# Law and Language on The Making of Tax Laws and Words and context – with Legal Semiotics

Fourth edition

by Björn Forssén

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# PREFACE

*Law and Language on The Making of Tax Laws and Words and context – with Legal Semiotics: Fourth edition* is primarily a continuation of my planned research project within the field of fiscal sociology and thereby of the law and language issues in my book *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law*, where by the way the making of tax laws is not to be confused with the making of tax law. With my planned research project, I aim to analyse such issues as *the use of tax revenues*.

I distinguish fiscal sociology from sociology of law, but, although I consider The Making of Tax Laws a branch of fiscal sociology, I deem of course the law and language perspective on that topic also a topic within sociology of law. Research on tax law in Sweden is traditionally made by law dogmatic studies. When doing the research on The Making of Tax Laws, I conduct instead empirical studies, which regarding the law and language issues in the first place concern the process of The Making of Tax Laws. Thereby the underlying issue concerns *how* – what I mention – communication distortions occur between the legislator's intentions with a tax rule and the perception of the rule by those applying it.

Amongst other things, I refer in this book to conclusions that I make concerning the topic of words and context in the EU tax law in my book *Ord och kontext i EU-skatterätten – En analys av svensk moms i ett law and language-perspektiv*. In the end of this book, I suggest the use of Legal Semiotics (the Semiotics of Law) as a method to conduct empirical studies of VAT (value added tax) law.

Stockholm in November 2019
*Björn Forssén*

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# ABBREVIATIONS

Alt., alternative
art., article
B, criminal case (Sw., brottmål)
BEPS, Base Erosion and Profit Shifting
BFL, *bokföringslagen* (1999:1078) – the Swedish Book-keeping Act
BKA, Book-keeping Act
C, curia (about the CJEU)
Ch., chapter
Cit., citation, cited
CJEU, Court of Justice of the EU
CTP, Code of Taxation Procedure
dnr, *diarienummer* – register number
EC, European Community
ECHR, European Convention of Human Rights
ECLI, European Case Law Identifier
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 förvaltningsdomstolen* – the Supreme Administrative Court (also the HFD's yearbook)
HST, harmonized sales tax
i.e., id est, that is
IL, *inkomstskattelagen* (1999:1229) – the Swedish income tax act
Im, *indirekt skatt mervärdesskatt* (indirect tax VAT)
IRSL2018, The 19th International Roundtable for the Semiotics of Law
IT, information technology
ITA, Income Tax Act
LFT, Logic Function Tree
LSt Stockholm, *Länsstyrelsen i Stockholms län* (i.e. the County Administrative Board of Stockholm)
MF, *mervärdesskatteförordningen* (1994:223) – the Swedish VAT regulation
ML, *mervärdesskattelagen* (1994:200) – the Swedish VAT act [VATA 1994]
Moms, abbreviation of *mervärdesskatt* (compare: VAT)
NAFTA, North American Free Trade Agreement
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
POTB, passing on the tax burden
prop., *Regeringens proposition* – Government bill
ref., report case
RF, *regeringsformen (1974:152)* [one of the Swedish constitutional laws]
RSV, *Riksskatteverket* (nowadays the SKV)
RÅ, *Regeringsrättens årsbok* (from 2011 HFD)
SAC, the Supreme Administrative Court
SBL, *skattebetalningslagen* (1997:483) – replaced by the SFL
SC, Swedish Constitution
SE, Sweden
sec., section
sen., sentence
SFF, *skatteförfarandeförordningen* (2011:1261) – the regulation of taxation procedure
SFL, *skatteförfarandelagen* (2011:1244) – the Code of Taxation Procedure
SFS, *svensk författningssamling*, Swedish Code of Statutes
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
TEU, Treaty of European Union
TFEU, Treaty on the Functioning of the EU
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
URL, *upphovsrättslagen (1960:729)* – the Swedish copyright act
US, United States; USA, United States of America)
v., versus
VAT, value added tax (*mervärdesskatt*)
VATA, Value Added Tax Act
www, world wide web

# OVERVIEW OF THIS BOOK AND ITS BACKGROUND

As mentioned in the preface, this book is mainly a merger of two previous books, namely:

- *The Making of Tax Laws – Law and Language issues*

  and

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

They form in this book its Part I and Part II respectively and in the above-mentioned order. Below I give you some background to parts I and II.

In Part III you find, as also mentioned in the preface, my suggestion on using Legal Semiotics (the Semiotics of Law) as a method to conduct empirical studies of VAT (value added tax) law. I chose the topic of VAT law, since I can use an example from my doctor's thesis to show how to use that method instead of the Swedish tradition of law dogmatic studies where tax law research is concerned. In my doctor's thesis from 2013, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier*, which I by the way, from a later edition, have translated into English, i.e. *Tax and payment liability to VAT in joint ventures and shipping partnerships*, I focused on issues about the tax subject. However, I also mentioned, as a contrast thereto, an issue about the tax object. I believe it is in that respect you find the most methodical use of Legal Semiotics, independently or for the purpose of supporting a law dogmatic study, when analysing tax law.

Before parts I and II you find a paper on the topic of The Making of Tax Laws: *The Entrepreneur and the Making of Tax Laws: An introduction of a new branch of Fiscal Sociology*. Part III consists of an abstract and a paper about the topic *On signs of tax crime in an artistic environment*.

After parts I and II you find an Epilogue, which contains something about the present stage of my research project on the topic of The Making of Tax Law***s*** (not to be confused with the making of tax law) and about planning of a continuation of the project.

The background to Part I is the following:

- The main book of my fiscal sociology-project concerning, as a branch within the field of fiscal sociology, the topic of The Making of Tax Laws is the above-mentioned *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law*.[1] Therein I have mentioned in parts A-C that the topic of The Making of Tax Laws borders e.g. the disciplines linguistics and pedagogy.[2]

- Part D of Forssén 2019 (1) also forms Part I of this book. Therein 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 connects mainly to Part B in Forssén 2019 (1) and concerns linguistics and pedagogy with respect of the topic law and language. Thus, in this part 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 Forssén 2019 (1).

The background to Part II is the following:

- Inspired by my work with previous editions of this book I made an empirical study of the process of the making of tax laws from a Swedish and EU perspective, which I in 2016 presented in *Ord och kontext i EU-skatterätten – En analys av svensk moms i ett law and language-perspektiv*, i.e. in the first edition of that book.[3] In the end of its second edition of 2017, I added a translation into English of the summary and concluding viewpoints from Ch. 5 of the first edition, which forms Ch:s 2 and 3 of Part II of this book.

- Thus, in this part I suggest how research on law and language issues concerning tax law may be conducted regarding The Making of Tax Laws as a branch within the field of fiscal sociology. That suggestion corresponds with Ch. 5 of Forssén 2019 (2) and occurs, as above-mentioned, in translation into English in the end of that book and also in the main book of my fiscal sociology-project, Forssén 2019 (1), added as *Annex No. 1 to Part D*. In the end of Forssén 2019 (2) I added a paper on the topic of The Making of Tax Laws: *The Entrepreneur and the Making of Tax Laws: An introduction of a new branch of Fiscal*

[1] Fourth edition, cit. Forssén 2019 (1).
[2] See Forssén 2019 (1): Part A, sec:s 1.2 and 4.2, Part B, sec. 1.3 and Part C, sec. 1.1.
[3] Third edition, cit. Forssén 2019 (2).

*Sociology*. To give the reader a perception of my project as a whole, I present that paper also in this book, before parts I and II. Thereby the reader gets an overview of parts A-E in Forssén 2019 (1) and an understanding of the context of Part D of that book, where my fiscal sociology-project is concerned, i.e. an understanding of the law and language perspective on the process of The Making of Tax Laws, which perspective is supposed to be developed further by this book.

- I also comment in Ch. 4 of this part the conclusions from Ch:s 2 and 3 in relation to some questions in Forssén 2019 (1). Thereby Part II makes a continuation to Part I as well as to Part D in Forssén 2019 (1).

- Together with Forssén 2019 (2) may Part II also be considered my suggestion of how to do, by an empirical method, a thesis on the topic of the process of The Making of Tax Laws from a law and language perspective.

- Forssén 2019 (2) may actually be considered a thesis on the topic of the process of The Making of Tax Laws, as a branch within the field of fiscal sociology. Thereby, I have for the empirical study of communication distortions in the process of The Making of Tax Laws used my own experience – since 1985 – of tax matters in the following way. I made an inventory of such distortions by updating in 2016 the first edition of my VAT handbook, *Momsrullan*, which nowadays in its fourth edition has the title *Momsrullan IV: En handbok för praktiker och forskare*.[4] From that book I have got examples for the analysis in Forssén 2019 (2), and by that analysis I am able to present suggestions on altered value added tax rules on a national Swedish level and on an EU level, which I am doing in *Momsreform II: Förslag för Sverige, EU och forskningen*.[5]

[4] Cit. Forssén 2019 (3).
[5] Cit. Forssén 2019 (4).

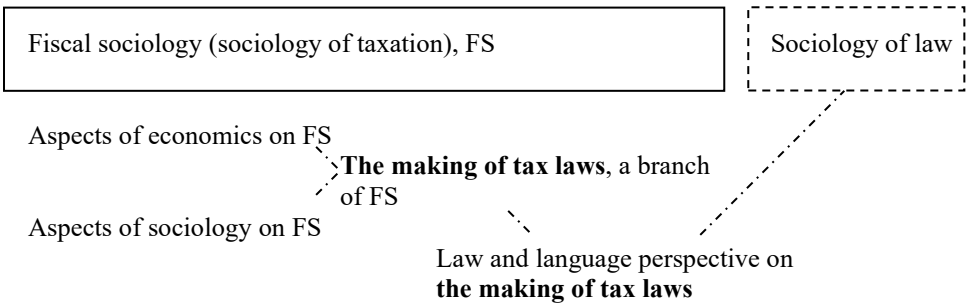
# *PAPER* – THE ENTREPRENEUR AND THE MAKING OF TAX LAWS: AN INTRODUCTION OF A NEW BRANCH OF FISCAL SOCIOLOGY

*The topic of this paper is fiscal sociology or, as it is also called, the sociology of taxation. It is restricted to the making of tax law**s** (not to be confused with the making of tax law). The focus is set on issues regarding tax rules as tools used by the legislator to convey the intended taxation to entrepreneurs. I have published The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Fourth edition.*[6] *In the first edition I mentioned the following main issues in parts A-C, namely:*

- how *a communication distortion may occur with respect of the legislator's intention of taxation being able to misconstrue;*
- *what can be done in a systematic sense concerning the making of tax laws to avoid the emergence of such communication distortions;*
- *what consequences may occur if they are not.*

*I completed my fiscal sociology project with a second and a third edition, where I firstly added a Part D with aspects on linguistics and pedagogy to the process of the making of tax laws, and also a Part E mentioning something about aspects of economics and sociology, and secondly I added, as above-mentioned, an annex to Part D.*

*Thus, by Forssén 2019 (1) I am presenting a new perspective on the subject of fiscal sociology, i.e. a new branch of fiscal sociology, not a subject in its own right and neither a subfield to fiscal sociology. 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):*




[6] Forssén 2019 (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.*

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

In this paper I present the topic of the making of tax laws by giving short overviews of parts A-E in my book: firstly parts A-C and secondly of parts D-E. There is also an Epilogue after parts A-C, where I make some remarks tying the conclusions about the consequences mentioned in Part C together with those in parts A and B. Furthermore, I continuously make suggestions on research efforts. In the INTRODUCTION I thereby refer to: Part A, sections 1.1, 3.2.2, 3.3.1, 3.3.2 and 4.2; Part B, sections 3.2.1 and 4.2; the Epilogue to parts A-C; Part C, section 3.2; Part D, section 4.2; and Part E, Chapter 3.

***Parts A-C***

**Background to the topic of the making of tax laws**

The term fiscal sociology was coined by the Austrian economist Rudolf Goldscheid in the course of a controversy with another Austrian economist, Joseph Schumpeter, regarding the treatment of Austrian public debt after World War I and the dissolution of the Austro-Hungarian Empire.[7] Already in 1918 Schumpeter argued that an area he called fiscal sociology had great promise. However, fiscal sociology declined and for much of the twentieth century most historians, sociologists, legal scholars and political scientists did not ask questions about the social or institutional roots or consequences of taxation, since they had surrendered the study of public finance to economists, who neither asked those questions since they had surrendered the study of them to sociologists and other social scientists.[8]

In The New Fiscal Sociology: Taxation in Comparative and Historical Perspective from 2009 fiscal sociology is mentioned as growing rapidly and being on the verge of a renaissance.[9] However, knowingly no

[7] See Wagner 2007, p. 180, and also Martin, Mehrotra & Prasad 2009, p. 2.
[8] See Martin, Mehrotra & Prasad 2009, p. 6, and also Jacobs & Waldman 1983, p. 550.
[9] See Martin, Mehrotra & Prasad 2009, p. 26; and Campbell 2009, p. 256.

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. By this paper the ambition is to introduce this as a branch of fiscal sociology.

**The making of tax laws – a branch of fiscal sociology, not a subject in its own right but neither just a subfield to fiscal sociology**

Taxation should in general be appraised as a method of financing government, i.e. a tool of public finance. The modern viewpoint is that the concept of taxation is the inseparable twin of the modern state covering both the sphere of public finance and the sphere of sociology, i.e. the evolvement of the subject of the sociology of taxation.[10] Fiscal sociology is synonymous with the sociology of taxation, and spans over a number of fields, e.g. economics and sociology. It was originally suggested as a science transcending increasingly narrow disciplines and uniting the study of economics with the study of history, politics and society.[11]

The making of tax laws introduced by my book is fiscal sociology restricted to issues regarding tax rules as tools used by the legislator to convey an intended taxation. The focus is set on market-based enterprises.[12] Thus, it is a matter of the legislator transmitting the intended taxation to the entrepreneurs. The making of tax laws could be deemed a subject in its own right, e.g. named sociology of tax laws, but to avoid confusion fiscal sociology or sociology of taxation is used in this paper and then restricted to the mentioned functioning of conveying the Government's intentions of taxation to the entrepreneurs. By that perspective it is a new branch of fiscal sociology and, as mentioned, not a subject in its own right but neither to be considered as just a subfield to fiscal sociology. The making of tax laws should instead be regarded as a bridge between aspects of economics and sociology on the fiscal sociology: In other words as a certain aspect on fiscal sociology fitting within the subject in the broader senses mentioned, e.g. regarding the use of tax revenues for social spending, which is considered a big deal concerning research efforts.[13]

Thus, further research efforts concerning the restricted aspects on the subject of fiscal sociology introduced by this paper, i.e. the making of tax laws, are of course of interest taken by itself. However, such

[10] See Mann 1943, p. 225.
[11] Martin, Mehrotra & Prasad 2009, p. 2.
[12] See Wagner 2007, p. 19.
[13] See Martin, Mehrotra & Prasad 2009, p. 26.

research efforts 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 can become input for researchers or politicians to work on adjustments of e.g. the Swedish tax system or to start on a new footing by revising it altogether.

**Issues regarding the making of tax laws**

The making of tax laws as a matter of conveying the Government's intended taxation to the entrepreneurs raises a number of issues and the following may be considered main issues in that respect. It is not necessarily a question of interpretation of the tax rules for the purpose of establishing current law, rather a matter of handling communication distortions regarding the taxation intended by the legislator, one main issue concerning the present restricted aspects on fiscal sociology is *how* such a communication distortion in the meaning of possible misinterpretation may occur. Other main issues in the present sense of fiscal sociology are for instance these questions: What can be done in a systematic sense concerning the making of tax laws to avoid the emergence of such communication distortions? What consequences may occur if they are not?

**A suggestion for developing the topic of the making of tax laws**

For the benefit of developing the making of tax laws as a bridge between aspects of economics and sociology on the fiscal sociology my book contains the three parts mentioned, i.e. issues (A) regarding systematic imperfections concerning the making of tax laws for entrepreneurs, (B) communication distortions in that respect between the legislator's intention and the perception of the tax laws and (C) consequences thereof for the entrepreneur.

Each one of the parts A-C are introduced by a history or background review and together they form a logical continuity on the topic of the making of tax laws. Part B and Part C are to a large extent based on the conclusions in my licentiate's dissertation in 2011[14] and doctor's thesis in 2013[15] at Örebro University, where I analysed some differences between the Swedish Value Added Tax Act 1994 and the EU's VAT Directive (2006/112/EC) regarding current law on the determination of the tax subject and the right to deduct input tax etc. and presented a couple of models – tools – to deal with such differences in practice. Thus, I had established in my theses differences concerning the legislator's making of some of the basic rules in the Value Added Tax

[14] Cit. Forssén 2011.
[15] Cit. Forssén 2013.

Act 1994 compared to the intentions by the VAT Directive (2006/112). Those differences may also be looked upon as communication distortions caused by the legislator failing to transmit properly the intended taxation to the entrepreneurs as tax subjects. Therefore, I am making the fiscal sociology reasoning on *how* such differences occur, why I in that respect name them communication distortions. However, concerning the issue on *how* a communication distortion in the present meaning may occur, it is, as mentioned, not necessarily a question of establishing current law by interpretation of case law. Communication distortions as such may be indicated by a number of other sources, e.g. by newspapers, various organizations' periodicals or the media at large etc.

**The main thread in parts A-C**

I am making as mentioned, on the topic of the making of tax laws, the fiscal sociology reasoning on *how* the communication distortions may occur. The main thread of parts A-C is to examine that issue with focus set on the entrepreneur's situation:

- In Part A, I am arguing for systematic changes regarding the making of tax laws specifically concerning the entrepreneurs: In short I am presenting arguments 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 him from the top-down by politicians.

- In Part B, I am giving 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 a taxation intended by the directive. I am suggesting models – tools – to handle those communication distortions, where I, as mentioned, refer to models from my theses of 2011 and 2013. Thereby, I am also influenced by pedagogy and so called problem-based learning.[16]

- In Part C, I am reviewing 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.

[16] 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.

**Suggestions for research efforts**

I am giving, as mentioned, 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 instead taxable person is used in the directive. However, there are more issues to deal with regarding the use of the concept tax liable and already my theses of 2011 and 2013 showed that there is a need of a more holistic reform of the Value Added Tax Act 1994 in that respect, which I have also pointed out in the latest edition of my doctor's thesis.[17] In Part C I am setting that focus concerning future issues on the Swedish tax system's relationship to the EU law on VAT on the following questions:

- Would 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 promote the principle of legal certainty? I am raising this question with regard of the individual's rights, and the principles of neutrality of taxation and efficient tax collection, including control.

- Would research on the tax laws as tools of effective communication between the legislator and the individual be of importance to avoid unnecessary difficulties for a future introduction of an EU-tax?

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,[18] 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.

Anyhow, I aim to continue to work with my project, assuming that the work must carry on making the Swedish tax system under existing EU law as legally certain as possible. 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

[17] Cit. Forssén 2019 (5).
[18] See Nergelius 2009, p. 58.

also be of interest concerning problems regarding the legislator conveying the intentions behind a tax rule. Russia is one example of interest in that respect, since the 89 Russian Republics have tremendous difficulty to introduce a Financial Constitution and to raise taxes.[19]

***Parts D-E***

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

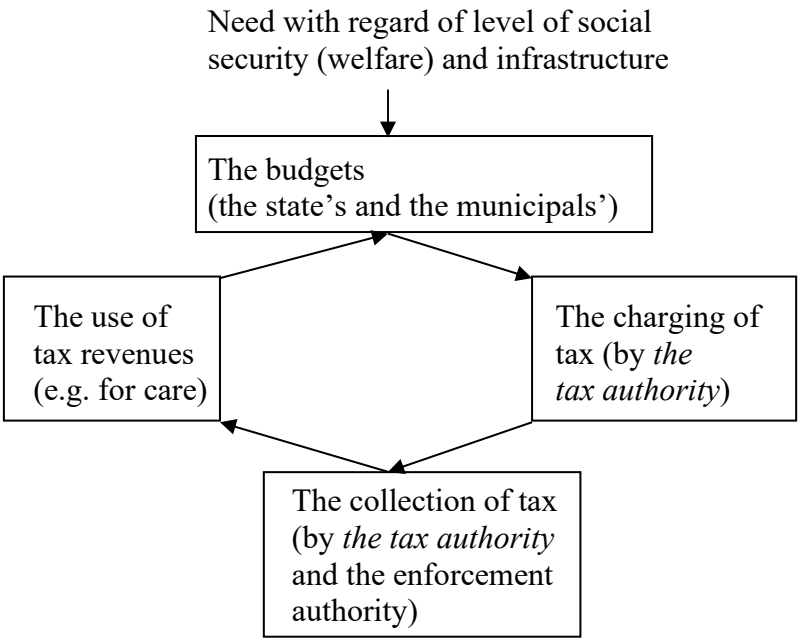
In Part D, I am reasoning from the linguistic law and language perspective about *why* a text containing a tax rule may make a poor tool to convey the intention of the legislator to the tax subject, e.g. to an entrepreneur. A resulting question is whether there is any pedagogy to support a decrease of 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.

**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, i.e. with regard of aspects of economics or sociology. Thereby I will analyse such issues as *the use of tax revenues*. I have also some ideas about how to go further with fiscal sociology studies by research on economics or sociology that may be influenced by the experiences regarding categories A-D of above. Concerning the above mentioned category D, I have already moved on during 2016 with empirical studies of the law and language perspective on The Making of Tax Laws, by *Ord och kontext i EU-skatterätten – En analys av svensk moms I ett law and language-perspektiv Andra upplagan*,[20] i.e. words and context in the EU tax law. I translated the summary and the concluding viewpoints of that book into English, and I have, as above-mentioned, added this as an annex to Part D in *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law*.[21]

[19] See Backhaus 2013, p. 337.
[20] Forssén 2019 (2).
[21] See Forssén 2019 (1).

In conclusion, by my presentation of The Making of Tax Laws I instigate to research on the tax system in a broader sense, i.e. the big picture. I illustrate this view on the tax system as a flow by this figure:




Thus, the big picture of the tax system, subject to the research I suggest, goes beyond the traditional approach to the tax subject of merely regarding the charging and collection of tax by *the tax authority*.

# PART I

The Making of Tax Laws – Law and Language issues

# 1. OUTLINE OF PART I

In the main book, *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Fourth edition*,[22] I have mentioned in parts A-C that the topic of The Making of Tax Laws borders e.g. the disciplines linguistics and pedagogy.[23] In part D of that book, which also forms this Part I of this book, 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 connects mainly to Part B in Forssén 2019 (1) and concerns linguistics and pedagogy with respect of the topic law and language. Thus, in this part I am, as previously mentioned, 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 Forssén 2019 (1).

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 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 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 sec:s: 3.1, Introduction; 3.2, Suggested models for detection of risks of communication distortions regarding the use of the concept tax

[22] Forssén 2019 (1).
[23] See Forssén 2019 (1): Part A, sec:s 1.2 and 4.2, Part B, sec. 1.3 and Part C, sec. 1.1.

liable instead of taxable person in the main rule on VAT deduction and in the representative rule (which I often refer to as the models);[24] 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 sec:s: 4.1, Summary; and 4.2, Concluding viewpoints.

[24] See sec. 3.2 and also Forssén 2019 (1): 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.[25] 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 the Swedish Constitution 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*.[26] 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".[27] That is important to remember when reading this 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 parts A-C of Forssén 2019 (1) have been about *how* communication distortions occur between the legislator's intentions with tax rules and the perception of them. However, in this 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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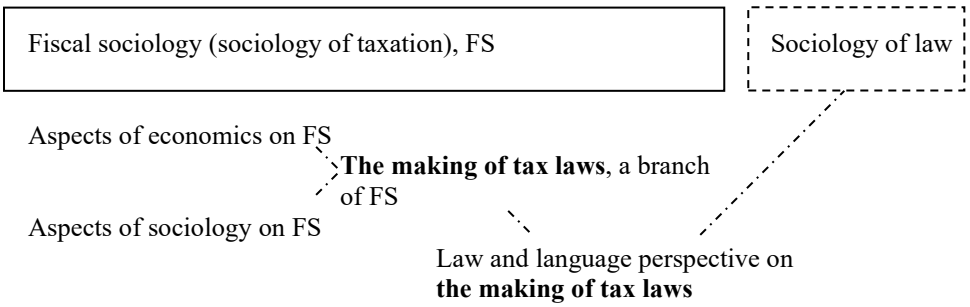
[25] Compare Ståhl et al. 2011, p. 41. See also Forssén 2011, p. 68.
[26] See Forssén 2019 (1): Part A, sec. 1.3.
[27] See Endicott 2014, sec. 2.1.

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 book leaves out questions about systematic imperfections concerning the making of tax laws [Part A of Forssén 2019 (1)] and consequences of communication distortions [Part C of Forssén 2019 (1)], but connects instead to Part B of Forssén 2019 (1), where I mention experiences of *how* communication distortions in the meaning of this book occur.

Forssén 2019 (1) is 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 book, 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.[28] By the figure below I elucidate the position of the making of tax laws in the respects mentioned:




[28] See Forslund 1978, p. 59. See about the law dogmatic method: Forssén 2019 (1) Part A, sec. 1.3.

In sec. 2.2 I am mentioning problems in general with the use of language in law and in sec. 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 Ch. 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 book still not a matter of any law dogmatic analysis of the current law meaning of a tax rule,[29] 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 sec. 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.[30]

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.[31]

Thus, as mentioned in the previous sec., laws are not linguistic acts, or even communicative acts. They are standards of behaviour that can be

[29] See Forssén 2019 (1): INTRODUCTION, concerning part B.
[30] See Endicott 2014, sec. 2.1.
[31] See Endicott 2014, sec. 2.1.

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.[32] I summarize those problems here and get back to it for comparison in the next sec.:

- 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".[33]

- 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

[32] See Endicott 2014, sec. 2.2. See also Charnock 2007, sec. 6.2.
[33] 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*.[34]

- 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.[35]

- 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.[36]

- 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 communicative act *using* the word (over which they disagreed):

[34] See Endicott 2014, sec. 2.2.
[35] See Endicott 2014, sec. 2.2.
[36] See Endicott 2014, sec. 2.2.

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.[37]

- 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.[38]

- 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.[39]

Although agreeing with Endicott 2014 in the senses recently mentioned, note that I am not emphazising interpretation of language when reasoning about fiscal sociology in the meaning of this book, i.e. when reasoning about *how* communication distortions occur between the

[37] See Endicott 2014, sec. 2.2.
[38] See Endicott 2014, sec. 2.2.
[39] See Endicott 2014, sec. 2.2.

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 sec. 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 Ch. 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 sec. and with some of the experiences mentioned in Part B of Forssén 2019 (1) about *how* communication distortions in the meaning of this book occur where the making of tax laws is concerned, I am reasoning in this sec. 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 sec. 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 would 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.[40] 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.[41]

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

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

- 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 of Forssén 2019 (1):

- 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 Ch.[42]

- 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 of Forssén 2019 (1) prove instead that the legislator is lacking where the *context of use* of words is concerned:

    - In my licentiate's dissertation 2011,[43] 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 art. 9(1) first para. of the VAT Directive (2006/112). This was resolved by the reform of the 1st of July 2013, but not, as mentioned in the fifth edition of my doctor's thesis,[44] with regard of the two side issues in my licentiate's dissertation, namely concerning the use in that act of the concept *tax liable* to

[42] See Forssén 2019 (1): Part B, Ch. 2.
[43] Forssén 2011.
[44] Forssén 2019 (5).

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.[45]

- 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 art. 9(1) first para. 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.[46]

- The first mentioned example from Part B of Forssén 2019 (1) 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 art. 168(a) of the VAT Directive into Ch. 8 sec. 3 first para. of the Value Added Tax Act 1994. The legislator should e.g. consider that an EU law rule – like art. 168(a) – must be placed in its context and interpreted in the light of the EU law as a whole.[47] 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 on who is a taxable person, art. 9(1) first para. of the VAT Directive, is supposed to have the fundamental function of

[45] See Forssén 2019 (1): Part B, sec. 2.2.
[46] See Forssén 2019 (1): Part B, sec. 2.3.2.
[47] See Prechal 2005, pp. 32 and 33 and van Doesum 2009, p. 20. See also Forssén 2019 (5), p. 76.

distinguishing the tax subjects, i.e. the entrepreneurs, from the consumers.[48] Thus, in both situations described by the two examples from Part B of Forssén 2019 (1) 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 of Forssén 2019 (1), 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.[49] This should preferably be made in the perspective of law and language mentioned in this book. 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 book on the *context of use* of words in the process of the making of tax laws and I am thereby considering matters of grammar etc. only as supporting issues in that process.

[48] See Forssén 2019 (1): Part B, sec. 2.3.2.
[49] See Forssén 2019 (1): Part A, sec. 3.3.1.

- 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. Ch. 4 sec. 1 of the Value Added Tax Act 1994 and art. 9(1) first para. 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 art. 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 art. 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 art. 9(1) first para. of the VAT Directive so that it would be clarified that the expression *any person who* in the art. comprises also non-legal persons, if they fulfil the prerequisites of taxable person in that art.[50] 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 art. 9(1) first para. of the VAT Directive (and implementation into Ch. 4 sec. 1 of the Value Added Tax Act 1994) would over time various, unforeseeable forms of figures conducting business be more likely to be covered by the concept taxable person.

[50] See Forssén 2019 (1): Part B, sec. 3.3.1.

- 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, art. 9(1) first para. of the VAT Directive, I suggest in Part B of Forssén 2019 (1) e.g. tools to handle cases of communication distortions regarding the representative rule and I will get back to those tools below in Ch. 3.[51] There I also mention some more situations regarding the compliance of the Value Added Tax Act 1994 with the EU law.

[51] See Forssén 2019 (1): 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 sec. 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 of Forssén 2019 (1) 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;[52] parsing is used in computer science,[53] 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.[54]

Thus, I refer problems to be resolved by parsing in the first place to the procedural law. Thereby, I am not saying that parsing would 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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[52] See www.merriam-webster.com/dictionary/parse.

[53] See Beal.

[54] 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.[55] Since they are built by using it,[56] 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 Ch. 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.[57] 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 of Forssén 2019 (1) mentioned in the previous sec. 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, Ch. 8 sec. 3 first para., and on the so called representative rule for VAT in *enkla bolag* (joint ventures) and *partrederier* (shipping partnerships), Ch. 6 sec. 2 of the Value Added Tax Act 1994 instead of the concept *taxable person* in art. 9(1) first para. of the VAT Directive (see below sec. 3.2).

In sec. 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, Ch. 7 sec. 1 first para. No. 3 of the Code of Taxation Procedure 2011;

[55] See e.g. Seipel 2010, pp. 197, 198 and 235.
[56] 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.
[57] See Forssén 2019 (1): Part A, sec. 1.3 and Part B, sec. 1.1.

2. the rule on so called intra-Union acquistions of goods, Ch. 2 a sec. 3 first para. No. 3 of the Value Added Tax Act 1994;

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

4. the special rule in Ch. 9 sec. 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 Ch. 6, Ch. 9 and Ch. 9c of the Value Added Tax Act 1994 (which follows by Ch. 1 sec. 2 last para.). These three cases are about tax liability beside the main rule, Ch. 1 sec. 1 first para. No. 1, to which the main rule on who is tax liable, Ch. 1 sec. 2 first para. No. 1, refers.[58]

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

In sec. 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.

### 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 sec:s 3.3.2.2 and 3.3.2.3 in Part B of Forssén 2019 (1) 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

[58] See also Forssén 2019 (1): Part B, sec. 2.3.2.

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 art. 1(2) of the VAT Directive, i.e. the VAT principle according to the EU law, presented in sec. 3.2.1 in Part B of Forssén 2019 (1) 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 rowspan="3">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 Ch. 1 sec. 1 first para. No. 1 and Ch. 8 sec. 3 first para. 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, Ch. 1 sec. 1 first para. No. 1, are conform with the corresponding main rules in that respect in the directive, i.e. with art:s 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, Ch. 8 sec. 3 first para., use the concept *tax liable* (tax liability), instead of taxable person as in the corresponding main rule of the directive, art. 168(a), which I mentioned as side issue D in my licentiate's dissertation and come back to below.

In e.g. sec. 3.3.2.3 in Part B of Forssén 2019 (1) 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, Ch. 6 sec. 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, Ch. 8 sec. 3 first para. 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 art. 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 art. 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 sec. 4.1 (Issue No.1) in Part B of Forssén 2019 (1) 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 Ch. 4 sec. 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 sec. 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, Ch. 6 sec. 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. Ch. 6 sec. 2 first sen., 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 Ch. 4 sec. 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. art. 9(1) first para., 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, art. 9(1) first para. 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 are 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.[59] Thus, that constitutional principle – of the Swedish Constitution 1974 – may limit also an EU conform interpretation of a national tax rule governed by EU law, since the CJEU has established that the Member States are not obliged to interpret the national law *contra legem*.[60] 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).[61] 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.

[59] See sec. 2.1 and Forssén 2019 (1): Part A, sec. 1.3.
[60] See para. 110 in *Adeneler et al*. (C-212/04). See also Forssén 2019 (1) Part A, sec. 1.3 and Forssén 2013, p. 38.
[61] See Forssén 2019 (6), sec. 10.4, which sec. – 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. Ch. 6 sec. 2 second sen., 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 of Forssén 2019 (1) 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 (Ch. 8 sec. 3 first para. 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 Ch. 7 sec. 1 first para. No. 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.

   - Ch. 7 sec. 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 art. 213 of the VAT Directive.[62]

   - Mainly for control reasons I argue in sec. 4.1 (Issue No.1) in Part B of Forssén 2019 (1) for the liability to register to VAT no longer connecting to the concept *tax liable* in Ch. 7 sec. 1 first para. No:s 3 and 4 of the Code of Taxation Procedure 2011.

[62] See Forssén 2019 (1): Part A, sec. 3.2.1.2.

- I compare with Figure 3 in the previous sec. 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 art. 213 using the concept *taxable person*, the concept *tax liable* in Ch. 7 sec. 1 first para. No:s 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, Ch. 2 a sec. 3 first para. No. 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 para. 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 Ch. 2 a sec. 3 first para. No. 3 and second para. of the Value Added Tax Act 1994 thereby getting an improved formal correspondence with art. 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 Ch. 2 a sec. 3 first para. No. 3 and second para. of the Value Added Tax Act 1994, if the problems had not been raised in the courts.[63] This is, as mentioned, particularly conspicuous when compared with the issue regarding the use of *tax liable* in the main rule on the right of deduction of VAT: Would the legislator also describe a future reformation of Ch. 8 sec. 3 first para. of the Value Added Tax Act 1994 in that respect merely as a formal improvement in relation to art. 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 Ch. 2 a sec. 3

[63] See Forssén 2019 (1) Part C, sec. 1.3, where I mention e.g. The Svea court of appeal's case B 1378-96 (29 May 1997) and a lecture I gave in 2001, Forssén 2001.

first para. No. 3 and second para. 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. Ch. 6 of the Value Added Tax Act 1994 there are more special rules which, like the mandatory part of the representative rule (Ch. 6 sec. 2 first sen.), 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. Ch. 6 sec. 7 and Ch. 6 sec. 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 too 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 art:s 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 [art. 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 [art. 28].

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

   - The special rule on tax liability for *6:7-cases* comprise the situations of art:s 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, Ch. 1 sec. 1 first para. No. 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 Ch. 6 sec. 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 sec. 2.4 of Part A of Forssén 2019 (1) – 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 of Forssén 2019 (1) – 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 sec. 2.4 of Part A of Forssén 2019 (1) 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.[64] 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.[65] 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.[66]

- 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 Ch. 6 sec. 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. Ch. 6 sec. 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.[67]

  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.[68] 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* (and *partrederier*) concerning the representative rule before my doctor's thesis.[69]

4. In sec. 3.3.1 of Part A of Forssén 2019 (1), I mention another special rule using the concept *tax liable* (tax liability) in the Value Added

[64] See Dictionary of Norstedts 1993, p. 776.
[65] See Forssén 2007 (1), pp. 276, 277 and 287.
[66] See Forssén 2007 (1), p. 277.
[67] See, for comparison with Ch. 6 sec. 2 and Ch. 6 sec. 7 of the VATA 1994, sec. 12 item 2 and the third para. first sen. of the instructions to sec. 12 of the *Kungl. Maj:ts förordning (1959:507) om allmän varuskatt*, which came into force in 1960.
[68] See Forssén 2019 (1): Part B, sec:s 3.3.2.3 and 4.1 (Issue No. 2).
[69] 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.

Tax Act 1994, Ch. 9 sec. 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 art:s 12 and 137(1)(d). The voluntary rule in art. 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 art:s 12 and 137(1)(d) of the VAT Directive for the existing Ch. 9 sec. 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.).[70]

- In this case the facultative rule art. 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 too far anyway, by opening for voluntary tax liability also for e.g. ordinary private persons, since the facultative rule art. 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 Ch. 9 sec. 1 of the Value Added Tax Act 1994 complying with the main rule on taxable person, art. 9(1) first para.; art. 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 art. 9(1) first para. of the VAT Directive and thereby not including others than taxable persons in that sense – not in the meaning of art. 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 Ch. 1 sec. 1 first para. No. 1 of the Value Added Tax Act 1994, and would perhaps have realized this by structuring the process of the making of tax laws by models like those represented by Figure 1 and Figure 3.

  Compare sec. 2.3, where I refer to procedural experiences in practice mentioned in sec. 3.3.1 in Part A of Forssén 2019 (1) 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 art. 12 as referring to the tax subject and art. 137(1)(d)

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

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 sec. 3.1).

- Thus, in my opinion, Ch. 9 sec. 1 is – as mentioned in Part A of Forssén 2019 (1) – 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 sec. 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.[71] In this sec. 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 of Forssén 2019 (1) I mention *Rompelman* (Case 268/83), whereby it was made *acte éclairé* by the CJEU – construing the predecessor to art. 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 taxable person in the main rule on the right of deduction in the Value Added Tax Act 1994, Ch. 8 sec. 3 first para., raise – as mentioned in sec. 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

[71] See Forssén 2007 (1), sec. 6.3.

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 art. 176 second para. 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, Ch. 8 sec. 9 first para. No. 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 Ch. 16 sec. 2 of the Income Tax Act 1999), Ch. 8 sec. 9 first para. 2; and

- acquisitions of passenger cars and motor cycles, Ch. 8 sec. 15 No. 1.

In *Ampafrance et al.* the CJEU considered that national French legislation was not EU conform, since therein, with support of art. 27(1) of Sixth Directive (77/388) – nowadays art. 395(1) of the VAT Directive – for avoidance of tax evasion and tax loss, exemption from the general right of deduction in art. 17 of the Sixth Directive – nowadays art. 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 art. 27 was made in comparison to art. 17(6) second para. of the Sixth Directive, nowadays art. 176 second para. 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 Ch. 8 sec. 9 first para. 2 of the Value Added Tax Act 1994 connecting to the income taxation (Ch. 16 sec. 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 sec. 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 sec. 3.2 and some of my remarks there about them and also to sec. 3.4.

"There are seven basic logic gates: AND, OR, XOR, NOT, NAND, NOR, and XNOR."[72] Models like those in sec. 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".[73]

**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 sec. 3.2).

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

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

- If a taxable person intends to make taxable or from taxation qualified exempted transactions (Input 1) OR has made such transactions (Input 2) the taxable person has the right to deduction/reimbursement of VAT on his acquisitions (Output).

[72] See The Electronics glossary.
[73] See The Electronics glossary.

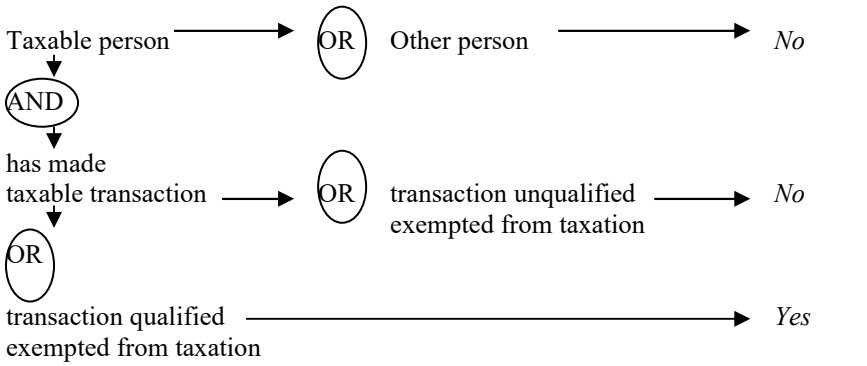
If both Inputs are false (0) the Output is false (0), i.e. no right to deduction/reimbursement. [Note the regard of CJEU case law by consideration of the mentioned intention.]

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.[74] Thereby I use, as mentioned, as nodes AND and OR functions, which gives the following LFT:s for Figure 3 and Figure 4:

LFT 1, Tax liability (main rule)

**Question**

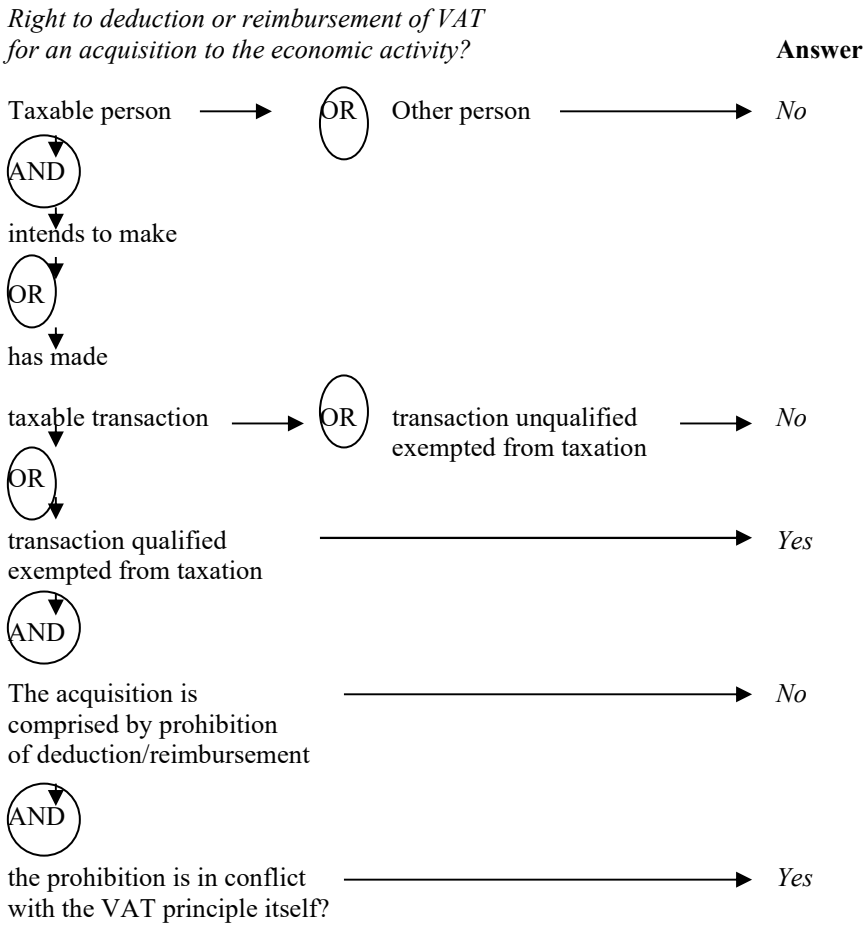
*Tax liability for VAT for a transaction?* **Answer**




[74] 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:[75]

- 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

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

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

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

### 3.6 Seriation as a supplementation to the models

Where law history is concerned for the process of the making of tax laws, I 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.[76] That rule has namely, as mentioned under item 3 in sec. 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.[77] 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.[78]

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

[76] See Lyles 2007, p. 74. See also Forssén 2019 (5), pp. 36 and 37.
[77] See Forssén 2019 (5), p. 37.
[78] See Forssén 2019 (5), p. 37.

interest, like with a law dogmatic analysis, but the motives which have given rise to the existence of the present rule.[79]

The case mentioned in sec. 2.2, *Garner v. Burr*, and my reflections, in sec. 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 book 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 of Forssén 2019 (1) 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 income tax act of 1928.[80] 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.[81] To get a special fiscal sociology concept for the relevant systematic purpose of the

[79] See Lyles 2007, pp. 79, 80 and 87.
[80] See Ch. 2 sec. 1 and sec. 24 ITA 1999.
[81] See Forssén 2019 (5), sec. 1.2.1. Compare also Forssén 2019 (1) Part A, sec:s 1.3 and 3.2.1.2; Forssén 2019 (1) Part B, sec:s 1.1, 1.3, 3.2.1 and 4.2; and sec:s 2.1, 2.2, item 4 in sec. 3.3 and sec. 3.4.

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

Thus, I propose *seriation* as a *supplementary mean* to the models – tools – that I 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.[82] Other and more complex examples can of course be made, and with the figure above I only want to make the point that it would benefit the process of the making of tax laws to introduce seriation as a special fiscal sociology concept which is distinguished from concepts within law history in general and law dogmatic. This is not a method in its own right, but a supplementation to the suggested models – tools – for improvement of the process of the making of tax laws and, if you like, in line with the law generic method. I 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.

[82] 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 Forssén 2019 (1) Part B, sec. 1.1.]

Based on the figure above I reason as follows about the aspects made previously, in sec. 3.2.1.2 in Part A of Forssén 2019 (1), 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 sec. 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 Ch. 7 sec. 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 sec. 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., Ch. 7 sec. 2 first para. 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.[83]

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

[83] See Forssén 2019 (5), p. 292.

It was not wrong of the legislator in a law historic perspective to look at the conditions for a farmer when making the reform of 2009. Farmers have been equal to entrepreneurs for income tax purposes since the Municipal income tax act of 1928 and since the income tax reform of 1990 the concept *person carrying on a business* or *entrepreneur* comprise e.g. the concept farmer. For VAT purposes this is also in line one of the necessary prerequisites for taxable person according to art. 9(1) first para. of the VAT Directive, namely the concept *economic activity* which according to art. 9(1) second para. 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.[84] This may be compared with the purpose of protection of public roads having changed to be more about protection of people today.

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

In conclusion, I propose seriation of tax concepts to bring out that continuous movement referred to about the law generic method also in the process of the making of tax laws; by seriation as a supplementation that process will probably become more living, which might not be the case if only e.g. the model represented by Figure 3 from sec. 3.2 or LFT 2 from sec. 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.

[84] 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).

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 Ch. 3 sec. 3 first para. No. 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 Ch. 4 sec. 1 No. 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 sec. 3.2.1.2 in Part A of Forssén 2019 (1)], 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.[85]

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 Ch. 3 sec. 3 first para. No. 5 of the Value Added Tax Act 1994 in 2014.

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

[85] See Forssén 2011, p. 213.

taxes called VAT, and the OECD also mention that their number includes countries with GST. I mention this in my licentiate's dissertation.[86] Thereby I also mention that the VAT principle according to art. 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 art. 1(2) of the VAT Directive which follow by legislations in countries outside the EU.[87]

### 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 sec. 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 sec. 3.5, may be used to make a software to support an audit of e.g. VAT problems in an enterprise or organization applying the Value Added Tax Act 1994. Such a software should, due to the limitations mentioned for the use of computer science in the present respect, aim to assist in finding the point of complexity that demands that the entrepreneur etc. go further by consulting tax consultants about the VAT problem at hand. In February 2005 I made such a checklist (program) for a VAT audit and I mention in short the main items here.

VAT audit by LGS-flow-analysis

*Purpose*

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

[86] 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).
[87] See Forssén 2011, pp. 71 and 279-297. See also Forssén 2019 (1): Part A, sec. 3.2.1. Regarding the VAT principle according to art. 1(2) of the VAT Directive: see sec. 3.2 and Forssén 2019 (1) Part B, sec. 3.2.1.

*Aim*

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

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

  - the past, the present and the future.

- The entrepreneur (or organization) can judge whether it 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 notifications being filed by the entrepreneur and the tax authority;
  - renegotiation and/or inserting a VAT clause in a contract, negotiate about invoicing in retrospect of VAT;
  - change invoicing routines; and
  - combinations of the above mentioned.

*Method*

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

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

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

> 2(1)(a) and art. 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.

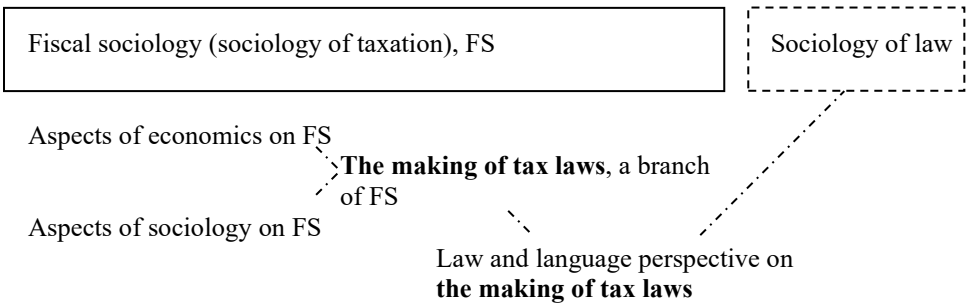
Thus, by processing some or all of the questions on the checklist, i.e. by carrying out the LGS-flow-analysis regarding various problems, the entrepreneur or the organization will get a preview of the VAT situation concerning the aspects subject to the VAT audit. If it is a rather simple VAT problem 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:[88]




The overall conclusion in this book 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 Ch. 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

[88] 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 this book in this sec. as follows and give some concluding viewpoints in the next sec.:

- This 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 book connects mainly to Part B of Forssén 2019 (1) 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 of Forssén 2019 (1).[89]

- Of importance for examining the topic in this book 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.[90]

    - Language has a context-dependence.[91]

- In sec. 2.3 I compare with the general aspects on the use of language in law mentioned in sec. 2.2 and with some of the experiences mentioned in Part B of Forssén 2019 (1) 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.

[89] See Ch. 1.
[90] See sec. 2.1.
[91] See sec. 2.2.

- I am not emphazising interpretation of language when reasoning about fiscal sociology in the meaning of this book, i.e. when reasoning about *how* communication distortions occur between the legislator's intentions with tax rules and the perception of them. It 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.[92]

- Thus, I reason in Ch. 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 sec. 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 Ch. 3 to models – tools – from Part B of Forssén 2019 (1) to detect such risks and try to develop them further.[93]

- I begin the work to develop the models with the models and issues from Part B of Forssén 2019 (1), i.e. concerning

[92] See sec:s 2.2 and 2.3.
[93] See sec. 3.1.

communication distortions regarding the use of the concept *tax liable* in the rules on the right of deduction, Ch. 8 sec. 3 first para., and on the so called representative rule for VAT in *enkla bolag* (approximately translated joint ventures) and *partrederier* (shipping partnerships), Ch. 6 sec. 2 of the Value Added Tax Act 1994 instead of the concept *taxable person* in art. 9(1) first para. of the VAT Directive.[94]

- 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*.[95]

- 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.[96]

- 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 sec. 3.2 and my remarks there and in sec. 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.[97]

- 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.[98]

- Finally, I suggest development of software based on the models adapted into LFT:s for the purpose of supporting tax audits or

[94] See sec. 3.2.
[95] See sec. 3.3.
[96] See sec. 3.4.
[97] See sec. 3.5.
[98] See sec. 3.6.

further refining the process of the making of tax laws for the 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.[99]

### 4.2 Concluding viewpoints

I restrict my concluding viewpoints about this book 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 Forssén 2019 (1) be regarded, i.e. parts A-C (including their Epilogue), where it should be noted that Part D, i.e. this book, mainly connects to Part B [of Forssén 2019 (1)]. Thus, from this book 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 art. 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,[100] 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

[99] See sec. 3.7.
[100] See sec:s 3.2 and 3.4.

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.

- 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).[101]

- 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.[102]

- 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 of Forssén 2019 (1). I have suggested a research effort to investigate legal uncertainties in relation to this phenomenon.[103]

- 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. Ch. 6 sec. 7 and Ch. 6 sec. 8. Thereby could my research about the representative rule in Ch. 6 sec. 2 be used by comparison, since those special rules can be said sharing a common history with the special rule Ch. 6 sec. 2. The problems about intermediaries and the VAT

[101] See sec. 3.4.
[102] See sec:s 3.5 and 4.1.
[103] See sec. 2.3 and Forssén 2019 (1): Part A, sec. 3.3.1.

are rather complex and for a proper approach could the ABCSTUXY-model illustrated by Figure 2 serve as an inspiration.[104] Regarding the use of the concept *tax liable* (tax liability) in yet another special rule, Ch. 9 sec. 1 of the Value Added Tax Act 1994, I mention for research purposes that both law dogmatic and fiscal sociology studies might be appropriate.[105]

- 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.[106] 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.[107] 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

[104] See sec. 3.3, item 3.
[105] See sec. 3.3, item 4.
[106] See sec. 3.6.
[107] See sec. 3.6.

> this calls for research about such connections to the Income Tax Act 1999 in relation to the EU's Excise Duty Directive (2008/118), where it follows by para:s 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 Ch. 4 sec. 1 No. 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. Ch. 1 sec. 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,[108] 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 of Forssén 2019 (1) on systematic changes of the process of the making of tax laws, where the interest of entrepreneurs is concerned; in this book 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

[108] See Forssén 2019 (7), sec:s 2.3 and 4.2. See also Forssén 2019 (8), p. 145.

reflected by the tools supporting it and susceptible to influences from e.g. the entrepreneur.

- 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.[109] By the way, the latter would – if done on the EU level too – provide well for the introduction of an EU tax.[110]

- 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 art. 9(1) first para. of the VAT Directive applies or should apply also to non legal entities such as *enkla bolag* and *partrederier*.[111]

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.[112] I suggest the development of software, like the LGS-flow-analysis described in sec. 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,[113] 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.[114]

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[109] See Forssén 2011, sec:s 2.2.5 and 8.2.
[110] Compare the Epilogue to parts A-C of Forssén 2019 (1), Forssén 2011, pp. 269, 327 and 328 and Forssén 2019 (5), sec. 1.2.3.
[111] See Forssén 2019 (1) Part A, sec. 3.2.1.2 and Forssén 2013, pp. 209 and 222 and PAPER, p. 47.
[112] See Forssén 2011, pp. 33, 79, 80, 81 and 176–181 and Forssén 2013, PAPER, p. 20.
[113] See Forssén 2019 (1): Part B, sec. 3.3.2.2.
[114] See sec. 3.1.

> 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 called original version and, if possible, with the language of the case.[115] 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,[116] 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).[117] 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 para. 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.[118]

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.[119] Thereby I remind too about previously mentioning Russia concerning research about difficulties to introduce a Financial Constitution and to raise taxes.[120]

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,[121] I come back to this in Part E of Forssén 2019 (1), where I mention e.g. how the experiences from parts A-D may affect or inspire

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[115] See Forssén 2011, p. 69 with references to Bernitz 2010 and to Mulders 2010.
[116] See Forssén 2011, p. 69.
[117] See Forssén 2019 (1): Part A, sec. 1.3; Part B, sec. 1.1; and Part C, sec. 1.1.
[118] See Forssén 2011, pp. 92, 93, 94, 247, 248 and 304.
[119] See sec. 3.6.
[120] See in that respect suggestions of research efforts also in the Epilogue to parts A-C of Forssén 2019 (1).
[121] See the Epilogue to parts A-C of Forssén 2019 (1).

studies of economics and sociology about the fiscal sociology. By the way, Part D, i.e. this book, should per se – at least to some extent – have an influence upon studies on sociology of law.

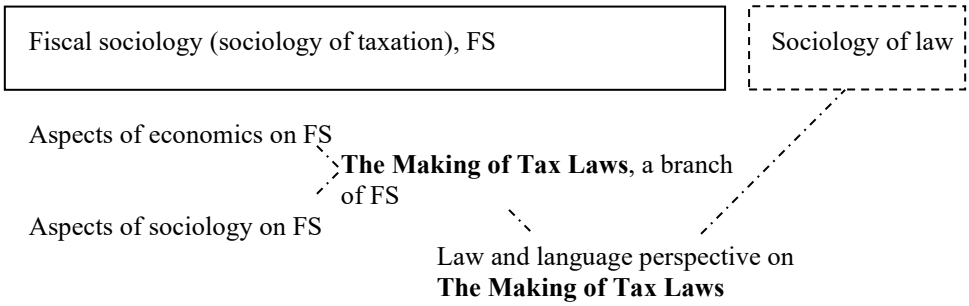
# PART II

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

# 1. OUTLINE OF PART II

I present, as previously mentioned, in this Part II, 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 Andra upplagan*,[122] where I suggest how research on law and language issues concerning tax law may be conducted regarding The Making of Tax Laws as a branch within the field of fiscal sociology.[123]

I also comment in Ch. 4 the conclusions from Ch:s 2 and 3 in relation to some questions in *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law*,[124] whereby this part makes a continuation to Part I as well as to Part D of the recently mentioned book. Thus, this Part II is, together with Forssén 2019 (2), 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.:[125]




In this Ch. I mention the topic, purpose, method, material and questions of *Ord och kontext i EU-skatterätten – En analys av svensk moms i ett law and language-perspektiv Andra upplagan*:[126]

- *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.

[122] Forssén 2019 (2).
[123] Compare Ch. 5 of Forssén 2019 (2).
[124] Forssén 2019 (1).
[125] Compare Forssén 2019 (1), INTRODUCTION and Part D, sec:s 2.1 and 4.1, or Part I, sec. 2.1.
[126] See Forssén 2019 (2), sec. 5.1.1.

- *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.

- *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*,[127] 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*,[128] and from my theses.[129]

- In Ch. 2 of Forssén 2019 (2) 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 Ch. of Forssén 2019 (2) has to a certain extent formed a comparison for the continuing

[127] Forssén 2019 (3).
[128] Cit. Forssén 2019 (7).
[129] See my licentiate's dissertation, *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen* (Forssén 2011).
See my doctor's thesis, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier*, its *fifth edition* Tax and payment liability to VAT in joint ventures and shipping partnerships [Forssén 2019 (5)].

investigation in that book, by me thereby sometimes making comparisons with those examples of interpretation problems.

- In Ch. 3 and Ch. 4 of Forssén 2019 (2) I have analysed the examples of *communication distortions* regarding material 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 (2) 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 (2), 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*).

I refer, in Ch. 2 of this part, to the conclusions from Ch:s 3 and 4 of Forssén 2019 (2).

I refer, in Ch. 3 of this part, to the concluding viewpoints of Forssén 2019 (2), 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.

I comment, in Ch. 4 of this part, the concluding viewpoints from Forssén 2019 (2) in relationship to some questions in Forssén 2019 (1). In Ch. 4 I also mention more about the continuation of the research project.

# 2. THE CONCLUSIONS FROM CH:S 3 AND 4 OF FORSSÉN 2019 (2)

## 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[130]

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 (2) 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:

[130] See Forssén 2019 (2), 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.[131]

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[132]

In sec:s 3.3-3.3.4 of Forssén 2019 (2) 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,[133] 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.[134]

> 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 have 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

[131] See Forssén 2007 (2) and Forssén 2007 (3).
[132] See Forssén 2019 (2), sec. 5.1.3.
[133] See Forssén 2019 (2), sec. 2.2.
[134] 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 in Forssén 2019 (1) or item 3 of sec. 3.3 of Part I.

becomes 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.[135]

- 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.

[135] See Forssén 2019 (5), 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[136] 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[137]

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

[136] *Lag (1968:430) om mervärdeskatt* (GML).
[137] See Forssén 2019 (2), 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.[138]

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).[139]

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).[140] 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 (2), 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.[141]

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[138] 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.

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

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

[141] 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 (3), 12 210 010 and Forssén 2019 (5), 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[142]

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 by 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

[142] See Forssén 2019 (2), sec. 5.1.5.

and similar manipulations at the use of e-money (Sw., *e-pengar*).[143] 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'.[144]

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

[144] Compare, regarding *ne bis in idem* etc., also *Skatteförfarandepraktikan – med straff- och europarättsliga aspekter* [Cit. Forssén 2019 (6)], sec:s 8.8.1 and 10.1-10.4.

- The HFD and the CJEU should in the advance ruling by 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[145]

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

[145] See Forssén 2019 (2), 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 (2), 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[146]

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).

[146] See Forssén 2019 (2), 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[147]

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/EEC)], 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).[148] 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

[147] See Forssén 2019 (2), sec. 5.1.8.
[148] See prop. 2012/13:124 p. 94.

from the time before the 1st of July 2013. Thus, the description 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/EEC) 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/EEC).

## 2.8 The determinations of goods and services – Ch. 1 sec. 6 ML[149]

The review in sec:s 3.9.2.1-3.9.2.3 of Forssén 2019 (2), 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

[149] See Forssén 2019 (2), sec. 5.1.9.

is not the case, the transaction is taxable according to the general 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.[150] 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/EEC) 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. 13(b) of the implementing regulation (EU) No. 282/2011, instead of to *jordabalken* (1970:994) – i.e. instead of to the Swedish Land

[150] Compare sec. 2.4.

Code.[151] 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.[152]

### 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[153]

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

[151] Compare also prop. 2016/17:14 p. 46. See also Forssén 2019 (2), sec. 3.11.1.
[152] See Forssén 2019 (2), sec. 3.11.1.
[153] See Forssén 2019 (2), sec. 5.1.10.
[154] See 2007/2311 K(2008) 2803.

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 (2), 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.[155] 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[156]

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

[155] 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”.
[156] See Forssén 2019 (2), sec. 5.1.11.

- 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 (2) I state that I have in a

book,[157] and also in an article[158] 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[159]

In sec:s 4.2-4.4 of Forssén 2019 (2) 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 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.

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

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 (2), 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 (2), 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 (2) 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 (2) 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 (2) 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 (2) 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.[160]

  In sec. 3.11.4 of Forssén 2019 (2) 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

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

bankrupt's estate can become tax liable according to Ch. 6 sec. 3 ML. In sec. 4.5 of Forssén 2019 (2) 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)*, RF (one of the Swedish constitutional laws) 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 the RF. Thus, in my opinion must the rule alteration 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 (2) 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.[161] 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 was instead set on the accounting rules.[162] The rules on tax liability in special cases in Ch. 6 ML have not been analysed in

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

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*.

# 3. THE CONCLUDING VIEWPOINTS OF FORSSÉN 2019 (2)

## 3.1 Introduction[163]

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 *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Fourth edition* 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".[164]

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 (2) 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 (2), namely the following:

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[163] See Forssén 2019 (2), sec. 5.2.1.
[164] See Forssén 2019 (1) 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.[165]

### 3.2 The context question concerning the rules themselves in the ML, their relationship to other rules and lacking EU conformity[166]

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)[167] and in two articles in 2007.[168]

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*

[165] See Forssén 2019 (2), sec. 1.1.1.
[166] See Forssén 2019 (2), sec. 5.2.2.
[167] See Forssén 2011.
[168] 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[169]

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.[170] 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[171]

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

[169] See Forssén 2019 (2), sec. 5.2.3.
[170] Compare Forssén 2019 (2), sec:s 3.6.1 and 3.6.2.
[171] See Forssén 2019 (2), 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[172]

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

[172] See Forssén 2019 (2), 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).[173] 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, 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,[174] and also in an article[175] 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.

[173] Compare prop. 2012/13:124 p. 94.
[174] See Forssén 2008, sec. 7.1.
[175] See Forssén 2006 p. 377.

### 3.6 The problem that the rules in the ML should correspond with the systematics of the VAT Directive (2006/112)[176]

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/EEC) 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

[176] See Forssén 2019 (2), 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[177]

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.

[177] See Forssén 2019 (2), 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 (2) 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 (2), 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.[178]

  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

[178] 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 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 the RF. 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.[179] 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.[180] 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.

[179] Compare SOU 2002:74 Part 1 p. 20.
[180] 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[181]

### *3.8.1 Summary of concluding viewpoints*[182]

I deem that the purpose of the book Forssén 2019 (2) 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*. [183]

> 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.[184] In Forssén 2019 (2) 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

[181] See Forssén 2019 (2), sec. 5.2.8.
[182] See Forssén 2019 (2), sec. 5.2.8.1.
[183] See sec:s 3.2 and 3.3.
[184] 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 (2) 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 (2) 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 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 (2) and in this book. Although the Council on Legislation would improve its ability to identify semantic, syntactic and logical interpretation problems, the analysis in Forssén 2019 (2) 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;[185] 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.[186]

- The scope and character of the lacks form in other words already with respect of the analysis in Forssén 2019 (2) 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* of *The Entrepreneur and the*

[185] See sec. 3.5.
[186] 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.

*Making of Tax Laws – A Swedish Experience of the EU law: Fourth edition*, meaning that a second chamber should be installed in the Swedish Parliament for the entrepreneurs' organizations, is only a suggestion regarding form.[187] 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 (2) 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

[187] See sec. 3.1 and Forssén 2019 (1) Part A, sec. 2.4.

> internal market ceases to function – which also is to the disadvantage for the consumers. The entrepreneurs cannot wait 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 (2) 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 (2) 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 (2) – 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 (11 Jun. 2013), 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.[188]

I consider that the current procedural situation after the case NJA 2013 p. 502 (11 Jun. 2013) 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*).[189] 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 (31 Mar. 2010), where the HD contrary to in the mentioned NJA 2013 p. 502 (11 Jun. 2013) 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 (11 Jun. 2013) 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.[190]

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 (11 Jun.

[188] See prop. 1989/90:110 Part 1 p. 517. See also Forssén 2019 (6) pp. 180 and 181.
[189] See also Forssén 2019 (6) pp. 189 and 190.
[190] See Forssén 2019 (3), 12 213 240.

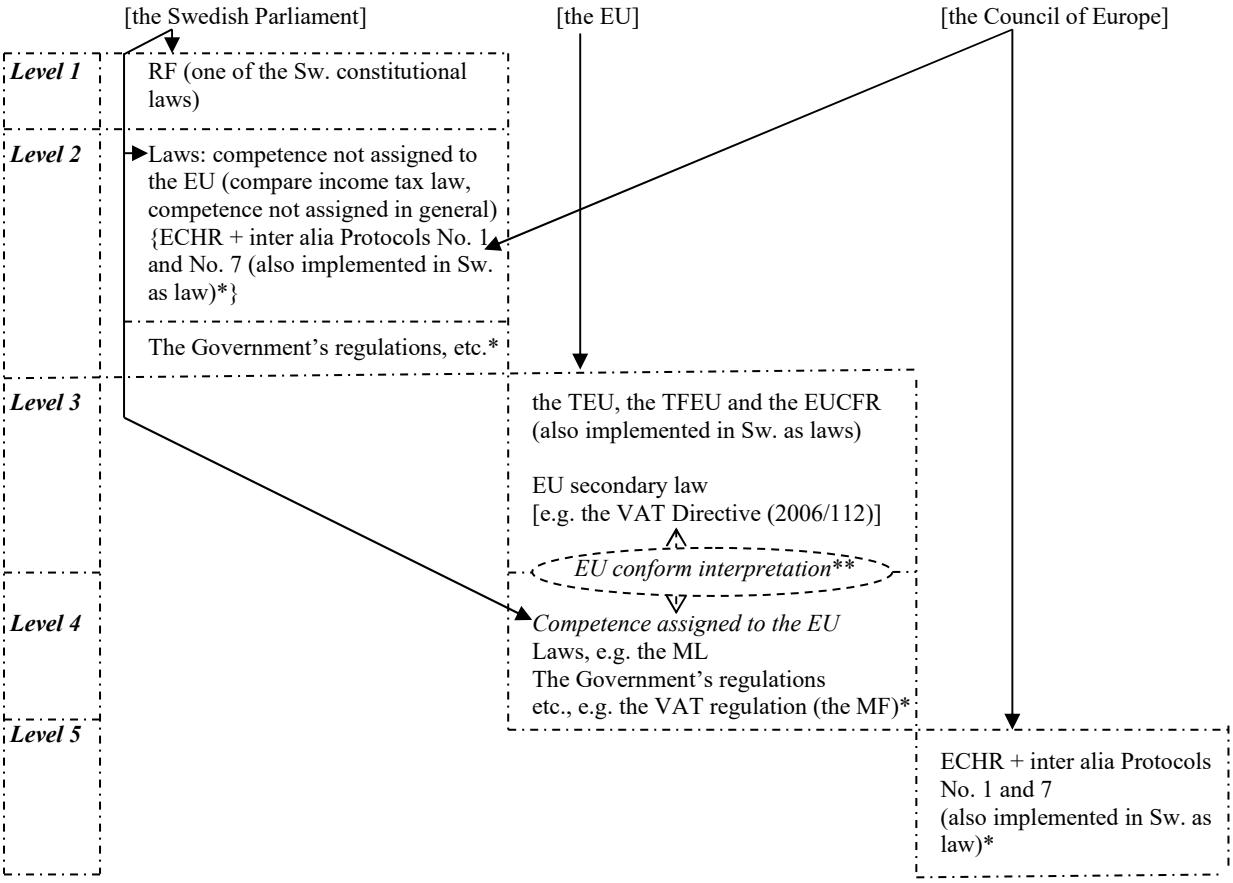
2013) were alterations made in the SFL and *skattebrottslagen (1971:69)* – the Tax Penal Act – on the 1st of January 2016, by SFS 2015:633 and SFS 2015:634, concerning the principle *ne bis in idem* regarding tax surcharge and tax fraud, but it did not mean any clarification of the question of the importance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

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*):[191]

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). 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. Although the Swedish Parliament has assigned the EU's institutions competence in certain fields (Ch. 10 se. 6 RF), is the RF 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:

[191] See Forssén 2019 (6) pp. 187 and 188.

**”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), 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 is 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 the RF, by the rules wording – which, as mentioned in sec. 4.2 of Forssén 2019 (2), 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 the RF. 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 (2), 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.[192]

My point with presenting something in Forssén 2019 (2) 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.[193] However, this was not done in the reform treaty, i.e. the Lisbon treaty.[194]

### *3.8.2 Something about legal certainty*[195]

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.[196] 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

[192] See inter alia pp. 88, 95 and 96 of Forssén 2019 (5) and also e.g. sec. 3.3.1 of Forssén 2019 (2).
[193] See art. I-10.1 of the draft of an EU constitution.
[194] See Forssén 2019 (6) p. 185.
[195] See Forssén 2019 (2), sec. 5.2.8.2.
[196] See Forssén 2019 (3), 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*.[197]
>
> *If a decision of relieve is made according to the first para. may a corresponding relieve be made from demurrage, tax surcharge and interest*.[198]

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.[199] Thereby is according to the

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[197] 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*."

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

[199] 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.[200] 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*”).[201] 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),[202] 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*.[203]

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.[204] 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.[205]

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[200] 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.
[201] See prop. 1996/97:100 Part 1 p. 596.
[202] *Tullagen (2016:253)* replaced on the 1st of May 2016 *tullagen* (2000:1281).
[203] Sw., ”*Om det finns synnerliga skäl, får regeringen eller den myndighet som regeringen bestämmer medge nedsättning av eller befrielse från annan skatt än tull*.”
[204] 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*”).
[205] 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.[206]

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.[207] 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

[206] 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.

[207] 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 the RF 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 (2), i.e. the *Svea hovrätts* (Eng., The Svea court of appeal's) case B 1378-96 (29 May 1997), 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 (2) 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 the RF 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 with 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. 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, 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.[208]

The review of the questions in Forssén 2019 (2) 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*[209]

In sec. 1.1.1 of Forssén 2019 (2) I mention the research project I am planning at Örebro University, *Användningen av skattemedel* (Eng. the use of tax revenues).[210] *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Fourth edition*[211] can be considered a pre study to it. Forssén 2019 (2) 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 (2), the *law and language perspective* on the process of the creation of a tax rule.

Forssén 2019 (2) 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* in *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of*

[208] See art:s: Forssén 1998 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 Forssén 2019 (1) Part A, sec. 2.3 (pp. 31 and 32).
[209] See Forssén 2019 (2), sec. 5.2.8.3.
[210] See www.oru.se.
[211] Forssén 2019 (1).

*the EU law: Fourth edition*, 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 (2). I will probably do so after or during that I have continued with *Användningen av skattemedel* (Eng., the use of tax revenues), which will be an extension of the last part of *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Fourth edition*, i.e. *Part E, Ideas about fiscal sociology studies by aspects on economics or sociology that may be influenced by the experiences from parts A-D*.

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 (2). 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.[212]

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 (2), 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* of *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Fourth edition* with inter alia the following commentary:

> "Thus, […] 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".[213]

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

[212] See Forssén 2019 (2), sec. 2.5.
[213] See Forssén 2019 (1) Part D, sec. 3.1. See also Part I, sec. 3.1.

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.[214] 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 (11 Jun. 2013) makes a distinction concerning in what legal form an entrepreneur is carrying out 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 (2) 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.[215] 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).[216] 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.[217] It is inter alia such lacks in Henkow 2008 that make me deeming

[214] See Forssén 2019 (3), 12 213 240.

[215] See Henkow 2008 p. 48, where it is stated that *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 (2) and Forssén 2019 (3), 12 213 153.

[216] 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 (2) and Forssén 2019 (3), 12 213 153.

[217] 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 (3), 12 213 240.

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 analysed thereby.[218]

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 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 cases NJA 2010 p. 168 I and II (31 Mar. 2010), 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*

[218] Compare Forssén 2019 (2), sec. 4.4.

*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 (2), 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 unconsciously – 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.[219] 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.[220] 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*.[221]

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 – 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 (2) that *The Making of Tax Laws* can contribute to develop the EU project.

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[219] 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 (3), 12 213 240.

[220] *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 (3), 12 213 240.

[221] See also Forssén 2019 (3), 12 213 240.

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*).[222] It is instead a matter of creating 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.[223] 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 (2) 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 (5):

[222] See Forssén 2019 (2), sec. 1.1.2.
[223] Compare Forssén 2019 (1) and also Part I and Forssén 2019 (3), 12 213 240.

<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>

**Commentary to the figure above:**

> 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.[224] 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*].[225] 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

[224] Compare also Forssén 2019 (5), sec. 3.3.
[225] Compare Kellgren 1784 p. 10. See also Forssén 2019 (3), 12 213 240.

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.[226]

In Rendahl 2009 is VAT on the EU level compared with *goods and services tax* (GST) in Australia and Canada.[227] 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 USA and New Zealand been chosen, since the USA has so-called *sales tax*, a gross tax similar to the general tax on goods in Sweden that was the predecessor to VAT,[228] whereas New Zealand has a simple in principle correct VAT insofar as it is lacking a differentiation of the VAT rate.[229] If Canada still would have been chosen, it could have been combined with the USA, to judge whether the NAFTA-countries, USA, Canada and Mexico, form an internal market with a common VAT system like the EU's.[230] Why not – for the same reason – choose to compare the EU with the USA and Mexico, since Mexico – like the EU Member States – has one single VAT?[231] To not letting the English language govern the choice, could

[226] Compare Forssén 2019 (3), 12 213 153 and 12 213 240.
[227] See Rendahl 2009 p. 10. Compare also Forssén 2019 (3), 12 213 240.
[228] See sec:s 2.2 and 3.2. Compare also Forssén 2019 (3), 12 213 240 and Forssén 2011 pp. 280 and 281.
[229] See Forssén 2011 pp. 280-282, where I am commenting Rendahl 2009 in the present respect. Compare also Forssén 2019 (3), 12 213 240.
[230] See Forssén 2011 p. 281. Compare also Forssén 2019 (3), 12 213 240.
[231] Compare Forssén 2011 pp. 281, 285 and 286. Compare also Forssén 2019 (3), 12 213 240.

also other combinations of two countries outside the EU, for comparison with the EU's VAT, be made.[232]

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).[233] 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.[234] I made in my licentiate's dissertation such a weighting of the OECD's information that nearly three quarters of the world's countries have VAT.[235] Rendahl 2009 just states that it is only the USA amongst the OECD countries that does not have "a form of value added tax".[236] That is, for a comparative analysis of the EU law, an information of questionable value.[237]

The comparison with countries outside the EU that have gross taxes (Sw., *bruttoskatter*), like *sales tax* in the USA, 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.[238] 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.[239] 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

[232] 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 (3), 12 213 240.
[233] See Rendahl 2009 p. 187. Compare also Forssén 2019 (2), sec. 3.9.2.3 and Forssén 2019 (3), 12 213 240.
[234] See Forssén 2019 (3), 12 213 240. Compare also Forssén 2019 (3), 12 201 031, 12 211 110 and 12 213 164.
[235] See Forssén 2011 pp. 279ff. Compare also Forssén 2019 (3), 12 213 240.
[236] See Rendahl 2009 p. 3. Compare also Forssén 2019 (3), 12 213 240.
[237] Compare also Forssén 2019 (3), 12 213 240.
[238] Compare Forssén 2019 (3), 12 201 010 and 12 213 240.
[239] The latter follows by art. 401 of the VAT Directive (2006/112). Compare also Forssén 2019 (5), sec. 2.4.1.4 and Forssén 2019 (3), 12 213 240.

taxation that an EU tax would mean.[240] 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.[241] 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,[242] 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.[243]

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 USA 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*).[244]

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*

[240] Compare the weekly letter from the EU representation in Brussels week 30 year 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 (5), sec. 1.2.3 and Forssén 2019 (3), 12 213 240.
[241] Compare Forssén 2019 (3), 12 213 235 and 12 213 240 and Forssén 2019 (1) p. 214.
[242] See Forssén 2019 (2), sec. 3.5.3. Compare also Forssén 2019 (3), 12 213 153 and 12 213 240.
[243] Compare also Forssén 2019 (3), 12 213 240.
[244] Compare also Forssén 2019 (3), 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 USA.

*meningsfullt att fastställa ett för alla rättsområden enhetligt varubegrepp. Man bör i stället fortsätta med att bestämma begreppets innebörd områdesvis utifrån den aktuella rättsakten*".[245] 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.[246]

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.[247] 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.[248] 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 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.[249] 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.[250] 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.

[245] See Moëll 1996 p. 41. Compare also Forssén 2019 (3), 12 201 010.
[246] See e.g. Wiman et al. 2016 p. 91. Compare also Forssén 2019 (3), 12 201 010.
[247] Compare also Forssén 2019 (3), 12 201 010 and 12 213 240.
[248] Compare also Forssén 2019 (3), 12 201 010 and 12 213 240.
[249] Compare also Forssén 2019 (3), 12 201 010 and 12 213 240.
[250] Compare sec. 3.8.2 and Forssén 2019 (3), 12 201 010,12 201 024, 12 201 034, 12 213 164 and 21 112 000.

*product* or *article* can be used as singular form.[251] There is – to my knowledge – concerning the noun *goods* no such singular form – "good" – as is used in Henkow 2008.[252]

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

[251] 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 (9) and Forssén 2019 (3), 12 201 010.

[252] See Henkow 2008 pp. 50, 211 and 264. Compare also Forssén 2019 (3), 12 201 010.

# 4. COMMENTS OF THE CONCLUDING VIEWPOINTS FROM 2019 (2) IN RELATIONSHIP TO SOME QUESTIONS IN FORSSÉN 2019 (1) 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 (2)]. 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 Ch. those conclusions in relation to some questions in *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Fourth edition* [Forssén 2019 (1)], which I do as follows.

In sec:s 3.1 and 3.8.1 I refer to Forssén 2019 (1) 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.[253]

Forssén 2019 (2) 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 (2) forms together with the text- and handbook *Momsrullan Andra upplagan* [Forssén 2019 (3)] and *Momsreform i Sverige: Förslag till ändrade mervärdesskatteregler nationellt och på EU-nivå* (Eng., VAT reform in Sweden: Suggestions on altered value added tax rules on a national and an EU level) [Cit. Forssén 2019 (4)]. From Forssén 2019 (3) I have got examples for the analysis in Forssén 2019 (2), and by that analysis I have been able both to present in Forssén 2019 (4) issues suitable for a VAT reform in Sweden and to confirm in this book the assumption in Forssén 2019 (1) 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.

[253] See also Forssén 2019 (1) Part A, sec. 2.4.

In the recently mentioned respect I state that I make, in Part D of Forssén 2019 (1), concerning the law and language perspective on the process of The Making of Tax Laws, the main concluding viewpoint that it is 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 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.[254]

In sec. 3.8.1 I conclude that my analysis in Forssén 2019 (2), 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 (2) 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.[255] 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

[254] See Forssén 2019 (1) Part D, sec. 4.2. See also Part I, sec. 4.2.
[255] See Forssén 2019 (1) Part A, sec. 2.4 and also sec:s 3.1 and 3.8.1 in this book.

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 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 (2) 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 (2), 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 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 (2) 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.

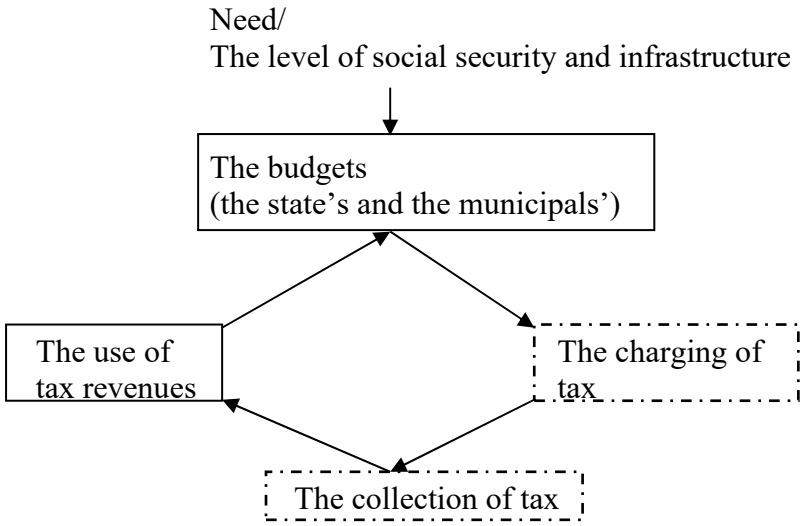
Thus, by the confirmation I make in this book – based on the summary and concluding viewpoints in Forssén 2019 (2) – that the assumptions in Forssén 2019 (1), of a need for systematic alterations of the process of The Making of Tax Laws and that the aim thereby should be to find ways to put the entrepreneur 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. I will further develop Part D of Forssén 2019 (1); 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 of Forssén 2019 (1) 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[256]




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 of Forssén 2019 (1) to make tools for method development.

[256] The figure is from Forssén 2019 (1) Part E, Ch.2.

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 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 are efficiency gains 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.

# EPILOGUE – IN SHORT ABOUT THE PRESENT STAGE OF THE RESEARCH PROJECT AND THE PLANNING OF ITS CONTINUATION

Since 2015 I am a member of the Research Team Tax Law at Örebro University. On Örebro University's website (www.oru.se) you find the original version from 2015 of the paper which is, in an updated version of 2017, presented previously in this book, i.e. *THE ENTREPRENEUR AND THE MAKING OF TAX LAWS: AN INTRODUCTION OF A NEW BRANCH OF FISCAL SOCIOLOGY*. On Örebro University's website you also find something about my plans for a continuation of the research on The Making of The Laws as a branch within the field of fiscal sociology, namely the following:

> ”Björn Forssén is aspiring to start a research project within the subject Fiscal Sociology (FS). A pre study was made already in 2015 by his book The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law. He followed up in 2016 with a study called Ord och kontext i EU-skatterätten (Eng., Words and context in the EU tax law), presenting an analysis of flaws in the process of The Making of Tax Laws. Applications for funding the FS-project have been filed and decisions are awaited in 2017. The project is supposed to continue with an empirical study of the use of tax revenues within tax funded activities like health care and schools. Thereafter will probably a study follow of method issues concerning feedback from analyses of such activities to the processes of making budgets and tax tables and improving collection, and algorithms are mentioned in the pre study to make tools for method development.”

By *Ord och kontext i EU-skatterätten – En analys av svensk moms i ett law and language-perspektiv Andra upplagan*[257] I have come a bit on the way with my research project on the topic of The Making of Tax Laws, since that book can be considered my suggestion of how to do, by an empirical method, a thesis on the topic of the process of The Making of Tax Laws from a law and language perspective. In Part II, sec. 3.8.3, I e.g. state – as my opinion – that 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. In my opinion this is due to the tradition with law dogmatic studies within the tax law leading – although unconsciously – to the evolvement of an unholy hegemony

[257] Forssén 2019 (2).

between the academic world and the highest instances of the courts, who use to obtain law investigations from the researchers.

In Part II, Ch. 4, I e.g. mention that I make a confirmation in this book – based on the summary and concluding viewpoints in *Ord och kontext i EU-skatterätten – En analys av svensk moms i ett law and language-perspektiv Andra upplagan*[258] – that the assumptions in *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Forth Edition*,[259] i.e. in the main book of my current fiscal sociology-project, 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. Therefore, I also mention, that I will probably continue my research project on the topic of The Making of Tax Laws as I am planning in sec. 3.8.3 of Part II, 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. I will further develop Part D of *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Fourth Edition*;[260] 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 of *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Fourth Edition*[261] 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, as previously mentioned, aiming to tie together in The Big Picture of the Swedish tax system 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.

As above-mentioned, I am introducing in Part III of this book the use of Legal Semiotics (the Semiotics of Law) as a method to conduct empirical studies of tax law, beginning with VAT law. By Part III I believe I am showing that Legal Semiotics will make a methodical improvement, where analyses of tax law are concerned.

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[258] Forssén 2019 (2).
[259] Forssén 2019 (1).
[260] Forssén 2019 (1).
[261] Forssén 2019 (1).

## PART III

On signs of tax crime in an artistic environment

## Abstract

Björn Forssén (2017): On signs of tax crime in an artistic environment

The Semiotics of Law (or Legal Semiotics) should be a topic for debate also in the fields of taxation and tax crime. Invited by professor Laura Ervo to The 19th International Roundtable for the Semiotics of Law (IRSL2018) on May 23-25, 2018 at Örebro University Björn Forssén has in November 2017 submitted the paper *On signs of tax crime in an artistic environment*.

The aim with the paper is to instigate a discourse on the Semiotics of Law in the tax law and the chosen subject is value added tax (VAT) and the paper contains various examples of VAT fraud. The conclusion is that various artistic environments *can* work as an external objective sign in the case in point to judge whether or not the artist's attitude to VAT liability or his or her choice of VAT rate means that he or she has committed VAT fraud. The main question in each example has been whether the acting by the artist and the actual artistic environment constitute signs of VAT fraud, if the artist's attitude to those signs is to refrain from filing a VAT return or filing one containing a wrong VAT rate.

The examples of artistic environments are headlined: *Concert hall/Theatre*, *Recording studio*, *TV studio*, *Cinema* or *Web show*. Two special examples have also been presented concerning whether a joint venture constituting the artistic environment and thereby also a literary or artistic work *or* a painter's work being made under different legal forms can indicate objective signs of VAT fraud made by the partners of the joint venture or by the painter. In addition reasoning has also been made in the mentioned respects about artists' use of attributes – props – being possible as decisive objective signs of VAT fraud when they act in environments of e.g. theatre or film.

*Keywords*: Acting, *aktiebolag*, algorithms, artistic environments, associative meaning, attributes, auditing firms, ballet, *Bolagsverket*, cinema, circus, composite supplies, concert/-s, concert hall, connotation, copyright, doll's house, *enkla bolag*, Fiscal Sociology, goods or services, *handelsbolag*, joint ventures, joint work, knowledge managers, law and informatics, law and language, law firms, legal forms, legal person, Legal Semiotics, limited company, literary or artistic work, logic function trees, mask maker, metaphor, mixed activity, musical, music group, natural person, opera, originators, painter, partnership, producer, production company, props, recording studio, scriptwriter, search engines, software, stage designer, state grants, supply, *Sveriges Television (SVT)*, VAT fraud, taxable person, theatre, the Internet, the Making of Tax Laws, the Semiotics of Tax Law, TV studio, unique, value added tax (VAT), wardrobe people and web show.

**PAPER**

# On signs of tax crime in an artistic environment[262]

*The Semiotics of Law (or Legal Semiotics) should be a topic for debate also in the fields of taxation and tax crime. Invited by professor Laura Ervo to The 19th International Roundtable for the Semiotics of Law (IRSL2018) on May 23-25, 2018 at Örebro University Björn Forssén has written this paper, where he is aiming to instigate a discourse on the mentioned topic and more precisely on signs of tax crime in an artistic environment. He is using the subject of value added tax (VAT) thereby why the tax crime is about VAT fraud in the examples of Legal Semiotics issues in this paper, which he submitted to professor Ervo in November 2017.[263]*

## 1 Introduction and background

Before October 1, 1955 there was a so called variety prohibition in Sweden, which had been introduced about six decades earlier. It meant that it was forbidden to serve alcoholic beverages in premises where artistic performances took place. The limits between performances classified in that respect as variety or not variety were supposedly rather blunt. For instance, according to an anecdote, that I – as a lawyer – have picked up from producers with many years of experience in show business, the variety prohibition was considered violated if a person reciting literature wore a red jacket instead of a dark one.

In the picture above *Julius* standing to the left is reciting literature and wearing a dark jacket and to the right his brother is doing the same but wearing a red jacket. Nowadays that difference from the anecdote of above would be of no significance

[262] Compare (my article in Swedish): Forssén 2019 (10).
[263] I have chosen not to attend the IRSL2018, and publish the paper here instead.

when for example determining whether they are making an artistic performance. The world has become a somewhat more complex place e.g. for such matters, which I will show in this paper.

This paper concerns signs on a tax crime, namely tax fraud (Sw., *skattebrott*), in an artistic environment and I have chosen as the topic of tax fraud in that sense erroneous information in a return on value added tax (VAT) or the failure of filing such a VAT return by an artist. Thereby are immaterial rights of interest and that the preparatory work to the current Swedish copyright act, *upphovsrättslagen (1960:729), URL*, is from the time only a few years after the abolishing of the variety prohibition. The first Swedish VAT act was introduced on January 1, 1969 and the existing one, *mervärdesskattelagen (1994:200), ML*, came into force on July 1, 1994. Both the URL and the predecessor to the ML have been influenced by the EU law and since Sweden's accession to the European Union (EU) on January 1, 1995 the ML shall be interpreted in the light of the EU law in the field of VAT, which today mainly concerns the EU's VAT Directive (2006/112/EC). There you have a short background to the examples of tax fraud presented in this paper, where I am setting the eventual liability to file a VAT return in a context – i.e. an artistic environment – where an artist's attitude to that liability or his or her choice of tax rate when deeming such a liability to exist should be determined by the artist acting in various artistic environments. In that respect it is of relevance that VAT liability rules according to the ML since January 1, 1997 for literary and artistic rights according to the URL, with application of the general VAT rate of 25 per cent or a reduced VAT rate of 6 per cent, and exemption from VAT rules for a performing artist's performance of such a literary or artistic work. The recently mentioned exemption is not in accordance with the EU's VAT Directive. However, it is allowed in the ML by virtue of the accession treaty between Sweden and the EU.

In the examples presented in this paper it is assumed that the artist is a so called taxable person, i.e. a person that can be subject to VAT liability for receiving payment for supplying goods or services and who – for the purpose of those examples – in practice can be described in short as a self-employed artist. I am not considering subjective prerequisites for tax fraud according to the Swedish Tax Penal Act, *skattebrottslagen (1971:69), SBL*. Instead I am restricting the reasoning in the examples to the objective prerequisites for tax fraud by a VAT fraud – the main question in each example is whether the acting by the artist and the actual artistic environment constitute signs of tax fraud, i.e. here a VAT fraud, if the artist's attitude to those signs is – with or without intent – refraining from filing a VAT return or filing one containing a wrong VAT rate. I also give two special examples, where a joint venture constituting the artistic environment and thereby also a

literary or artistic work *or* a painter's work being made under different legal forms can indicate objective signs contributing to the determination of VAT fraud made by the partners of the joint venture or by the painter. In addition I reason in the mentioned respects about artists' use of attributes – props – being the decisive objective signs of VAT fraud when acting, i.e. when making a performance. Finally I make a summary and some concluding viewpoints.

## 2 The artist's acting and the environment can constitute objective signs contributing to the determination of VAT fraud


In a number of examples I am putting an artist, *Elsa* in the picture of above, in various typical artistic environments. She is a singer songwriter and also does some acting or reciting of literature, and I assume as above mentioned that she is a taxable person for VAT purposes and therefore *can* be subject to VAT liability for receiving payment for supplying her artistic services in e.g. some artistic environments which I am headlining as follows:

- Concert hall/Theatre,
- Recording studio,
- TV studio,
- Cinema or
- Web show.

I am not doing a complete trial of whether or not all the VAT legal circumstances that determine if the objective prerequisites for a correct VAT return filed by Elsa are fulfilled. I restrain the objective trial to the mere fact that the actual environment in which she is acting or the used technology *can*, by its associative meaning for the classification under the URL of the services she is supplying, make her liable to file a VAT return and therefore she *can* be considered having committed VAT fraud if she has not done so or if she has filed such a return containing erroneous VAT information.

*Concert hall/Theatre*

As above-mentioned exemption from VAT rules according to the ML (Chapter 3 section 11 item 1) for a performing artist's performance of a literary or artistic work according to the URL. The Swedish tax authority (Sw., *Skatteverket, SKV*) has issued its statement on the scope of this exemption.[264] According to the SKV it only applies to a performance made directly before an audience.[265]

Thus, Elsa *cannot* commit VAT fraud for not filing a VAT return to the SKV due to her receiving a consideration in the form of a fee (Sw., *gage*) from a company running the concert hall or theatre where she e.g. has sung a song or recited literature before an audience, since her services thereby supplied are exempted from VAT according to the ML. Thereby it does not matter whether the preformed song, i.e. the performed literary and artistic work, is written by herself or someone else.

- *Conclusion*: The concert hall or theatre building *can* give performances made therein an associative mening insofar as they *can* be assumed to be classified as performing artists' performances of literary or artistic work, unless it is apparent that the premises are instead used for e.g. a political meeting (since a politician is not a performing artist although his or her manuscript of a political speech is considered a literary work according to the URL).

However, Elsa could be liable to file a VAT return although her performance is comprised by the above-mentioned exemption from VAT. Such a situation would occur if she is also making taxable supplies in her economic activity. If so she has a so called mixed activity, where she shall account in a VAT return for both taxable supplies and from taxation exempted supplies. The purpose thereby is that it shall be possible to deem the scope of the right to deduct input tax, which is limited due to the existence of exempted supplies in an economic activity otherwise producing

[264] See SKV 2017-01-27, dnr 131 44322-17/111.
[265] See section 4.3 of the SKV's statement of 2017-01-27, dnr 131 44322-17/111.

supplies for which output tax shall be accounted for entitling her to deduction. Barring a situation with a mixed activity where VAT is concerned Elsa is, as mentioned above, not liable to file a VAT return for her supply of services exempted from VAT.

*Recording studio*

If Elsa's performance of the literary or artistic work instead would take place in a recording studio, the SKV would according to its above-mentioned statement consider it a supply of a showing right since it is not performed directly before an audience. Thereby Elsa *can* be considered committing VAT fraud for not filing a VAT return due to her receiving a fee from the recording company, since she would be liable to register for VAT at the SKV and to account for output tax in a VAT return filed to the SKV. Her negligence to fulfil the latter could be considered VAT fraud under section 2 of the SBL.

- *Conclusion*: The recording studio *can* give performances made therein an associative mening insofar as they *cannot* be assumed to be classified as performing artists' performances of literary or artistic work before an audience.

By the way Elsa *can also* be considered committing VAT fraud when filing a VAT return, if she is accounting by using the reduced VAT rate of 6 per cent instead of the general one of 25 per cent when the showing right would not be considered a literary or artistic work under sections 1, 4 or 5 of the URL. According to Chapter 7 section 1 third paragraph item 8 of the ML the reduced VAT rate of 6 per cent applies to *supplies of rights comprised by sections 1, 4 or 5 of the URL*, whereas photographs, advertisement products, systems or programs for automatic data processing or film, video recordings or other comparable recordings of information are comprised by the general VAT rate of 25 per cent in Chapter 7 section 1 first paragraph of the ML, which would also be the case simply by the showing right not being considered a unique and thereby not comprised by sections 1, 4 or 5 of the URL. However, in these situations the correct VAT rate to use would primarily be determined by the contract between the artist and the recording company and an interpretation of that internal sign to establish their perception of whether or not the showing right is to be considered a unique or merely repetition. Then the problem would not be resolved by the perception of any external objective sign like the premises used for the recording of the performance. Therefore, in this paper I mean by an external objective sign an objectively noticeable circumstance as opposed to internal circumstances which are only noticeable by the involved parties themselves, like what is stated in their contract regarding the supplies to be deemed for VAT purposes. I am

aiming with this paper to mention in the first place examples of artists' acting and other external objectively noticeable signs implying whether or not they *can* be considered committing VAT fraud by not filing a VAT return or by filing such a return containing erroneous VAT information.

*TV studio*

If Elsa is performing the literary or artistic work in a TV studio and gets a fee from the broadcasting company both for performing before a studio audience and for the recording of the performance, her supply could for VAT purposes be deemed one or several supplies. The SKV would in accordance with its above-mentioned statement consider it one single supply, if Elsa is performing at a TV recording with audience. The SKV is reasoning about what is the main part of the supply in such a case:

- If the performance is made when broadcasting the SKV deems the studio audience merely as means to conduct the TV broadcast, and thereby not a performance directly before an audience – rather mainly a supply of the showing right to the performance, where VAT liability would occur for Elsa (at the VAT rates 6 or 25 per cent).

- If Elsa instead gets a fee for performing at rehearsals before the TV broadcast, the SKV would consider her performance one single supply mainly as taking place directly before an audience and therefore exempt from VAT in accordance with Chapter 3 section 11 item 1 of the ML.

- *Conclusion*: In the latter case you have an external objective sign that Elsa *cannot* be considered committing VAT fraud if she is not filing a VAT return to the SKV, namely the circumstance that she has received a fee only for performing at the broadcasting rehearsal, not for her following performance at the TV broadcast. In my opinion this shows the importance of completing e.g. a law dogmatic study of composite supplies in the field of VAT with analyses based on Legal Semiotics. That applies also in the previous case, although the issue of the correct VAT rate would primarily be determined by the agreement between Elsa and the broadcasting company and interpretation of their perception of whether or not the showing right to her performance is to be considered a unique, not by any external objective sign.

*Cinema*

If Elsa's performance of the literary or artistic work would take place in a film studio, the SKV would according to its above-mentioned statement consider it a supply of a showing right rather than a performance directly before an audience, since the SKV considers the performance subsequent to the showing right of it as the main supply. By the way the SKV considers that supply comprised by the reduced VAT rate of 6 per cent. Thereby Elsa *can* be considered committing VAT fraud for not filing a VAT return due to her receiving a fee from the film company.

- *Conclusion*: The film studio *can* give performances made therein an associative mening insofar as they *cannot* be assumed to be classified as performing artists' performances of literary or artistic work before an audience. Thus, the external objectively noticeable signs of the use of a film studio for Elsa's performance *can* be considered excluding an application of the exemption from VAT in Chapter 3 section 11 item 1 of the ML.

By the way would in the latter respect a difference also exist for VAT purposes between performances in real time, where a performance before an audience in a concert hall or theatre would be exempted from VAT, whereas a broadcast to a cinema audience would cause liability to account for output tax (VAT). In the latter case would furthermore another difference occur, namely that the artist would be using the reduced VAT rate of 6 per cent on the consideration (fee or royalty), wheras the cinema – due to an alteration of the ML in this respect was introduced by SFS 2015:748 on January 1, 2007 – is liable to use the general VAT rate of 25 per cent on the cinema tickets while the reduced VAT rate of 6 per cent still applies for the sale of tickets to concerts, theatre, opera, ballet or circus and comparable shows, according to Chapter 7 section 1 third paragraph item 5 of the ML.

*Web show*

If Elsa is performing the literary or artistic work in a Web show, there will not be any difference for VAT purposes in comparison with her performing in a TV studio (see above under *TV studio*) but in comparison with her performance taking place in a film studio (see above under *Cinema*). I make the following reflections in these senses:

- There is a so called implementing regulation, COUNCIL IMPLEMENTING REGULATION (EU) No 282/2011. By this

implementation regulation are some concepts in the EU's VAT Directive meant to be clarified, e.g. 'electronically supplied services' as referred to in Directive 2006/112/EC. According to Article 7(1) of the implementation regulation those "shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology". By COUNCIL IMPLEMENTING REGULATION (EU) No 1042/2013 there was an addition to the implementation regulation of inter alia Article 6b(1). Thereby broadcasting services are treated equally for VAT purposes whether one means radio or TV programmes transmitted or retransmitted over radio or TV networks or such programmes distributed via the Internet or similar electronic network (IP streaming), if they are broadcast simultaneous to their being transmitted or retransmitted over a radio or television network. In both cases the transmission or distribution concern *broadcasting services* and therefore there was also an amendment made so that it is nowadays stated in Article 7(3)(a) of the implementation regulation that what is mentioned therein about electronically supplied services does not apply to *broadcasting services*.

Thus, there is no difference for VAT purposes between what is mentioned above regarding Elsa's performance in a *TV studio* and her instead performing the literary or artistic work in a Web show. It is in that respect a matter of *broadcasting services* in both cases.

- There *can* be a difference for VAT purposes compared to what is mentioned above about her performing in a film studio (see above under *Cinema*), if Elsa's performance (of a literary or artistic work) would be considered subsequent to the showing right of it as the main supply. This is the SKV's standpoint according to its above-mentioned statement. Then the SKV deems, as mentioned above, the reduced VAT rate of 6 per cent to apply. However, that depends on what means of supplying the showing right to the producer of the Web show – or for that matter to the film studio company – Elsa is using. If she is supplying the showing right to either of them by using the Internet, the supply would for VAT purposes no longer be considered a supply of a right under sections 1, 4 or 5 of the URL but some other kind of service supplied, e.g. an electronically supplied service. Then the general VAT rate of 25 per cent according to Chapter 7 section 1 first paragraph of the

ML would apply to that service and not the reduced VAT rate of 6 per cent in Chapter 7 section 1 third paragraph item 8 of the ML.

Thus, Elsa *can* be considered committing VAT fraud for filing a VAT return where she accounts for the reduced VAT rate of 6 per cent instead of the general one of 25 per cent due to the technology used for the supply of the showing right.

- *Conclusion*: The technology used for the supply of the showing right *can* be an external objectively noticeable sign implying whether or not the artist *can* be considered having committed VAT fraud.

**3 Special examples – a joint venture constituting the artistic environment and thereby also a literary or artistic work *or* a painter's work being made under different legal forms can indicate objective signs contributing to the determination of VAT fraud made by the partners of the joint venture or by the painter**

*A joint venture constituting the artistic environment and thereby also a literary or artistic work can indicate objective signs contributing to the determination of VAT fraud made by the partners of the joint venture*

By this example I aim to illustrate a situation where a question of VAT fraud *can* be raised by the way an artistic environment, in which a literary or artistic work is supposed to be performed, is built by the artists. Of course I do not mean thereby how the premises, e.g. the theatre building, is built, but how the setting of a play is created by the artists making a literary or artistic work in the form of a theatre play and perhaps also of a film of that play. In this example Elsa is one of the actors and she is co-operating, in the effort to create the theatre play (a spoken drama), with the following people:

- a scriptwriter,
- a stage designer,
- wardrobe people,
- makers-up,
- a mask maker,
- the sound-control room and
- a light effect operator.

I assume that the other participants are, like Elsa, taxable persons for VAT purposes and therefore, like her, *can* be subject to VAT liability for receiving payment for supplying their services when creating the theatre play, i.e. for fees they receive for their co-operation with

creating the literary and artistic work that is the theatre play to be performed in the theatre. I will not go into the problems with the performance of the play they have created. The focus is instead on the question whether or not each of them, by his or her contribution (supply) to the joint venture resulting in the play (or the film), have created a literary or artistic work comprised by sections 1, 4 or 5 of the URL. If so he or she is liable to account for VAT at the reduced VAT rate of 6 per cent and if not the general VAT rate of 25 per cent applies to his or her supply. To sort out that problem I refer to my doctor's thesis, where a special issue concerned whether Chapter 7 section 1 third paragraph item 8 of the ML applies to a literary or artistic work comprised by the URL, if it is created by partners of an *enkelt bolag*, i.e. by partners of (approximately) a joint venture. In my thesis I focused on VAT matters concerning the tax subject and in that respect the issue about the scope of Chapter 7 section 1 third paragraph item 8 of the ML was independent (from the question about Chapter 6 section 2 of the ML) and I stayed at just pointing out that *enkla bolag*, which are not legal persons, can cause problems regarding the determination of the tax object, i.e. about the question whether the partners of *enkla bolag* (joint ventures) shall apply the reduced VAT rate of 6 per cent or the general VAT rate of 25 per cent. This tax object-problem is in short the following:

> As long as Chapter 7 section 1 third paragraph item 8 of the ML only refers to sections 1, 4 and 5 of the URL partners of *enkla bolag* – joint ventures – are liable to apply the general VAT rate of 25 per cent (according to Chapter 7 section 1 first paragraph of the ML). Under this provision each partner, Elsa or anyone of the others above-mentioned participants, is liable to apply the general VAT rate of 25 per cent, if they are not making a literary or artistic work of their own, since section 6 of the URL about joint works (Sw., *gemensamma verk*) is not referred to in Chapter 7 section 1 third paragraph item 8 of the ML. The only participant who can be certain that he or she is correctly accounting for output tax by using the reduced VAT rate of 6 per cent is the scriptwriter, since the manuscript is an external objectively noticeable sign implying that he or she as a natural person is making a supply of a literary work under section 1 of the URL (of course provided that the manuscript is not a plagiarism).
>
> Thus, Elsa and the other partners of the (legal) figure *enkelt bolag* – joint venture – *can* be considered committing VAT fraud for filing VAT returns where they account for the reduced VAT rate of 6 per cent instead of the general one of 25 per cent for their supplies of services.

- *Conclusion*: The absence of a registered legal person by *Bolagsverket* (Swedish Companies Registration Office) *can* in fact be an external objectively noticeable sign implying that a participant *can* be considered having committed VAT fraud, if he or she has applied the reduced VAT rate of 6 per cent instead of the general VAT rate of 25 per cent on his or her supply.

  The solution today – for the purpose of being able to use the reduced VAT rate of 6 per cent on the whole of a joint work like the present theatre play (or film) – is that the partners of the joint venture register by *Bolagsverket* a limited company (Sw., *aktiebolag*) or a partnership (Sw., *handelsbolag*), where they instead are employed (and thus not taxable persons themselves according to Article 9(1) first paragraph of the EU's VAT Directive). Then the literary and artistic work in question would be owned by a legal person and it would not be considered a joint work under section 6 of the URL, but rather a work comprised by copyright already under sections 1, 4 or 5 of the URL, i.e. the limited company or the partnership would make a supply comprised by Chapter 7 section 1 third paragraph item 8 of the ML.[266]

  An *enkelt bolag* cannot register a company name in the Register of Partnerships (Sw., *handelsregister*) at *Bolagsverket*,[267] but a partner [Sw., *bolagsman* or (with the ML's terminology) *delägare*] in an *enkelt bolag* can on his or her own be liable to register in the Register of Partnerships, namely if he or she is carrying out business activity to the extent that he or she is liable to prepare annual accounts.[268] However, such a registration would not be of any significance to deem the VAT issue, where the tax object-problem is concerned.

- *Conclusion*: The registration of a legal person by *Bolagsverket* *can* indicate that the supply of the theatre play (or the film) *can* be comprised by Chapter 7 section 1 third paragraph item 8 of the ML and that such a registration information is an external objectively noticeable sign implying that a representative of the legal person *cannot* be considered having committed VAT fraud by applying the reduced VAT rate of 6 per cent on the legal person's supply.

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[266] See section 7.1.3.6 of *Tax and payment liability to VAT in joint ventures and shipping partnerships: Fifth edition* [Cit. Forssén 2019 (5)].

[267] See section 2 first paragraph item 5 and third paragraph item 1 *handelsregisterlagen (1974:157)*. See also section 1.1.1 of Forssén 2019 (5).

[268] See section 2 first paragraph item 5, second and third paragraphs of *handelsregisterlagen*. See also section 1.1.1 of Forssén 2019 (5).

In my opinion this example also shows the importance of completing e.g. a law dogmatic study of composite supplies in the field of VAT with an analysis based on Legal Semiotics. I have in another work mentioned the so called EMA Telstar-verdict by the Supreme Administrative Court (*Högsta Förvaltningsdomstolen, HFD*), RÅ 2002 ref. 9, where that concert production company, EMA Telstar, applied for an advanced ruling for the question of applicable VAT rate but thereby – advised by another lawyer than me – relied solely on a statement from a professor in civil law and thus waived away my advice to also point out in the application the basic VAT prerequisites for a judgement of the scope of Chapter 7 section 1 third paragraph item 8 of the ML. My suggestion was that the application should be drawn up as a drawing of a doll's house, where each step in the production of a concert by a music group would be described with respect of both the immaterial rights and such basic VAT prerequisites as the concept supply and thereby making a trial of the VAT situation step-by-step, i.e. of the VAT situation for each participant (i.e. scriptwriter, stage designer, wardrobe people etc.) who would have been given a room (or step) of his or her own in the imagined doll's house as the complete joint work. Thereby it would have been possible to establish if some of the participants could have created a literary or artistic work of his or her own – i.e. an independent work – on the way to the complete joint work, i.e. the final concert production. By not doing so the HFD had no chance to grasp the complexity of the circumstances under the application for the advanced ruling and I have mentioned that there is still a necessity for a precedent on the proper level of complexity concerning above all the application of the VAT rules on production companies at large in the cultural sector.[269]

[269] See 12 214 030 of *Momsrullan Andra upplagan*, by Björn Forssén, Melker Förlag, Laholm 2016 [Cited Forssén 2019 (3)].

*A painter's work being made under different legal forms can indicate objective signs contributing to the determination of VAT fraud made by the painter*

*Michael Angelo* in the picture of above is a painter and I assume that he is a taxable person for VAT purposes and therefore *can* be subject to VAT liability for receiving payment for selling his paintings, if he has an annual turnover of at least SEK 300,000 or applies for voluntary tax liability by the SKV – see Chapter 1 sections 2 a and 2 b of the ML. He is working in his capacity of natural person and is entitled to apply the reduced VAT rate of 12 per cent, according to Chapter 7 section 1 second paragraph item 2 of the ML. If he instead would choose to work under the legal form of a legal person like a limited company (*aktiebolag*), he would be liable to apply the general VAT rate of 25 per cent in accordance with Chapter 7 section 1 first paragraph of the ML, since the reduced VAT rate of 12 per cent only applies to the visual arts like paintings when sold directly by the artist or by the estate of a deceased artist. If Michael Angelo's limited company would sell one of his paintings, it would not be considered sold by himself and the company must apply the general VAT of 25 per cent on that supply.

Thus, Michael Angelo *can* be considered committing VAT fraud for filing a VAT return where he accounts for the reduced VAT rate of 12 per cent instead of the general one of 25 per cent due to the use of a legal person and thereby of another legal form than natural person.

- *Conclusion*: Opposite to what is mentioned above about joint ventures the registration of a legal person by *Bolagsverket can* indicate that the supply of the painting *cannot* be comprised by Chapter 7 section 1 second paragraph item 2 of the ML and that such a registration information is an external objectively noticeable sign implying that Michael Angelo as the representative of e.g. a limited company *can* be considered

having committed VAT fraud by applying the reduced VAT rate of 12 per cent on the company's sale of the painting.

In connection with this example I am coming back – for the sake of comparison – to the case mentioned in the nearest previous section (under *Web show*) about used technology. If Michael Angelo is supplying the image (of one of his paintings) via the Internet, that supply would for VAT purposes not be considered a supply of a copy of the painting and neither a supply of a right under sections 1, 4 or 5 of the URL, but some other kind of service supplied, e.g. an electronically supplied service. Then the general VAT rate of 25 per cent according to Chapter 7 section 1 first paragraph of the ML would apply to that supply and not the reduced VAT rate of 6 per cent nor the reduced VAT rate of 12 per cent. Thereby it would not be any difference whether or not Michael Angelo is working as a natural person or by a registered limited company (or another legal person). Thus, Michael Angelo *can* be considered committing VAT fraud for filing a VAT return where he himself or he as a representative of a legal person accounts for one of the reduced VAT rates (6 or 12 per cent) instead of the general one of 25 per cent due to the technology used for the supply of the image of his visual arts, e.g. a painting.

- *Conclusion*: The technology used for the supply of the image *can* be an external objectively noticeable sign implying whether or not the artist (e.g. a painter) *can* be considered having committed VAT fraud.

## 4 Attributes – props – that can be decisive for constituting objective signs contributing to the determination of VAT fraud

Here I am coming back – for the sake of comparison – to both the cases in the nearest previous section. In the first of those two examples the mask maker – whom I am still assuming has the character of a taxable person (and therefore *can* be subject to VAT liability) – could probably not be considered creating an artistic work under section 1 of the URL, if he would only make the masks of a sad or a happy face as illustrated in the picture of above. If he would have made the mask to the leading role of the musical The Phantom of the Opera, he would surely be considered having made an independent artistic work according to section 1 of the URL. Thereby he should apply the reduced VAT rate of 12 per cent on the sale of the original copy and he should apply the reduced VAT rate of 6 per cent if he would supply the image of the same mask, regardless of what technology he would use to convey that image.

- *Conclusion*: The history of the environment in which an attribute – prop – has been used *can* be an external objectively noticeable sign implying whether or not the artist *can* be considered having committed VAT fraud by using another VAT rate than the general one of 25 per cent. In the case of the mask to the leading role in The Phantom of the Opera the mask maker *cannot* be considered having committed VAT fraud by applying 12 or 6 per cent for the supply of the actual mask or for the supply of the image of it.

Regarding the painter Michael Angelo I am now instead assuming that he is an actor and that the beret that I am still assuming he is wearing, now as an attribute – prop – to a character that he is doing on stage and on film. The beret could as such be enough to determine if he is supplying a right under section 1 of the URL when he for instance is appearing in a theatre play or a film. That could be determined by whether or not he is wearing in such an environment his beret. Thus, the beret could besides its function as a headgear have got a connotation indicating that he is not just acting as the private person Michael Angelo but rather as Michael Angelo the famous artist, like with the once so celebrated comedy movie stars Laurel and Hardy wearing their bowler hats on film. Thus, the actor Michael Angelo *can* be considered performing an artistic work by merely appearing in a theatre play or a film wearing his beret. Thereby he *can*, as being considered a performing artist performing an artistic work, also be deemed making a supply exempted from VAT in accordance with Chapter 3 section 11 item 1 of the ML.

- *Conclusion*: Certain attributes – props – used for the supply of a service in the environments of e.g. theatre or film *can* be an external objectively noticeable sign implying whether or not an artist *can* be considered having committed VAT fraud by not filing a VAT return to the SKV for his or her supply of the acting.

In this context I am also reflecting somewhat about the environment of the TV studio (see under *TV studio* in the second previous section). There I stated that the SKV probably would consider the fee that Elsa would get for performing (acting) at rehearsals before the TV broadcast as one single supply mainly taking place directly before an audience and therefore exempt from VAT in accordance with Chapter 3 section 11 item 1 of the ML. If she would just appear as one of the participants in a quiz show, game show or talk show on TV, she would – provided that she is still hired as a taxable person – be liable to apply the general VAT rate of 25 per cent on her fee, since she in this instance would not be performing a literary or artistic work, regardless that she is known both as a singer songwriter and an actress or reciter. However, the actor Michael Angelo *can* be deemed performing an artistic work merely by taking part in a quiz show, game show or talk show (or chat show) on TV, if he thereby would wear the beret contributing

to the metaphor 'Michael Angelo' as a *denomination (term)* for his famous stage or film character (and, although perhaps yet hired as a taxable person, not just appearing in such a TV show under his *name* Michael Angelo). Thereby he *can* also in these cases be regarded making a supply exempted from VAT in accordance with Chapter 3 section 11 item 1 of the ML.

From my experience as a lawyer, I may also mention in this context that artists *can* have some problems in practice with respect of the application of the rules determining whether or not they are VAT liable or about which VAT rate to apply, where negotiations with *Sveriges Television (SVT)* – i.e. the Swedish public service television company – are concerned. In my opinion, it is then a matter of the SVT being exempted from VAT according to Chapter 3 section 20 of the ML (and Article 132(1)(q) of the EU's VAT Directive), which means that the SVT, as a public service (non-commercial) broadcasting company, is not entitled to deduct input tax (according to Chapter 8 section 3 first paragraph of the ML and Article 168(a) of the EU's VAT Directive). Thus, it is not only the environment in the case in point where the artist is acting – e.g. a TV studio – that can cause him or her VAT problems. It *can* – at least in practice – also be a matter of taking into consideration the VAT situation by his or her counterpart – which is a rather common phenomenon in the field of VAT law.

## 5 Summary and concluding viewpoints

*Summary*

This paper is supposed to be a contribution to The 19th International Roundtable for the Semiotics of Law (IRSL2018) on May 23-25, 2018 at Örebro University. The aim with the paper is to instigate a discourse on the Semiotics of Law (or Legal Semiotics) on signs of tax crime in an artistic environment. Thereby the chosen subject within the tax law is value added tax (VAT) why the tax crime in the examples given in this paper is about VAT fraud.

In the examples of tax fraud presented in this paper the eventual liability to file a VAT return is set in various artistic environments which I have concluded *can* work as an external objective sign in the case in point to judge whether or not the artist's attitude to that liability or his or her choice of VAT rate means that he or she has committed VAT fraud (barring whether or not the prerequisite of intent is fulfilled). The reasoning in the examples has been restricted to the objective prerequisites for VAT fraud. The main question in each example has been whether the acting by the artist and the actual artistic environment constitute signs of VAT fraud, if the artist's attitude to those signs is – with or without intent – to refrain from filing a VAT return or filing one containing a wrong VAT rate.

The artistic environments which have been chosen as examples are headlined as follows: *Concert hall/Theatre*, *Recording studio*, *TV studio*, *Cinema* or *Web show*. I have also presented two special examples

concerning whether a joint venture constituting the artistic environment and thereby also a literary or artistic work *or* a painter's work being made under different legal forms can indicate objective signs contributing to the determination of VAT fraud made by the partners of the joint venture or by the painter. In addition I have reasoned in the mentioned respects about artists' use of attributes – props – being possible as decisive objective signs of VAT fraud when they act in environments of e.g. theatre or film.

*Concluding viewpoints*

As concluding viewpoints in short I would like to emphasize the importance, for the development of the research within tax law and in particular EU tax law, of completing it with Legal Semiotics, regardless whether the method is law dogmatic or empirical studies. I have mentioned that the current Swedish copyright act is from 1960 and that it – like the Swedish VAT legislation which came into force 1969 – has been already from the beginning influenced by the EU law. However, although the current Swedish VAT act from 1994 shall, due to Sweden's EU accession in 1995, be interpreted in the light of the EU law in the field of VAT, I argue, above all after the review of Legal Semiotics on copyright questions in this paper, for the research on VAT law to adopt such questions.

A historic reflection might prove at least parts of the reasoning behind the current Swedish copyright act obsolete. One Member of the Swedish Parliament proposed a motion meaning that the preparatory work to that act should be dismissed altogether and suggested instead the following solution to issues on copyright: The state should purchase the rights for a small sum of one for all and pay the originators state grants. The majority of the Parliament dismissed the motion but *without any trace of reasoning in principle*.[270] Like the previously mentioned anecdote from the time about the dark or red jackets, this proves in my opinion that the discourse behind the Swedish copyright act of 1960 on copyrights cannot have been so sophisticated as today's complex reality demands. That act is as above-mentioned still current and I believe that Legal Semiotics would support the search for underpinning reasons to construe it and all the more when construed together with the interpretation of the Swedish VAT act in the light of the EU law.

Thus, I for one suggest research on the Semiotics of Tax Law to be introduced in the research on tax law and I will come back to that when

[270] See pages 169 and 170 in *Rätten till menuetten: Historien om musikens värde*, by Gunnar Petri, Kungl. Musikaliska akademiens skriftserie nr 92, Bokförlaget Atlantis AB, Stockholm 2000. See also 12 213 111 of Forssén 2019 (3).

I continue with the Law and Language part of a research project on The Making of Tax Laws (not to be confused with The Making of Tax Law) I started in 2015.[271] I have introduced The Making of Tax Laws as a new branch of Fiscal Sociology, where I am, regarding the Law and Language part, e.g. aiming to further develop my ideas about models (tools) with logic function trees to build software sophisticating the examination of the process of The Making of Tax Laws. Therefore, I believe that my ideas in this paper should be used to introduce the Semiotics of Tax Law into the tax law research, e.g. as an element in Law and Language on VAT law (or tax law in general). Especially concerning studies of the tax object for VAT purposes, which issue may be endless in variation (regarding questions on the determination of whether a supply of goods or services is emerging or – if so – when or where it is taking place), I am – after having written this paper – convinced that the tradition of strictly law dogmatic studies in the field of tax law should be completed with the Semiotics of Tax Law, e.g. the Semiotics of VAT Law. Otherwise the lack of empirical studies in the field of tax law will, in my opinion, make research in that field more or less an exercise in deduction which is not giving new knowledge like with inductive analyses, since the task of law dogmatic studies is merely to interpret and systematize current law. With respect of the ambition of making tax law research usable, I also see a benefit of such a development for practicians like knowledge managers working at e.g. law firms or auditing firms with Law and Informatics software and search engines like Google on the Internet (containing algorithms).

[271] See Part D of Forssén 2019 (1) and parts I and II of this book.

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SE: *Länsstyrelsen i Stockholms län Rapport 2012:34*, *Åtgärdsprogram för kväveoxid och partiklar i Stockholms län* [LSt Stockholm Report 2012:34]

SE: Statistics Sweden (*Statistiska Centralbyrån*) – website www.scb.se

SE: Swedish Board of Agriculture (*Jordbruksverket*) – website www.jordbruksverket.se

**EU sources and the European Convention**

EU sources

*Primary law*

EUCFR, the EU Charter of Fundamental Rights (also the Charter)
The Lisbon Treaty, signed in 2007 and ratified in 2009, i.e. TEU and TFEU
Treaty on EU [TEU]
Treaty on the Functioning of the EU [TFEU]

*Utkast till fördrag om upprättande av en konstitution för Europa av den 18 juli 2003* (CONV 850/03) [draft of the EU constitution, which was approved in 2004 but never ratified by all the EU Member States]

*Secondary law*

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*Rådets direktiv 2009/162/EU* – the Council's directive 2009/162/EU

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European Convention

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**OECD**

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UK: *Garner v. Burr* [1951] 1 KB 31.

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268/83 (Rompelman), ECLI:EU:C:1985:74
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