019 (5), sec. 5.2.8.
[615] See Forssén 2019 (5), sec. 5.2.8.1.
[616] See sec:s 3.2 and 3.3.
[617] See sec. 3.3.

iceberg's part under the surface and which has never even been tried by the administrative courts.

These two conclusions, and the problems that I mention in sec. 3.4 concerning concepts in the ML should be relevant over time despite a dynamic technology development and development of online services, are *sufficient* for me to conclude that there is a need to change the Swedish process of The Making of Tax Laws regarding in the first place the VAT and suggesting that the legislator improves that process, by putting the entrepreneur in the centre of it. That is in my opinion absolutely necessary for legal certainty reasons. *By the way* I am also referring to what is mentioned in sec:s 3.6 and 3.7 regarding the problem that the rules in the ML should correspond with the systematics of the VAT Directive (2006/112) and regarding the problem with procedure questions on VAT supporting my opinion that there is a need to change the Swedish process of the making of tax laws regarding in the first place the VAT.

In sec. 3.8.2 I make, in connection with the questions on gaps in the law according to sec. 3.5, certain legal certainty reflections especially regarding the institute of relieve of tax in Ch. 60 sec. 1 SFL and the institute of law trial in *lag (2006:304) om rättsprövning av vissa regeringsbeslut* (Eng., the law on law trial of certain Government decisions). Before that I mention in the present sec. something about what the analysis in Forssén 2019 (5) may be deemed to have proven about the role of the Council on Legislation (Sw., *lagrådet*) in the process of The Making of Tax Laws regarding VAT and about the entrepreneur's situation in a perspective of *makt och rätt* (Eng., power and right) thereby and what the entrepreneur and his organizations should do to accomplish an alteration of the process of The Making of Tax Laws:

- Since the Council on Legislation has not contributed to minimize the risk of the emergence of those in Forssén 2019 (5) stated *communication distortions*, it is also a consequence of the lacks that the Council on Legislation may be deemed to have played out its role in the process of The making of Tax Laws. The only guarantee to minimize the risk of the emergence of such distortions in the process of The Making of Tax Laws regarding corporate taxation law, like what is stated here concerning the VAT, is to make a change of systematics for that process. Thus, the process of the making of tax laws should be altered so that the entrepreneur is placed in the centre of it. That the tax rules made are functioning is a both for the individual entrepreneur and the development of society more important development than that the Council on Legislation is making a

judgement on whether the principle of legality for taxation measures in Ch. 8 sec. 2 first para. item 2 RF 1974 has been regarded, since the Council on Legislation unquestionably cannot treat the VAT questions in the perspective of law and language that I have demonstrated with the examples in Forssén 2019 (5) and in this annex. Although the Council on Legislation would improve its ability to identify semantic, syntactic and logical interpretation problems, the analysis in Forssén 2019 (5) shows that the technology development and the development of online services etc. still demands that expert knowledge becomes decisive for the development of concepts in the process of The Making of Tax Laws. Then must entrepreneurs and professionals within all sectors of society, e.g. information technology, care and finance, be placed in the centre of that process. The analysis has, which is shown above, furthermore proven that there are lacks in the process of The Making of Tax Laws in the following situations: to identify historical problems reoccurring in the field of VAT;[618] to identify problems regarding the VAT rules' relationship to other taxes and fees; and – above all – to discover the existence of or risk of development of an *actual current law* beside *current law in a true sense* and to regard that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material, formal and certain procedure questions about VAT: the national, with the ML and the SFL, and from the EU law – in the first place – the VAT Directive (2006/112). Those lacks are in my opinion attached to both the legislator and the Council on Legislation.[619]

- The scope and character of the lacks form in other words already with respect of the analysis in Forssén 2019 (5) a basis for that the entrepreneurs should, from a democracy perspective regarding power and right, demand a radical alteration of the process of The Making of Tax Laws. This alteration should in my opinion mean that the entrepreneurs would get the power over the words and concepts used in rules on VAT. Then must the entrepreneur not only be placed in the centre of the process of The Making of Tax Laws concerning VAT, but also be involved in the actual process, so that representatives of the entrepreneurs' organizations can participate in it. If that then shall be done by such a reform that I am suggesting for systematic reasons in Part A, meaning that a second chamber

[618] See sec. 3.5.
[619] In sec. 3.8.2 I get back to that the Council on Legislation may be deemed to have failed to fulfil its role in the process of The Making of Tax Laws.

should be installed in the Swedish Parliament for the entrepreneurs' organizations, is only a suggestion regarding form.[620] What is important is that a new system will mean that entrepreneurs and organizations in Sweden will not only be used as references in the process of The Making of Tax Laws. They must have the power over which words and concepts that are used in the tax rules made, and that demands in my opinion that the existing hegemony in the process of The Making of Tax Laws is abolished, so that the forming of concepts is made from below upwards, i.e. from those that shall be comprised by an imperative meaning 'pay tax' (Sw., '*betala skatt*') – the entrepreneurs. That the concepts are coming from the top downwards, i.e. from those who do not have a direct access to trade terms and are not involved in developing such terms in the business- and organization world, can never guarantee the creation of legal certain VAT rules.

- The main thread in my criticism of the legislator in Forssén 2019 (5) is that the legislator is not just awaiting the development of current law and patch up rather than preventing *communication distortions*, but that the legislator is also lacking ambition to be active on the EU level with suggesting alterations of the VAT law. A legislator who has done his homework should be capable of adding Swedish experiences of VAT to the EU project, instead of passive awaiting and patch up in due time in the VAT legislation. According to my own experience the legislator has not responded on flaws in the legislation in the field that I have described in my theses and articles on the subject and even answered my e-mail about a gap in the law by stating that the Government rather awaits case law than acting upon my suggested alterations. Thereby is the Government also not interested of that it in the mean time may occur constructed activities that may impair the public treasury (Sw., *statskassan*). That is of course not to the benefit of the EU project, but works in my opinion against the realization of the aim to create an internal market. Therefore should the entrepreneurs be active with making demands that their *legal framework* for the activity that they are carrying out or intend to carry out is prioritized by the legislator where the VAT is concerned. Regardless whether the individual is for or against the EU, it is decisive for the entrepreneurs that the rules applying in the field of VAT are effective too, since the competition otherwise is distorted and the internal market ceases to function – which also is to the disadvantage for the consumers. The entrepreneurs cannot wait

[620] See sec. 3.1 and Part A, sec. 2.4.

> together with an awaiting legislator for the legislator to create the presuppositions for enterprises in the present respect. If not the Government or the entrepreneur's representative in the Parliament does anything, should the entrepreneur and his organizations make a reference to the EU Commission thereby.

Furthermore I consider that the side purpose of Forssén 2019 (5) according to its sec. 1.2 is fulfilled, namely that the examples of *communication distortions* which have been treated also give practicians ideas to a broader choice of arguments for law questions about tax in court writs or at the writing of verdicts in tax proceedings and in criminal cases where tax is concerned.

Concerning procedural law I may by the way refer to sec. 3.5.4 of Forssén 2019 (5) and what is stated there about the question of the principle *ne bis in idem*, which is also mentioned in connection with the question about bitcoins in sec. 2.4. Regardless whether the legislator brings up at EU level, as Im suggesting in sec. 2.4, the question about activities with bitcoins or similar virtual currency that is carried out without permit from the FI, should – in accordance with what I am invoking in sec. 3.5.4 of Forssén 2019 (5) – the legislator address the EU Commission, the European parliament and the EU Council about codifying in the Treaty of European Union (TEU) or in the TFEU the principle of the EU law's supremacy over national law. National authorities and courts should be made obligated to *ex officio* apply the EU law, when they, as is the case with the VAT, are bound by the EU law according to art. 288 second and third para:s TFEU.

Concerning the *ne bis in idem*-question current law is without nuances in my opinion concerning questions about tax surcharge (Sw., *skattetillägg*) and tax fraud (Sw., *skattebrott*) regarding the VAT after the case NJA 2013 p. 502, where *Högsta domstolen* (HD) – the Supreme Court – makes a distinction with respect of legal form insofar as the *ne bis in idem*-principle would apply when a natural person (Sw., *fysisk person*) carries out activity under *enskild firma* (Eng., sole proprietorship), but not if he is carrying out his business in a one-man limited company (Sw., *enmansaktiebolag* – one owner/board member and one deputy board member). The HD's standpoint is in my opinion in conflict with one of the fundamental law political aims for the Swedish tax system since the tax reform of 1990, namely the principle of neutrality in the taxation concerning legal form. The ambition was to create rules giving a reasonable neutrality both in relation to the taxation of natural persons and the taxation of limited companies.[621]

[621] See prop. 1989/90:110 Part 1 p. 517. See also Forssén 2019 (2), sec. 10.3.

I consider that the current procedural situation after the case NJA 2013 p. 502 means that if the EU law's supremacy over national law is not codified, so that national authorities and courts are made obligated to *ex officio* apply the EU law in the field of VAT, the risk is that the competition- and consumption neutrality according to art. 113 TFEU and item 5 of the preamble to the VAT Directive (2006/112) is subdued at the trial of the principle of prohibition of double proceedings (*ne bis in idem*) concerning tax surcharge (Sw., skattetillägg) and tax fraud (Sw., *skattebrott*).[622] The following proves in my opinion that the legal certainty demands that it for procedural reasons is established that the EU law is fully regarded in tax proceedings and in criminal cases, when it is a matter of a field where – like concerning the VAT – the EU law governs the contents of the tax rules:

> In the HD's cases NJA 2010 p. 168 I and II, where the HD contrary to in the mentioned NJA 2013 p. 502 considered that the procedures on tax surcharge and on tax fraud was not in conflict with the *ne bis in idem*-principle, the Justice of the Supreme Court Stefan Lindskog stated on his part inter alia that *whether the Swedish order with double proceedings of and double sanction systems for an erroneous tax information is acceptable in a perspective of rule of law has in my opinion got an attentiveness that it in a material respect hardly deserves* (Sw., "*huruvida den svenska ordningen med dubbla prövningar av och dubbla påföljdssystem för en oriktig skatteuppgift är godtagbar i ett rättsstatligt perspektiv har efter min mening fått en uppmärksamhet som den i materiellt hänseende knappast förtjänar*"). The case NJA 2013 p. 502 shows that this was hardly a well balanced judgement of the Justice of the Supreme Court Lindskog – who by the way nowadays is the chairman of the HD.[623]

The statement is in my opinion hardly any guarantee for either legal certainty or development of the tax system. It proves that the need mentioned of securing the EU laws position in the court proceeding exists and that it as well exists a need of research being carried out on the theme of words and context in the EU law, which I will come back to in sec. 3.8.3.

> For the context may be mentioned that after NJA 2013 p. 502 were alterations made in the SFL and *skattebrottslagen (1971:69)* – the Tax Penal Act – on the 1st of January 2016, by SFS 2015:633 and SFS 2015:634, concerning the principle *ne bis in idem* regarding tax surcharge and tax fraud, but it did not mean any clarification of the question of the importance of legal form thereby.

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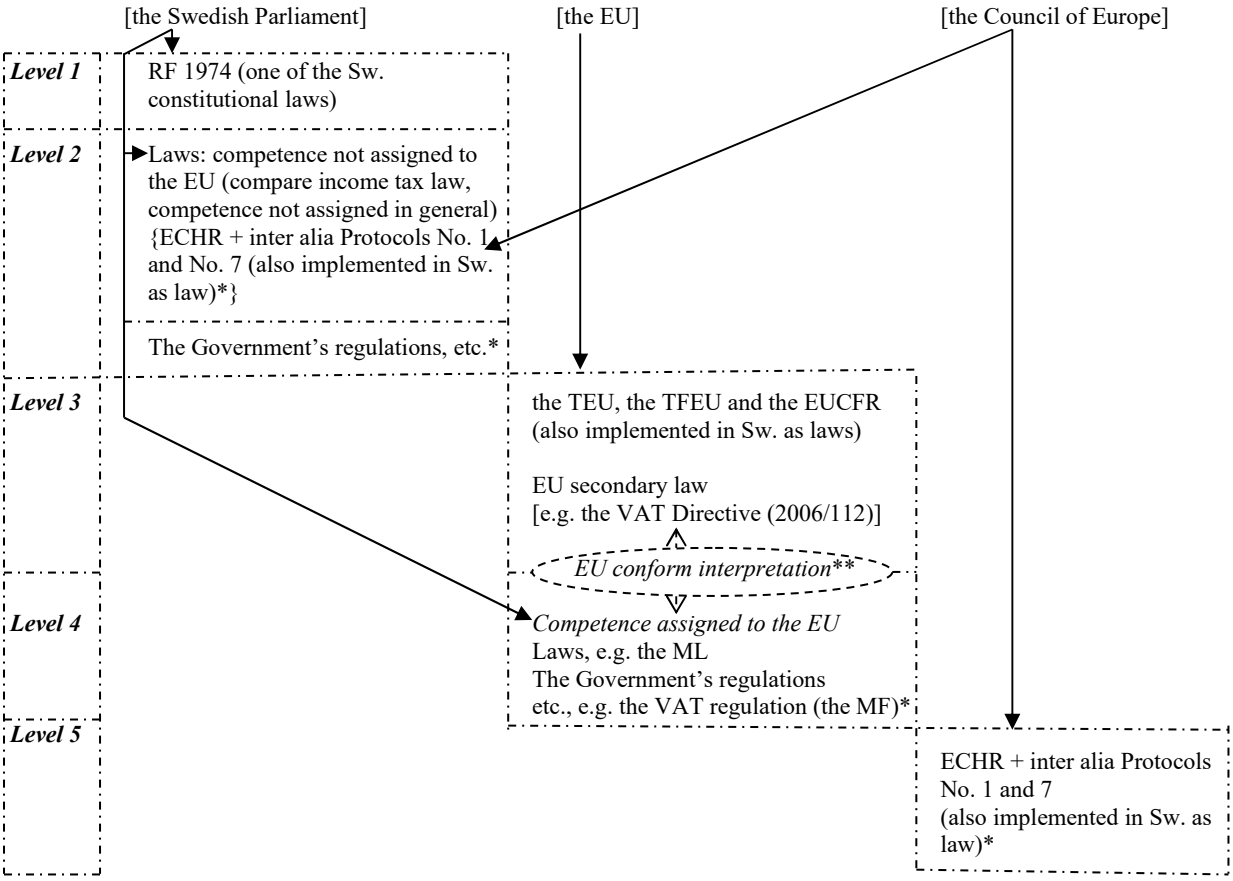
[622] See also Forssén 2019 (2), sec. 10.4.
[623] See Forssén 2019 (6), 12 213 240.

Concerning the demand that the legislator brings up on EU level about making national authorities and courts obligated to *ex officio* apply the EU law, when it is binding, I express here from another context something about the complex picture existing concerning the norm hierarchy regarding rules decided by the Swedish Parliament, the EU and the Council of Europe (Sw., *Europarådet*), and which I also here name the European staircase or the European stepladder (Sw., *Europatrappan*):[624]

All power emanates from the people. It is exercised under the laws, which are established the Swedish Parliament (Ch. 1 sec:s 1 and 4 RF 1974). The Swedish Parliament does not make the rules in the European law: the EU law and the Convention law forms their own legal orders (*sui generis*). The TEU, the TFEU and the EU Charter of Fundamental Rights (EUCFR – the Charter) and the ECHR with inter alia its Protocols No. 1 and No. 7 are implemented in Sweden, but as ordinary laws – not constitutional laws. [The Lisbon treaty with the TEU and the TFEU – the treaties – and the Charter were implemented as ordinary law in Sweden on the 1st of December 2009, by SFS 2009:1110. By SFS 1994:1219 were the ECHR and inter alia its Protocols No. 1 and No. 7 implemented as law – not constitutional laws – in Sweden on the 1st of January 1995.] At law conflict constitutional law goes before law, according to Ch. 11 sec. 14 and Ch. 12 sec. 10 RF 1974. Although the Swedish Parliament has assigned the EU's institutions competence in certain fields (Ch. 10 se. 6 RF 1974), is RF 1974 placed here higher than EU primary law (the TEU, the TFEU and the EUCFR), since an EU constitution never has come into effect. Within the EU law the primary law is set before the secondary law. Art. 6(2) TEU about that the EU shall join the ECHR has not yet been ratified; rights according to the ECHR are included only as general principles in the EU law [art. 6(3) TEU]. In the fields where the EU has been assigned competence is the EU law here set over the ECHR. The relationship between the Swedish sets of rules and those according to European law can – according to my suggestion – be illustrated as norm hierarchy staircase ("the European staircase"), where the rules decided by the Swedish Parliament, the EU and the Council of Europe are placed in order of preference and given their mutual relationships in ***five levels*** (where 1 is the highest and 5 is the lowest) according to the following:

[624] See Forssén 2019 (2), sec. 10.4.

**”The European staircase”**




*In Nergelius 2012 (p. 34) it is stated that it *at law conflict exists a weak presumption for the ECHR to have supremacy before other laws* (Sw., ”*vid lagkonflikt finns en svag presumtion för att EMRK ska ha företräde framför andra lagar*”). However, at rule competition I consider the question to be procedural: Does then the national court make in the case at hand a hypothecical trial of what judgement the ECtHR would do? However, here is the ECHR placed (together with inter alia its Protocols No. 1 and No. 7) before the Government’s regulations, etc. (see Ch. 8 RF 1974), except in the fields where the Swedish Parliament has assigned competence to the EU – compare the MF.

***EU conform interpretation* (various interpretation results)
- *Alt. 1*: EU conform interpretation means an interpretation in two steps. If the actual question concerns the application of e.g. a rule in the ML, the corresponding rule in the VAT Directive (2006/112) that shall be implemented in the ML. Thereafter is the law rule interpreted to judge whether its meaning fits within the frames that follows by the interpretation that has been made of the directive rule. If that’s the interpretaion result, the individual can invoke the directive rule to his advantage, if it has direct effect. However, it is, as mentioned, unclear whether national authorities and courts are obligated to *ex officio* apply the EU law before the national law rule. By the way is in my opinion that relationship not complying with the investigation responsibility that rests upon the SKV and the administrative courts according to Ch. 40 sec. 1 SFL and sec. 8 first para. of *förvaltningsprocesslagen (1971:291)* – the Administration Procedural Act.

- *Alt. 2*: An EU conform interpretation of a national rule can be limited by the principle of legality for taxation measures in RF 1974, by the rules wording – which, as mentioned in sec. 4.2 of Forssén 2019 (5), is CJEU's opinion too. Thus, in such a case can the directive rule not be enforced against the individual's will.
- *Alt. 3*: Another situation, which above all concerns the right of deduction of input tax, raises the question if the state is protected against a rule in the ML whose wording expands the individual's rights in excess of the result that shall be achieved with the VAT Directive (2006/112): The rule is not even EU conform (art. 288 third para. TFEU), but constitutes a national creation that lacks correspondence in the directive rules. The state should be deemed having the protection mentioned, if the interpretation result e.g. becomes so extreme that the law rule gives *the consumer* right of deduction of input tax. That interpretation result must be considered not being protection worthy for the individual by RF 1974. Instead should the national courts *de sententia ferenda* redefine legal facts, so that the legal consequence will be that the right of deduction according to the law rule cannot be exercised. The state should be protected against abusive practice (Sw., *förfarandemissbruk*) that leads to right of deduction being exercised in conflict with the basic idea with the VAT mentioned in sec. 3.3.1 of Forssén 2019 (5), namely that the consumer shall be distinguished from the entrepreneur, when it is a matter of determining who is comprised by the VAT's liabilities *and* rights. Since the situation means a breach of the VAT Directive (2006/112), can furthermore the EU Commission or another EU Member State start a procedure on breach of treaty against Sweden at the CJEU.[625]

My point with presenting something in Forssén 2019 (5) about my reasoning regarding *the European staircase* is to show the following. Above all as long as national authorities and courts are not made obligated to *ex officio* apply the EU law, when it is binding, must a description of the norm hierarchy in the tax field contain the procedural implication that that relationship means to the description. By the way may be mentioned that in the draft of the EU constitution, which was approved in 2004 but never ratified by all the EU Member States, it was suggested that the principle of the EU law's supremacy over national law would be codified.[626] However, this was not done in the reform treaty, i.e. the Lisbon treaty.[627]

### *3.8.2 Something about legal certainty*[628]

On the theme of legal certainty I may concerning the two questions on gaps in the law according to sec. 3.5 mention something about the so-called institute of relieve of tax in Ch. 60 sec. 1 SFL, which is mentioned in sec. 3.8.1, and thereby to a certain extent connect in the following to what I thereby has stated in another context.[629] Based on the gaps in the law regarding *tullagen (2016:253)* – i.e. the Swedish customs act – and regarding the wording before the 1st of July 2013 of

[625] See inter alia pp. 88, 95 and 96 of Forssén 2019 (1) and also e.g. sec. 3.3.1 of Forssén 2019 (5).
[626] See art. I-10.1 of the draft of an EU constitution.
[627] See Forssén 2019 (2), sec. 10.4.
[628] See Forssén 2019 (5), sec. 5.2.8.2.
[629] See Forssén 2019 (6), 12 213 164.

Ch. 2 a sec. 3 first para. item 3 ML I make in this sec. certain legal certainty reflections especially regarding the institute of relieve of tax in Ch. 60 sec. 1 SFL and the institute of law trial in *lag (2006:304) om rättsprövning av vissa regeringsbeslut* (Eng., the law on law trial of certain Government decisions).

Regarding the institute of relieve of tax may be mentioned that it provides an opportunity to get relieve of tax deduction (Sw., *skatteavdrag*), employer's contribution (for national social security purposes) [Sw., *arbetsgivaravgifter*], VAT and excise duties, which follows by Ch. 60 sec. 1 SFL, which reads as follows:

> *If there are pronounced reasons, may the Government or the authority that the Government decides fully or partly grant relieve from*
> 1. *the payment liability according to Ch. 59 sec. 2 for he who has not made tax deduction with the correct amount, and*
> 2. *the liability to pay employer's contribution, VAT or excise duty*.[630]
>
> *If a decision of relieve is made according to the first para. may a corresponding relieve be made from demurrage, tax surcharge and interest*.[631]

Thus, the presupposition for relieve is that pronounced reasons exist. In the rule it is stated that the Government or the authority that the Government decides fully or partly may grant relieve from inter alia the liability to pay VAT, if there are pronounced reasons. It is according to Ch. 13 sec. 12 *skatteförfarandeförordningen* (2011:1261), SFF – i.e. the regulation of taxation procedure – by the SKV (its head office) that such an application shall be filed. The SKV's decisions can then be appealed to the Government, according to Ch. 67 sec. 6 SFL.

According to the wording of Ch. 60 sec. 1 SFL it seems to be output tax that is meant with VAT, since therein is stated an opportunity of relieve from the liability to *pay* VAT etc.[632] Thereby is according to the

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[630] Sw., "*Om det finns synnerliga skäl, får regeringen eller den myndighet som regeringen bestämmer helt eller delvis medge befrielse från*
1. *betalningsskyldigheten enligt 59 kap. 2 § för den som inte har gjort skatteavdrag med rätt belopp, och*
2. *skyldigheten att betala arbetsgivaravgifter, mervärdesskatt eller punktskatt*."

[631] Sw., "Om beslut om befrielse fattas enligt första stycket får motsvarande befrielse medges från förseningsavgift, skattetillägg och ränta."

[632] See prop. 2010/11:165 Part 2 p. 1012 and SOU 2009:58 Part 3 pp. 1359 and 1360.

legislator regarded, as mentioned in sec. 3.5, only the liability to pay tax to the state.

That it thus is the seller that according to Ch. 60 sec. 1 SFL can apply for relieve from having to charge and pay output tax on his sale is also clearly confirmed by the preparatory work to the nearest predecessor to Ch. 60 sec. 1 SFL, i.e. the preparatory work to Ch. 13 sec. 1 *skattebetalningslagen* (1997:483), SBL.[633] Therein it is stated that with such a *pronounced reason* (Sw., *synnerligt skäl*) that could lead to *relieve from payment of VAT cannot be meant cases where the tax liable has charged his customers for the tax* (Sw., ”*befrielse från betalning av mervärdesskatt kan inte anses fall då den skattskyldige har tagit ut skatten av sina kunder*”).[634] A buyer's application for relieve from paying input tax will be rejected by the SKV and the Government.

Of interest concerning the application of the institute of relieve according to Ch. 60 sec. 1 SFL regarding VAT is a comparison with Ch. 2 sec. 20 *tullagen* (2016:253),[635] which reads as follows:

> *If there are pronounced reasons, the Government or the authority that the Government decides grant reduction of or relieve from another tax than customs*.[636]

In connection with the introduction of the SFL on the 1st of January 2012 the phrase that existed in Ch. 13 sec. 1 second para. SBL, meaning that the institute of relieve also applied to VAT that shall be paid to the Customs (Sw., *Tullverket*) at import of goods (and when excise duty shall be paid to the Customs), did not get an equivalent in Ch. 60 sec. 1 SFL. The legislator referred, regarding the reasons for that, to the investigation's report.[637] There it is stated that the SFL shall not be applied on such a tax, since it is instead *tullagen* that shall be applied and it will be unclear if the SFL and *tullagen* overlap each other. Therefore it was suggested that the SFL would not contain any rule on tax – e.g. VAT – that shall be paid to the Customs.[638]

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[633] The institute of relieve was from the beginning to be found in sec. 76 GML, which was transferred to Ch. 22 sec. 9 ML and was by the introduction on the 1st of November 1997 of the tax account system (Sw., *skattekontosystemet*) transferred to Ch. 13 sec. 1 SBL, and came then to apply to certain taxes and fees beside VAT. By the introduction on the 1st of January 2012 of the SFL, which replaced inter alia the SBL, the institute of relieve was transferred to Ch. 60 sec. 1 SFL.
[634] See prop. 1996/97:100 Part 1 p. 596.
[635] *Tullagen (2016:253)* replaced on the 1st of May 2016 *tullagen* (2000:1281).
[636] Sw., ”*Om det finns synnerliga skäl, får regeringen eller den myndighet som regeringen bestämmer medge nedsättning av eller befrielse från annan skatt än tull*.”
[637] See prop. 2010/11:165 Part 2 p. 1012, where that reference is made to *the report p. 1359 etc*. (Sw., ”*betänkandet s. 1359 f*”).
[638] See SOU 2009:58 Part 3 p. 1360.

However has after the SFL was introduced in 2012 an order been inserted on the 1st of January 2015, by SFS 2014:50 and SFS 2014:51, where *import-VAT* (Sw., ”*importmoms*”) is comprised by the procedure according to the SFL and is taken out by the SKV for those who are VAT-registered here, whereas the Customs (Sw., *Tullverket*) otherwise still is the taxation authority for import and thus also for inter alia *import-VAT* thereby. Thus, there should in my opinion be introduced an equivalent to the second para. of Ch. 13 sec. 1 SBL into Ch. 60 sec. 1 SFL, so that the institute of relieve is applicable on such *import-VAT* that is no longer comprised by tullagen but by the SFL. I thereby refer to *the Union Customs Codex, UCC* (Sw., *unionstullkodexen*) [regulation (EU) No. 952/2013], which since the 1st of May 2016 shall be applied together with *tullagen* (2016:253), and whereof it follows that the customs return shall be filed to the Customs, except in certain special cases, by *a person making a return* (Sw., *deklarant*) established within the Union's customs territory.[639]

In the preparatory work to the SBL it was stated as an example of pronounced reasons for relieve according to Ch. 13 sec. 1, that it would be a question of a foreign entrepreneur, who is not registered himself to VAT in Sweden, but who has paid *import-VAT* here and later on cannot be compensated for that by his Swedish customer due to the customer having gone bankruptcy.[640] Such a situation should in my opinion belong in the SFL, and Ch. 60 sec. 1 therein. That such a second para. like in Ch. 13 sec. 1 SBL has not yet been inserted into Ch. 60 sec. 1 SFL is thus another example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

The recently mentioned is however not so surprising with respect of the answer I received from the Treasury as a response to that I on 2014-12-12, as mentioned in sec. 3.5, notified about the gap in tullagen concerning the mentioned altered procedure in 2015 meaning that the SKV then took over the VAT-taxation of a certain kind of import from the Customs (Sw., *Tullverket*. I refer in this sense to the other example of gap in the law mentioned in sec. 3.5, i.e. concerning the law alteration on the 1st of July 2013 in Ch. 2 a sec. 3 first para. item 3 ML, by SFS 2013:368, where the legislator stated that the alteration of the word *skattskyldig* (Eng., tax liable) to *beskattningsbar person* (Eng., taxable

[639] Compare regarding art:s 170(2) and 170(3) of the UCC: prop. 2015/16:79 p. 113 and SOU 2015:5 p. 105. Compare also Ch. 1 sec. 2 first para. item 6 and fifth para. ML, their wordings according to SFS 2016:261.

[640] See prop. 1996/97:100 Part 1 p. 596. The described situation for a foreign entrepreneur was also one of few examples of relieve from VAT according to sec. 3 in RSV Im 1982:3.

person) just should be deemed to have concerned the accomplishment of an improved *formal* (Sw., *formell*) correspondence with what is stipulated about UIF of goods in art. 2(1)(b) of the VAT Directive (2006/112), despite that the concept *skattskyldig* (Eng., tax liable) in the previous wording of Ch. 2 a sec. 3 first para. item 3 ML has been a decisive question in a number of tax- and tax fraud proceedings from the time before the 1st of July 2013. The question is in my opinion whether it first must exist various constructed activities and an arbitrary setting aside of the principle of legality for taxation measures in RF 1974 in proceedings where the state and the prosecutor are getting problems with that principle, for the legislator to thereafter patching up in retrospect with such unrealistic statements as the recently mentioned concerning altered wording of the main rule for UIF.

In the latter context I may furthermore especially mention that there is nothing that would indicate that calculated output tax on a UIF would be disqualified for trial by the SKV, with possibility to appeal to the Government, by application of the institute of relieve in Ch. 60 sec. 1 SFL. In the criminal case that I especially mention in sec. 3.8.1 of Forssén 2019 (5), i.e. the *Svea hovrätts* (Eng., Svea court of appeal) case B 1378/96, the HD refused an appeal for a new trial (Sw., *resningsansökan*) – the HD's case No. Ö 257-99 without finding any *reason to obtain preliminary ruling from the CJEU* (Sw., "*anledning inhämta förhandsavgörande från EG-domstolen*"), when the verdict in the Svea court of appeal meant that the principle of legality was set aside, despite that the asserted tax fraud (Sw., *skattebrottet*) consisted of the liability to account for calculated output tax on UIF was set aside with respect of the wording then of Ch. 2 a sec. 3 first para. item 3 ML and at the time the other involved EU Member State did not stipulate VAT liability for the goods in question. Although neither the HFD nor the HD are constitutional courts, it is in such a case of interest to regard the possibilities of law trial (Sw., *rättsprövning*) by the HFD. With respect of the examples on *communication distortions* that I have described in Forssén 2019 (5) it is not unfounded to speak of the existence of a number of unrecorded cases (Sw., *mörkertal*) that would be needed to try, but where the demand of review dispensation (Sw., *prövningstillstånd*) in the highest instance, e.g. in the HFD, presents an obstacle for a trial of e.g. erroneous written tax rules, by the HFD issuing a short 'no review dispensation' at an appeal of a verdict in someone of the administrative courts of appeal (Sw., *kammarrätterna*).

The HFD tries applications of law trial, and that applies according to the law on law trial of certain Government decisions [Sw., *lag (2006:304) om rättsprövning av vissa regeringsbeslut*]. That law came into force on the 1st of July 2006, whereby *lagen (1988:205) om rättsprövning av vissa förvaltningsbeslut* was revoked. By that law followed that e.g. law

trial could be made of whether an administrative authority's (Sw., *förvaltningsmyndighets*) decision concerning e.g. the principle of legality for taxation measures in RF 1974 was in conflict with any law rule in such a way that the applicant stated, and there was no other possibility for trial, e.g. by mentioning in the decision that it could not be appealed. That possibility is nowadays by and large gone in the field of taxation, since the new law introduced on the 1st of July 2006 only concerns law trial of certain Government decisions. However, the public seeking for legal judgement should have the possibility to refer a question like the one on application of the main rule on UIF according to its wording before the 1st of July 2013 to the HFD, by first trying it in accordance with Ch. 60 sec. 1 SFL via the SKV up to the Government.

That the Council on Legislation (Sw., *lagrådet*) in connection with the introduction of the SFL in 2012 did not react about those legal certainty questions about the VAT gives me additional confirmation of the conception in sec. 3.8.1 that the Council on Legislation has played out its role in the process of The Making of Tax Laws. The Council on Legislation should, in connection with the law alteration in 2015 meaning that *import-VAT* for VAT-registered shall be comprised by the SFL instead of *tullagen*, have reacted on that the for legal certainty so important rule Ch. 60 sec. 1 SFL lacks an equivalent to the second para. in Ch. 13 sec. 1 SBL. If now the Council on Legislation shall work wit legal certainty questions in the process of The Making of Tax Laws, that work should have become more important when the new law on law trial from 2006 by and large means that the law trial institute is reserved for Government decisions, and the institute of relieve in Ch. 60 sec. 1 is the rule in the SFL that can be comprised by Government decisions. It means in my opinion a major legal uncertainty that neither the legislator nor the Council on Legislation did react on the law alteration in 2015 meaning that the institute of relieve is not applicable to such an *import-VAT* that no longer is comprised by *tullagen* but by the SFL, as long as Ch. 60 sec. 1 SFL does not provide an equivalent to the second para. in Ch. 13 sec. 1 SBL. The legislator's and the Council on Legislation's inadequacy is particularly troublesome since an application for law trial by the HFD can be an alternative to an application by the ECtHR after the possibilities of national remedies are exhausted, but then must the individual first have been able to apply for relieve of the *import-VAT* according to Ch. 60 sec. 1 SFL by the SKV and moved on to the Government.

That the Council on Legislation is no guarantor for upholding the constitutional dimension of the concept democracy I began to suspect in 1998. Then I stated in an article that the Council on Legislation had not done its work thereby in connection with the review of a wealth tax rule in relation to the prohibition of retroactive tax legislation in Ch. 2 sec.

10 second para. RF 1974. The main owners in quoted companies (Sw., *börsbolag*) had an exemption, whereas ordinary shareholders were taxed. The chairman of the Council on Legislation at the time, Stig von Bahr, answered in an article that I should address my criticism to the design of the RF 1974, not against the Council on Legislation. That main owners in quoted companies were exempted from taxation, when companies on the Stockholm stock exhange (Sw., *Stockholms fondbörs*) were moved from the A-list to the OTC- or O-lists, to avoid wealth tax, was not all commented by the chairman of the Council on Legislation.[641]

The review of the questions in Forssén 2019 (5) has to me meant a confirmation that what I suspected in 1998 was more serious than I could imagine: The lacks that I have mentioned in the process of The Making of Tax Laws should have led to reactions from the Council on Legislation, which in my opinion must be considered having played out its role in that process. The Council on Legislation can at best be expected to give legitimacy to corporativism in parliamentary politics, where the ordinary citizen, e.g. the small business entrepreneur, is not a player who counts. After the review conducted I cannot find that the Council on Legislation is any guarantor for observing legal certainties in the process of The Making of Tax Laws.

### *3.8.3 Something about the continuation of the research project and some general reflections regarding the tax law research*[642]

In sec. 1.1.1 of Forssén 2019 (5) I mention the research project I am planning at Örebro University, *Användningen av skattemedel* (Eng. the use of tax revenues).[643] This book can be considered a pre study to it. Forssén 2019 (5) can be seen as a continuation of the second last part therein, i.e. *Part D, Communication Distortions within tax rules and Use of language in law*. That part concerns, as mentioned in sec. 1.1.1 of Forssén 2019 (5), the *law and language*-perspective on the process of the creation of a tax rule.

Forssén 2019 (5) develops that perspective on *The Making of Tax Laws*, and when I continue with analysis models to discover risks for *communication distortions*, which I am writing about in Part D, my thought is to refer to what I am writing about concerning the various problems regarding words and context in the EU tax law in Forssén 2019 (5). I will probably do so after or during that I have continued with

[641] See art:s: Forssén 1998 (1) p. 509-517 and von Bahr 1998 pp. 701-702. See also my commentaries of the phenomenon, with reference to the two art:s, in Part A, sec. 2.3 (pp. 31 and 32).
[642] See Forssén 2019 (5), sec. 5.2.8.3.
[643] See www.oru.se.

*Användningen av skattemedel* (Eng., the use of tax revenues), which will be an extension of Part E.

By the way I may refer to sec. 3.8.1 and my conception that there is a need of research being carried out on the theme of words and context in the EU tax law, and mention the following.

If not the tradition with by and large pure law dogmatic studies is interrupted within the tax law research, the legislator's possibilities to discover *communication distortions* will not be improved. However, such a measure does not need to mean that the tax law research is dedicated to either such studies or pure empirical studies like in Forssén 2019 (5). One thing does not have to rule out the other, but law dogmatic studies to deem current law concerning tax laws can of course be combined with an empirical analysis.[644]

What in my opinion is typically objectionable is analyses of the tax law which are made without or with very limited elements of application questions. That is in my opinion mathematics and not tax law research to any worldly good. However, it is relevant with a mathematical thinking e.g. where it is a matter of dealing with logical interpretation problems, like what follows by the example in sec. 2.4 of Forssén 2019 (5), and, which I mention in my introduction of *The Making of Tax Laws*, to build models for discovering *communication distortions*, which I describe in Part D with inter alia the following commentary:

> "Thus, in this chapter I am 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".[645]

At least should in my opinion e.g. the VAT be subject to research with respect of not only material taxation rules, but also with regard of inter alia procedure questions, so that words and context are given a true meaning. For example Sonnerby 2010 lacks nothing in particular from a material viewpoint – however I consider that the procedure rules on VAT could have been mentioned more therein on the theme of neutrality. The question is e.g. if the procedure rules can be allowed to affect the principle of neutrality in the material rules for the choice of legal form at the corporate taxation.[646] That question is inter alia of interest due to that the HD, which is mentioned in sec. 3.8.1, in NJA 2013 p. 502 makes a distinction concerning in what legal form an entrepreneur is carrying out

[644] See Forssén 2019 (5), sec. 2.5.
[645] See Part D, sec. 3.1.
[646] See Forssén 2019 (6), 12 213 240.

his business, where the scope of the principle of prohibition of double proceedings (*ne bis in idem*) regarding tax surcharge (Sw., *skattetillägg*) and tax fraud (Sw., *skattebrott*) is concerned.

Henkow 2008 is in my opinion an example of law dogmatic studies of a limited value for the application of the law. In sec. 3.5.3 of Forssén 2019 (5) I mention that the SRN in the case HFD 2016 ref. 6 (2 Feb. 2016) – which also is mentioned in sec:s 2.4 and 3.4 – did not find anything therein for the VAT judgement of exchange services and bitcoins, but that Henkow 2008 only has treated the expression *legal* (Sw., *lagligt*) means of payment in connection with bills and coins. In my opinion would Henkow 2008 hardly been of any guidance even if bitcoins had existed when that thesis was written, since it in Henkow 2008 inter alia is made an obscure description of the concept of money (Sw., *pengar*). Therein is money described as a precise concept – with three functions.[647] The report on electronic money SOU 1998:14 states instead that it is an example of a terminology having various meanings concerning what is alternately used to be meant with *pengar* (Eng., money): *kontanter* (Eng., cash), *bokpengar* (Eng., book-money), *räkneenheter* (Eng., arithmetical units), *värdemätare* (Eng., measure of value), *betalkraft* (Eng., payment-power) and *instrument* (Eng., instruments).[648] Henkow 2008 does not contain anything about that report. The report SOU 1998:14 and another report that is neither mentioned in Henkow 2008, SOU 1989:35, show that interest (Sw., *ränta*) is a vague (Sw., *vagt*) concept, whereas it is stated in Henkow 2008 that interest is also a precise concept – with three component parts.[649] It is inter alia such lacks in Henkow 2008 that make me deeming that it would probably not have helped the HFD or the SRN in HFD 2016 ref. 6 (2 Feb. 2016), for the VAT judgement of exchange services and bitcoins, if Henkow 2008 had been written after the invention of bitcoins. To write about financial services and VAT without thoroughly judging concepts like money and interest gives a result of limited use – it will at the most be a matter of mathematics. The field of VAT and financial service is by the way very vast, and I describe it as by and large being a blank where research is concerned – for example could private law options (Sw., *privaträttsliga optioner*) have been analyzed thereby.[650]

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[647] See Henkow 2008 p. 48, where it is stated that att *money* (Sw., *pengar*) serves three functions: ”as a medium of exchange, a unit of account and as a store of value”. Compare also sec. 3.5.3 of Forssén 2019 (5) and Forssén 2019 (6), 12 213 153.

[648] See SOU 1998:14 p. 22. Compare also Furberg et al. 2000 p. 25, where the concept *pengar* (Eng., money) is also described as having various meanings (Sw., *mångtydigt*) and being vague (Sw., *vagt*). Compare also sec. 3.5.3 of Forssén 2019 (5) and Forssén 2019 (6), 12 213 153.

[649] See Henkow 2008 p. 54: ”…the interest is thus composed of a pure interest payment, a pure risk premium and a fee to the bank.” Compare also Forssén 2019 (6), 12 213 240.

[650] Compare Forssén 2019 (5), sec. 4.4.

If the research is not made as empirical studies with the approach that I have introduced, by *The Making of Tax Laws* as a branch within *fiscal sociology*, should the tax law research at least be carried out so that also application questions are treated. For the legislator it is a matter of being able to discover and take measures about e.g. such a matter as an imperative *to pay VAT* (Sw., *betala moms*) must not be based on accounting rule, like what I am stating in sec. 3.7 concerning Ch. 13 sec. 28 a ML: It is not in compliance with the principle of legality for taxation measures in Ch. 8 sec. 2 first para. item 2 RF 1974 that a bankrupt's estate (Sw., *konkursbo*) is made liable to pay 'adjustment VAT' (Sw., '*jämkningsmoms*') according to Ch. 8 a by support of the accounting rule Ch. 13 sec. 28 a ML.

One use to say that the power of tradition is strong. The statement of the Justice of the Supreme Court in the case NJA 2010 p. 168 I and II, which I am mentioning in sec. 3.8.1, shows that the legislator cannot count on any dynamics from the HD for the benefit of strengthening the legal certainty for the individual and for the development of the tax system. The same proves what I am relating in sec. 3.8.2 about the, for such aspects, pointless answer from the Council on Legislation's chairman concerning the exemption from wealth taxation in 1998 of main owners in quoted companies (Sw., *börsbolag*) that I then raised in an article. The same passive attitude are the SRN and the HFD showing in HFD 2016 ref. 6 (2 Feb. 2016), when their members are not going further with an own deeper analysis of the question about VAT in connection with exchange services and bitcoins. When Henkow 2008 did not give any guidance they are skipping over for example Rendahl 2009, which as well as Henkow 2008 could have been of guidance. Why only refer to one example of doctrine on the subject VAT that was close at hand with respect of its aim? Instead does, as mentioned in sec. 3.4, the SRN the simplification that exemption from taxation according to Ch. 3 sec. 9 ML can be motivated due to that bitcoins *is a means of payment* (Sw., *är ett betalningsmedel*) that *shows great similarities with electronic money* (Sw., *visar stora likheter med elektroniska pengar*). The SRN and above all the HFD, after the of little value guiding preliminary ruling from the CJEU in the case C-264/14 (Hedqvist), should have made an own deeper analysis, and they would have, as mentioned in sec:s 2.4 and 3.4 and in sec. 3.5.4 of Forssén 2019 (5), been able to conclude that it is not correct. The SRN's statement is only giving an impression of a well balanced and thereby legally certain judgement in the case.

Thus, in my opinion there is altogether nothing solid for the legislator to lean against, where the description of current law in the field of VAT by the precedent instances, the Council on Legislation and the tax law research is concerned. The tradition with law dogmatic studies within

the tax law leads in my opinion to that there – although unconscious – will evolve an unholy hegemony between the academic world and the highest instances of the courts, who use to obtain law investigations from the researchers.[651] Within the corporate taxation this means that small enterprises who are not any strong lobbyists – and hardly can expect any special treatment by exemption – are at risk to be subjects to a from a corporate taxation law power and right-perspective structural discrimination. Research within the field of *fiscal sociology* would in my opinion in a decisive way contribute to obstruct this.[652] It could be a decisive support for small enterprises that the legislator gets impulses to reforms of the tax rules, for example by my aim of research on *fiscal sociology*, i.e. *The Making of Tax Laws*, so that rules can be created which as far as possible lacks *communication distortions*.[653]

If not the entrepreneurs themselves take their responsibility and try to affect the legislator, as I am suggesting in sec. 3.8.1, the researchers – whose activity enjoys a freedom protected in accordance with Ch. 2 sec. 18 second para. RF 1974 – have in my opinion a responsibility to give impulses of renewal to the legislator. Then the legislator can get impulses to – as I am stating e.g. in sec. 3.4 concerning the ambition to obstruct that bitcoins are used to hide barter transactions or exchange of assets (Sw., *byteshandel*) which are taxable – bring up on EU level that equilibrium solutions on a need to make rule alterations in the field of VAT can demand that other considerations than finance political are made too. Thereby shows in my opinion the review in Forssén 2019 (5) that *The Making of Tax Laws* can contribute to develop the EU project. A main thread is that it shows that the existing process of the making of tax laws, as mentioned in sec. 3.8.1, above all cannot ensure that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material, formal and certain procedure questions about VAT: the national, with the ML and the SFL, and from the EU law – in the first place – the VAT Directive (2006/112).

Research on *The Making of Tax Laws* concerns the process of the making of tax laws and not in the first place to accomplish a good application of the law (Sw., *god rättstillämpning*).[654] It is instead a matter of creating

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[651] If the phenomenon was conscious, I would describe it as an unholy alliance. However, I am not implying any conspiracy theory, so I use the expression unholy hegemony. See also Forssén 2019 (6), 12 213 240.

[652] *Fiscal sociology* may also contain a gender-perspective on small enterprises, whereby I refer to what is stated about structural inequality (Sw., *strukturell ojämlikhet*) in Gunnarsson & Svensson 2009 p. 209. See also Forssén 2019 (6), 12 213 240.

[653] See also Forssén 2019 (6), 12 213 240.

[654] See Forssén 2019 (5), sec. 1.1.2.

good technocracy (Sw., *god teknokrati*) in the process of the making of tax laws. In a state based on the rule of law there should not exist any contradiction between the state's interest of that it shall exist monetary political as well as finance political considerations and to ensure the individual's legal certainty in the mentioned respect. By *The Making of Tax Laws* the tax law research is given a in relation to other subjects more open paradigm that previously, so that the legislator can get impulses to tax reforms that he is not getting today from either the mainly law dogmatic research in the field of taxation or from verdicts in the HFD.[655] It is a matter of giving the legislator a tool – models – to be able to discover, as I am stating in sec. 3.8.1, if there exists or is a risk of an emergence of *communication distortions* as well concerning the visible part of the iceberg, i.e. regarding current law in a true sense, as concerning the iceberg's invisible part, i.e. whether it under the surface exists an actual current law expressed primarily in the SKV's handbooks and so-called standpoints (Sw., *ställningstaganden*) and which has never even been tried by the administrative courts. By such a simple model as the figure in sec. 3.2.1 of Forssén 2019 (5) over how the VAT's liabilities and rights are connecting the legislator could at the reform on the 1st of July 2013 have realized the need of not only inserting the VAT Directive's *beskattningsbar person* (Eng., taxable person) in Ch. 4 sec. 1 ML, but also to replace *skattskyldighet* (Eng., tax liability) in the rules on right of deduction in Ch. 8 ML with the same concept. I reproduce below the same figure from sec. 3.2 of Forssén 2019 (1):

<table>
<tr><td colspan="4">Persons</td></tr>
<tr><td colspan="3">(1) Taxable person<br>(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><td rowspan="3"></td></tr>
<tr><td>(3)<br>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="3">Purchase which is comprised by prohibition of deduction: Not right of deduction/reimbursement of input tax</td></tr>
</table>

**Commentary to the figure above:**

[655] Compare e.g. Part D, sec. 2.1 and Forssén 2019 (6), 12 213 240.

The figure gives a very simple illustration of the connection between the right of deduction (3) and the liabilities according to the VAT system. A taxable person (1) who intends to carry out taxable supplies of goods or services (2) with his acquisitions has the right of deduction of input tax on those acquisitions (3). When he makes taxable supplies of goods or services (2) he is liable to account for and pay VAT (output tax) to the state. These are in short the main rules of the VAT system according to the VAT Directive (2006/112), i.e. it is the main components of the VAT according to the EU law.[656] The figure illustrates quite clearly for e.g. the legislator that the concept tax liability (Sw., *skattskyldighet*) as a prerequisite for the emergence of the right of deduction according to the main rule Ch. 8 sec. 3 first para. ML does not comply with the VAT Directive (2006/112), since the corresponding rule in the VAT Directive (2006/112), i.e. art 168(a), contains the concept taxable person (Sw., *beskattningsbar person*).

By developing in the tax law research analysis models for the discovery of *communication distortions* the research would be teaching the powers, i.e. the legislator. I make in that respect a comparison with the Swedish Enlightenment's Johan Henric Kellgren (1751-1795), who in the 1700's argued for the abolishment of the guild system (Sw., *skråväsendet*) in favour of freedom of trade (Sw., *näringsfrihet*), and stated that the resistance came from *poorly educated governments* [Sw. (note, old language), *illa uplyste Regeringar*].[657] It took until half a century after Kellgren's death, before this was done. Entrepreneurs and innovators should, in line with what I am stating in sec. 3.8.1, not have to wait that long to get the power over which words and concepts are used when tax rules are created. That will not benefit the evolvement of the business world and the tax system who jointly shall meet the fast development with bitcoins and other things that we today hardly even can begin to imagine. The research should therefore contribute to a development that interrupts the thus far existing hegemony in the process of the making of tax laws, so that the forming of concepts is made from below upwards, i.e. from those who are making the innovations and also shall be comprised by an imperative meaning 'pay tax' (Sw., '*betala skatt*') – the entrepreneurs.

To meet the development there is in my opinion a need to regard both the indirect taxes' history and future in the research. Then the perspective of the determination of the tax object should be more developed in that respect than what is the case concerning money and interest in Henkow 2008. For comparative studies should also the selection for comparison with countries outside the EU (third countries) give a more interesting effect of contrast than what is the case in Rendahl 2009.[658]

[656] Compare also Forssén 2019 (1), sec. 3.3.
[657] Compare Kellgren 1784 p. 10. See also Forssén 2019 (6), 12 213 240.
[658] Compare Forssén 2019 (6), 12 213 153 and 12 213 240.

In Rendahl 2009 is VAT on the EU level compared with *goods and services tax* (GST) in Australia and Canada.[659] If two countries outside the EU with the same English law legacy as the two mentioned shall be chosen – if that at all shall be a criterion of selection – could the US and New Zealand been chosen, since the US has so-called *sales tax*, a gross tax similar to the general tax on goods in Sweden that was the predecessor to VAT,[660] whereas New Zealand has a simple in principle correct VAT insofar as it is lacking a differentiation of the VAT rate.[661] If Canada still would have been chosen, it could have been combined with the US, to judge whether the NAFTA-countries, the US, Canada and Mexico, form an internal market with a common VAT system like the EU's.[662] Why not – for the same reason – choose to compare the EU with the US and Mexico, since Mexico – like the EU Member States – has one single VAT?[663] To not letting the English language govern the choice, could also other combinations of two countries outside the EU, for comparison with the EU's VAT, be made.[664]

In Rendahl 2009 was in fact a perspective of the question of the placement of the supply of services according to the directive 2008/8/EC given before 2010 and until the end of the time of that reform in 2015 (with the rules on the determination of the placement of supply of telecommunication services, radio and TV-broadcasting and electronic services).[665] However should, for the comparison to give an effect of contrast, the EU law in the field of VAT, if two and not more third countries shall be chosen, be compared with one country with VAT or GST and one country without either VAT or GST, but e.g. with *sales tax*. However, that provides that a weighted material for comparison is made on e.g. which OECD countries outside the EU that have a VAT or GST which in a material sense is comparable with the VAT according to the EU law.[666] I made in my licentiate's dissertation such a weighting of the OECD's information

[659] See Rendahl 2009 p. 10. Compare also Forssén 2019 (6), 12 213 240.
[660] See sec:s 2.2 and 3.2. Compare also Forssén 2019 (6), 12 213 240 and Forssén 2011 pp. 280 and 281.
[661] See Forssén 2011 pp. 280-282, where I am commenting Rendahl 2009 in the present respect. Compare also Forssén 2019 (6), 12 213 240.
[662] See Forssén 2011 p. 281. Compare also Forssén 2019 (6), 12 213 240.
[663] Compare Forssén 2011 pp. 281, 285 and 286. Compare also Forssén 2019 (6), 12 213 240.
[664] Compare for selection of countries outside the EU pp. 280-287 in Forssén 2011, where both English-language and non-English-language countries outside the EU are mentioned. Compare also Forssén 2019 (6), 12 213 240.
[665] See Rendahl 2009 p. 187. Compare also Forssén 2019 (5), sec. 3.9.2.3 and Forssén 2019 (6), 12 213 240.
[666] See Forssén 2019 (6), 12 213 240. Compare also Forssén 2019 (6), 12 201 031, 12 211 110 and 12 213 164.

> that nearly three quarters of the world's countries have VAT.[667] Rendahl 2009 just states that it is only the US amongst the OECD countries that does not have "a form of value added tax".[668] That is, for a comparative analysis of the EU law, an information of questionable value.[669]

The comparison with countries outside the EU that have gross taxes (Sw., *bruttoskatter*), like *sales tax* in the US, has not only a value for giving an effect of contrast for the analysis of the VAT according to the EU law, but also for the development of an EU tax.[670] The EU project will, in my opinion, demand that the work to introduce some kind of EU tax is resumed. That will probably be a gross tax, since a competing VAT-like tax must not exist.[671] The EU Commission recommended already in 2004 the introduction of an EU tax and urged the EU Council to work with the issue, but so far the EU lacks such an own right of taxation that an EU tax would mean.[672] What would give a in my opinion negative evolution as well on a national level as on the EU level of above all the corporate taxation, would be the introduction of a Financial Transaction Tax (FTT) which certain other EU countries than Sweden plan to introduce.[673] Such a tax on financial transactions would, insofar as it would be expected to replace or complete the corporate taxation, be counterproductive in relationship to a fundamental idea for the VAT meaning that it shall comprise transactions regarding goods and services. In the same way as it would have a negative influence on monetary policy and finance policy to allow bitcoins without registration by the FI,[674] would, in my opinion, an introduction of FTT rather fast make it impossible to conduct a finance policy that comprises the corporate taxation, since charging of tax and collection of tax regarding FTT only would have an indirect connection to the production of goods and other services than financial services. An economical-political focus should, in accordance with what is mentioned above, instead be set on making both monetary policy and finance policy functioning.[675]

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[667] See Forssén 2011 pp. 279ff. Compare also Forssén 2019 (6), 12 213 240.
[668] See Rendahl 2009 p. 3. Compare also Forssén 2019 (6), 12 213 240.
[669] Compare also Forssén 2019 (6), 12 213 240.
[670] Compare Forssén 2019 (6), 12 201 010 and 12 213 240.
[671] The latter follows by art. 401 of the VAT Directive (2006/112). Compare also Forssén 2019 (1), sec. 2.4.1.4 and Forssén 2019 (6), 12 213 240.
[672] Compare the weekly letter from the EU representation in Brussels no. 30, 2004 (Sw., *Veckobrevet från EU-representationen i Bryssel vecka 30 år 2004*), www.regeringen.se. Compare also Forssén 2011 pp. 269 and 328 and Forssén 2019 (1), sec. 1.2.3 and Forssén 2019 (6), 12 213 240.
[673] Compare Forssén 2019 (6), 12 213 235 and 12 213 240 and Part E, Ch. 3.
[674] See Forssén 2019 (5), sec. 3.5.3. Compare also Forssén 2019 (6), 12 213 153 and 12 213 240.
[675] Compare also Forssén 2019 (6), 12 213 240.

In the field of indirect taxes, i.e. in the first place VAT, excise duties and customs, should also customs law be set high on the agenda for research efforts. That subject should be of interest with respect of a future introduction of the free trade agreement between the US and the EU, i.e. the TTIP-treaty, although I – on my question what the situation is thereby – got the following answer from the EU Commission on the 28th of April 2016: *It will take years before a TTIP-treaty would come into force* (Sw., *Det dröjer år innan ett TTIP-avtal skulle träda ikraft*).[676]

A research effort in the field of customs should be considered of interest for a more holistic harmonisation in the field of the indirect taxes, since Moëll 1996 may be considered obsolete today and therein was stated that *it would hardly be possible or even meaningful to establish a for all legal fields uniform goods concept. One should instead continue with determining the concept's meaning sector for sector based on the actual legal act* (Sw., "*det torde […] knappast vara möjligt eller ens meningsfullt att fastställa ett för alla rättsområden enhetligt varubegrepp. Man bör i stället fortsätta med att bestämma begreppets innebörd områdesvis utifrån den aktuella rättsakten*".[677] That attitude by researchers is not to the benefit of the EU project. I consider that precisely due to a comprehensive work is to be expected regarding the TTIP-treaty should it be combined with efforts meaning that at least within the field of indirect taxes simplifications being made by e.g. an introduction of a common goods concept. That is in my opinion more important than that the vast debate about income tax and the OECD project on BEPS (Base Erosion and Profit Shifting) being further stimulated.[678]

Above all I see the indirect taxes as law fields to further build upon to, in accordance with the above mentioned, prepare an introduction of an EU tax – probably in the form of a gross tax like the excise duties.[679] In fact it is important with an international work against aggressive international tax planning, like what is done in the OECD within the frame of BEPS and within the EU, but I consider in the first place, in accordance with the above mentioned, that the EU project about an introduction of an EU tax should be resumed.[680] Therefore should in my opinion the indirect taxes have priority in the work with the making of tax laws and within the tax law research, so that an introduction of an EU tax can be

[676] Compare also Forssén 2019 (6), 12 201 010. Furthermore has the situation become seemingly more troublesome for a TTIP-treaty being realized due to the new administration in Washington, D.C. after the 2016 presidential election in the US.
[677] See Moëll 1996 p. 41. Compare also Forssén 2019 (6), 12 201 010.
[678] See e.g. Wiman et al. 2016 p. 91. Compare also Forssén 2019 (6), 12 201 010.
[679] Compare also Forssén 2019 (6), 12 201 010 and 12 213 240.
[680] Compare also Forssén 2019 (6), 12 201 010 and 12 213 240.

prepared. It would, in my opinion, mean that it will be a for the EU project favourable priority of the harmonisation of the EU countries' legislations about indirect taxes and fees which, according to art. 113 TEUF, shall guarantee that the internal market is established and functioning and accomplish that competition distortion is avoided. Those aspects have probably, in my opinion, not become less important by the outcome of the referendum in Great Britain on the 23rd of June 2016 meaning a resulting British exit from the EU – the so-called Brexit.[681] Research efforts especially within customs law should be of interest not just due to the work with the TTIP-treaty, but also due to *tullagen (2016:253)* and the UCC, which cane into force on the 1st of May 2016.[682] From Moëll 1996 can an informative review be obtained of linguistic variations regarding the concept goods (Sw., *varor*), whereby I note that Moëll 1996 seems to express, like in my own opinion, that the English for the word *goods* consistently uses the plural form, wheras e.g. *product* or *article* can be used as singular form.[683] There is – to my knowledge – concerning the noun *goods* no such singular form – "good" – as is used in Henkow 2008.[684]

See more about the continuation of my research project in Ch. 4.

[681] Compare also Forssén 2019 (6), 12 201 010 and 12 213 240.
[682] Compare sec. 3.8.2 and Forssén 2019 (6), 12 201 010,12 201 024, 12 201 034, 12 213 164 and 21 112 000.
[683] See Moëll 1996 pp. 39 and 40. Regarding the *product* (Eng.) is in Moëll 1996 (p. 39) furthermore a comparison made with *produkt* (Sw.) insofar as that concept like the goods concept is not a uniform concept, whereby a reference inter alia is made to *produktansvarslagen (1992:18)* [Eng., the product liability act] and *produktsäkerhetslagen (1988:1604)* – replaced by *produktsäkerhetslagen (2004:451)* [Eng., the product safety act]. Compare also Forssén 2019 (7) and Forssén 2019 (6), 12 201 010.
[684] See Henkow 2008 pp. 50, 211 and 264. Compare also Forssén 2019 (6), 12 201 010.

# 4. COMMENTS OF THE CONCLUDING VIEWPOINTS FROM 2016 (1) IN RELATIONSHIP TO SOME QUESTIONS IN PART A AND MORE ABOUT THE CONTINUATION OF THE RESEARCH PROJECT

I mention in Ch. 1 that I present in Ch:s 2 and 3 the summary and concluding viewpoints from *Ord och kontext i EU-skatterätten: En analys av svensk moms i ett law and language-perspektiv* [Forssén 2019 (5)]. There I have made suggestions about how research on law and language issues concerning tax law may be conducted regarding The Making of Tax Laws. I also mention in Ch. 1 that I comment in this Chapter those conclusions in relation to some questions in Part A, which I do as follows.

In sec:s 3.1 and 3.8.1 I refer to Part A and that I have suggested alterations concerning systematics regarding the process of The Making of Tax Laws, where corporate taxation is concerned, i.e. taxation that comprise entrepreneurs. The aim is to minimize the risk that there will emerge distortions between the legislator's purpose with a tax rule and how it can be perceived by anyone conducting application of the law (*communication distortions*), i.e. by the SKV, the courts and the tax subject, i.e. the entrepreneur.[685]

Forssén 2019 (5) is, as mentioned in Ch. 1, my suggestion of how to do, by an empirical method, a thesis on the topic of the process of The Making of Tax Laws. Forssén 2019 (5) forms together with the text- and handbook *Momsrullan IV: En handbok för praktiker och forskare* [Forssén 2019 (6)] and *Momsreform II: Förslag för Sverige, EU och forskningen* (Eng., VAT reform II: Suggestions for Sweden, the EU and research) [Cit. Forssén 2019 (8)]. From Forssén 2019 (6) I have got examples for the analysis in Forssén 2019 (5), and by that analysis I have been able both to present in Forssén 2019 (8) issues suitable for a VAT reform in Sweden and to confirm in this annex the assumption in Part A that there is a need for systematic alterations of the process of The Making of Tax Laws, where the aim should be to find ways to put the entrepreneur in the centre of the process of The Making of Tax Laws.

In the recently mentioned respect I state that I make, in Part D, concerning the law and language-perspective on the process of The Making of Tax Laws, the main concluding viewpoint that it is important

[685] See also Part A, sec. 2.4.

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 in the first place the interest of entrepreneurs is concerned. Thereby I have suggested 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.[686]

In sec. 3.8.1 I conclude that my analysis in Forssén 2019 (5), of Swedish VAT in a law and language-perspective, has shown so vast lacks on the theme words and context in the process of The Making of Tax Laws that the legislator must be considered disregarding that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material, formal and certain procedure questions about VAT: the national, with the ML and the SFL, and from the EU law – in the first place – the VAT Directive (2006/112). By the review in Forssén 2019 (5) with examples of *obscurities on behalf of the legislator regarding the theme of words and context in the EU law where the VAT rules are concerned*, I consider that I have proven that there are lacks in the process of The Making of Tax Laws in the following situations: to identify historical problems reoccurring in the field of VAT; to identify problems regarding the VAT rules' relationship to other taxes and fees; and – above all – to discover the existence of or risk of development of an *actual current law* – developed or risking to be developed by the SKV's handbooks on VAT or so-called standpoints on the subject – beside *current law in a true sense* and, as mentioned, to regard that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law in e.g. the field of VAT. Those lacks are in my opinion attached to both the legislator and the Council on Legislation, which I also mention especially concerning the Council on Legislation in sec. 3.8.2.

In the latter respect I may repeat that one way to put the entrepreneur in the centre of the process of The Making of Tax Laws would be to alter that process along with an installation of a second chamber in the Swedish Parliament, so that the entrepreneurs' organizations will be represented in the second chamber.[687] I have also mentioned that my suggestions about the parliamentary system and how it should work concerning e.g. the tax legislation procedure are only in principle, and that there are of course 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, as mentioned, be a steering

[686] See Part D, sec. 4.2.
[687] See Part A, sec. 2.4 and also sec:s 3.1 and 3.8.1 in this book.

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. However, one conclusion of mine based on the analysis in Forssén 2019 (5) is, as mentioned in sec. 3.8.2, that, due to the Council on Legislation not reacting on the examples of lacks in the process of The Making of Tax Laws that I have reviewed in Forssén 2019 (5), the Council on Legislation is not any guarantor for observing legal certainties in the process of The Making of Tax Laws, at least not where VAT is concerned. Thus, I also consider that the Council on Legislation will neither be useful as such a steering committee as recently mentioned. In my opinion the Council on Legislation, at least in its present form and practice, should be removed from the process of The Making of Tax Laws concerning corporate taxation altogether, regardless of whether my suggested reform of that process will be made. Thus, I state – like in sec. 3.8.2 – that the Council on Legislation has played out its role in the process of The Making of Tax Laws. If the Council on Legislation cannot – as I have proved – effectively contribute to The Making of functioning tax rules by identifying risks of *communication distortions* in Tax Laws created by the legislator, there is in my opinion neither any idea to have a Council on Legislation trying e.g. the principle of prohibition of retroactive tax legislation in Ch. 2 sec. 10 second para. RF 1974 concerning corporate taxation rules – i.e. concerning e.g. VAT rules – proposed by the legislator.

The scope and character of the lacks mentioned form, as mentioned in sec. 3.8.1, in other words already with respect of the analysis in Forssén 2019 (5) a basis for that the entrepreneurs should, from a democracy perspective regarding power and right, demand a radical alteration of the process of The Making of Tax Laws. This alteration should in my opinion mean that the entrepreneurs would get the power over the words and concepts used in rules on VAT. Then must the entrepreneur not only be placed in the centre of the process of The Making of Tax Laws concerning VAT, but also be involved in the actual process, so that representatives of the entrepreneurs' organizations can participate in it.

Thus, by the confirmation I make in this annex – based on the summary and concluding viewpoints in Forssén 2019 (5) – that the assumption in Part A of a need for systematic alterations of the process of The Making of Tax Laws, and that the aim thereby should be to find ways to put the entrepreneur in the centre of the process of the making of tax laws, were justified assumptions, I will probably continue the research project as described in sec. 3.8.3, namely as follows:

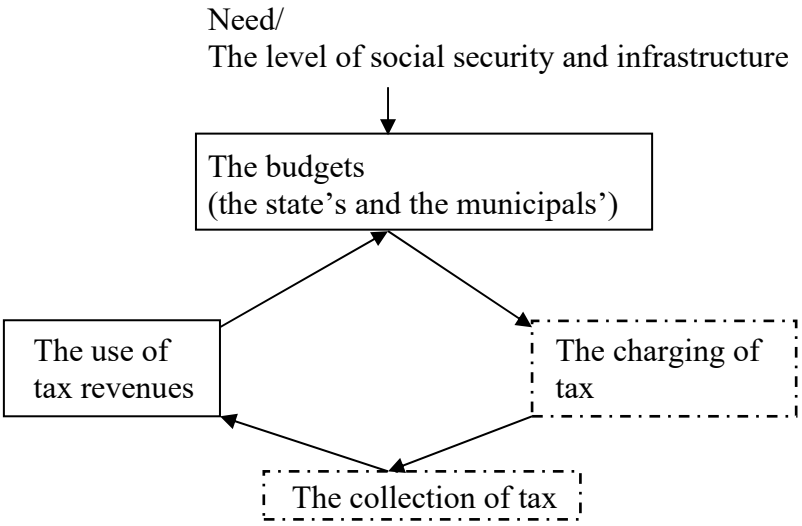
- I continue with the law and language-perspective on the process of The Making of Tax Laws by working on ideas about using

algorithms for analysis models to discover risks for *communication distortions*, i.e. will further develop Part D; and

- I will probably do so after or during that I have continued with *Användningen av skattemedel* (Eng., the use of tax revenues), i.e. after or during developing Part E by an empirical study of in the first place the use of tax revenues within the field of social care.

By those two directions of the further research I am aiming to tie together in *the big picture of the tax system* (see the figure below) the making of The budgets (for the purpose of the charging of tax) with The use of tax revenues, i.e. with cost analyses by hospitals, schools and other public financed activities – like social care.

The big picture of the tax system[688]




Thus, the project is supposed to continue with an empirical study of The use of tax revenues within tax funded activities – in the first place within social care. Parallel with this Part E or thereafter will probably, to develop Part D, a study follow of method issues based on feedback from that empirical study to the processes of making budgets and tax tables and improving collection, and algorithms are mentioned in Part D to make tools for method development.

My planned study to develop Part E will be made from a Swedish horizon, i.e. the topic of The use of tax revenues will be analysed with regard of its coverage of public expenses for the benefit of the need of

[688] The figure is from Part E, Ch.2.

social security and investments in infrastructure and similar matters in Sweden. The study in this respect will in a first stage, as mentioned, be limited to issues within the field of care, more precisely care of the elderly in the Swedish population. The purpose is to find out to what extent and how the tax system as a whole could be improved by the results of this study giving tools to evaluate the need of public funding by taxes of the care of the elderly, and thereby also giving feedback to improve other parts of The big picture of the tax system. By in this way tuning the tax system as a whole will efficiency gains are not unlikely to emerge regarding The collection of tax and lead to dynamic effects which can curb an eventual necessity to raise The charging of tax.

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