EC law analysis of the reference in the Swedish VAT act to the concept *näringsverksamhet* (business activity) in the Swedish income tax act for the purpose of determining the concept *yrkesmässig verksamhet* (taxable person) in the Swedish VAT act

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PREFACE

This book is a revised and shortened version of *Momsbegrepp och inkomstskatterätten – en EG-rättslig analys* (Eng., VAT-concepts and the income tax law – an EC law analysis), which book was published in a third edition on VJS publishers the spring of 2006. The work began on the 11th of March 2000, and those contacted are Olle Lekander, LL.M and B.A. and, at The University of Lund, Lars Pelin, Sture Bergström (deceased), Christina Moëll, Mats Tjernberg and Gregor Noll and at The Stockholm School of Economics, Bertil Wiman, and at the University of Linköping, Jan Kellgren. Special thanks to Olle Lekander and Jan Kellgren.

The work concerns first of all whether the value added tax act can connect to the income tax act for the determination of the tax subject, i.e. of who can belong to the VAT system. Since that's a corporate tax law-question, it's naturally brought up in connection with the accounting law in the presentation. The topic on EU law conformity with the connection of the determination of *yrkesmässig verksamhet* (YRVE), taxable person, according to the Swedish VAT act to the income tax law-concept *näringsverksamhet* (NAVE), business activity, has a common denominator for VAT and income tax in the civil law and the Requirement to maintain accounting records as proof concerning who can be let into or shall belong to the VAT system, since EC-directive exist in the field of accounting precisely like in the field of VAT. The main question on the determination of the tax subject in the field of VAT is related to questions on accounting, control and tax collection. That's necessary for the understanding of the importance of the question for the tax system as a whole. It's far too common that questions on tax only deal with the charging side leaving out questions on tax collection. That method is less appropriate for VAT issues, since the VAT is an idea built on principles of its own and not just an authoritarian decision on taxation of a certain phenomenon. It's instead a matter of capturing a dynamic activity in flight. Thereby can the idea of VAT as a tax collection system be put at the same level as the five hundred-year-old invention of book-keeping. That perspective gives also naturally the need of describing the VAT in connection with accounting issues and tax collection, and not as an isolated law technical question. Also other connections from the VAT act to the income tax act are mentioned, and then first of all the right of deduction in form of a claim on the state which is basic for the VAT as an idea. Can that right be limited by connections to income tax-concepts?

There are many references in this book to the first and sixth EC directives on harmonization of the Member States' legislation on turnover taxes. First of all the rules in these two directives were replaced on the 1st of January 2007 by the Council Directive 2006/112/EC of the 28th of November 2006 on the common system of value added tax (which denomination also is part of the title of the Sixth Directive). However, this does in principle not mean any material changes, and the reader can in a correlation table in Annex XII of the new directive find the articles corresponding to those in the First and Sixth Directives referred to here.

Stockholm in February 2007
Björn Forssén

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ABBREVIATIONS

AB, *aktiebolag*, company
ABL, *aktiebolagslagen (2005:551)*, the Companies Act
BFL, *bokföringslagen (1999:1078)*, the Book-keeping Act
BFN, *Bokföringsnämnden*, Swedish Accounting Standards Board
C, curia (about the ECJ)
Ch., chapter
COM, the EU-commission
Dan., Danish
Div., division
DN, *Dagens Nyheter*, Daily News (leading Swedish morning paper)
dnr, *diarienummer*, day-book number
Dt, *direkt skatt taxering*, direct tax assessment
EC, the European Community [also when referring to Article of the EC Treaty (i.e. the Rome treaty)]
ECJ, the European Court of Justice (in Luxembourg)
EEA, European Economic Area
EEC, European Economical Communities
EEIG, *europeiska ekonomiska intressegrupperingar*, European Economic Interest Groups
e.g., exempli gratia, for example
Eng., English
etc, etcetera
EU, European Union
F, (in F-tax), entrepreneur
FAR, *Föreningen Auktoriserade Revisorer*, the institute for the accounting profession in Sweden
FB, *förhandsbesked*, advanced ruling
First Directive, the first EC directive on VAT (67/227/EEC)
GAAP, Generally accepted accounting principles
GBFL, the old BFL
Ger., German
GML, the old ML
IAS, International Accounting Standards
IASB, International Accounting Standards Board
i.e., id est, that is
IL, *inkomstskattelagen (1999:1229)*, the income tax act
Im, *indirekt skatt mervärdesskatt*, indirect tax VAT
KL, *kommunalskattelagen (1928:370)*, the municipality tax act (replaced by IL)
Ltd, limited (compare: AB)

Memo, memorandum
ML, *mervärdesskattelagen (1994:200)*, the value added tax act
Moms, abbreviation of mervärdesskatt (compare: VAT)
NAVE, *näringsverksamhet* (compare: business activity)
No., number
Not, notice case
OECD, Organization for Economic Co-operation and Development
OJ, Official Journal of the European Union
p., page; pp., pages
Prop., *Regeringens proposition*, Governmental bill
Ref, report case
RF, regeringsformen, the Swedish national constitution
RSV, *Riksskatteverket*, formerly the National Tax Board
RÅ, *Regeringsrättens årsbok*, the SAC's yearbook
SAC, the Supreme Administration Court (Sw., *Regeringsrätten*)
SAL, *socialavgiftslagen (2000:980)*, the social security contributions' act
SBL, *skattebetalningslagen (1997:483)*, the act on tax payment
SEK, Swedish kronor
SFS, *svensk författningssamling*, Swedish Code of Statutes
SIL, *lag (1947:576) om statlig inkomstskatt*, the state income tax act (replaced by IL)
Sixth Directive, the Sixth EC directive on VAT (77/388/EEC)
SkBrL, *skattebrottslagen*, the act on tax fraud
SkU, *skatteutskottet*, the tax committee
SKV, *Skatteverket*, the nation-wide covering tax authority which replaced the RSV and the 10 regional authorities in 2004 – when referring to its writs=the head office, i.e. the former RSV
SOU, *statens offentliga utredningar*, Governmental investigations
SRN, *skatterättsnämnden*, the Tax Law Council
Sw., Swedish
TL, *taxeringslagen (1990:324)*, the Tax assessment act
VAT, value added tax
VE, *verksamhet* (compare: activity), inter alia the VE-part of YRVE
vs, versus
www, world wide web
YR, *yrkesmässig* (compare: professional), the YR-part of YRVE
YRVE, *yrkesmässig verksamhet* (compare: taxable person)

1. INTRODUCTION

1.1 SUBJECT, PURPOSE AND METHOD

Sweden became member of the European Union, EU, on the 1st of January 1995. Thus, value added tax (VAT) – Sw., mervärdesskatt (moms) – as a discipline comprises EU law for the purpose of interpretation of the Swedish value added tax act [*mervärdesskattelagen (1994:200)*, ML]. By virtue of the Maastricht treaty of 1992 the EU was established in 1993. Sometimes the expression EU law and sometimes the original EC (European Community) or EEC (European Economic Communities) law is used in doctrine after the establishment of the European Union in accordance with the Maastricht treaty of 1992. The EU constitution is not ratified by all EU27 countries and therefore the Rome treaty of 1958 still applies, which also is called Treaty Establishing the European Community, the EC Treaty. In Article 93 (formerly 99) of the EC Treaty – abbreviated Article 93 EC – "harmonisation" of indirect taxes, mainly including VAT and Excise Duties,[1] is stipulated, which means that the national VAT acts within the EU shall be integrated, for the purpose of ensuring the establishment and the functioning of the internal market existing within the EU since 1993.[2]

Since 1967 and the first EC Directive on VAT (67/227/EEC), here called the First Directive, a country cannot become a member of the EEC (nowadays the EU) without VAT in its economic system.[3] So called cumulative multiple-step-taxes were supposed to be exchanged with a common VAT system.[4]

Sweden exchanged its sales tax from 1960 with a VAT system by introducing its first VAT act on the 1st of January 1969 [*lag (1968:430) om*

[1] Direct taxes like the income tax burdens the person liable to pay the tax, whereas indirect taxes are turned over on others, e.g. when an enterprise adds VAT to the price of the goods or services sold to the customer (the consumer). See, e.g., *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 9th edition), p. 4, by Sven-Olof Lodin and others.
[2] The Articles of the EC Treaty were renumbered due to the Amsterdam treaty of 1997. Mainly because of some references here to the preparatory work, *Prop. 1994/95:19*, to the Swedish act deciding the Swedish membership of the EU, the formerly used numbers of the Articles will be set out between parenthesis.
[3] See Article 1 of the First Directive. See also *Prop. 1994/95:57* p. 73.
[4] See the forth and eighth paragraph of the preamble (introduction) of the First Directive.

mervärdeskatt, GML].[5] Already then under the influence of the EU law on VAT,[6] and more so by the time of the big tax reform of 1990 and in connection with the now existing ML replacing the GML on the 1st of July 1994.

Due to the Sweden becoming a member of the EU in 1995, EU law applies for the interpretation of the rules laid down in the ML. That's mainly an issue of applying the important Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (77/388/EEC). Here called the Sixth Directive. The Swedish Parliament (*Sveriges Riksdag*), by virtue of the national constitution (*regeringsformen*), transferred its competence on VAT law to the EU institutions when Sweden acceded to the EU.[7] In consequence thereof diversions in ML from the Sixth Directive are allowed only transitional if stated for a certain situation in the Swedish act deciding the Swedish membership of the EU, the so called EU act.[8]

In the field of income tax the Swedish Parliament hasn't transferred its competence generally to the EU institutions. Article 94 EC (formerly 100) means that the EU member countries should do "approximation of laws" between each other for instance concerning income tax acts and only where a unanimous EU Council issue a directive in a certain income tax matter.

One of the provisions necessary for liability to pay VAT in portal section of ML, Ch. 1 sec. 1 first paragraph item 1, is the one stipulating that the person who could be subject to that liability must be a taxable person (Sw., *yrkesmässig*). That person must have an *yrkesmässig verksamhet* (Eng., economic activity) in which taxable transactions can be made. It must

[5] See *Prop. 1968:100* pp. 1 och 31.
[6] See *Prop. 1968:100* pp. 25 och 51.
[7] See Ch. 10 sec. 5 of *regeringsformen*, RF.
[8] Sweden's accession to the EU is established by the EU act [*lag (1994:1500) med anledning av Sveriges anslutning till Europeiska unionen*, here translated into English, 'the act on Sweden acceding the European Union']. In the act announcing treatys and other instruments for the purpose of Sweden acceding the EU [*lagen Tillkännagivande (1994:1501) av fördrag och andra instrument med anledning av Sveriges anslutning till Europeiska unionen*] the certain and transitional solutions for Sweden on VAT are stipultaed, and they are also commented in the preparatory work to the EU act and the act of announcement (see *Prop. 1994/95:19* Part 1 pp. 142, 143, 236 and 237) and also in the preparatory work to the act on amendments of ML (*SFS 1994:1798*) due to Sweden acceding the EU [see *Prop. 1994/95:57* (*mervärdesskatten i EU*), Eng., the VAT in the EU].

thereby be noted that one of the issues to be construed here is whether *verksamhet* in the expression *yrkesmässig verksamhet* is equivalent to activity in the English version of Article 4(1) of the Sixth Directive, where it's stipulated inter alia that a taxable person shall mean a person carrying out an economic activity. Only for the sake of simplifying the reading, let's abbreviate *yrkesmässig verksamhet* with **YRVE** and especially point out when to separate the two words. YRVE is formally determined by C. 4 sec. 1 item 1 of ML referring to the concept *näringsverksamhet* (Eng., business activity) in Ch. 13 of the Swedish income tax act [*inkomstskattelagen (1999:1229)*, IL]. There's also a supplementary rule on YRVE in Ch. 4 sec. 1 item 2 of ML, stipulating that YRVE also means business activities comparable to the one's described in Ch. 13 of IL, so called businesslike activities (Sw., *rörelseliknande former* or, more accurately, *verksamhet som bedrivs i former som är jämförliga med en till sådan näringsverksamhet hänförlig rörelse*), provided that the annual turn over of such businesslike activities exceed SEK 30,000. Let's, for the sake of simplification, abbreviate *näringsverksamhet* with **NAVE** and use the expression **the SUPPLEMENTARY RULE** for the businesslike activities mentioned. For the sake of determining YRVE there are also a couple of references to IL concerning certain temporary transactions.[9]

The purpose with this book is to make an analysis whether the formal reference from ML to IL and the concept NAVE there for determining the taxable person, i.e. a person that could be liable to pay VAT provided the other necessary provisions thereto are fulfilled, complies with EU law. Hence the subject and title of this book: EU-law analysis of the reference in the Swedish VAT act to the concept *näringsverksamhet* (business activity) in the Swedish income tax act for the purpose of determining the concept *yrkesmässig verksamhet* (taxable person) in the Swedish VAT act. Note that YRVE should be interpreted as equivalent to taxable person when ML is to be deemed containing such an equivalent and the VE-part (*verksamhet*) thereof is to be construed in connection with the concept economic activity.

During the work with the big tax reform of 1990 it was argued that a common tax frame for VAT and income tax could be favorable,[10] but the question is whether the formal connection from ML to IL for the purpose of determining the taxable person contains a legal uncertainty for the

[9] See Ch. 4 sec. 3 first paragraph items 1 and 2 of ML.

[10] See *Mervärdeskatt En läro- och grundbok i moms* (Eng., Value added tax an educational- and handbook in VAT), p. 57, by Björn Forssén, where the expression common tax frame (Sw., *gemensam beskattningsram*) is used.

individual, since Sweden's accession to the EU in 1995 means there's a new environment for interpretation of the VAT legislation with EU law forming part of the law on VAT also in Sweden.[11] There's no formal EU law obstacle to prevent ML from referring to another legislation for the purpose of determining a certain concept. The European Court of Justice (ECJ) has established that the meaning of a concept governed by EU law cannot divert from the meaning given to it by EU law. Instead the content of such a concept shall be given an autonomous European meaning.[12]

Since the Swedish legal system is dual instead of monistic, the EC Directives on VAT must be implemented in Swedish national acts, and ML is such an act. However, the interpretation of the rules in ML shall be made with respect of EU law; thus far there are only directives (Sw., *direktiv*) on VAT and one regulation (Sw., *förordning*) on tax administrative co-operation on VAT, but regardless if a directive or a regulation from EU is concerned the EU law expressed thereby forms part of the law on VAT in Sweden although for some reason not yet implemented in ML or another Swedish act. The Supreme Administrative Court, SAC (Sw., *Regeringsrätten, RR*) – or when criminal cases on VAT are concerned the Supreme Court (Sw., *Högsta domstolen*) – is obliged to obtain a preliminary ruling by the ECJ where the interpretation of a rule in ML is not clear, i.e. when EU law is required to be laid down by the ECJ's interpretation for the purpose of the SAC being able to decide in the matter at hand.[13] Thus. the same applies if for instance a rule of the Sixth Directive isn't implemented in ML. The Sixth Directive has a so called direct effect. Contrary a Governmental obligation towards the individual cannot be effected against the individual if it's not covered by the letter of the rule in ML to be construed. Thus, the principle of legality for taxation may be considered equally applicable for VAT as for other taxation, e.g. income tax.[14] However, Ch. 4 sec. 1 item 1 of ML referring to Ch. 13 of IL for determining YRVE presents no problem with respect of the principle of legality for taxation; instead the problem with that connection is whether the structure of Ch. 13 of IL or the content of the concept NAVE according

[11] See *Svensk moms i EU* (Eng., Swedish VAT in the EU), p. 16, by Björn Forssén and *Ny Juridik* (Eng., New Law) 1/1995 p. 30, the article *Mervärdesskatten och EU* (Eng., The Value Added Tax and the EU), pp. 25-48, by Björn Forssén, where the expression new environment for interpretation (Sw., *ny tolkningsmiljö*) is used.
[12] See the ECJ case 107/76 (Hoffman-La Roche).
[13] See the third paragraph of Article 234 EC (formerly 177).
[14] See Ch. 8 sec. 3 of RF and also Ch. 2 sec. 10 second paragraph of RF (the prohibition of retroactive tax law) and *Legalitetsprincipen vid inkomstbeskattningen* (Eng., The principle of legality at the income taxation), pp. 5-7 and 185, by Anders Hultqvist and *Rätten och förnuftet* (Eng., The law and reason), p. 253, by Aleksander Peczenik.

to domestic Swedish practice is complying with the content of the concept taxable person of Article 4(1) of the Sixth Directive given by EU law.

For the topic at hand it's of interest that the former general reference in sec. 75 of GML to the income tax legislation for the purpose of interpretation of VAT concepts was revoked when GML was replaced by ML on the 1st of July 1994.[15] A reminiscence of that reference mainly exist with respect of the determination in question of YRVE, concerning Ch. 4 sec. 1 item 1 of ML formally referring thereby to IL. Other such references that should be mentioned are the following. Withdrawal taxation (Sw., *uttagsbeskattning*) of services on real estate, where the building contractor's own real estate is defined as stock of real estate in the building business activity (Sw., *byggnadsrörelse*) according to IL.[16] The so called prohibition of deduction of input tax (Sw., *ingående moms*) on expenses for the purpose of entertainment and similar (Sw., *representation och liknande ändamål*) and for which the taxable person isn't entitled to deduct for the purpose income taxation according to Ch. 16 sec. 2 of IL.[17] The rules on withdrawal taxation for building business activities exist by virtue of the EU act as a Swedish exception from the Sixth Directive and applies to the new production of buildings and sites for building.[18] The prohibition of deduction is in force by virtue of the second paragraph of Article 17(6) of the Sixth Directive. In both cases the special rules applies only transitionally. Above all the question has been raised whether or not the prohibitions of deduction in ML are complying with EU law, but diversions from the Sixth Directive are in principle acceptable thereby and for the rules on withdrawal taxation for building business activities transitionally, i.e. until the EU Council decides to revoke the possibility for the Swedish national rules in question. The subject o this book is limited to give the analysis of whether or not the determination of taxable person for the purpose of VAT can be made by the reference to the concept NAVE in Ch 13 of IL. Therefore those withdrawal rules in ML won't be subject to any analysis here, since they concern the object for taxation and diversions from the Sixth Directive are allowed in that respect. Neither will all of the different prohibitions of deduction be subject to any analysis here, since they also are allowed transitionally and in accordance with the Sixth Directive. Instead there'll be an analysis in particular of the prohibition of

[15] See *Prop. 1993/94:99* p. 326, where you can see that an equivalent of sec. 75 of GML is not to be found in ML.
[16] See Ch. 2 sec. 7 first paragraph of ML.
[17] See Ch. 8 sec. 9 first paragraph item 2 of ML.
[18] See *SFS 1994:1501*, pp. 5792 and 5793 under the headline *Sverige* items w), z) and aa) and *Prop. 1994/95:19* Part 1 p. 142 and *Prop. 1994/95:57* p. 93.

deduction of input tax on expenses for the purpose of entertainment and similar, since the right to deduct input tax is central to determine if a taxable person belongs to the VAT system and there's a formal reference in ML to IL for that particular case of prohibition of deduction.

The VAT is a tax on consumption and the rules about the VAT-system aim primarily to distinguish the entrepreneurs from the consumers. In that respect the concept taxable person in Article 4(1) of the Sixth Directive doesn't differ systematically from the accounting law concept entrepreneur or, at least not subjectively, from the income tax concept NAVE. There are two concepts describing the entrepreneur in ML: NAVE according to Ch. 13 of IL by the reference thereto in Ch. 4 sec. 1 item 1 of ML and entrepreneur (Sw., *näringsidkare*) concerning certain rules on placing the transaction, which is also used in the rules on information in the invoice. The question is if Ch. 13 of IL systematically and Swedish practice give NAVE a content that makes YRVE in ML not in compliance with taxable person in the Sixth Directive. It's thereby of interest that the ECJ, despite the fact that the tax sovereignty on income tax in principle still belong to the Swedish Parliament, claim that the EU Member States nevertheless are obliged to respect the EU primary law, and the so called four freedoms – free movement of persons, goods, services, and capital – and the right of (freedom to) establishment in another Member State for a national of an EU Member State expressed in the EC Treaty, also in that field of taxation.[19] The SAC has followed the ECJ thereby and on several occasions complied with EU primary law in income tax cases, despite the fact that the income tax question at hand wasn't comprised by any rule of an EU Directive.[20] However, the matter on whether or not the ECJ has the power to create competence of its own without being allowed competence by the legislative body of a member country has not yet been brought to a head. The ECJ's so called competence-competence and the SAC's willingness to obey thereto have been both questioned and possibly confirmed in doctrine.[21]

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[19] See inter alia the ECJ cases 270/83 (avoir fiscal), C-279/93 (Schumacker) and C-118/96 (Safir).

[20] (The SAC's yearbook is abbreviated RÅ in Swedish) See *RÅ 2000 Ref 17*, *RÅ 2000 Ref 38*, *RÅ 2000 Ref 47 (I.* and *II.)* and *RÅ 2002 Not 210* (SAC case No. 7009-1999). In *RÅ 2000 Ref 17* the SAC obtained a preliminary ruling of the ECJ: the ECJ case C-200/98 (X AB and Y AB). In *RÅ 2002 Not 210* the SAC obtained a preliminary ruling of the ECJ: the ECJ case C-436/00 (X and Y). [Note! For the 2002 case RÅ wrongly states the ECJ case No. C-36/00 instead of the correct No. C-436/00]

[21] See *Skattenytt* (Eng., the Tax news), 1995 pp. 26 and 27, the article *Medlemskapet i Europeiska Unionen och skatter – en överblick* (Eng., Membership in the European Union and taxes – an overview), pp. 15-29, by Lars Pelin; *Svensk skattetidning* (Eng., Swedish tax journal) 2002 pp. 561-573, the article *Den europeiska gemenskapens*

Although it's not clear that the ECJ has competence to try whether or not IL's rules are complying with EU law other than with reference to EU secondary law, i.e. with reference to the few issues on income tax comprised by EU directives on income tax,[22] there's nothing in VAT law contradicting such a trial of EU law compliance. It follows of Article 93 EC (formerly 99), of the second paragraph of the preamble in the First Directive and of the third paragraph of the preamble in the Sixth Directive that the rules of the national VAT acts must not obstruct the free movements of persons, goods, services and capital within the internal market of the EU. It follows of the fifth paragraph of the preamble in the Sixth Directive that also a person making temporary transactions within an EU Member State can be deemed a taxable person. Thus, ML's rules shall be written with respect of the EC Treaty principles on free movement of goods in Article 23 EC (formerly 9), of services in Article 49 EC (formerly 59), of persons in Article 39 EC (formerly 48) and of capital in Article 56 EC (formerly 73b) – the so called four freedoms – and also with respect of the EC Treaty principle on the right of (freedom to) establishment in another Member State for a national of an EU Member State. Thus, the SAC obeying by the ECJ's concept of a strict EU treaty complying principle of an absolute primacy (Sw., *absolut företräde*) of EU law over

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diskrimineringsförbud och dess skattekonsekvenser: den svenska erfarenheten (Eng., The European Community's prohition of discrimination and its taxconsequences: the Swedish experience), by Leif Mutén; *Skattenytt* (Eng., the Tax news) 2003 pp. 230 and 231, the article *Rättfärdigande av hindrande skatteregler mot bakgrund av EG-domstolens underkännande av ännu en svensk skatteregel* (Eng., Justification of obstructive tax rules with respect of the ECJ's disqualification of yet another Swedish tax rule), pp. 230-246, by Mats Tjernberg; *Skattenytt* (Eng., the Tax news) 2004 pp. 503-511, the article *EG-rättens betydelse på det direkta beskattningsområdet* (Eng., The EC-law's importance in the field of direct taxation), by Lars Pelin; *EG och EG-rätten* (Eng., the EC and the EC law), p. 84, by Allgårdh, Olof, Jacobsson, Johan and Norberg, Sven; *Svensk intern- och internationell skatterätt* (Eng., Swedish internal- and international tax law), p. 221, by Lars Pelin; *EG-skatterätt* (Eng., EC tax law), pp. 254 and 255, by Ståhl, Kristina and Persson Österman, Roger; *När tar EG-rätten över?* (Eng., When does the EC law rake over?), p. 237, by Fritz, Maria, Hettne, Jörgen and Rundegren, Hans; and *Mervärdesskatt vid omstruktureringar* (Eng., VAT at restructuring measures), p. 86, by Eleonor Alhager.

[22] The Merger Directive (90/434/EEC), The Mother-daughter-company Directive (90/435/EEC), The directive on taxation of income from savings in the form of interestpayments for private persons (2003/48/EC), the so called Interest directive, and The directive on a common system for taxation of interests and royalties paid between closely linked companies in different EU Member States (2003/49/EC). The directives mentioned are implemented in IL [the Interest directive although in *lag (2001:1227) om självdeklarationer och kontrolluppgifter* (Eng., the act on income tax returns and statement of earnings and tax deductions)].

the law of the Member States,[23] is something that could be questioned itself, but it doesn't present a problem with reference to VAT law. Therefore the expression EU law compliance is used here in the meaning EU directive compliance, when not otherwise expressly stated.

It should be mentioned that the decision to leave out here the question of the scope of the principle of primacy of EU law over the law of the Member States doesn't seem to be effected by the EU constitution issued in June 2004, if it would be ratified in the future by all the current EU27 Member States (which by the way may be added by a couple more). The principle on primacy of the EU law over the law of the Member States is "codified" by the EU constitution, which is supposed to replace the EC Treaty.[24] However, as long as the EU Member States are sovereign as such and Sweden still has a dual law system, the problems mentioned here with for instance the principle of legality for taxation in Ch. 8 sec. 3 of RF will exist then too. The Swedish constitution (RF) can be assumed to still be into effect and the question of kept tax sovereignty in principle in the field of income tax without an act expressly transferring competence in general also for that field to the EU institutions will remain unsolved. The Articles 93 EC and 94 EC will only be replaced by articles of equal wordings in the EU constitution.[25] In the EU constitution the expression regulation will be replaced by European law and directive, e.g. as in the Sixth Directive, will be replaced with European framework law. The only difference in competence allocation between the Swedish Parliament and the EU institution – with respect of material tax law – would be that the draft on the EU constitution expressly mentions *company tax* along with rules on the procedure of taxation as issues over which Sweden no longer would have a veto.[26] The EU constitution would in this sense make it possible for

[23] See the ECJ case 26/62 (van Gend en Loos) and the ECJ case 6/64 (Costa), where the principles on the EU treaties' direct effect and primacy over the law of the Member States are considered to have been established. Thus, considering inter alia the veto each EU Member State has due to the demand on unanimous decisions by the EU Council when issuing laws where the national legislative bodies have not transferred a general competence to the EU institutions according to Article 93 EC (formerly 99), and the task at hand is rather about "approximation of laws" according to Article 94 EC (formerly 100), it could be argued if the principles mentioned really support a principle of competence-competence by the ECJ, but that discussion would stretch to far for the main question in this book.

[24] See Article I-10(1) of the draft on the EU constitution. Equals Article I-6 of the final EU constitution [Article I-6 EU constitution].

[25] See Articles III-62(1) and III-64 of the draft on the EU constitution. Equaled foremost by Articles I-11 and III-130 and I-42(1a) EU constitution.

[26] See Article III-63 of the draft on the EU constitution. That question about the draft was discussed with the Swedish Treasury's Henrik Paulander 2003-09-09. [The article in the

the EU to prohibit an EU Member State from establishing itself as a so called tax paradise concerning the non-harmonized field of income taxes by lowering its company tax to a level significantly below those used by other EU Member States, which today is considered not possible to prohibit due to the EC Treaty's principles of free movement of persons, goods, services and capital and the right of (freedom to) establishment in another Member State for a national of an EU Member State. However, the VAT law won't be affected by such a development, since an establishment for income tax purposes with for instance a permanent establishment in the EU Member State Sweden isn't necessary for the sake of a foreign entrepreneur (from another EU Member State or from a third country) establishing for VAT purposes in Sweden and thereby joining the Swedish VAT register. As a result of Sweden becoming an EU Member State in 1995 the request to have YRVE 'in the country' (Sw., *här i landet*) to become liable to pay VAT in Sweden on taxable transactions of goods or services supplied here was removed from Ch. 1 sec. 1 first paragraph item 1 of ML. Besides the expression permanent establishment (Sw., *fast driftställe*), i.e. equal in wording with the same income tax-expression, which also was used in some of the rules on placing the supply in ML, was replaced on the 1st of January 2002 with the expression fixed establishment (Sw., *fast etableringsställe*),[27] which rules on placing the supply decide if a foreign entrepreneur shall belong to the Swedish VAT system and register here. If the EU constitution will replace the EC Treaty the only result in this context will be that EU law, union law (Sw., *unionsrätt*), should be used consequently instead of the alteration today between EC law (Sw., EG-rätt) and EU law (Sw., EU-rätt) when dealing with VAT questions.

Formally the reference from Ch. 4 sec. 1 item 1 of ML to Ch. 13 of IL for determining YRVE in Ch. 1 sec. 1 first paragraph item 1 of ML for the benefit of deciding who can be liable to pay VAT doesn't present any problem itself. Swedish verdicts in VAT questions have of course been legal also after Sweden acceding into the EU in 1995. The questions raised here are instead if the application in practice of VAT law by authorities and judges may have led to or created risks for the development of a Swedish VAT practice in conflict with the VAT concepts given by EU law concerning who's a taxable person according to Article 4 of the Sixth Directive, and thereby comprised by the scope of the VAT. The VAT

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draft is foremost equaled by Articles I-23(3), III-137 second paragraph, III-156 and III-158(1a) EU constitution – in these articles are no longer *company tax* expressly mentioned.]

[27] See the wordings of Ch. 5 sec. 7 and Ch. 5 sec. 8 of ML according to *SFS 2001:971* (*Prop. 2001/02:28*).

system with its rules is about distinguishing consumers from entrepreneurs. In principle it's the entrepreneurs who can belong to the VAT system, while consumers such as primarily private persons will carry the VAT. Here are first and foremost the entrepreneurs dealt with, although there are rules on public bodies also being able to have YRVE. They are then defined as taxable persons via the object for taxation, i.e. by virtue of their supplies of goods or services, provided such supplies are not made in line with their engagements as public authorities.[28] Non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*) may be excluded from YRVE and references are made to IL and its concepts to determine such exemptions.[29] This is of interest when handling the main question here on the EU law compliance of the application in practice of the concept YRVE in Ch. 4 sec. 1 item 1 of ML, but the core issue is nevertheless how to deal with the entrepreneurs' situation. Therefore entrepreneur is used here without distinguishing between different legal forms of business entity, unless otherwise expressly mentioned. The expressions enterprise and entrepreneur refers here to an individual as taxable person regardless whether or not working as a one-man business (Sw., *enskild firma*) or via e.g. his or her company [Sw., *(aktie)bolag*].

The method for the analysis in this book is first of all about finding a number of questions which may function as the starting point to go further by comparing the content of the concept taxable person in Article 4(1) of the Sixth Directive with NAVE in Ch. 13 of IL. Thereafter can an analysis based on case law be made. What prerequisites are there to deem a person as a taxable person? Who's comprised by the scope of ML? That person can belong to the VAT system, and when shall he do so? To be able to get that tool for comparing the VAT and the income tax it must first be determined what's VAT, i.e. what are the basic principles determining that a question of VAT is at hand at all and not some issue outside the VAT system and possibly comprised by some other form of taxation?

1.2 DISPOSITION AND SOURCES

This book doesn't contain a descriptive exposé of the VAT from an EU law perspective. In that sense it may be considered a more focused version of the larger book by the same author, *Momsbegrepp och inkomstskatterätten – en EG-rättslig analys* (Eng., VAT-concepts and the income tax law – an

[28] See Ch. 4 sec. 6 and Ch. 4 sec. 7 of ML.
[29] See Ch. 4 sec. 8 of ML.

EC law analysis), which is published in a third edition at the publisher VJS during the spring of 2006 and may as such be the first edition of the content of a thesis for a doctorate. The focus here is on the EU law compliance of the concept YRVE in ML being defined formally by reference to the concept NAVE in Ch. 13 of IL.

Thus, the task here isn't about creating the kind of general rules by the thumb often wanted for methods to solve tax issues.[30] The intention is not to write a "brick" that blurs the vision making the analysis difficult to grasp and hard to overview.[31] Investigations of norms on taxation are clearly something to be wished for taken by itself, but the analysis here is, for the reason mentioned, more focused and the method used thereby may leave threads leading to further investigations rather than being followed to an end.

The economic characteristics of tax law are emphasized for research within the field of tax law,[32] which will be expressed here by demonstrating NAVE in Ch. 13 of IL and economic activity in Article 4(1) of the Sixth Directive having a common denominator in the Book-keeping Act [Sw., *bokföringslagen (1999:1078)*, BFL], namely by way of separating the entrepreneur's economy from his private one with the concept Requirement to maintain accounting records (Sw., *bokföringsskyldighet*). In practice there's a need to make a distinction between those who can belong to the VAT system, the entrepreneurs, and the consumers, and it should be done in a neutral way, since the analysis here, i.e. of the connection from ML to IL for the purpose of determining YRVE, is possible to make as long as the distinction between NAVE and other income tax schedules (Sw., *inkomstslag*), i.e. the distinction where income tax is concerned between entrepreneurs and private persons, can be based on the same basic evidence, namely if the person in question is required to maintain accounting records. Thus, there are in practice possible to have a common tax frame for VAT and income tax, but the question is whether the current connection mentioned from ML to IL concerning the definition of YRVE creates uncertainty in law application. An investigation of norms on

[30] See *Skattenytt* (Eng., the Tax news) 1998 p. 539, the article *Skatterättsliga metodfrågor* (Eng., Tax law method questions), pp. 535-540, by Aleksander Peczenik.
[31] See *Skattenytt* (Eng. the Tax news) 2004 p. 741, the article *Skatterättsliga avhandlingar i ett förändringsperspektiv* (Eng., Tax law theses in a perspective of alteration), by Bergström, Sture, Norberg, Claes and Påhlsson, Robert (pp. 740-745).
[32] See *Skattenytt* (Eng., the Tax news) 2004 p. 742, the article *Skatterättsliga avhandlingar i ett förändringsperspektiv* (Eng., Tax law theses in a perspective of alteration), by Bergström, Sture, Norberg, Claes and Påhlsson, Robert (pp. 740-745).

taxation must for the benefit of the analysis here be made at least to the extent making it possible to distinguish VAT from other taxes. The basic principles for that distinction are also the platform for the further analysis here of whether or not the common tax frame mentioned for the entrepreneurs is possible and, if so, what's the scope of it.

One sometimes talk about a value added, when goods or services are to be considered finally consumed and about VAT principles for the purpose of various decisions. However, it has knowingly so far not been made any effort to try a question like the one at hand here about the connection from ML to IL for the purpose of determining YRVE. Here will just a couple of issues be brought up, making it possible to do the analysis in this book. On the other hand it has been tried after Sweden's accession to the EU if the excise duty on advertisement is in conflict with the principle of each Member State only allowed to have one VAT system. The SAC has found that the excise duty on advertisement is acceptable, since it lacks those characteristics of VAT assumed by the ECJ, inter alia '*that the excise duty on advertisement isn't levied on value added due to the absence of a right to deduct excise duty paid*' (Sw., "*att reklamskatten inte utgår på mervärdet eftersom någon generell avdragsrätt inte föreligger för erlagd skatt*").[33] The VAT is protected by Article 33 of the Sixth Directive containing a prohibition of taxes similar to VAT in effect beside the VAT. By a so called Wilmot-test is such a question tried,[34] but the question here is whether the connection from ML to IL to determine YRVE leads to an exclusion from the VAT system of persons who should be comprised of the VAT system or leads to persons who don't belong in the VAT system, i.e. those who really are consumers, being able to make access to the VAT system.

In the following there'll first be an analysis of the basic VAT principles and how they can be considered giving a method for interpretation of foremost the concept YRVE in ML in relation to NAVE in Ch. 13 of IL. Thereafter the analysis continues with respect of guidelines and frames set by those basic principles and that method for the purpose of determining who's a person liable to pay VAT.

[33] See the SAC cases *RÅ 1999 Ref 8* and *RÅ 2000 Not 59* and *Punktskatter – rättslig reglering i svenskt och europeiskt perspektiv* (Eng., Excise duties – legal regulation in Swedish and European perspective), pp. 123 och 124, by Stefan Olsson.
[34] See the ECJ case 295/84 (Wilmot).

The sources for the analysis are, besides Swedish law sources and doctrine, foremost these EU law sources: the First Directive and the Sixth Directive and the ECJ cases.

Regardless whether theoretically possible or not, neither the other EU Member States nor other closely linked countries with VAT in their economies, such as Norway, have any connection from the national VAT act to the national income tax act concerning the way of determining if a person has the character of 'taxable person' (Sw., '*skattskyldig person*'). On the whole all EU Member States, except Sweden, seem to follow Article 4(1) of the Sixth Directive more or less, when they describe in their national VAT acts who's to be deemed taxable person. Instead of a connection to the income tax act their common denominator appears to be to connect thereby to "business" in a civil law sense. That conclusion can be considered supported by preparatory work to the law in form of the Governmental investigation VAT in an EU law perspective (Sw., *SOU 2002:74, Mervärdesskatt i ett EG-rättsligt perspektiv*). That investigation, which has not yet led to a bill (Sw., *proposition – abbreviated Prop.*), contain proposals of terminology changes of concepts, where the suggested "*beskattningsbar person*" equals "*skattskyldig person*" in the Sixth Directive" (Eng., "taxable person") and is supposed to replace in ML both "*yrkesmässig*" (the YR-part of YRVE) as well as "*skattskyldig*", which is used as a conceptual term for person liable to pay VAT, and "*näringsidkare*" (Eng., "entrepreneur").[35] The investigation makes a reservation for not taking on the influence on material rules of such a change in terminology, whereas its analysis is expressly limited to deal with the rules on accounting for VAT.[36] The accounting rules in ML are suggested by the investigation to be disconnected from the civil law concept Generally accepted accounting principles (Sw., *god redovisningssed*), GAAP, of the Swedish Book-keeping Act.[37] Thus, the investigation lacks a real useful value to the analysis concerning the current material VAT rules, and rather gives the impression of being too hasty concerning the parts where it yet may be perceived to suggest a replacement of an "*activity-thinking*" – in the sense of the VE-part of YRVE (Sw., "*verksamhetstänkande*") – with a "*transaction-thinking*" (Sw., "*transaktionstänkande*") in certain material issues.[38] Without any analysis of the consequence for material rules of such a change, at least the VE-part of YRVE (Sw., *verksamhet*) would be abolished thereby from ML along

[35] See *SOU 2002:74* Part 1 pp. 65, 67, 68, 162 and 163 .
[36] See *SOU 2002:74* Part 1 pp. 17 and 186.
[37] See *SOU 2002:74* Part 1 p. 20.
[38] See *SOU 2002:74* Part 1 pp. 17 and 194.

with revoking the connection from ML to IL for the purpose of determining who's a taxable person – due to YR(VE) being replaced by "*beskattningsbar person*" (Eng., "taxable person").[39]

Due to the limited value from a material perspective of the investigation *SOU 2002:74* to the current question about determining the taxable person by the main rule in Ch. 4 sec. 1 item 1 of ML referring for that purpose to Ch. 13 of IL, a special inquiry has been done during the work with this book.[40] It shows that what the investigation is implying is true. All EU Member States except Sweden don't have a connection from the national VAT act to the national income tax act concerning the way of determining if a person has the character of 'taxable person', and that is according to the inquiry the case with Norway and Hungary too.

The Swedish technique to distinguish a person from the consumers, and determining that he's a taxable person who can belong to the VAT system, could theoretically be used by the EU Member States Finland, Ireland and the Netherlands and also by Hungary, who by the way is a member of EU since the 1st of May 2004, and Norway. These five countries have on the whole income tax systems similar to Swedish one, when the division of income on work (Sw., *arbetsinkomster*) from capital gain (Sw., *kapitalinkomster*) in close enterprises (Sw., *fåmansföretag*) is concerned or concerning legislation with similar consequences.[41] The perspective here is the initial stage of the economic activity. Of particular interest thereby are one-man businesses (Sw., *enskilda firmor*) and close enterprises, since the difficulties lie in the effort of judging if one or several starting an activity (i.e. the VE-part of YRVE) do that with the purpose of making money to support themselves (Sw., *förvärvssyfte*), and the activity therefore should be separated from his or their private economies. However, none of these five countries has chosen the Swedish technique with a connection from the VAT act to the income tax act, when they determine who could be within the scope of the VAT.

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[39] See *SOU 2002:74* Part 1 pp. 152 and 194-200.

[40] See LIST OF REFERENCES (under 1 LITERATURE – Interviews/inquiry …) the persons at tax authorities in EU Member States, in Norway and in Hungary which has been helpful by answering the inquiry done for this book which was made in January 2003.

[41] See *Skattenytt* (Eng., the Tax news) 1998 pp. 739, 740, 743, 744, 747, 748 and 750, the article *Jämförelse av de svenska s.k. 3:12-reglerna med utländska dito samt vissa ändringsförslag* (Eng., Comparison of the so called 3:12-rules with foreign equivalents and certain suggestions on alteration), pp. 739-752, by Jari Burmeister, where he's done a study of 85 countries on that theme. According to an interview with Jari Burmeister on the 8th of January 2003 his study comprised e.g. all the EU15 Member States.

Finland, which is particularly interesting for the sake of comparison, since Finland made access to the EU at the same time as Sweden did – in 1995 – and has official versions of directives as well as of the VAT act in Swedish, state in its VAT act that VAT is paid on '*businesslike sales of goods and services in Finland*' (Sw., "*rörelsemässig försäljning av varor och tjänster i Finland*") and on importation of goods (sec.1 first paragraph).[42] Thereafter a negative definition of "*businesslike*" (Sw., '*rörelsemässig*') is made so that it shouldn't comprise wages according to the Finnish Tax Collection Act – Sw., *uppbördslagen* – (sec. 1 third paragraph). The Finnish VAT act use the term business activity (Sw., *rörelse*), but lacks a connection to a division between NAVE [Sw. (Finland), *rörelse*] and capital gain according to the income tax act. However, a similarity to the Swedish ML is that the Finnish VAT act (sec. 4) connects to the Finnish income tax act [Sw. (Finland), *inkomstskattelagen (1535/92)*], when the exception from taxation for certain non-profit-making organizations [Sw. (Finland), *allmännyttigt samfund*] is concerned. An organization defined as such by virtue of the Finnish income tax act is liable to pay VAT only if the income from its activity is an income on a business activity for the organization,[43] which can be compared to the Swedish technique to, in accordance with Ch. 4 sec. 8 of ML, exempt from YRVE non-profit-making organizations (and registered religious congregations) when they are having income other than from NAVE and for which they aren't liable to income tax according to IL.

All other examined EU Member States follow the Sixth Directive and stipulate exemption for certain transactions made by non-profit-making organizations, i.e. the limitation of the scope of the VAT is done with reference to the object to tax and not to subject for taxation.[44]

Finland, which didn't replace its sales tax of 1964 with VAT until the 1st of June 1994,[45] is however on the same low level as Sweden, when applying for preliminary rulings from the ECJ are corned,[46] why Finland for the moment is of less value for comparison when making the analysis here. However, the concept "businesslike" may resemble the concept used in the Swedish SUPPLEMENTARY RULE in Ch. 4 sec. 1 item 2 of ML. That

[42] See *Mervärdesskattelag 30.12.1993/1501* (the VAT act of the 30th of December 1993/No. 1501), which came into effect on the 1st of June 1994.
[43] See *SOU 2002:74* Part 2 p. 219 (Appendix 4).
[44] See Article 13(A.l)l, m and o of the Sixth Directive.
[45] See *SOU 1989:35* Part I p. 123 and *Mervärdesskattelag 30.12.1993/1501*.
[46] See t*he EU Commission's seventeenth yearly report on control of application of EU law (1999), COM(2000) 92 final* [Sw., *Kommissionens sjuttonde årsrapport om kontroll av tillämpningen av gemenskapsrätten (1999), KOM(2000) 92 slutlig*, pp. 13 and 14].

concept is neither determined by reference to IL. Thus, Finland may become interesting if a practice would develop in Sweden, where the courts rely on the SUPPLEMENTARY RULE rather on the main rule in Ch. 4 sec. 1 item 1 of ML for the purpose of determining if a person is comprised by the concept YRVE. However, there are no signs presently for such an evolution of the Swedish case law on VAT, which is confirmed by the SAC case *RÅ 1996 Not 168*.[47]

Denmark, whose first VAT act came into effect already on the 1st of July 1967 – i.e. before Sweden – and who made access to the EU before all the other Nordic countries,[48] has traditionally been to some extent a role model for the Swedish legislation VAT,[49] and would've been the primary country for comparison here, if Denmark would've used the Swedish technique in question. However, a connection from the VAT act to the income tax act like the Swedish one wouldn't even be possible there, because the Danish income tax legislation only use one *income tax schedule* (Sw., *inkomstslag*) – a division is made on the cost side between on the one hand expenses such as wages and profit from independently carried out business activities and on the other hand capital gain first when calculation the tax.[50] The Danish VAT act, Ch. 2 sec. 3 first paragraph, reflects instead almost exactly Article 4(1) of the Sixth Directive: '*Taxable person shall mean any person who independently carries out ... economic activity ...*' (Dan., "*Afgiftspligtige personer er juridiske eller fysiske personer, der driver selvstændig økonomisk virksomhed*").

Great Britain's version of the Sixth Directive has been a model for the Swedish version, but Great Britain has neither anything like the Swedish technique with a connection to the income tax legislation for the purpose of

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[47] See also the SAC case *RÅ 2001 Not 15*. Let it otherwise be noted according to an interview on the 2nd of October 2003 made during the work with this book, with Leif Nilsson who was the reporter (Sw., *föredragande*) of the case at the SAC, that RÅ 2001 Not 15 is wrongly noted in RÅ as concerning an advanced ruling in an income tax issue – it was instead an advanced ruling on VAT.

[48] Sweden and Finland made access to the EU in 1995, and today only Norway and Iceland of the Nordic countries – together with Liechtenstein – are the only remaining members of the European Economic Area, EEA (Sw., *Europeiska ekonomiska samarbetsområdet, EES*).

[49] See *Prop. 1968:100* pp. 25 and 51 and e.g. *Prop. 1978/79:141* p. 69 and *SOU 1989:35* Part I p. 123.

[50] See *Skattenytt* (Eng., the Tax news) 2000 pp. 24 and 25, the article *Jämförelse mellan omfördelningsregler för enskilda näringsidkare i Sverige och Danmark* (Eng., Comparison between redistribution-rules for one-man businesses in Sweden and Denmark), pp. 23-33, by Urban Rydin.

determining the meaning of ”taxable person” (Sw., ”*skattskyldig person*”).[51]

Sweden is for comparable countries unique with its connection from ML to IL for the purpose of determining the taxable person and thereby who may be liable to pay VAT, and therefore the analysis here must be made with respect of sources consisting of the Swedish one’s including doctrine compared to foremost the EU sources of the First and Sixth Directives and the ECJ case law. Worth mentioning in this context is that EU directives and regulations etc lacks preparatory work to the law in the Swedish traditional meaning. The only official EU explanations in that sense are instead the preamble usually commencing an EU directive or regulation.[52] The EU Commissions proposals or, in connection with ECJ cases, the Advocate General’s (Sw., *generaladvokatens*) statement may for the purpose of interpretation of regulations and directives have the same function as preparatory work to the law has had traditionally in Sweden for the purpose of interpretation of tax laws, i.e. preparatory work such as Governmental investigations (Sw., *statens offentliga utredningar, SOU*), bills (Sw., *propositioner, Prop.*) and the finance- and tax committees of the Parliament’s overviews. Due to the need to implement the Sixth and Second Directives on VAT or the regulation on tax administrative co-operation on VAT into the Swedish acts ML or the Swedish VAT-regulation act [Sw., *mervärdesskatteförordningen (1994:223)*, MF] and, concerning the procedure of taxation (assessment of tax etc), into the Swedish act on tax payment [Sw., *skattebetalningslagen (1997:483)*, SBL], the Swedish preparatory work to the law will still be of importance when interpreting the rules, although the EU directives of course have primacy thereby.

The review of the basic VAT principles and of the questions on method for the analysis in chapter 2 is concluded with section 2.4, where an overview is given of how to do the analysis of the main question if the connection from ML to IL for determining who’s a taxable person complies with the EU law and of other questions of interest here. The review of who’s a taxable person and of the concept *ekonomisk verksamhet* (Compare: Eng., ”economic activity”) in chapter 3 is necessary as a reference frame for the trial if ML is complying with EU law in the sense mentioned. Is the VE-part necessary for determining YRVE? Chapter 4 contains a trial if the Swedish concept *verksamhet* in ML [Note VE (*verksamhet*) is also used in

[51] See *SOU 2002:74* Part 2 p. 237etc (Appendix 4).
[52] See *Prop. 1994/95:19* Part 1 p. 528.

other rules in ML] is complying with EU law and of when VE cease to exist where VAT and income tax respectively are concerned. In chapter 5 the relation between the material tax rules, rules of accounting tax and the Requirement to maintain accounting records and the importance of the development of norms for the Swedish civil law concept of GAAP is described when questions of evidence and procedure on material tax issues are concerned. In the sections under 6.1 the further disposition and limitation of the analysis of the main question of this book is described. Chapter 7 contains two other questions of interest, mainly pedagogically for the presentation as a whole.

This book regards legislation etc per the 1st of January 2007.

1.3 SOMETHING ON EXCISE DUTIES ETC BEFORE CONTINUING THE PRESENTATION

Before this presentation continue with the main question, it shall – however briefly – be mentioned something on account of the Swedish laws on social security contributions (Sw., *sociala avgifter*), excise duties (Sw., *punktskatter*) customs (Sw. *tull*) also governed by EU law.[53]

- Concerning social security contributions in form of so called self-employed person's social security contributions (Sw., *egenavgifter*), i.e. in case of a one-man business (Sw., *enskild firma*) or a partnership (Sw., *handelsbolag*), there's a connection from the Swedish social security contributions' act [Sw., *socialavgiftslagen (2000:980)*, SAL] to the concept NAVE in IL. The obligation to pay self-employed person's social security contributions comprise income belonging to the income tax schedule NAVE, but also income belonging to the income tax schedule of earned income (Sw., *inkomstslaget tjänst*), if the one paying the income isn't obliged to pay employer's contribution (for national social security purposes) [Sw., *arbetsgivaravgifter*] on it.[54] That complies with the

[53] See EC regulations 1408/71 and 574/72 on social security (Sw., *EG-förordningarna 1408/71 och 574/72 om social trygghet)*, the EC directive on excise duties, the so called circulation directive, 92/12/EEC [(Sw., *EG:s direktiv för punktskatter (92/12/EEG), det s.k. cirkulationsdirektivet*] and the Community Customs Code – the EC Council Regulation (EEC) No. 2913/92 [Sw., *EG:s tullkodex – Rådets förordning (EEG) nr 2913/92*].
[54] See Ch. 3 sec:s 3, 4, 5, 6, 8 and 11 of SAL.

EC regulations 1408/71 and 574/72 on social security comprising both entrepreneurs and employees.[55]

- Note concerning excise duties that for tax on energy the subject to tax is determined by a definition of YRVE exactly according to the one in Ch. 4 sec. 1 of ML. I.e., the definition consist of a reference to the concept NAVE in Ch. 13 of IL together with a transcript of the SUPPLEMENTARY RULE of ML.[56] For tax on advertisement the concept YRVE is partly also determined by a reference to the concept NAVE in Ch. 13 of IL,[57] whereas taxable person (Sw., *yrkesmässig*) – compare, the YR-part of YRVE in ML – concerning tax on alcoholic products means – without any reference to IL – that the activity of a '*warehouse holder*' (Sw., "*upplagshavare*") is ancillary to '*carrying out a business*' (Sw., "*näringsutövning*").[58]

- Concerning customs the so called 'debtor' (Sw., "*gäldenären*") – i.e. the person liable to pay customs, customs duties and VAT on importation of goods – can be anyone reporting to 'the Customs' (Sw., "*Tullverket*") goods imported from a third country (i.e. from a place outside the EU. That's formally called 'reporting goods for transition to free transfer' (Sw., "*anmäler varan till övergång till fri omsättning*") within the customs union which is the EU and the internal market.[59] The same applies for who's liable to pay VAT on import of the goods.[60] Thus, the liabilities to pay customs, customs duties and VAT on import of goods don't apply only to entrepreneurs, but also to a private person reporting imported goods to the Customs.

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[55] See Article 1a and Appendix 1 of the EC regulation 1408/71.

[56] See Ch. 1 sec. 4 of the act on tax on energy [Sw., *1 kap. 4 § lag (1994:1776) om skatt på energi*] and the National Tax Board's (Sw., *Skatteverket*, SKV) manual on excise duties 2004 (Sw., *SKV:s Handledning för punktskatter* 2004), p. 168.

[57] See the first paragraph of the notifications to sec. 9 of the act on tax on advertisement and marketing [Sw., *första stycket anvisningarna till 9 § lag (1972:266) om skatt på annonser och reklam*] and the SKV manual on excise duties 2004, p. 326.

[58] The definition of what's a 'taxable activity' (Sw., "*yrkesmässigt*") for a taxable person isn't stated by the rules on persons liable to tax and warehouse holders, sec:s 8 and 9 of 'the act on tax on alcoholic products [Sw., "*lag (1994:1564) om alkoholskatt*"], but is described instead in the preparatory work to that act, *Prop. 1994/95:56* p. 85. See also the SKV manual on excise duties 2004, p. 55.

[59] See Ch. 3 sec:s 3 and 4 and Ch. 5 sec:s 1 and 2 of the Swedish act on customs [Sw., *tullagen (2000:1281)*].

[60] See Ch. 1 sec. 2 first paragraph item 6 and second paragraph and Ch. 1 sec. 1 first paragraph item 3 of ML.

Concerning customs and VAT on importation there's no reference to IL for determining the debtor. Instead may the connections from SAL and, where the occasion arise, from the Swedish national acts on excise duties to the concept NAVE in IL be of interest to the topic here on EU law compliance – i.e. about their relations to the EU sources – in the same way as with the connection to that concept for the determination of YRVE in Ch. 4 sec.1 item 1 of ML.

For example the motive was, with ML as a model, to connect the concept of YRVE in the act on tax on energy to the concept NAVE in IL only to maintain the tradition to thereby connect the indirect taxation to the direct one.[61] The relations to the EC circulation directive on excise duties (92/12/EEC) etc weren't commented, and it may thus be of interest to analyze if such a common tax frame is possible as well with reference to EU law.

Thus, the SAC has concluded that the Swedish tax on advertisement doesn't conflict with the principle of one single national VAT in accordance with Article 33 of the Sixth Directive. In the doctrine there's not yet been an analysis whether or not the Swedish acts on excise duties comply with the concept "trader" (Sw., "*näringsidkare*") in Article 7.2 of the EC circulation directive on excise duties and the concept 'independent enterprise' (Sw., "*självständig verksamhet*"), when the concept YRVE is concerned. Stefan Olsson, in his thesis *Punktskatter* (Eng., Excise duties), divide the liability to pay tax in one objective and one subjective part, where the objective part refers to the transaction, the object of taxation, whereas the subjective part means 'which subjects are liable to pay tax' (Sw., "*vilka subjekt som är skattskyldiga*"). That's in line with the division for the analysis in this book, where the subjective prerequisites for NAVE in Ch 13 sec.1 first paragraph second sentence of IL and the object oriented prerequisites for NAVE otherwise defined in Ch. 13 of IL respectively are tried in relation to the prerequisites for taxable person in the Sixth Directive concerning who can belong to the VAT system, whereas the question about the characteristics of the object of taxation decides if such a person shall belong to the VAT system. Stefan Olsson doesn't make a subject oriented analysis of the concept tax liability in relation e.g. to the article mentioned of the EC circulation directive on excise duties. He just notes that the tax liability has an objective and a subjective side and that both the prerequisites must be fulfilled for an actual tax liability emerging and, referring to Peter Melz, that restrictions of the subjective tax liability limit

[61] See *Prop. 1994/95:54* pp. 81 and 82.

the scope of taxation so that otherwise formally taxable transactions remain untaxed.[62] Stefan Olsson notes that a definition of YRVE is lacking in most of the Swedish acts on excise duties, but he doesn't analyze e.g. the concept YRVE in the acts on tax on energy and tax on advertisement and marketing, and the connections therein to the national income tax concept NAVE, in relation to the concept "trader" in the EC circulation directive on excise duties.[63] Thus, reason may exist to also try the EU law compliance of the Swedish legislation on excise duties with respect of the determination of the tax subject.

However, there'll be no review here of the recently mentioned questions, since this book deals only with the question of EU law compliance with the connection from ML to IL for determination of the subject to tax in relation to the Sixth Directive.

[62] See *Punktskatter – rättslig reglering i svenskt och europeiskt perspektiv* (Eng., Excise duties – legal regulation in Swedish and European perspective), p. 159, by Stefan Olsson and *Mervärdeskatten Rättsliga grunder och problem* (Eng., Legal bases and problems), p. 88, by Peter Melz whereto Stefan Olsson refers. Note that Stefan Olsson consequently in his references wrongly name Peter Melz' book "*Mervärdesskatten – rättsliga problem och grunder*". At that time (1990) *mervärdesskatt* was spelled with one "s" in GML, which also Peter Melz used, and in the title of Peter Melz' book '*Rättsliga grunder*' (Eng., Legal bases) comes before '*problem*' (Eng., problems).

[63] See *Punktskatter – rättslig reglering i svenskt och europeiskt perspektiv* (Eng., Excise duties – legal regulation in Swedish and European perspective), p. 169, by Stefan Olsson.

2. THE NEW ENVIRONMENT FOR INTERPRETATION AND QUESTIONS FOR THE ANALYSIS IN THIS BOOK

2.1 THE VAT SYSTEM: COLLECTION AND CONTROL

Each analysis of the VAT system should be fundamentally viewed for what it actually is about, a system for tax collection – namely collection of VAT. The Swedish legislator's view on the person liable to pay VAT is that he in principle has the function of a tax collector for the state (Sw., "*Den skattskyldige fungerar i princip som uppbördsman för staten*").[64] The British view point on the VAT seems to be that "the taxpayer" (Sw., '*Den skattskyldige*') is acting as an "agent for the Commissioners" (Inland Revenue Commissioners),[65] i.e. as a 'tax collector' (Sw., '*uppbördsman*') for the Commissioners (Sw., '*Skatteverket'*, SKV). The consumer shall in the end carry the burden of the VAT on the whole value added of the goods or services from the chain of enterprises involved with producing and distributing it, and for the benefit of tax collection each entrepreneur in that chain shall loyally account for and pay his part of the total VAT that equals the value added by him so that the input tax deduction by the last entrepreneur in the chain is covered by VAT payments made previously in the chain and that entrepreneur will make the final accounting of the VAT of the whole value added on the goods or services purchased by the consumer. The VAT distinguish itself from taxes on gross sales (Sw., '*bruttoomsättningsskatter*'), i.e. from various sales taxes, by having these characteristics of a multiple-step-tax, where the right to deduct VAT 'entrepreneur by entrepreneur' in the chain of ennobling the product in question – i.e. of adding value to it – result in the consumer only having to carry the burden of VAT of the value added on the final product, i.e. goods or services,[66] but this is basically only a technical solution to guarantee efficiency in tax collection and in financing public expenses. The tax collection function of the VAT system also has an EU level, since a certain

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[64] See *Prop. 1989/90:111* p. 294.

[65] See British Tax Review 1998 p. 591, the article Restitution of Overpaid VAT (pp. 582-591), by Graham Virgo.

[66] See *Prop. 1968:100* p. 36: 'By the right of deduction of input tax the VAT distinguish from multiple-step-taxes of a so called cascade type. In a cascade-tax-system each transaction leads to an actual burden of carrying the tax' (Sw., "*Genom avdragsrätten för ingående skatt skiljer sig mervärdeskatten från flerledsskatter av s.k. kaskadtyp. I ett kaskadskattesystem medför varje omsättning en faktisk skattebelastning*".

part of the EU Member States' VAT base shall form a foundation for the Member States contribution to the financing of the EU's own budget.[67]

If a country is to become a member of the EU it must have VAT in its economy, and that part of the tax collection system in each respective EU Member State shall in principle function under a common system of laws for the Member States. The consumers in the EU shall not choose one competitor over another due to differences of the VAT between suppliers within the own EU Member State or between suppliers in the own country and another EU Member States. Consumers outside the EU, i.e. in third countries, shall not choose suppliers other than within the EU due to all EU Member States being obligated to have VAT in their economies. For that matter export of goods and supply of services to places outside the EU and customers established outside the EU are zero rated (Sw., *nollbeskattade*), i.e. the exporters and suppliers are then entitled to deduct input tax on their own purchases and imports – provided they would have that when doing a supply within the own country – although they aren't obliged to levy VAT on the export or supply to the place outside the EU. In the first situation mentioned, with supplies within the EU, the competition- and consumption-neutrality is supposed to be upheld by the common VAT system within the EU functioning as rules of appointment of which EU Member State's VAT legislation to apply, where the right of taxation for a certain supply within the EU shall be given to one of the countries in 'the VAT country which is the EU' (Sw., "*mervärdesskattelandet EU*").[68]

Supplies within the EU shall neither cause double taxation nor loss of taxation. When an entrepreneur do a taxable transaction of goods or services within the EU, it shall either be taxed by the entrepreneur himself or taxation of acquisition by the customer, regardless where in the world the entrepreneur is established. Also when the entrepreneur's supply e.g. in the EU Member State Sweden is only temporary and a single one, it shall

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[67] See second paragraph of the preamble of the Sixth Directive and *Prop. 1994/95:57* pp. 73 and 93.

[68] See *EG-skatterätt* (Eng., EC tax law), p. 170, by Ståhl, Kristina och Persson Österman, Roger, where they conclude that 'VAT may in principle be charged on all transactions made in the geographical territory which is the EU' (Sw., "*Mervärdesskatt kan i princip tas ut på alla transaktioner som sker på den geografiska yta som tillhör EU*"). See also *Momshandboken Enligt 1998 års regler* (Eng., The VAT handbook. According to the rules of 1998), p. 18, by Björn Forssén and *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 18, by Björn Forssén, concerning that the EU can be considered 'one single VAT country' (Sw., "*ett enda momsland*", which is also the case with excise duties.

be subject to VAT here one of those ways or the other.[69] To achieve that tax liability occur according to the main rule in Ch. 1 sec. 1 first paragraph item 1 of ML for all taxable transactions of goods or services within the country (Sweden), regardless where in the world the supplier is established as entrepreneur, the text 'which is carried out within the country' (Sw., "*som bedrivs här i landet*"), with reference to YRVE, was abolished from that main rule when Sweden made access to the EU in 1995. The Sixth Directives function of giving the right of taxation of a certain supply within the EU to one of the Member States is also expressed by the rules concerning the upholding control. Each Member State within the EU may – concerning transactions exempted from taxation – restrict the liability for taxable persons to issue invoices on 'supplies of goods or services' (Sw., "*leveranser av varor eller tillhandahållande av tjänster*") concerning transactions which the taxable person 'carries out on its territory' (Sw., "*utför på deras territorium*").[70] Thereto the EC regulation on tax administrative co-operation on VAT also applies between the tax authorities in the EU Member States.[71]

2.2 NEUTRALITY IN COMPETITION: EXTERNAL AND INTERNAL

2.2.1 External and internal neutrality, VAT law

The neutrality in competition is said to have an external and an internal side. The principle of neutrality has according to the ECJ and repeatedly been described meaning that each entrepreneur in the ennobling chain ending before the consumer shall be free from the burden he would carry in his economic activity, if the right to deduct the VAT wouldn't apply to him

[69] See fifth paragraph of the preamble of the Sixth Directive and *Prop. 1994/95:57* pp. 155 and 175.

[70] See Article 22(3a) first and forth paragraphs of the Sixth Directive. See also the so called invoicing directive on VAT (2001/115/EC) [Sw., *faktureringsdirektivet (2001/115/EG)*] which was amended to Article 22(3) of the Sixth Directive and on the 1st of January 2004 implemented in Ch. 11 of ML (*Prop. 2003/04:26*).

[71] See the EC council regulation (EC) No. 1798/2003 of the 7th of October 2003 on tax administrative co-operation on VAT [Sw., *rådets förordning (EG) nr 1798/2003 av den 7 oktober 2003 om administrativt samarbete om mervärdesskatt*] and of revoking the regulation (EEC) No, 218/92 [Sw., *(EEG) nr 218/92*]. The new EC regulation on tax administrative co-operation was implemented in the Swedish legislation on the 1st of January 2004 by The act on regulation of applying the Council's regulation [Sw., *Förordning (2003:1107) om tillämpning av rådets förordning*].

or to one or more of the entrepreneurs before him in the chain.[72] Neutrality in competition shall apply between for enterprises belonging to the VAT system, i.e. between entrepreneurs whose purchases are supposed to be used for taxable transactions. The ECJ has said that the principle that ”the common system of VAT ensures that all economic activities, whatever their purpose or results, are taxed in a wholly neutral way, presupposes that those activities are themselves subject to VAT”.[73]

In the doctrine it’s spoken about external and internal neutrality respectively, and the distinction between those two sides of the neutrality concept for the VAT may be open for debate. Eleonor Alhager has, in her thesis *Mervärdesskatt vid omstruktureringar* (Eng., VAT at restructuring measures), concluded that the ECJ only use one principle of neutrality, and that neutrality disturbing elements mainly are allowed by Article 12(4) of the Sixth Directive admitting reduced tax rates beside the general one.[74] Robert Påhlsson has in a comment of that thesis questioned that view as being a definition of neutrality.[75] In another comment of the same thesis Peter Melz say that the division of neutrality into an external and an internal side of the concept is useful, and state that ¨’external neutrality means neutrality when trading between EU Member States and that internal neutrality means neutrality for consumption, production etc in one Member State’ (Sw., ”*[e]xtern neutralitet innebär neutralitet vid handel mellan medlemsländerna och att intern neutralitet är neutralitet vid konsumtion, produktion m.m. i ett land*”).[76] A comparison can also be made with the view on the principle of neutrality in the field of excise duties, where the so called EC circulation directive (92/12/EEC) exactly like the directives on VAT shall “ensure the establishment and functioning of the internal market” (Sw., ”*garantera den inre marknadens upprättande och*

[72] See item 15 of the ECJ case C-37/95 (Ghent Coal), where references also are made to item 19 of the ECJ case 268/83 (Rompelman) and item 15 of the ECJ case 50/87 (Commission vs France).
[73] See item 26 of the ECJ case C-4/94 (BLP Group), where a reference is also made to item 19 of the ECJ case ”Rompelman”.
[74] See *Mervärdesskatt vid omstruktureringar* (Eng., VAT at restructuring measures), pp. 72 and 73, by Eleonor Alhager.
[75] See *Svensk skattetidning* (Eng., Swedish tax journal) 2001 p. 749, *Bokanmälan av En avhandling om mervärdesskatt vid omstruktureringar* (Eng., Report of A thesis on VAT at restructuring measures), pp. 747-753, by Robert Påhlsson.
[76] See *Skattenytt* (Eng., the Tax news) 2001 p. 714, *Bokanmälan av Mervärdesskatt vid företagsöverlåtelser* (Eng., Report of A thesis on VAT at transfer of enterprises), pp. 712-719, by Peter Melz – which, although the difference in naming the title, is a report of the same book, i.e. Eleonor Alhager’s thesis.

funktion"),[77] and where Stefan Olsson talks about neutrality on a macro level (Sw., *makroplan*) and on a micro level (Sw., *mikroplan*) respectively. The latter stated to apply to the relation between different entrepreneurs in the taxed industrial sectors.[78]

It would be beside the aim of this book to attempt to make a full law theoretical analysis of the EU law neutrality concept. In this book the concepts external neutrality and internal neutrality respectively are used with the reservation that external neutrality means neutrality in trade between EU Member States and internal neutrality means neutrality between competing entrepreneurs belonging to the VAT system in one and the same EU Member State or to the VAT systems of different Member States. The eventual nuances made by the scholars mentioned of the neutrality concept should hardly be in conflict with that division into an external and internal side respectively of the concept, and it can be deemed to be in line with Eleonor Alhager's view on the ECJ practice concerning the neutrality concept. The principle of neutrality in the external perspective is about neutrality between alternatives in how to act in the sense that border crossing trading will be treated equally where VAT is concerned regardless of which the other country involved is. In the internal perspective the principle correspond to the general tax principle on conformity (Sw., *likformighetsprincipen*), i.e. entrepreneurs and consumers respectively in the same country and for which the terms otherwise as well are the same will be taxed and burdened to carry the VAT respectively in the same way. Regardless which of the two perspectives is applied to the principle of neutrality, the ECJ may however be perceived to use only one neutrality principal, where the goal is neutrality on consumption within the EU admitting diversions therefrom only in cases of allowed diversities in applicable VAT rate. What might be more emphasized here than by others is that the content of internal neutrality, based on the ECJ practice mentioned and the basic VAT principles according to the First and Sixth Directives, can first of all be perceived by the way the VAT rules are applied in practice.

The Sixth Directive has already according to its preamble the First Directive as a reference, and in the preamble of the Sixth Directive it's stated that deduction of levied input tax shall be allowed the purchasing

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[77] See forth paragraph of the preamble of the EC circulation directive on excise duties (92/12/EEC).

[78] See *Skattenytt* (Eng., the Tax news) 2002 p. 178, the article *Neutralitetsfrågor avseende punktskatter* (Eng., Issues on neutrality concerning excise duties), pp. 177-186, by Stefan Olsson.

entrepreneur regardless of the VAT rates used by the EU Member States. It's for the Member States to see to it that the VAT rates are set so that they "allow the normal deduction" (Sw., "*medger normalt avdrag*") of the VAT applied at the preceding stage of the ennobling chain.[79] The rules on VAT rates mean that each EU Member State can have a general VAT rate and one or two reduced VAT rates; the general must be at least 15 per cent and the reduced at least 5 per cent.[80] The neutrality distortion of reduced VAT rates shall be limited – as stipulated in Article 12(4) of the Sixth Directive – by each such rate being determined so that applying it allows 'in a normal way' (Sw., "*på normalt sätt*") deduction of the whole VAT deductible according to Article 17 of the Sixth Directive. The rules of the Sixth Directive on placing a transaction made within the EU in a certain EU Member State is expressed inter alia by the so called "transitional arrangements for the taxation of trade between Member States" (Sw., '*den s.k. övergångsordningen för varuhandeln mellan EU-länderna*'),[81] which was made to guarantee the functions of the EU internal market that came into force in 1993. By those transitional arrangements equalization is supposed to take place concerning differences in used VAT rates between the EU Member States, by excluding an intra-Community acquisition (Sw., *gemenskapsinternt förvärv*) between entrepreneurs in two Member States from taxation in the EU Member State of the supplier and levying the VAT in the Member State of the purchaser.[82] External neutrality is achieved thereby. Internal neutrality shall be achieved by, regardless of in which EU Member State an entrepreneur is established, the competition shall not be distorted in relation to entrepreneurs in the same EU Member State or other Member States depending on differences in how to apply reduced VAT rates. Thus, the functions of the internal market which applies since 1993 are guaranteed, why the EU Member States were allowed to use differentiated VAT rates.

Thus, the internal neutrality in the meaning the way how to apply the VAT rules is of the foremost interest here, when, for the analysis in this book, it shall be decided which basic VAT principles – and the scope of them – will be used to answer the questions made here to give the analysis. The distortion of external neutrality due to the EU Member States not yet being

[79] See eleventh paragraph of the preamble of the Sixth Directive.
[80] See Article 12(3a) first and third paragraph of the Sixth Directive. It's only Great Britain, Ireland and Sweden which transitionally may have a so called zero rate on certain goods and services by virtue of their treaties on accession to the EU.
[81] See the EC Directive 91/680/EC amended to the Sixth Directive by the Articles 28a-28n of the Sixth Directive.
[82] See *Prop. 1994/95:57* pp. 78 och 79.

able to agree on common VAT rates is plainly something with which the entrepreneurs will have to live. Purchase travels to other EU Member States is a well known Swedish phenomenon due to Sweden – together with Denmark – having the highest general VAT rate within the EU, namely 25 per cent. Above all dealers of passenger cars and boats have a protection of competition by the rules on intra-Community acquisitions comprising also private persons, i.e. consumers, with respect of so called new means of transportation.[83] However, nothing prohibits a Swedish private person to purchase a passenger car e.g. from Germany with their low VAT, when the car no longer is deemed as new (which by the way is due to another distinction in this respect than when deciding if it's second-hand).[84] Goods may also be imported from a place outside the EU (third country) to an EU Member State using a low VAT rate and then brought to Sweden without any equalization due to the high Swedish VAT rate.

2.2.2 External and internal neutrality, a comparison of VAT law with income tax law

Since the EC Treaty's principles on free movement (the four freedoms) and on the right of (freedom to) establishment are also expressed by the First and Sixth Directives on VAT, it's not a problem here that the SAC follows the EC Treaty's principle on the right of (freedom to) establishment in another Member State for a national of an EU Member State also for income tax issues in general, despite the question on competence-competence by the ECJ being questioned. Thus, there's no conflict between ML and IL concerning external neutrality. Concerning the external neutrality it's instead a matter of the VAT being influenced also by the secondary EU law on income tax. Of interest thereby is the Mother-daughter-company Directive. In the SAC case *RÅ 2000 Ref 17*, where the SAC as mentioned obtained a preliminary ruling from the ECJ (the case "X AB and Y AB"),[85] it was deemed to be in conflict with EU law to refuse deduction for group contribution (Sw., *koncernbidrag*) from a Swedish mother company to a Swedish daughter company, when the mother company owns the daughter company together with two or more fully

[83] See in ML: Ch. 1 sec. 13a and Ch. 2a sec. 3 first paragraph item 1 compared to the second paragraph.
[84] See the EC directive on Special arrangements applicable to second-hand goods, works of art, collectors' items and antiques (94/5/EC) (Sw., *Särskilda föreskrifter för begagnade varor, konstverk, samlarföremål och antikviteter*), amended to the Sixth Directive by Article 26a of it and implemented in Ch. 9a of ML, the so called 'rules on margin taxation' (Sw., *vinstmarginalbeskattningsreglerna*).
[85] The SAC refers besides in the SAC case *RÅ 2000 Ref 47 (I. och II.)* to the ECJ case "X AB and Y AB", in addition to the ECJ cases C-251/98 (Baars) and C-35/98 (Verkooijen)

owned foreign daughter companies. The foreign daughter companies had their seats in different EU Member States with which Sweden had treaties on avoiding double taxation (Sw., *dubbelbeskattningsavtal*) containing a non-discrimination clause. Although not mentioned by the SAC or the ECJ, the ECJ case C-168/01 (Bosal Holding) may be noted for comparison, which case also was about trying the right of (freedom to) establishment according to Article 43 EC (formerly 52). The ECJ considered there, referring to the Mother-daughter-company Directive, that the terms of the national tax system on tax congruity (Sw., *kongruens*) by the same tax subject can be accepted, but not between different subjects if it deter from establishment in another EU Member State.

The SAC also obtained and followed a preliminary ruling from the ECJ (the case "X and Y") in the SAC case RÅ 2002 Not 210. Also in that case the ECJ tried the right of (freedom to) establishment according to Article 43 EC (formerly 52), and found that the EC Treaty is an obstacle to rules in one of the income tax acts that preceded the IL, namely *lagen (1947:576) om statlig inkomstskatt* (Eng., the state income tax act), and in IL disqualifying postponement of taxation of over value on shares sold at under price, when the transfer is done to a foreign juridical person in which the vendor directly or indirectly owns shares. The external neutrality in the field of income tax within the EU is established also by the ECJ seeking guidance in the OECD model treaty to avoid double taxation of income and wealth.[86] It's a model to bilateral treaties as OECD-countries, like for instance Sweden, make to avoid double taxation. Between the Nordic countries there's by the way a multilateral double taxation treaty since 1983, which also is built on the principles of the OECD model treaty. Since non-discrimination clauses of the double taxation treaties are accepted as law sources by the ECJ,[87] it strengthens, in conjunction with the Mother-

[86] OECD's tax committee presented in 1963 a draft to a model treaty to avoid double taxation, "Draft Double Taxation Convention on income and Capital" (Sw., '*OECD:s utkast till modellavtal för undvikande av dubbelbeskattning av inkomst och förmögenhet*', respectively in 1966 a draft to a model treaty to avoid double taxation on inheritance. Both drafts were revised and issued as model treaty to avoid double taxation on income and capital 1977 respectively model treaty to avoid double taxation on inheritance 1982. Since 1992 the loose-leaf publication "OECD Model Tax Convention on Income and on Capital" has been updated a number of times by the OECD council.

[87] See *Svensk skattetidning* (Eng., Swedish tax journal) 2002 p. 48, the article *EG-rätten och skyddet för den svenska skattebasen* (Eng., the EC law and the protection of the Swedish tax base), pp. 21-50, by Ståhl, Kristina and Persson Österman, Roger, where it's argued with reference to the ECJ case "Schumacker" that the ECJ seem to have accepted as a law source the OECD model treaty and *EG-skatterätt* (Eng., EC tax law), pp. 135 and 137, by Ståhl, Kristina och Persson Österman, Roger, where the same is expressed

daughter-company Directive confirming the same principle, the principle of external neutrality in the field of income tax generally, regardless it's debated whether the primary law principles on free movement (the four freedoms) and on the right of (freedom to) establishment shall have primacy over national sources for income tax issues not comprised by EU directives. Thus, it can be discussed if the ECJ has such a competence-competence so that the court as in the case "X and Y", where the ECJ had no regulation or directive etc from the EU like the Mother-daughter-company Directive to refer to, can disqualify a national income tax rule.[88] However, it's not an obstacle to the analysis here that external neutrality is generally presupposed by the ECJ in the filed of income tax, since such a practice is compatible with the presupposition on external neutrality for the VAT.

Already before the ECJ case "Bosal Holding" it has, concerning foremost the decision in the ECJ case C-204/90 (Bachmann), been discussed within the field of international tax law that it should at all exist 'any principle of deduction depend on the same state also having the right to tax a corresponding income' (Sw., "*någon princip om att avdragsrätt skall vara beroende av att samma stat också har beskattningsrätt till motsvarande inkomst*").[89] The "Bosal Holding" case shows that congruity in national income tax law, in the sense of inner context of the tax system concerning the same subject, is complying with EU law. That means on the other hand that such a presupposition cannot be upheld in conflict with the right of (freedom to) establishment within the EU. This together with the ECJ accepting double taxation treaties based on the OECD model treaty as law sources, thus also the non-discrimination clauses in them, means that the EU law can be deemed stipulating a general demand on external neutrality also for the income tax law. Not only for the VAT, where the principle is protected both by the primary and the secondary law.

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concerning the OECD model treaty with reference to the ECJ cases C-307/97 (Saint-Gobain), C-336/96 (Gilly), C-250/95 (Futura) and C-391/97 (Gschwind).

[88] See *Skattenytt* (Eng., the Tax news) 2003 pp. 230-246, the article *Rättfärdigande av hindrande skatteregler mot bakgrund av EG-domstolens underkännande av ännu en svensk skatteregel* (Eng., Justification of obstructive tax rules with respect of the ECJ's disqualification of yet another Swedish tax rule), by Mats Tjernberg. See also *Svensk skattetidning* (Eng., Swedish tax journal) 2002 pp. 561-573, the article *Den europeiska gemenskapens diskrimineringsförbud och dess skattekonsekvenser: den svenska erfarenheten*, by Leif Mutén; and *Skattenytt* (Eng., the Tax news) 2004 pp. 503-511, the article *EG-rättens betydelse på det direkta beskattningsområdet* (Eng., The EC-law's importance in the field of direct taxation), by Lars Pelin

[89] See *EG-skatterätt* (Eng., EC tax law), pp. 128 och 129, by Ståhl, Kristina and Persson Österman, which book was published before the ECJ case "Bosal Holding".

Of interest here is also the income tax law principle on reciprocity corresponding with the ECJ accepting presupposing congruity by the same tax subject where income tax is concerned. Reciprocity for income tax purposes means that a deductible cost by a tax subject results in a taxable income by another tax subject.[90] The principle on reciprocity is also stipulated for the VAT, by Article 2 of the First Directive and Article 17(1) of the Sixth Directive. Thereby the analysis here of the connection from ML to IL and the concept NAVE in Ch. 13 there, to determine who's a taxable person, will be made first of all with respect of the EU law's presupposition of internal neutrality for the VAT, when it comes distinguishing the entrepreneurs from the consumers. The concept NAVE in Ch. 13 of IL may thereby not mean that the right to deduction shall resemble the one for the VAT, since it according to the so called Wilmot-test would conflict with only one VAT being allowed, and the question is whether the connection in question to the IL is complying with Article 4(1) of the Sixth Directive, when the determination of who's a taxable person (entrepreneur) is concerned. Thus, the analysis here is about whether the connection mentioned from ML to IL is complying with the EU law presupposition of internal neutrality for the VAT, when the entrepreneurs shall be distinguished from the consumers, i.e. when it shall be determined who can belong to the VAT system. Therefore it's of a special interest here that the case "X AB and Y AB" was about double taxation treaties with other countries, where the treaties contained non-discrimination. However, Leif Mutén emphasize this – without claiming that the ECJ would have come to another conclusion where such double taxation treaties didn't exist – for the interpretation of the ECJ disqualifying that tax relieves for group contributions would be excluded only because of the fact of a company in between being established in another EU Member State, since it inter alia would be in conflict with the right of (freedom to) establishment in another Member State for a national of an EU Member State according to Article 43 EC (formerly 52).[91] Whether the ECJ with respect of the primary law contains the powers to disqualify an income tax rule discriminating foreign subjects when a double taxation treaty doesn't exist between Sweden and the other country involved is however not of interest here, since the analysis now will be about the internal neutrality.

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[90] See e.g. *Inkomstbeskattning vid konkurs och ackord* (Eng., Income taxation at bankruptcy and compound with creditors), p. 94, av Pelin, Lars and Elwing, Carl M.

[91] See *Svensk skattetidning* (Eng., Swedish tax journal) 2002 p. 566, the article *Den europeiska gemenskapens diskrimineringsförbud och dess skattekonsekvenser: den svenska erfarenheten*, by Leif Mutén (pp. 561-573).

2.3 INTERNAL NEUTRALITY AND THE BASIC VAT PRINCIPLES FOR DISTINGUISHING THE ENTRERPRENEURS FROM THE CONSUMERS

2.3.1 Value added and consumption

ML and the EC directives on VAT are about taxation of a value added. It's not defined in the rules as either quantity (Sw., *storhet*) or unit (Sw., *enhet*), using the terminology of physics (Sw., *fysikens terminology*). Thus, it may possibly be about a better value of the goods or services in question at a later stage in the ennobling chain than at the stage before. However, this is neither a presupposition for the existence of a value added in the meaning of VAT, since the VAT is levied e.g. on an article of goods used as a component in other products (goods) without being changed as such, regardless of being sold by the manufacturer or sold on to a wholesaler or a retailer. The VAT is a tax on consumption and is carried by the consumer with the VAT on 'the value added' (Sw., '*mervärdet*') on the goods or services after leaving the chain producers and distributors and can be used by a purchaser who's a consumer and as such not belonging to the VAT system. The value of the article of goods or the service can be lower economically when it leaves the chain of ennobling than in the link before the last one of the chain. By Article 4(1) of the Sixth Directive it's stated that a taxable person can be deemed to have the character as such, thus being within the scope of the VAT rules and belonging to the VAT system due to the product being of a taxable character where VAT is concerned, whatever the purpose or results of the economic activity.

Thus, taxation of VAT is about taxation of an economical value, but it's not a question of determining that value in itself as a 'value added' (Sw. '*mervärde*'). Instead the VAT is first of all defined by the companies belonging to the VAT system not having to carry the VAT as a cost for the activity. In each link of the ennobling chain the VAT levied by the entrepreneur before shall be lifted off. Thus, the right to deduct input tax is primarily giving the VAT its special characteristics. It's also the right of deduction that negatively distinguishes the consumer from the entrepreneur. A definition of consumer isn't done, and it can be discussed philosophically e.g. when an article of goods is finally consumed. Is it when it's left to the garbage station? Maybe not. It can still be sold as scrap, paper for recycling etc and the value added taxation continues. Thus, the VAT may from an ennobling perspective as well as a consumption perspective be basically defined by the supplier making the transaction of the article of goods or service in question being entitled to deduct input tax on his purchases.

2.3.2 The entrepreneur is distinguished from the consumer by the taxable person being the one having the right of deduction or would have had it if transactions of his goods or services were not comprised by exemption from taxation

According to the fifth paragraph of the preamble of the First Directive the ideal for the VAT system is that "the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution" (Sw., "*skatten tas ut på ett så allmänt sätt som möjligt och ... omfattar alla led av produktion och distribution*"), in which way one "achieves the highest degree of simplicity and of neutrality" (Sw., "*blir enklast och mest neutralt*"). Goods and services shall in general be comprised by the VAT and exemptions from taxation of transactions, when those apply, shall be applied restrictively.[92] An entrepreneur who's a taxable person and as such comprised by the rules of the Sixth Directive and ML can, if he's only got from taxation exempted transactions in his economic activity, not belong to the VAT system. Such a taxable person can be described to artificially be a consumer. When other entrepreneurs belonging to the VAT system do business with such a taxable person there'll be cumulative effects. Instead of being able to deduct his VAT expenses there'll be hidden VAT costs in the prices of his products, and the next entrepreneur in line in the ennobling chain will charge VAT on a price which to a certain extent consists of a VAT cost that's not been possible to deduct. It's sometimes spoken of the exemptions from taxation for entrepreneurs and organizations within certain sectors, e.g. care, education, financial services and insurances, being hidden subsidies beside the state budget, but it may not be altogether true. The VAT cost occurring by an enterprise standing beside the VAT system will of course be bigger the more VAT expenses the entrepreneur in question has. The more the competition can be so to speak sector crossing, i.e. between the value added taxed industrial sector and the exempted sectors, the less will the assumed benefits of the situation be for the VAT free entrepreneur as well as for the consumer.

[92] See the ECJ cases 348/87 (SUFA), item 13, C-2/95 (Sparekassernes Datacenter), item 20, C-358/97 (Commission vs Ireland), item 52, C-150/99 (Stockholm Lindöpark), item 25, C-269/00 (Seeling), item 44 and C-275/01 (Sinclair Collis), item 23 and *Prop. 1989/90:111* p. 86. See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 418, by Björn Forssén and *Mervärdesskatt En handbok* (Eng., Value added tax A handbook), p. 16, by Björn Forssén.

Sweden didn't have a reasonable scope of the taxable transactions in GML with respect of EU law compliance until the services were made taxable in general on the 1st of January 1991 the same way as was already the case with goods.[93] The enumeration principle that applied before for taxation of transactions of services according to GML lead to the services largely being excluded from VAT taxation without even an exemption explicitly applying according to GML. However, the importance of the right of deduction was already when the GML came into force on the 1st of January 1969 emphasized for the purpose of deeming that a Swedish was at hand at all. In the preparatory work to GML it was stated that the right of deduction of input tax distinguished the VAT from multiple-step-taxes of the so called cascade type, where every supply leads to an actual tax burden with the thereby following cumulative effects.[94]

Thus, the most basic principle to fulfill the purpose of the VAT being a competition- and consumption-neutral tax is the right to deduction, regardless if it's a question of interpretation of ML before or after Sweden making its accession to the EU on the 1st of January.

It's the entrepreneurs and not the consumers who shall have the right of deduction, and then that right can be limited for an entrepreneur due to the Sixth Directive containing mandatory and facultative rules respectively stipulating that certain transactions shall or can be exempted from the general rule on taxation of goods and services in the national VAT acts within the EU. The decisive importance of the right of deduction, for the purpose of defining the VAT as a multiple-step-tax which – unlike cascade taxes – in principle shall not lead to tax-on-tax- effects (so called cumulative effects), is confirmed inter alia by the EU Commission, in connection with a proposal of the 17th of June 1998 to the Council to introduce special rules on prohibition of deduction (which hasn't been done yet), pointing out that "[i]t should not be forgotten that the right to deduct is a basic feature of the value added tax system. Consequently, any exclusion from this right is an exception to the rule, which is unacceptable unless it is specifically justified" (Sw., "*man får inte glömma att avdragsrätten utgör en grundläggande del av mervärdesskattesystemet. Detta får till följd att varje undantag från denna rätt utgör ett undantag från regeln vilket endast kan godtas om det åtföljs av en mycket precis motivering*").[95]

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[93] See *SFS 1990:576*; *bet. 1989/90:SkU31*; *Prop. 1989/90:111*; *SOU 1989:35*.
[94] See *Prop. 1968:100* p. 36.
[95] See COM (1998)377 final [Sw., *KOM (1998)377 slutlig*].

The entrepreneur can basically be deemed distinguished from the consumer, by the description of a taxable person (Sw., *företagare*) as the one who has the right of deduction or who would have had that right if the transactions of his goods or services wouldn't have been comprised by exemption from taxation. The Governmental investigation *SOU 2002:74* suggest – as mentioned before – that '*skattskyldig person*' can be replaced by '*beskattningsbar person*', as a 'compromise term' (Sw., '*sammanvägd term*') when looking into several language versions of the Sixth Directive [see the English version and the term taxable person]. However, the intention of the investigation hereby is no other than expressing the subject of taxation, 'i.e. someone who can be subject for taxation' (Sw., "*dvs. någon som kan komma i fråga för beskattning*"), and 'who belongs to the VAT system' (Sw., "*som är underkastad systemet*").[96] '*Beskattningsbar person*' can be considered closer to English version of the Sixth Directive and "taxable person", but the current '*skattskyldig person*' doesn't either present any uncertainty with respect of thereby meaning an entrepreneur and that he as such ('*skattskyldig person*') can make taxable transactions or transactions exempted from taxation or, in which case the expression 'mixed activity' (Sw., '*blandad verksamhet*') is usually used, both.[97]

Here it's not a case of doing any Wilmot-test, since it shouldn't be questioned by anyone that the ML is the only law describing the Swedish VAT system. It's not a matter of trying whether NAVE according to IL is so to speak a competing VAT.

The main difference between ML and IL is actually the deduction matter. The result of NAVE is calculated so that the costs in form of expenses gives the right to an immediate deduction and depreciations and diminuition of value on investments 'set up as assets' (Sw., '*aktiverade*') from 'the income items' (Sw., '*intäktsposterna*').[98] If the result is a profit, it'll be taxed as 'income of NAVE' (Sw., "*inkomst av näringsverksamhet*"). Is the result a deficit the principle is to 'carry it forward' (Sw., "*rullas*") to the next 'fiscal year' (Sw., '*beskattningsår*'), and it'll be used there to reduce the income items in NAVE that year.[99] Thus, the costs in the income

[96] See *SOU 2002:74* Part 1 p. 163.
[97] See *SOU 1999:133* pp. 72 and note 13 there. See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), pp. 431 and 432, by Björn Forssén, where it says that '*skattskyldig person*' means a person who *can* (Sw., *kan*) be liable to pay VAT, regardless if he's making taxable or from taxation exempted transactions of goods or services.
[98] See Ch. 14 sec. 2 second paragraph first sentence and sec. 21 first paragraph and Ch. 16 sec. 1 IL.
[99] See Ch 14 sec. 22 third paragraph and Ch. 40 sec. 2 IL.

tax schedule NAVE never give cause for the entrepreneur to claim the state. That's on the other hand the case with the VAT, where he who's conducting an activity causing liability to pay VAT for him thus has the right to deduct input tax in respect of goods or services supplied or to be supplied to him by another taxable person or in respect of VAT due or paid on imported goods.[100] The entrepreneur shall under these provisions be reimbursed by the state of the VAT paid by the price e.g. for an acquired article of goods including VAT as precisely for a claim on the state. The input tax shall normally be paid back by the state with as much as it exceeds the 'output tax' (Sw., '*utgående moms*') by the entrepreneur [and his employer's contribution (for national social security purposes), employee withholding taxes and preliminary tax] in the monthly 'tax return' (Sw., '*skattedeklaration*') for the accounting period in question *or*, in case the yearly turnover is low and the VAT therefore is accounted for in the income tax return, to the part it exceeds output tax and other taxes and contributions in 'the notice of tax assessment' (Sw., '*slutskattsedeln*') for the fiscal year in question.[101] The ideal is that input tax and output tax respectively will never be cost and income item respectively by the entrepreneur.[102]

Thus, NAVE according to IL is undoubtedly not an unlawful VAT beside VAT expressed by ML. Here it's instead a question of making an analysis if the structure of Ch. 13 IL and national case law cause or may have a tendency to cause that YRVE in the ML, by the reference in Ch. 4 sec. 1 item 1 to Ch. 13 IL and the concept NAVE, isn't complying with a division of entrepreneurs and consumers according to Article 4(1) of the Sixth Directive and the concept taxable person.

Thus, the task here is put the right of deduction as a basic VAT principle in connection with the other basic principles which make the way of applying the VAT rules not distorting the competition. Thus, here it's about finding the fundamentals for internal neutrality valid regardless of which EU Member State is at hand. What are they and how do they interact, the principles which shall give favourable tendencies for an evolution of law in

[100] See Ch. 1 sec.. 8 second paragraph and Ch. 8 sec. 2 ML and Ch. 8 sec. 3 first paragraph ML, which shall equal Article 17(2) of the Sixth Directive. Whether the latter also is the case in every respect will be dealt with below, but here it's sufficient to note that the principle that the VAT on purchases and imports shall be lifted from the expenses so that the VAT won't be a cost for the entrepreneur is upheld by the ML.
[101] See Ch. 11 sec:s 10 and 14 and Ch 18 sec. 2 first paragraph item 1 SBL.
[102] See Ch. 16 kap. sec. 16 first paragraph respectively Ch. 15 sec. 6 first paragraph first sentence IL.

the direction of the ideal VAT with a general scope in the industrial sector? Distortion of competition shall for the analysis here be allowed only due to all EU Member States not using the same VAT rates yet and various EU Member States being transitionally allowed by virtue of their treaties for accession to the EU to have exemptions from taxation not complying with either mandatory nor facultative rules thereon in the Sixth Directive. The lack of neutrality in these two respects will entrepreneurs and consumers in the EU Member States have to live with so to speak until the EU Council decides otherwise or it will cease to exist due to the EU constitution being ratified by all EU Member States. Otherwise the aim is that the VAT shall be applied competition neutral. It follows already by the eighth paragraph of the preamble of the First Directive that "even if the rates and exemptions are not harmonized at the same time" (Sw., "*även om skattesatser och undantag inte harmoniseras samtidigt*") within the EC (EU) the aim to strive for is competition neutrality in the whole ennobling chain.

2.3.3 The value added tax-principle's basic components: reciprocity and passing on of the tax burden (to the consumers) aiming for a competition neutral application of the VAT rules

2.3.3.1 Analysis of Article 2 of the First Directive

The competition neutrality may be considered representing an overall view on the construction of the VAT. The functions to achieve neutrality consist of the right of deduction being upheld and VAT deductions being passed on link by link in the ennobling chain until the consumer. A description of the idea VAT can be 'the construction of the VAT satisfying the demand on competition neutrality as long as the tax burden is passed on to the final consumer (Sw., "*[m]ervärdesskattens konstruktion tillgodoser kravet på konkurrensneutralitet så länge som skatten övervältras på den slutlige konsumenten*").[103] The 'inner engine' (Sw., '*inre motor*') of the VAT can be described as a 'hermeneutic circle' (Sw., '*hermeneutisk cirkel*'), with the right of deduction in principle in connection to the principle on reciprocity and the principle on passing on the tax burden (to the consumer) – the latter called here 'the passing on tax burden-principle', here abbreviated the POTB-principle, (Sw., '*övervältringsprincipen*'). The overall view with a competition neutral final result of the application of the VAT rules shall be achieved by upholding the part functions, i.e. the two basic parts. The other way around reciprocity and POTB shall each on its own be applied with

[103] See *Skattenytt* (Eng., the Tax news) 1998 p. 553, the article *Skatteförmåga och skatteneutralitet – juridiska normer eller skattepolitik?* (Eng., Tax-paying capacity and tax neutrality – legal norms or tax politics?), pp. 550-559, by Åsa Gunnarsson.

respect of the consumer not being likely to choose one supplier before the other, due to one of the two factors (parts) having when applying the VAT rule to be interpreted a tendency to lead to such a non-neutral interpretation result. These basic principles for the VAT as an idea, 'the value added tax-principle', here abbreviated the VAT-principle (Sw., '*mervärdesskatteprincipen*'), can be derived from Article 2 of the First Directive, which in fact describes the basic principles of the common system of VAT.

An analysis of Article 2 of the First Directive paragraph by paragraph shows that the idea can be called a hermeneutic circle. The principles competition neutrality, reciprocity and POTB interlace. The right of deduction characteristic for the VAT, i.e. the possibility for each entrepreneur in the ennobling chain to lift off the VAT paid to the one before them from the cost of the purchase of an article of goods or a service, shall be upheld first and foremost by an interaction between these three principles. That's the way to achieve the ideal, i.e. that value added taxation comprise all links of the chain involved for the purpose of production and distribution and is applied as simple and neutral as possible.

The first paragraph of Article 2 of the First Directive reads:

"The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged" (Sw., "*Principen om det gemensamma systemet för mervärdesskatt innebär tillämpning på varor eller tjänster av en allmän skatt på konsumtion som är exakt proportionell mot priset på varorna och tjänsterna, oavsett antalet transaktioner som äger rum under produktions- och distributionsprocessen före det led där skatt tas ut*.")

The first paragraph can – together with the second paragraph – be construed expressing the POTB-principle.

The second paragraph of Article 2 of the First Directive reads:

"On each transaction value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deducting of the amount of value added tax borne directly by the various cost components" (Sw., "*På varje transaktion skall*

mervärdeskatt, beräknad på varornas eller tjänsternas pris enligt den skattesats som är tillämplig på sådana varor eller tjänster, tas ut efter avdrag av det mervärdeskattebelopp som burits direkt av de olika kostnadskomponenterna.")

The second paragraph can – together with the first paragraph – be considered expressing the POTB-principle and the reciprocity principle.

The third paragraph of Article 2 of the First Directive reads:

"The common system of value added tax shall be applied up to and including the retail trade stage" (Sw., "*Det gemensamma systemet för mervärdesskatt skall tillämpas till och med detaljhandelsledet*.")

The third paragraph can – together with the first paragraph – be considered determining the scope of the VAT system, by including all producers and distributors of the article of goods or the service in question up to the retailer. He who shall not belong to the VAT system is the one who shall carry the burden of tax on consumption, i.e. the consumer. POTB stops there, i.e. when the consumer meets 'the dealer' (Sw., "*handlaren*") – regardless if he's a wholesaler or a retailer – and no further ennobling of the article of goods or the service in question will take place.

There's also a fourth paragraph of Article 2 of the First Directive, but it's obsolete since 1993. It stipulates exemption from the third paragraph until abolishing the tax on imports between the EU Member States, which was made by the introduction of the transitional arrangements for the taxation of trade between Member States along with the internal market 1993 (external neutrality). Here the internal neutrality is of interest instead, and the aim with the application of the VAT rules shall be that the principles according to the other paragraphs of Article 2 of the First Directive shall give an interpretation result as competition neutral as possible. Neutrality is desirable also for other taxation than value added taxation. The overall economic characteristics of the tax law leads to a postulate of the reality on which to apply tax law to having a need for neutrality.[104] However, the competition neutrality-principle isn't protected by EY directives, when the issue is the entrepreneur tax law of income taxation, except for the few cases where directives have been issued by the Council on income tax matters. Thus, contrary to the VAT, where neutrality is presumed generally

[104] See *Skattenytt* (Eng., the Tax news) 2004 p. 742, the article *Skatterättsliga avhandlingar i ett förändringsperspektiv* (Eng., Tax law theses in a perspective of alteration), by Bergström, Sture, Norberg, Claes and Påhlsson, Robert (pp. 740-745).

already according to the second paragraph of the preamble of the First Directive. Therefore, it's of interest to compare the principles of Article 2 of the First Directive with the income tax.

The POTB-principle doesn't exist for income taxes, since the right of deduction isn't supposed to have that function there. The reciprocity principle is on the other hand valid also within the field of income taxes. A cost deductible for income tax purposes shall in principle result in a taxable income item by another taxpayer (the reciprocity principle).[105] The difference is that the reciprocity principle is stronger in the field of VAT, by the POTB-principle assumed to satisfy the need for neutrality.[106] Thus, the basic principles of the right of deduction of VAT interact and the tendency is a strengthening of the principles. Although different VAT rates and possibilities for diversions from the Sixth Directive concerning exemptions from taxation are allowed, the aim when applying the VAT rules shall be competition neutrality.

The reciprocity principle's strong position in the field of VAT is also expressed in Article 17(1) of the Sixth Directive, which stipulates that "[t]he right to deduct shall arise at the time when the deductible tax becomes chargeable" (Sw., "*[a]vdragsrätten inträder samtidigt som skattskyldigheten för avdragsbeloppet*"). Since it's about a basic principle for the VAT as an idea, the reciprocity principle's strong position in the field of VAT was emphasized already in the preparatory work to the GML, i.e. before the introduction of the ML and before Sweden made its accession to the EU.[107] The difference after the Swedish accession to the EU is more that the reciprocity principle and the other basic principles for the VAT as an idea are protected both in the EU primary and secondary law, and the aim there meaning that the VAT shall be applied competition neutral for the purpose of upholding the functions of the internal market. After Sweden making its accession to the EU, e.g. state financial reasons

[105] See *Inkomstbeskattning vid konkurs och ackord* (Eng., Income taxation at bankruptcy and compound with creditors), p. 94, by Pelin, Lars and Elwing, Carl M.

[106] See also *Skattenytt* (Eng., the Tax news) 1993 p. 448, the article *Felförräntade fordringar och skulder* (Eng., Wrong interest on claims and debts), pp. 426-448, by Claes Norberg, where he already before Sweden made its accession to the EU emphasized that demand for reciprocity is stronger for the value added taxation than within other fields of taxation.

[107] See *SOU 1964:25* p. 382, where it says that the right to deduct input tax provides that liability to pay VAT has occurred by the 'joint party' (Sw., '*medkontrahent*'), but not that he has fulfilled his obligation to account for and pay VAT to the state. See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), pp, 74-76, by Björn Forssén.

are no longer valid as motives for Swedish diversions from the Sixth Directive. Such diversions must be supported by 'the treaty of accession to the EU' (Sw., '*anslutningsfördraget*').

2.3.3.2 Certain EC Treaty-conform interpretation in the field of VAT?

It wouldn't be far fetched in the field of VAT with the kind of EC Treaty-conform interpretation of the EU law which means that also the reading of legislation before Sweden making its accession to the EU and for which the competence was transferred to the EU institutions at the accession shall be construed under the EU law. The argument for such an EC Treaty-conform interpretation is in that case the VAT as an idea actually being expressed already in ML and GML before Sweden made its accession to the EU, it was only the scope of the VAT that differed. That's also the case today with the treaty of accession to the EU allowing certain diversion from the Sixth Directive, and therefore it's not far fetched that the EC Treaty-conform interpretation described would at least comprise the VAT as an idea, i.e. at least comprise also ML and GML before Sweden made its accession to the EU so that the EU law in the field in question should be respected when trying the rules as they described the VAT at the time. Thus, it could, within the then effective law in the field of VAT in Sweden, be to some extent argued that the basic VAT principles described here (competition neutrality, reciprocity and POTB) should be applied when trying a VAT issue after Sweden making its accession to the EU, although the trial concerns the reading of a rule before Sweden's accession.

Such an EC Treaty-conform application of the VAT law would be in line with the so called "von Colson"-principle. It's namely argued in doctrine, with reference inter alia to the ECJ case 14/83 (von Colson and Kamann), 'that as well the legislation by which the directive is implemented into national law as the legislation in effect before that shall be interpreted so it when possible correspond with the wording and purpose of the directive' (Sw., "*att såväl den lagstiftning varigenom direktivet införlivas i nationell rätt som den lagstiftning som gällt dessförinnan skall tolkas så att den om möjligt överensstämmer med direktivets ordalydelse och syften*"). That's called an almost 'far-reaching EC Treaty-conform interpretation' (Sw.,"*långtgående fördragskonform tolkning*"), and certain problems to be likely at the application in national court is pointed out.[108] The prohibition

[108] See *När tar EG-rätten över?* (Eng., When does the EC law rake over?), p. 185, by Fritz, Maria, Hettne, Jörgen and Rundegren, Hans. In the first edition (of 1996) of that book the expression used in this context then on p. 114 was by the way 'extreme EC Treaty-conform interpretation' (Sw., "*extrem fördragskonform tolkning*".

against retroactive tax legislation in the Swedish constitution,[109] can be added to such an inventory of problems, but it can be argued that the SAC shouldn't always hesitate to bring up and try the EC Treaty-conformity with problems remaining after Sweden made its accession to the EU only because they belong to the time before the EU-accession. In any case not when the section in question of the ML is unchanged after the EU-accession or has been altered but it's stated in the preparatory work without the intention of thereby changing the material application of the section. A certain support for such an EU Treaty-conformity can be traced in the SAC VAT-cases *RÅ 2001 Not 97*, *RÅ 2001 Not 98* and *RÅ 2001 Not 99*, which were decided the same day. The application in the first two mentioned, which concerned accounting periods from the time before Sweden made its accession to the EU in 1995, correspond materially with the latter case. The latter case concerned accounting principles after the EU-accession, where the SAC looked for support in cases from the ECJ. All the three cases concerned the VAT rule on 'exemption from taxation for transfer of a going concern '(Sw., '*skattefri verksamhetsöverlåtelse*') (sec. 8 item 18 of GML; Ch. 3 sec. 25 of ML). That rule wasn't changed when Sweden made its accession to the EU. The SAC can, although it isn't clearly expressed, be assumed to have taken at least an indirect impression of its own interpretation of the ECJ cases also when interpreting the two cases concerning the time before the EU-accession.[110] The complex of problems in question would for natural causes be practically non-existing today, but it can maybe in the future be of interest in 'petitions for a new trial' (Sw., '*resningsärenden*') concerning VAT issues from the time before Sweden made its accession to the EU.

Thus, the degree of EU Treaty-conformity can be discussed when the VAT is concerned, but the important thing here is that the rules of the ML after Sweden made its accession to the EU in 1995 undoubtedly shall be interpreted with respect of the basic VAT principles described here. That should be valid also for the cases where the treaty of accession to the EU allows diversions from the Sixth Directive, since only one VAT system is allowed and the aim by interpreting such special rules on VAT also shall be competition neutrality. Although such special rules in accordance with the

[109] See Ch. 2 kap. sec. 10 second paragraph of RF.

[110] The complex of problems in question isn't taken up this way in *Mervärdesskatt vid omstruktureringar* (Eng., VAT at restructuring measures), by Eleonor Alhager, which can be deemed the standard book on questions about the rule Ch. 3 sec. 25 of ML. The SAC had namely granted 'leave to appeal' (Sw., '*prövningstillstånd*') only to one of the three cases in question, *RÅ 2001 Not 97* (*mål 3802-1996*), when that book was written (se p. 362 in it).

treaty of accession to the EU in themselves mean distortion of the competition, can the application of them not be made without respecting the principles on competition neutrality, reciprocity and POTB as far as possible. Otherwise the application will give a wrong tendency in the direction away from being a question concerning a VAT rule at all.

2.3.3.3 The ECJ look into the basic principles of Article 2 of the First Directive, although sometimes not stating it explicitly in the verdict

Here it shall also be mentioned that those in the preamble of a directive or a regulation specified purposes with it appear in the motives of the ECJ's decisions, but it's normally not mentioned explicitly in the verdicts.[111] That's also the case with the preambles of the First and the Sixth Directives. 'Those applying the law' (Sw., '*rättstillämparna*') often miss that the ECJ refers not only to the Sixth Directive, but also to the First Directive. They often miss too that the ECJ emphasize the competition neutrality-principle that follows from the preambles of both the directives or the other basic principles of the VAT-principle following of Article 2 of the First Directive. Above all should the POTB-principle be more emphasized by those applying the law. Has a deducted VAT been taxed by the entrepreneur accounting for and paying output tax on his transactions? That question should be tried more often then today in investigations of whether an evasion has occurred where VAT is concerned. That's important when trying questions on 'tax surcharge' (Sw., '*skattetillägg*') and 'tax fraud' (Sw., '*skattebrott*') in the field of VAT. Many times that analysis is lacking as well in a prosecutor's crime description on the theme VAT fraud as in a court's verdict. Nevertheless, the defendant has been convicted and maybe already served the penalty, before the procedures on the tax issue itself even has been decided upon by The county administrative court. Furthermore it's far from always that the described trial of the risk for tax evasion is done by the administrative courts concerning the tax surcharge question.

The mayor importance of the trial of deduction questions being done with reference to the POTB-principle is emphasized by the ECJ e.g. in the cases C-4/94 (BLP Group), C-98/98 (Midland Bank), C-408-98 (Abbey National) and C-16/00 (Cibo). In all theses cases the ECJ make its trial of the scope of the right to deduct with reference to Article 2 of the First Directive (and also to Article 2 of the Sixth Directive), and thus inter alia to the POTB-

[111] See *Mervärdesskatt – en kommentar* (Eng., Value Added Tax – a commentary), p. 26, by Björn Westberg.

principle containing the assumption that the VAT that's been deducted will be taxed by the entrepreneur accounting for and paying output tax on his transactions. The emphasizing of the Article 2 of the First Directive to describe the scope of the right to deduct input tax has been called a "purist approach". Michael Conlon uses that expression and note from the "BLP Group"-case that the ECJ when interpreting the scope of the right to deduct according to Article 17 of the Sixth Directive "relied on Article 2 of the First Directive".[112] Those who align themselves with that view can hardly be called fundamentalist in the popular sense of the word, since it can't be perceived that the ECJ would allow anyone not to join the purists concerning the importance of the basic VAT principles in Article 2 of the First Directive. That's the case also regarding the question of who can belong to the VAT system, and thereby not only causing himself the obligation to account for and pay output tax, but whom then also will have the right to deduct input tax.

An example of preliminary ruling where the ECJ not explicitly refer to Article 2 of the First Directive, but indirectly emphasizes the basic principles deriving thereof for the question of the scope of the VAT, is the ECJ case C-291/92 (Armbrecht). There the ECJ states in item 20 that a taxable person shall not carry the burden of input tax paid on purchases which will lead to tax liability. It's plain and simple the POTB-principle etc in Article 2 of the First Directive being reflected by the case, although the ECJ goes directly into the Sixth Directive and apply Articles 2(1), 17(2) and 20(2) of the Sixth Directive. The VAT on goods and services shall not get stuck as a cost within the ennobling chain of entrepreneurs belonging to the VAT system, instead it shall be passed on to burden (POTB) the consumer (the carrier of the tax – Sw., *skattebäraren*). Besides it can be noted that the investigation *SOU 2002:74* doesn't make any 'further investigation' (Sw., "*vidare utredning*") of this 'limitation of the scope of the VAT' (Sw., "*begränsning av mervärdesskattens tillämpningsområde*").[113] However, the question is central for this book. *SOU 2002:74* makes a comprise between different language versions by the EU Member States of the Sixth Directive and thus without any material analysis of how the concepts in the ML comply with the Sixth Directive, whereas here that's what the analysis is all about: Basic concepts for the common VAT system in Article 2 of the First Directive will be given their rightful place for the purpose of a necessary overall view when deeming single concepts. The accounting rules and other things will be dealt with

[112] See British Tax Review 1998 p. 569, the article A Tide in the Affairs of Men … (pp. 563-572), by Michael Conlon.
[113] See *SOU 2002:74* Part 1 p. 64.

here only when it fills a structural, systematical purpose for the material analysis.

2.3.4 Literal interpretation, systematical interpretation and teleological interpretation

It would be undisputed that 'all interpretation begins with the text' (Sw., "*all tolkning börjar med texten*").[114] In the field of VAT that's first and foremost something that concerns the Sixth Directive, since the competence in the field of VAT was transferred to the EU institutions when Sweden made its accession to the EU in 1995. A literal interpretation of a rule in the ML will have to stand back for a literal interpretation of the corresponding rule in the Sixth Directive. The rules of the Sixth Directive may per definition be assumed to describe the scope of the VAT system, and can thus be presumed to have been written with respect of the basic VAT principles on competition neutrality, reciprocity and POTB. For interpretation problems concerning the wording of a rule in the Sixth Directive the limit of the scope of the rule is in the end set by the ECJ. The ECJ has when interpreting the EU law considered that all the official language versions of a directive text must be compared, where the one most favourable for the individual rules.[115] However, in a case about indirect taxation of transfer of securities (Sw., *värdepapper*) – which directive by the way isn't implemented in Sweden – the ECJ applied a majority principle when interpreting the various language versions of the directive.[116] Thus, the comparison of language versions presents a certain complication for the literal interpretation. Anyway it's clear that if a literal interpretation of a rule in the Sixth Directive is helpful for the interpretation of the rule in ML by which the directive rule is supposed to be implemented, the directive text shall be considered expressing the current law when applying the ML. The courts and authorities such as SKV shall first and foremost apply such a literal interpretation of the rule in the Sixth Directive which shall guide in decisions concerning the corresponding rule in the ML.

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[114] See *EG-skatterätt* (Eng., EC tax law), p. 46, by Ståhl, Kristina and Persson Österman, Roger. Iustus förlag. Uppsala 2000.
[115] See the ECJ case 283/81 (CILFIT).
[116] See the ECJ case EG-målet C-236/97 (Aktieselskabet Forsikringsselskabet Codan) concerning the interpretation of a rule in 'the EC directive on indirect taxation on the raising of capital (69/335/EEC)' [Sw., "*EG:s direktiv om indirekta skatter på kapitalanskaffning (69/335/EEG)*"], which as mentioned isn't implemented in Swedish legislation. In the case mentioned a reference was by the way made to the "CILFIT"-case.

If such a literal interpretation isn't explanatory enough, can a systematical interpretation be of guidance. The basis for interpretation can in an EU law perspective inter alia be 'a rules place and relation to other rules in the same act' (Sw., "*en bestämmelses placering och relation till andra bestämmelser i samma författning*").[117] However, when making a systematical interpretation the problem easily can emerge of the interpretation opening for a final result that can be in conflict with the basic VAT principles. The aim must always be that the interpretation result gives competition neutrality with respect of the principles on reciprocity and POTB. If a systematical interpretation cannot be done covered by the text in the rules in the Sixth Directive, can neither the same presumption be made as for a literal interpretation of a single rule in the Sixth Directive. A 'judicial leap' (Sw., '*juridiskt språng*') at a systematical interpretation must be covered by the same aim.

If not a literal interpretation – with or without a comparison of different language versions of the actual rule in the Sixth Directive – is sufficient to explain by interpretation a rule in the ML, and a systematical interpretation isn't possible without a judicial leap, there's only the teleological interpretation left.

The SAC is obliged to obtain a preliminary ruling from the ECJ only when the SAC consider itself unable to interpret the EU law. Those cases therefore are naturally about a literal or systematical interpretation not giving sufficient guidance. The ECJ has as the highest interpreter of the EU law to give guidance, and when an issue comes down there a teleological interpretation normally remains to be applied. It follows by the preparatory work to the act on Sweden's accession to the EU too that a teleological interpretation is done by the ECJ of the EU law. A directive conform interpretation, i.e. interpretation in accordance with the "von Colson"-principle, is made by the ECJ by reason of promoting harmonization (integration). The ECJ tries to determine the content of the rule of the directive in the light of its intention and aim and chooses the application best fulfilling the aim. The court often refers to the solution chosen being the one most efficient for the Community law, i.e. to the principle of efficiency.[118]

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[117] See *Inför europeiseringen av svensk rätt* (Eng., Before the Europeanization od Swedish law), p. 37, by Ulf Bernitz [pp. 29-40 in *Juridisk Tidskrift* (Eng., Legal journal) 1991-1992] concerning the quotation and *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 434, by Björn Forssén.
[118] See *Prop. 1994/95:19* Part 1 p. 484.

The importance of the principle of efficiency is confirmed inter alia by the principally important excise duty case by the ECJ, C-296/95 (Man-in-Black). There the taxpayers invoked legal rights of the individual to be foreseeable, but the ECJ went by the fiscal line of the Advocate General supported by a contextual and systematical reasoning, where the Advocate General especially pointed out the advantages of analogy, which indicates the ECJ wanting to exercise its role of filling out gaps in the written law in a way making tax planning harder to accomplish.[119] The ECJ disregarded the civil law principle meaning that a person can take legal action by representative as if he had acted on his own (”qui facit per alium facit per se” as the legal basis concept is expressed in Roman Law), by which the ECJ referred to the Advocate General’s remark that a contract law principle can be disregarded with respect of special purposes of the tax law.

- In the case the interpretation of the Danish and Greek language versions of the EC circulation directive for excise duties allowed excise duty would be levied in the destination country England and not in Luxemburg where the goods (tobacco) were released for consumption, since those versions for the sake of excluding excise duty in the destination country provided that they were brought there by the purchaser personally and not, as were the case, transported there by the vendor or on his behalf. Since all language versions have the same status the ECJ deemed that the higher excise duty in England could be levied despite the complainants’ arguments about insecurity regarding the legal rights of the individual due to the Danish and Greek language versions of the circulation directive contradicting the other language versions – which assertion the ECJ by the way remarked being a consequence if one would follow the argumentation proposed by the complainants.

- There’ll be no closer look here on whether the ”Man-in-Black”-case got the described outcome only because it dealt with the question where taxation would take place, and not if taxation would take place. Kristina Ståhl and Roger Persson Österman have noticed this.[120] Here will instead be noted partly that the court implies that the unclearness between the different language versions which the case concerned provided that the complainants’ reasoning was

[119] See *EG-skatterätt* (Eng., EC tax law), p. 55, by Ståhl, Kristina and Persson Österman, Roger.
[120] See *EG-skatterätt* (Eng., EC tax law), p. 57, by Ståhl, Kristina and Persson Österman, Roger.

supposed to be followed, partly above all that the court didn't express that the interpretation result from the Danish and Greek language versions would be any unreasonable outcome in relation to the wording of the English national language version, which in short stated that 'excise duties shall be levied on tobacco goods imported … to the United Kingdom' (Sw., "*punktskatt skall tas ut på tobaksvaror som importeras ... till Förenade kungariket*"). If the principle of 'one excise duty- and VAT-country' is accepted, a reasoning about the "Man-in-Black"-case only concerning in which of the two EU Member States involved taxation would take place and not if taxation would take place can't be accepted as an explanation of the outcome. Instead it's of a greater interest that the court point out that double taxation won't occur due to tax paid in Luxemburg will be reimbursed when taxation also will be the case in England.[121]

- Instead it may be noted here there's a case, the "Man-in-Black"-case, where an EU Member State had to accept that the ECJ has chosen the language versions of the directive from two other EU Member States, but also that this doesn't seem to have been in conflict with the principle of legality for taxation and legal rights of the individual following thereof for the sake of interpreting the national rule of taxation in question by the EU Member State in question. The ECJ may only be perceived to have had found the Danish and Greek versions of the directive fulfilling its purpose better, since tax planning thereby would be harder to accomplish. Thus, the principle of efficiency is central for the interpretation of the EU law.

The teleological method here should be of the kind that Jan Kellgren calls an aim based law interpretation. The aim is also deciding for that sort of teleological interpretation, but is more a deal of 'regarding aims [goal] of the application of the law, not single rule' (Sw., "*beakta ändamål [mål] för rättstillämpningen, inte för en enskild regel*").[122] The goal here is that the VAT rules shall lead to a competition neutral distinction of who can belong

[121] The "Man-in-Black"-case was commented already after the Advocate General's statement by Christina Moëll: see *Skattenytt* (Eng., the Tax news) 1997 p. 684etc, the article *Fusk med punktskatter* (Eng., Cheating with excise duties), pp. 682-689. See also *Punktskatter – rättslig reglering i svenskt och europeiskt perspektiv* (Eng., Excise duties – legal regulation in Swedish and European perspective), pp. 135 and 136, by Stefan Olsson.
[122] See *Mål och metoder vid tolkning av skattelag* (Eng., Aims and methods at interpretation of tax law), p. 203, by Jan Kellgren.

to the VAT system (the entrepreneur) and who's a consumer. Are the Swedish rules efficient for the purpose of that selection procedure?

A historical interpretation principle doesn't fulfill any major function for the trial whether the connection in question between ML and IL for the determination of the subject of taxation is EU law conform, since the EU law has an absolute primacy before national law. This means according to the ECJ case 6/64 (Costa) that Sweden cannot unilaterally make a change in the ML valid in contradiction of the EU law which Sweden has accepted by its accession to the EU in 1995.[123] However, this doesn't mean that the SAC's decisions in the field of VAT from the time before the EU-accession are obsolete. In the SAC case *RÅ 2001 Not 99*, which was about applying the rule on exemption from taxation for transfer of a going concern in Ch. 3 sec. 25 of ML for the time after the EU-accession, the SAC referred 'inter alia' (Sw., "*bl.a.*") to the SAC case *RÅ 1984 1:67*.[124] In that case a purchaser of services were deemed to act in 'good faith' (Sw., '*god tro*') when assuming that the supplier of the services was an independent entrepreneur. Despite the supplier, a Finnish company, not being finally deemed as an independent entrepreneur (Sw., '*yrkesmässig*' – i.e. the YR-part of YRVE) according to the main rule of YRVE at the time or the SUPPLEMRNTARY RULE of GML, the purchaser was considered being in good faith thereof and there entitled to deduct the (Swedish) input tax levied in the invoices from the Finnish company. It's sometimes claimed by the SKV that the case mentioned is to be considered obsolete due in particular to Sweden's EU-accession and the EU law thereby would've altered the rules. The latter is correct, but for the judgement whether a supplier is comprised by YRVE it can be claimed that the case of 1984 is rather more than less valid today, if the influence of the EU law on the ML is to be considered. At the EU-accession in 1995 was as mentioned the previous prerequisite to have YRVE 'in the country' (Sw., '*här i landet*') to become liable to pay VAT in Sweden on taxable transactions of goods or services supplied here removed from Ch. 1 sec. 1 first paragraph item 1 of ML. Nowadays an entrepreneur, regardless where in the world he's established, tax liable for taxable transactions of goods or services within the country (Sweden), unless taxation of acquisition shall take place by the customer. Since tax liability also applies to temporary, single transactions here, it can be claimed that the client to the Finnish company in the case of 1984 should have had even more reason today to rely on the charge of

[123] See *Prop. 1994/95:19* Part 1 pp. 486 and 487 and comments there of the ECJ case 6/64 (Costa).
[124] See also the SAC case RÅ 2004 Ref 65, where the SAC in a VAT casse concerning the time after Sweden's accession to the EU refer to as well *RÅ 1984 1:67* as *RÅ 1988 ref 74*.

Swedish input tax in the invoice concerning a correct purchase in the sense that the supplier could be presumed to be liable for output tax on the corresponding supply. Thus, the current law in the field of VAT from the time before Sweden's EU-accession in 1995 can at least have a value for comparison today.

2.3.5 Rights, obligations and the principle of legality for taxation

Obligation to account for and pay output tax to the state is a duty laid upon the entrepreneur, whereas the right to deduct input tax is an individual right (a claim against the state) for the entrepreneur.

The rule in Article 4(1) of the Sixth Directive on who's a taxable person is mandatory. There's neither any Swedish special regulation of that concept under the treaty of accession to the EU. If the concept YRVE in ML materially differs from taxable person so that someone who otherwise would belong to the VAT system and thereby having the right of deduction of VAT on his purchases and imports would be excluded therefrom, the directive rules. The directive is considered to have a so called 'direct effect' (Sw., '*direkt effekt*') when it comes to the rights acknowledged by it to the individual.

In the SAC case *RÅ 2000 Ref 5*, which concerned whether an 'export service' (Sw., '*exporttjänst*') would be deemed to exist according to Ch. 5 sec. 11 item 3 of ML, the SAC referred to the ECJ cases 26/62 (van Gend en Loos) and 6/64 (Costa) and the ECJ's practice meaning that if 'a directive rule gives the individual a right and this right is limited by national legislation' (Sw., "*en direktivbestämmelse ger en enskild en rättighet och denna rättighet beskärs genom nationell lagstiftning*") the directive is given 'primacy before national rules in conflict with it' (Sw., "*företräde framför däremot stridande nationella regler*") (the principle on the EU law's absolute primacy before national law). Since the service was of a taxable character, i.e. would've caused liability to account for output tax if it wasn't deemed an export, it constituted right of deduction of input tax on the purchase of goods and services assignable to its performance. The wording of Ch. 5 sec. 11 item 3 of ML means a limitation of "export" only to apply if the service is performed on goods brought here, i.e. to Sweden, from a third country for its performance. That limitation could according to the SAC not be read from the corresponding rule in Article 15(3) of the Sixth Directive. Therefore, the directive was considered having direct effect and primacy over the letter of the rule in the ML. The tax authorities and the administrative courts shall the disregard the letter of the

act and apply 'the export rule' also for services on domestically produced goods exported to a third country after being performed. The individuals have the right to apply 'the export rule' in pursuance of the directive; the tax authorities (SKV) may not impose output tax even if the letter of the law admits it and they shall allow VAT deduction on the entrepreneur's purchases to make the service.

If a directive rule causes rights for individuals to emerge that can be invoked before national courts and authorities and the rule fulfill the conditions mentioned meaning that it's clear, precise and unconditional, it has such a direct effect. Since e.g. a rule in the Sixth Directive shall be implemented in the national ML, it could be claimed that the directive is directly applicable within the Swedish law system, but not immediately.[125] The SAC referred in the SAC case *RÅ 2000 Ref 5* also to the ECJ case 8/81 (Becker) of the meaning that the principle on a direct effect of the EC directives also comprise e.g. the Sixth Directive. If an administrative court in Sweden [i.e. the county administrative court (Sw., *länsrätten*), the administrative court of appeal (Sw., *kammarrätten*) or the Supreme Administrative Court, here abbreviated the SAC (Sw., *Regeringsrätten*)] finds that a stipulation in ML is in conflict with a Sixth Directive-rule having direct effect, the court shall not apply the actual rule of the ML in the case. An example is Article 17(2) of the Sixth Directive which gives a taxable person right to deduct input tax on purchases from the output tax supposed to be paid by him on his taxable persons. It's considered to mean that the individual is recognized 'rights to be invoked at a national court for the purpose of questioning national rules not complying with the rule' (Sw., "*rättigheter som kan åberopas vid en nationell domstol för att ifrågasätta nationella regler som inte är förenliga med bestämmelsen*".[126]

The Sixth Directive can, if the directive for the question at hand is more favourable for the individual than the ML, be claimed giving him or her the right not to pay tax (output tax) and a right to deduct tax (input tax).[127]

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[125] See *Förvaltningsprocesslagen m.m. En kommentar* (Eng., The Administrative Procedure Act etc A commentary), p. 32, by Bertil Wennergren.

[126] See *RÅ 2003 Ref 36*, the SAC's advanced ruling concerning VAT of the 6th of June 2003 (case No. 1438-2001), where this was expressed with reference to 'e.g.' (Sw., "*t.ex.*") the ECJ's verdict in the case C-62/93 (BP Soupergaz), item 35.

[127] See *Skattenytt* (Eng., the Tax news) 2006 p. 208, the article *Några synpunkter på JK:s beslut den 4 oktober 2005 att ge skadestånd till enskild på grund av att Skatterättsnämnden tolkade EG-rätten fel* [Eng., Some viewpoints on the JK's (Attorney-General's) decision of the 4th of October 2005 to grant damges to an individual due to the SRN interpreting the EC law wrongful], pp. 205-211, by Roger Persson Österman. There he notes that if a right is identifiable in a law from the EC and concerns tax, is it 'so to

However, ML is still Swedish legislation. Thereof follows that a duty for the individual to account for and pay output tax according to the Sixth Directive is neither possible to force upon the individual if it isn't covered by the wording of the corresponding rule in the ML. The *lex scripta*-condition stipulated by the principle of legality for taxation in Ch. 8 sec 3 of RF is accommodating the demand of legal rights of the individual being foreseeable in legislation and application of laws in the field of taxes. The concept of legal rights of the individual (Sw., *rättssäkerhetsbegreppet*) is supported by the EU law by the European Convention for the Protection of Human Rights and Fundamental Freedoms – here abbreviated the European Convention (Sw., *Den Europeiska Konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna – Europakonventionen*) – and references being made to it in the Maastricht Treaty of 1992 about introducing the EU internal market in 1993. The principle of legality for taxation is also derived from the ECJ case 8/81 (Becker). Negligence to adapt legislation and administrative practice to the EU law shall be of disadvantage for the authorities and not for the individuals.[128]

2.4 QUESTIONS FOR THE ANALYSIS IN THIS BOOK

The analysis whether YRVE in the ML is EU law conform shall be done first and foremost in relation to the question if the expression can be deemed limiting or expanding the number of persons who can belong to the VAT system compared to who can be a taxable person according to the Sixth Directive.

If the reference to NAVE according to Ch. 13 of IL, for the determination of YRVE according to Ch. 4 sec. 1 item 1 of ML, means that persons who has the character of taxable person according to Article 4(1) of the Sixth Directive aren't considered having YRVE, it isn't EU law conform. If that connection from ML to IL instead means that by NAVE the scope of the persons who can belong to the VAT system will be expanded in relation to who can be comprised by taxable person, it isn't EU law conform either.

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speak a right to be relieved from paying tax' (Sw., "*s.a.s. en rättighet att slippa erlägga skatt*").

[128] See also *Punktskatter – rättslig reglering i svenskt och europeiskt perspektiv* (Eng., Excise duties – legal regulation in Swedish and European perspective), p. 134, by Stefan Olsson and *Mervärdesskatt vid omstruktureringar* (Eng., VAT at restructuring measures), pp. 95-96, by Eleonor Alhager.

A literal interpretation is of interest here only concerning to *whom* taxable person refer. It can already here be determined from Article 4(1) of the Sixth Directive that the person in question shall be independent and thus not employed. The literal interpretation continues with *how* the economic activity according to the rule in that article can be described. In the English language version is "economic activity" used and in the French is "activités économiques" used, which imply an activity condition in addition to the title to property which in itself generates income. That question may be completed with an analysis of what the ECJ practice says about the activity condition and the degree thereof determining that an economic activity according to Article 4(1) of the Sixth Directive is established. Another question is *when* a person is a taxable person and as such entitled to deduction according to Article 17(2) of the Sixth Directive. Is there a request that taxable transactions actually must have been done first? Is there a request of profitability? Article 4(1) only speaks of a taxable person "whatever the … results" (Sw., "*oberoende av ... resultat*"), which means that the person has such a character regardless if the activity shows a profit or a loss. Is there instead a request of a certain quantity of purchases for an economic activity to be considered existing according to Article 4(1) of the Sixth Directive? Is there for the determination of taxable person any request of a certain pace of taxation of the VAT-deductions made in the economic activity of the person in question, by virtue of him accounting for output tax, i.e. any thoughts about an adequate degree of POTB?

It's against the answers to questions like these about the prerequisites for taxable person in Article 4(1) of the Sixth Directive that YRVE in ML and the connection for that concept to NAVE in Ch. 13 of IL shall be tried.

At first there'll be an analysis of the concept taxable person. That analysis is done based on various interpretation alternatives and the practice by the ECJ. It's thereby regarded that the purpose of the rules foremost is to distinguish entrepreneurs, which can belong to the VAT system, from consumers, where the aim is a competition neutral interpretation result.

The continuing analysis is then about the issue if the connection in question, from ML to Ch. 13 of IL and the concept NAVE there, leads to persons comprised by taxable person in the Sixth Directive can't be considered belonging to the VAT system or that the connection in question instead means that those who aren't taxable persons can belong to the VAT system anyway.

A non-EU conform VAT system can also depend on the structure of the ML itself. How do the concepts 'tax liable' (Sw., '*skattskyldig*'), i.e. person liable to pay VAT, and the VE-part of YRVE (Sw., '*verksamhet*)' work when it comes to determining who can and shall respectively belong to the VAT system? Before the analysis of judging if NAVE according to Ch. 13 of IL gives a non-allowed limitation or expansion of the number of persons who can belong to the VAT system compared to who's taxable person referring to continue, a systematical analysis will therefore be done of the EU law conformity of the concepts tax liable (Sw., *skattskyldig*), right of deduction (Sw., *avdragsrätt*) and YRVE (Sw., *yrkesmässig verksamhet*) in the ML.

If the interpretation result of the connection from ML to IL to determine who's got YRVE leads to the VAT system in Sweden over compensating so that persons which aren't taxable persons according to the Sixth Directive will be allowed access to the VAT system and opportunity to deduct input tax on their purchases, the state will have to accept that they use that possibility. The state can't on the other hand impose a duty of accounting for and paying output tax, if they don't want to belong to the VAT system.

Another question concerning the topic of over compensation from the VAT system is if there's any situation making the VAT system as a 'tax collection system' (Sw., '*uppbördssystem*') not to be used for payment from the state, despite there would be a rule in the ML formally stating deduction? That question will be dealt with finally in this book, since it has to do with concepts within the field of VAT without any connection to the IL.

Directly after the analysis of the concept taxable person there'll be two part analyses, before the analysis continue with the question on the connection of the concept YRVE in ML to Ch. 13 of IL and the concept NAVE.

The first partly analysis concern whether the investigation SOU 2002:74 has support in national practice for the perception there's a need to abolish the Swedish concept '*verksamhet*', i.e. inter alia the VE-part of YRVE, from ML. That's one of few suggestions in material sense by the investigation. Although the investigation focus on the accounting issues is it of interest here to examine if the investigation has a backup for its proposal to abolish the concept in question, i.e. '*verksamhet* – here abbreviated VE, from ML. The proposal seems to be based on a notion about statements by the SAC in one single case, namely the SAC case *RÅ*

1999 Not 282, and the fact that the right of deduction in ML is depending on the VE leading to 'tax liability' (Sw., '*skattskyldighet*'), whereas the right of deduction in the Sixth Directive is connected to 'the taxable person's taxable transactions and thus not to VE as such' (Sw., "*den beskattningsbara personens skattepliktiga transaktioner och således inte till verksamheten som sådan*"). The latter standpoint is also the investigation's motive for the Sixth Directive's rules supposed to be more 'transaction orientated' (Sw., "*transaktionsinriktade*") than those of the ML.[129] Worth keeping in mind is that *SOU 2002:74* propose a transition from a 'VE-thinking' (Sw., "*verksamhetstänkande*") to a 'transaction-thinking' (Sw., "*transaktionstänkande*") with the provision that any analysis of the consequences materially has not been done by the investigation, which instead focus as mentioned on the accounting rules. Since a material analysis of ML's concept YRVE will be made here in relation to EU law conformity, it's of interest to examine if the VE-concept should be abolished from the ML. Is the case that a VE-thinking is relevant for determining who can belong to the VAT system, it's also relevant for the question of the right of deduction emerging. Another question is then if the emergence in time of the right of deduction is depending on a taxable transaction first occurring or not. Although, as the investigation claim, the VE-concept in the ML doesn't have any direct corresponding concept in the Sixth Directive, it has its similarity in the Sixth Directive's "economic activity" (Compare: Sw., "*ekonomisk verksamhet*"), i.e. concerning the determination of who can be subject to taxation. The question is then if the right of deduction is depending on taxation actually taking place, i.e. if the emergence of taxable transactions decides the emergence and upholding of the right of deduction. If not so, it remains to be examined whether the SAC case *RÅ 1999 Not 282* is evidence of a need to abolish the VE-concept from the ML.

Thus, here it's not a matter of questions about the tax object such as the scope of exemptions from taxation or the scope of the right of deduction in a 'mixed activity' (Sw., '*blandad verksamhet*'), but an analysis of the tax subject. It's about judging the basis for distinguishing the entrepreneurs, i.e. those who shall belong to the VAT system (if they aren't only doing transactions of goods or services exempted from taxation), from the consumers. Therefore, it's important for the continuing analysis after having dealt with taxable person to examine the 'to be or not to be' of the VE-concept in ML. If the VE-concept should be abolished from the ML, the provisions will change radically for the analysis of the question of EU

[129] See *SOU 2002:74* Part 1 pp. 152 and 194.

law conformity with determining the tax subject by the connection to NAVE in Ch. 13 of IL. Already thereby will also the question of when VE, economic activity (Compare: Sw., *ekonomisk verksamhet*) and NAVE respectively cease to exist.

The second partly analysis, before the analysis continues with the main question concerning the material rules to determine the tax subject, is about these rules relating to book-keeping and 'questions on the procedure of taxation' (Sw., '*förfarandemässiga frågor*'). Is there a value in itself to keep the connection of the accounting rules in the ML to the civil law concept of GAAP, i.e. regardless if it's possible to have a 'common tax frame' (Sw., '*gemensam beskattningsram*') for VAT and income tax when it comes to determining the tax subject? Also for that matter is the investigation SOU 2002:74 questioned when it suggests such a disconnection. The value of evidence of the existence of or absence of a 'properly done book-keeping' (Sw., '*ordnad bokföring*') to resolve issues on assessment of tax concerning VAT and income tax will be put into the contexts of building norms, registration, control, 'tax return procedures' (Sw., '*deklarationsförfarandena*') and 'tax case procedure' (Sw., '*skatteprocess*').

The continuing analysis of the main issue on the ML's connection to Ch. 13 of IL will be done in relation to what will come out of the analysis of taxable person and the partly analyses.

3. TAXABLE PERSON: WHO, HOW AND WHEN?

3.1 TAXABLE PERSON, WHO?

3.1.1 The main rule

In Article 4 of the Sixth Directive it's stated who is considered to have the character of a taxable person. In Article 4(1), which is a mandatory directive rule, is stated the main rule of who's a taxable person.

According to the main rule taxable person shall mean any person who ”independently” (Sw., ”*självständigt*”) in any place carries out any ”economic activity” (Compare: Sw., ”*ekonomisk verksamhet*”), whatever the purpose or results of that activity. [From now on will the Swedish '*ekonomisk verksamhet*' be abbreviated E-VE; it's the equivalent to 'economic activity' in the English language version of the main rule, but only structurally and not necessarily semantically since we have to deal with two different languages. VE is by the way still referring to the semantics of ML, e.g. as a part of YRVE (if it doesn't follow by the context that it's a case of another concept VE as e.g. in the Swedish language version of the Sixth Directive or in the income tax legislation).] The provision of a 'purpose of making money' (Sw., '*förvärvssyfte*') can be perceived already in these two prerequisites. That's confirmed also by the ECJ, which has established that he who only provides goods and services free of charge can't be deemed a taxable person.[130] If then the result is profit or loss doesn't matter for the judgement whether the subject in question is a taxable person, which also is stated explicitly in Article 4(1) of the Sixth Directive.

The elimination of non-profit-making organizations from the VAT system is made in the Sixth Directive with reference to the tax object, i.e. the supply of goods or services. In Article 13A of the Sixth Directive there are stipulated exemptions from taxation for certain supplies made by 'public bodies' (Sw., '*offentligrättsliga organ*' or other by the Member State in question recognized 'cultural entities' (Sw., '*kulturella organ*') or 'non-profit-making organizations' (Sw., '*allmännyttiga ideella föreningar*').

Finland and Sweden respectively are the only here examined EU Member States who don't follow the Sixth Directive in this respect, but instead

[130] See item 12 of the ECJ case 89/81 (Hong-Kong Trade).

make exemptions for ‘non-profit-making organizations’ [Sw. (Finland), ’*allmännyttiga samfund*’] and ’non-profit-making organizations and registered religious congregations’ (Sw., ’*allmännyttiga ideella föreningar och registrerade trossamfund*’) respectively with respect of whether the incomes are ’*business income*’ [Sw. (Finland), ’*näringsinkomst*’] and income of NAVE respectively. However, Finland has, similar to other EU Member States and other countries mentioned here, not the Swedish solution for the main rule with a connection to the income tax legislation. On the other hand can the concept ’businesslike sales’ [Sw. (Finland), ’*rörelsemässig försäljning*’] in the Finnish VAT act become of a comparative interest for the SUPPLEMENTARY RULE on YRVE, Ch. 4 sec. 1 item 2 of ML, and there comparable VE ’carried out in forms comparable with a business comprised by NAVE’ (Sw., ”*som bedrivs i former som är jämförliga med en till näringsverksamhet hänförlig rörelse*”), i.e. so called ’businesslike activities’ (Sw., ’*rörelseliknande former*’). That depends on the evolution of the law in Sweden, but since the SAC case RÅ 1996 Not 168 the SAC can’t be perceived to seek support in the SUPPLERMENTARY RULE for the purpose of determining the scope of YRVE in the ML. Therefore the focus here can be on the main rule on YRVE, Ch. 4 sec. 1 item 1 of ML, and the SUPPLEMENTARY RULE is subject to an analysis first when making the analysis of the structure of the ML for the purpose of distinguishing the entrepreneurs from the consumers.

At present it’s foremost of interest for the context at hand now to make an analysis of the EU law conformity with Ch. 4 sec. 8 of ML stipulating the exemption from the VAT system on a subject level for non-profit-making organizations and registered religious congregations. This technique doesn’t necessarily mean today there’s a diversion materially concerning the distinction between entrepreneurs and consumers, but can it constitute a structural risk for the evolution of a national practice in conflict with EU law?

A public body can be exempted from the VAT system by virtue of the character of the tax object according to Article 13A or specifically due to its character as such a subject according to Article 4(5) of the Sixth Directive. Here it’s primarily the subject’s perspective which is of interest, when it comes to the ML’s rules on distinguishing those who can belong to the VAT system from the consumers. Thus far it’s noted that exemptions from taxation according to Article 13A of the Sixth Directive for public bodies or cultural entities and ’non-profit-making organizations’ (Sw., ”*organisationer utan vinstintresse*”) must not ’risk creating such competition distortions which would put commercial entrepreneurs who are

obliged to pay output tax in a disadvantageous position' (Sw., "r*iskera att skapa sådana konkurrenssnedvridningar som skulle försätta kommersiella företag som måste betala mervärdesskatt i underläge*" or that the activities 'directly compete' (Sw., "*direkt konkurrerar*") with such enterprises,[131] and that such a limitation of the exemption of public bodies is stipulated in Article 4(5) of the Sixth Directive.

3.1.2 Facultative rules on who's a taxable person

In Article 4(3), which is a facultative rule in the Sixth Directive, is stipulated that the Member States can deem as a taxable person he who temporarily makes a transaction of an economic activity. It's thereby especially noted supply of production of new buildings and land for building. There are special rules on 'taxation of withdrawal' (Sw., '*uttagsbeskattning*') in Ch. 2 sec. 7 of ML, where reference is made to the concept 'building business activity' (Sw., '*byggnadsrörelse*') according to IL concerning real estate in stock. Since those rules in the ML are in effect by virtue of the treaty of accession to the EU, it's allowed already thereby if they would cause a deviation from the number of building contractors that would be deemed taxable persons according to the main rule of the Sixth Directive, i.e. when determining the tax subject. Furthermore, there's support to that relation in Article 4(3) of the Sixth Directive. Thus, and foremost considering that the special rules in question in the ML are about the tax object (withdrawal – Sw., *uttag*) and not the determination of the tax subject, which shall be analyzed here, the rules mentioned on taxation of withdrawal and the reference to building business activity won't be dealt with any further in this book.

Article 4(3) of the Sixth Directive has never been invoked in that respect by the legislator, but the facultative rule can be of importance for the application of rules in Ch. 4 sec. 3 of ML on certain temporary transactions also being deemed to take place in YRVE. This will be dealt with further on in this book.

Sweden used on the 1 of July 1998 the facultative rule in Article 4(4) second paragraph of the Sixth Directive on the opportunity to register VAT groups, and the rules were implemented in a new chapter (6a) in the ML.[132] Such a registration means exemption for the group members from the otherwise applying general principle that VAT isn't accounted in group.

[131] See Article 13A.(2a) and (2b) of the Sixth Directive.
[132] See *SFS 1998:346*; *Prop. 1997/98:134* and *Prop. 1997/98:148*.

The exchange of goods and services between the group members isn't charged with output tax, and the group is treated for VAT purposes as one unit.[133] In one of the cases of opportunity to group registration the ML connects to the rules on 'certain agent agreements' (Sw., '*kommissionärsförhållanden*') according to Ch. 36 of IL.[134] However, this doesn't mean anything for the trial if the unit which is the group is comprised by the concept taxable person. Thus, the VAT group is also subject to the main question in this book, i.e. whether the connection from ML to Ch. 13 of IL and the concept NAVE is EU law conform for determining who's got YRVE. Therefore there's no reason to give the VAT group a special treatment here.

3.1.3 Public body activities

In Article 4(5) of the Sixth Directive it's stated that a "public body" (Sw., "*offentligrättsligt organ*") isn't a taxable person when activities or transactions made by it are 'exercise of authority' (Sw., '*myndighetsutövning*') are concerned. Whereas it's a taxable person if charges (Sw., *avgifter*), fees (Sw., *arvoden*), subsidies (Sw., *bidrag*) or in payments (Sw., *inbetalningar*) are received in connection with the exercise of authority, and it would cause competition distortion of a certain significance if the public body in question, e.g. a Swedish municipality (Sw., *svensk kommun*) or the state, wouldn't be given such a character. Thus, a public body can for a certain activity or transaction be deemed a taxable person. That trial will be done on the basis of the basic conception on competition neutrality, and it's not about trying e.g. the municipality as a subject on the topic of entrepreneur or consumer, but more about trying if a certain part of the municipality's activity shall be considered taxable person only on account of the existence of a competition submitted sector with corresponding activities or transactions which must be protected thereby. In the ML this is technically done by way of the public body's transactions of goods or services causing that precisely those transactions constitute YRVE by the municipality, unless the transaction is done in the line of exercising authority or it concerns e.g. issuing evidence of the exercise of authority.[135]

There's an exercise of authority done by others than the public bodies, e.g. by lawyers commissioned as 'notary public' (Sw., '*notarius publicus*'), and

[133] See *Prop. 1997/98:148* p. 26.
[134] See Ch. 6a sec. 2 first paragraph item 3 of ML.
[135] See Ch. 4 sec:s 6 and 7 of ML.

it's comprised by the general rules of the ML on YRVE.[136] Such an activity is also comprised by the main question of this book, i.e. whether the connection from ML to Ch. 13 of ML on the topic of EU law conformity with the determination of who's got YRVE. It's the same with public body activities carried out by the usage of a company. A municipality owned company is neither a public body.

Since the exemption from taxable person for the public, public bodies', exercise of authority in Article 4(5) of the Sixth Directive isn't about any trial on the topic distinction between entrepreneur and consumer and ML's determination of the YR-part of YRVE for public body activities is done with reference to the tax object without any connection to the concepts of IL, there's no reason to furthermore handle public body activities and the interface between exercising authority and taxable person in this book.

It can only be mentioned here that the SAC in the latter sense applied the principle of legality for taxation in the SAC case *RÅ 2003 Ref 99*. Concerning the exemption from YRVE in Ch. 4 sec. 7 first paragraph item 1 of ML for transactions made in certain public body activities in the line of exercising authority in comparison to the competition provision in Article 4(5) first paragraph second sentence of the Sixth Directive, the SAC considered that 'the directive … can't be invoked *against* the municipality' (Sw., "*direktivet … inte kan åberopas* mot *kommunen*"). Although such a competition distortion could exist in the case comprised by Article 4(5) of the Sixth Directive, and which should give the municipality the character of taxable person 'the municipality can on its behalf invoke the exemption from tax liability following by Ch. 4 sec. 7 first paragraph item 1 of ML' (Sw., "*kan kommunen för sin del åberopa det undantag från skattskyldighet som följer av 4 kap. 7 § första stycket 1 ML*".[137]

3.2 TAXABLE PERSON AND E-VE (Sw., *EKONOMISK VERKSAMHET*), HOW?

3.2.1 Entrepreneur, not employee

Thus, the main rule on taxable person, Article 4(1) of the Sixth Directive is of interest in this book, and the prerequisites "independently" (Sw.,

[136] See *SKV:s Handledning för mervärdesskatt* 2005 (Eng., The SKV's manual for value added tax 2005), pp. 157 and 158.
[137] See also the SKV writ of the 3rd of November 2004 (Sw., *SKV:s skrivelse 2004-11-03*), *dnr 130 553890-04/111*, concerning the SAC case *RÅ 2003 Ref 99*.

”*självständigt*”) and E-VE (Sw., ”*ekonomisk verksamhet*”) in that rule are amplified in Articles 4(2) and 4(4) first paragraph.

In Article 4(4) first paragraph is stated that by the expression ”independently” it’s meant to exempt all kind of legal bindings creating an employment relation concerning working conditions, wages and employer’s responsibility.

The limitation of the independence prerequisite against employment relations is clear principally. There shouldn’t be any discrepancy between domestic practice and EU practice when it comes to questions like e.g. if it for assignment relations is enough with three mandators (Sw., *uppdragsgivare*) for a business risk being deemed to exist. That’s more about problems of evidence in the actual case at hand.

The connection from ML to the subjective prerequisite ’independently’ (Sw., ”*självständigt*”) in Ch. 13 sec. 1 first paragraph second sentence of IL for the purpose of determining YRVE doesn’t necessarily has to lead to a Swedish non-EU law conform practice, which is shown by the Swedish view on two cases from the ECJ concerning the application of the EC regulation 1408/71 on social security, which regulation by the way is in effect in both the EU Member States and in the EEA-countries. According to the ECJ the judgement in one EU Member State whether a person according to that country’s legislation is deemed to be an employee or independent entrepreneur shall from a social security contributions perspective be accepted in another EU Member State where the person in question is working.[138]

The National Tax Board (RSV) has in a writ of the 6th of April 2000,[139] due to the both ECJ cases mentioned, referred to the EC Treaty’s principles on free movement (the four freedoms), and states that the concept ‘YR’ (Sw.,”*begreppet yrkesmässighet*”), i.e. the YR-part of YRVE, in the ML shall be ‘judged according to Community law principles’ (Sw., ”*bedömas enligt gemenskapsrättsliga principer*”). The RSV express furthermore in the writ that ’it’s not the task of the SKM (i.e. the tax authorities) to question another country’s judgement that an activity (i.e. the VE-part of YRVE) carried out in that country is YR’ (Sw., ”*[d]et ankommer inte på SKM att ifrågasätta ett annat lands bedömning att en verksamhet som bedrivs i det landet är yrkesmässig*”). The RSV also notes that ‘tax

[138] See the ECJ cases C-178/97 (Barry Banks and others) and C-202/97 (Fitzwilliam Executive Search Ltd).
[139] See the RSV-writ (Sw., *RSV:s skrivelse*) *dnr 3997-00/100.*

liability' (Sw., '*skattskyldighet*') according to Ch. 1 sec. 1 first paragraph item 1 of ML emerge regardless to whether YRVE is 'carried out within the country' (Sw., "*bedrivs här i landet*") or abroad, which as mentioned applies since Sweden's accession to the EU in 1995. Similar to the standpoint which can be perceived on RSV's behalf, can the EC regulation on social security be claimed to give certain guidance for the decision whether a foreign subject is comprised by YR according to the ML. The Community law principle of EU law concepts having 'an autonomous European meaning' (Sw., "*en autonom europeisk innebörd*") does hardly allow the ECJ to give different contents to what shall be understood with an independent entrepreneur according to Article 14a of the EC regulation on social security and taxable person according to Article 4(1) of the Sixth Directive respectively. The judgement of who's an independent entrepreneur or employee where income tax is concerned according to Swedish legal practice follows the social security contribution-law judgement and vice versa. Both in cases on income tax and in cases on social security contributions, where the topic is precisely the entrepreneur's independence contrary to employment, the SAC often refers to the investigation *SOU 1975:1* and the part 'On the employment concept' (Sw., "*Om arbetstagarbegreppet*").[140] Thus can, due to the described Swedish relation in practical application to EU law practice, the application of the independence prerequisite in the section mentioned of Ch. 13 of IL as a part of the determination of YRVE in the ML still be expected to be EU law conform.

The difficulties in principle here lie instead in the prerequisite E-VE. Already the fact that it applies both to regular trade of goods and assignment relations open for more various problems.

3.2.2 E-VE

For the determination of E-VE there are first listed in Article 4(2) of the Sixth Directive a number of active professional categories: ("all activities of producers, traders and persons supplying services including mining and

[140] See e.g. the SAC cases *RÅ 1983 1:40* (income tax), *RÅ 1984 1:101* (withholding of tax) and *RÅ 1987 ref 163* [employer's contribution (for national social security purposes)], where reference is made to the investigation of 1975. In for instance the SAC case *RÅ 2000 Not 189* (income tax) the SAC refer to inter alia the cases of 1983 and 1984. See also the SAC case *RÅ 2001 Ref 60* (income tax), where reference is made to inter alia the case of 1984. In that case of 2001 on the topic of independence is also referred to a decision the same day by the SAC concerning advanced ruling on VAT (the SAC case with the case No. 4453-2000).

agricultural activities and activities of the professions" (Sw., "*alla verksamheter av producenter, återförsäljare och personer som tillhandahåller tjänster, däribland gruvdrift och jordbruksverksamhet samt verksamhet inom fria yrken*"). Furthermore is it stipulated there that as economic activity shall also be considered "[t]he exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis" (Sw., "*[u]tnyttjande av materiella eller immateriella tillgångar i syfte att fortlöpande vinna intäkter därav*").

A taxable person according to Article 4(1) of the Sixth Directive is in other words an independent entrepreneur with an 'intention for the benefit of himself and eventual employees to make money on his VE' (here the VE-part of E-VE), Sw., '*förvärvssyfte*'. A literal interpretation give the result that it's some kind of activity which is supposed to generate a continuous income. In the English language version of Article 4(1) of the Sixth Directive is as described here the expression "economic activity" used and in the French language version is "activités économiques" used.[141] The word activity is more precise, since the Swedish word *verksamhet* (compare: the VE-part in E-VE and in YRVE) according to normal use of language also can mean passive VE within e.g. tax law. A passive activity would be a pointless contradiction.

3.2.3 The activity prerequisite in E-VE

3.2.3.1 E-VE, consumption- and competition perspective in practice

The issue of the activity prerequisite gives the resulting question: what degree of activity does the EU law stipulate for the constitution of an E-VE according to Article 4(1) of the Sixth Directive? The provision of some kind of title to tangible or intangible property, when it's not about a taxable person having such a character mainly by offering his professional skills, is a reasonably obvious one. It's of course also so that the activity condition means that E-VE can't emerge solely by the possession of property which in itself has an economic value. Then the VAT would, at least to some extent, have the character of a 'wealth tax' (Sw., '*förmögenhetsskatt*'). Thus, the question is above all what degree of activity is requested with acquisition of property for the acquisitions to constitute E-VE in the present sense.

[141] See also *SOU 2002:74* Part 1 p. 163.

It follows from Article 2(1) of the Sixth Directive that it's the supply by the taxable person himself which shall be judged with reference to the question if a transaction of an article of goods or a service is taxable or not. That goes with the directive rule stating that VAT shall be paid for delivery of goods or supply of services etc done "by a taxable person acting as such" (Sw., "*av en skattskyldig person i denna egenskap*"). In that respect the Swedish practice was EU law conform already at Sweden's accession to the EU in 1995.[142] If the person is a consumer, e.g. an ordinary private person, can he or she make a taxable transaction, but will not be liable to pay VAT since he or she isn't thereby acting as a taxable person. The sale of e.g. the private bicycle isn't carried out in an E-VE and will not be value added taxed, despite the object being of a taxable character. However, the subject shall pay VAT if sales of bicycles are made for the 'purpose of making money' (Sw., '*förvärvssyfte*').

A 'purpose of making money' and E-VE is at hand e.g. when the person in question is making that kind of sales at such an extent and frequency that he's no longer to be deemed consuming bicycles for his private use. He's competing with other bicycle businesses. The person in question is then an entrepreneur and shall separate his private economy from the one of his enterprise. In other words shall the E-VE be able to identify objectively, so that it shall be at all possible to prove when he's acting as a taxable person.

3.2.3.2 Requirement to maintain accounting records according to GAAP, an indicator of E-VE

The ultimate distinction of E-VE is 'the book-keeping' (Sw., '*bokföringen*'), since the 'Requirement to maintain accounting records' (Sw., '*bokföringsskyldigheten*') of course exist for what's qualified as E-VE according to the Sixth Directive. It follows by the preparatory work to the BFL that 'the interface between private economy and business activity' (Sw., "*gränsen mellan privatekonomi och näringsverksamhet*") should be determined 'in connection with book-keeping' (Sw., "*i samband med bokföring*") regarding what's considered as 'GAAP' (Sw., '*god redovisningssed*').[143]

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[142] See e.g. the SAC cases *RÅ 1985 Aa 203*, *RÅ 1988 Not 642*, *RÅ 1991 Not 82*, *RÅ 1992 Ref 62*, *RÅ 1992 Not 209*, *RÅ 1992 Not 210*, *RÅ 1993 Ref 13* and *RÅ 1994 Not 13*. After the EU-accession in 1995 can on the same topic be noted inter alia the SAC cases *RÅ 1998 Not 111* and *RÅ 1999 Not 46* [with reference to the ECJ case C-2/95 (Sparekassernes Datacenter)].

[143] See *Prop. 1998/99:130* Part 1 p. 229.

The Council on Legislation (Sw., *Lagrådet*) note in its statement over the introduction 'the assessment year' (Sw., '*taxeringsåret*') of 2002 of the IL – which inter alia replaced 'the municipality tax act' [Sw., '*kommunalskattelagen (1928:370)*', KL] and 'the state income tax act' [Sw., '*lagen (1947:576) om statlig inkomstskatt*', SIL] – inter alia the following. The calculation of the result in NAVE shall be based upon the BFL and other legislation in the field of accounting. This follows according to the Council on Legislation already by Ch. 14 sec. 2 of IL referring to GAAP when it comes to allocating 'incomes' (Sw., '*inkomster*') and 'expenses' (Sw., '*utgifter*') respectively as 'revenues' (Sw., '*intäkter*') and 'costs' (Sw., '*kostnader*') respectively to the 'fiscal year' (Sw., '*beskattningsår*') they shall belong to. The Council on Legislation pointed out the difficulties to find out if it's even any difference between GAAP and 'book-keeping standard basis' (Sw., '*bokföringsmässiga grunder*'), and meant that the latter concept could be abolished due to the 'question of allocation to a particular period' (Sw., '*periodiseringsfrågan*') getting an adequate solution by the connection mentioned to GAAP for the calculation of the result.[144] However, the Government considered it couldn't lead to non-intended material alterations to remove the concept 'book-keeping standard basis' from the IL. To only connect the calculation of the result to GAAP cause problems, when IL contain several rules on allocation to a particular period which can lead to demands on modification for accepting the civil law accounting at the taxation. The Government referred instead to the Council on Legislation's notification that 'book-keeping standard basis' means that the accounting of incomes and expenses doesn't allow a 'cash basis principle' (Sw., '*kontantprincip*'); they shall instead be 'allocated to the period to which they by applying business administration principles belong' (Sw., "*hänföras till den period som de med tillämpning av företagsekonomiska principer belöper sig på*"). The Government considered 'book-keeping standard basis' thereby 'expressing a basic principle for the accounting where taxes are concerned' (Sw., "*uttryck för en grundläggande princip för den skattemässiga redovisningen*"),[145] and the concept was kept by the legislator and is to be found in Ch. 14 sec. 2 of: 'the result shall be calculated according to book-keeping standard basis' (Sw., "*[r]esultatet skall beräknas enligt bokföringsmässiga grunder*").

Thus, the civil law concept 'business transaction' (Sw., '*affärshändelse*') should be considered an important 'entrepreneur tax law' (Sw.,

[144] See *Prop. 1999/2000:2* Part 3 pp. 396 and 397.
[145] See *Prop. 1999/2000:2* Part 2 pp. 177 and 178.

'*företagsskatterättslig*') rule.[146] The tax reform of 1990 strived for tax neutrality between entrepreneurs and employees. The aim with the neutrality principle is that the legislation shall not make consumption of tax credits possible, i.e. that tax relieves in the enterprise will be available to the entrepreneur. The possibility to have reserves provides that 'a distinction is made between the business activity and the private economy' (Sw., "*en åtskillnad görs mellan näringsverksamheten och privatekonomin*").[147] The connection between accounting and taxation (the so called connected area) has taken by itself its material meaning concerning the allocation to a particular period. It shall be based on 'the books of account' (Sw., '*räkenskaperna*') 'as long as the allocation to a particular period in these is complying with GAAP and neither in conflict with special tax law rules' (Sw., "*så länge periodiseringen i dessa är förenlig med god redovisningssed och inte heller strider mot särskilda skatterättsliga bestämmelser*".[148] However, it's obvious that the evidence best supporting that somebody acting as an entrepreneur makes a separation between his private and the enterprise's economy is the book-keeping.

The material rules to determine who's a taxable person or who shall account income of NAVE can present differences for the determination of the entrepreneur, and it's not an axiom that a common tax frame between VAT and income tax shall be maintained. However, the analysis here is about whether ML's connection to NAVE is EU law conform for the determination of who's an entrepreneur and can belong to the VAT system, and the lowest common denominator will be the books of account and the civil law concept Requirement to maintain accounting records. No Requirement to maintain accounting records, no books of account and no evidence for the topic of separation between the enterprise's and the entrepreneur's private economy. The person in question noting in his books

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[146] See *Momshandboken Enligt 1998 års regler* (Eng., The VAT handbook. According to the rules of 1998), p. 26, by Björn Forssén and *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 35, by Björn Forssén and references there to sec. 4 of the predecessor to BFL, *bokföringslagen (1976:125)* – abbreviated GBFL (i.e. the old BFL), and Ch. 1 sec. 2 first paragraph item 7 of BFL.

[147] See *SOU 1996:157* p. 331 and *Prop. 1999/2000:2* Part 2 p. 167.

[148] See *Prop. 1999/2000:2* Part 2 pp. 179 and 180. See also, concerning the expression 'connected area' (Sw., '*kopplat område*'), *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 9th edition, p. 251, by Sven-Olof Lodin and others and *Skattenytt* (Eng., the Tax news) 2003 pp. 508-518, the article *Senare års rättspraxis beträffande sambandet mellan redovisning och beskattning på det kopplade området – några reflektioner* (Eng., The legal practice in the later years concerning the connection between accounting and taxation in the connected area – some thoughts), by Claes Norberg.

a business transaction indicates that at least he himself deem himself as being an entrepreneur.

A business transaction is in principle every event leading to a change of the wealth of the enterprise, depending on the enterprise's relation to the world around it. Also 'withdrawals' (Sw., '*uttag*') and 'additions' (Sw., '*tillskott*') by the entrepreneur himself are business transactions.[149] Thereby is made clear compared to GBFL the condition that the entrepreneur must clearly separate his private economy from the one of the enterprise.[150] Since 'the one required to maintain accounting records' (Sw., '*den bokföringsskyldige*') ha a need to be able to prove the existence of the business transaction, he's assumed to use a document deriving from the business transaction as 'supporting voucher' (Sw., '*verifikation*') if such a document is at hand.[151] All business transactions shall be noted in the book-keeping continuously and that must be done with respect of GAAP according to BFL, regardless if an invoice is issued or received.[152] Due to the new patterns of commerce created foremost on account of the IT-evolution the connection in sec. 8 second paragraph GBFL to when an invoice or a document equivalent thereto should exist according to 'good business practice' (Sw., '*god affärssed*') was abolished for the question on when a business transaction shall be noted in the book-keeping, by the introduction of the BFL.[153]

In the tax legislation there's also a lack of rules on the time frame within which an invoice must be issued. The ML only contain rules on the content of an invoice in Ch. 11 and the accounting of output and input tax shall according to the main rules in Ch. 13 sections 6 and 16 in principle be done when the business transaction is noted or should be noted in the book-keeping according to GAAP.[154] Proposals made in connection with the introduction of the GBFL that the private circumstances of a 'one-man business' (Sw., '*enskild näringsidkare*') would be accounted for separately in 'the annual accounts book' (Sw., '*årsboken*') has never led to legislation, despite that it would benefit 'the protection of the creditors' (Sw., '*borgenärsskyddet*'); instead, for not making the work to much of an

[149] See Ch. 1 sec. 2 first paragraph item 7 of BFL.
[150] See *SOU 1996:157* p. 463.
[151] See *SOU 1996:157* p. 464.
[152] See Ch. 4 sec. 1 first paragraph items 1 and 2 and Ch. 5 sec. 2 of BFL.
[153] See *SOU 1996:157* p. 276etc and 291 and also *Prop. 1975:104* p. 168.
[154] See *Prop. 2003/04:26* pp. 42 and 48 and inter alia section 2.4 in *Momsen och fakturan, m.m. – momsens krav på fakturainnehåll* (Eng., The VAT and the invoice, etc – the VAT's requests on content of invoice), by Björn Forssén.

administrative burden for those required to maintain accounting records, it's been considered sufficient with information in 'the wealth-enclosure' (Sw., '*förmögenhetsbilagan*') to the tax liable's 'income tax return' (Sw., '*självdeklaration*').[155] The concept GAAP, which is developed under the responsibility of the Swedish Accounting Standards Board [Sw., *bokföringsnämnden*, abbreviated BFN) according to sec. 8 first paragraph of BFL, hasn't any decisive importance for the material tax law and the question on who's an entrepreneur, but it gets a decisive importance as evidence for somebody considering himself required to maintain accounting records and thus at least according to civil law an entrepreneur. It also become important as evidence of whether the person in question can be deemed an entrepreneur for tax purposes.

He who starts an activity normally receives invoices mostly from deliverers and has got to chronologically and systematically maintain books of account. In that respect can it be mentioned here that the concept 'properly done book-keeping' (Sw., "*ordnad bokföring*") in item 1 of the notifications to sec. 24 of KL was abolished by the introduction of the IL, but only due to it having lost its independent meaning after the introduction of the KL for calculating income of NAVE. With a 'properly done book-keeping' was meant 'a book-keeping which as well formally as materially was constituted so that the result was reflecting the actual economic events in the business' (Sw., "*en bokföring som i såväl formellt som materiellt hänseende är så beskaffad att resultatet återspeglar det verkliga skeendet ekonomiskt sett i rörelsen*").[156] Since book-keeping must be done of the business transactions with respect of GAAP, regardless if invoices have been issued or received for the business transactions, will that concept and the existence of a properly done book-keeping of course have a decisive importance as evidence for the person in question being deemed an entrepreneur. Above all if e.g. the purchaser of bicycles has noted in the book-keeping so many delivered bicycles that it can be assumed that they shall not be consume db y himself and his family. Then it's another question, which shall be examined here, if the connection from ML to IL for the determination of who's an entrepreneur and must separate his private economy from the one of the enterprise is EU law conform. Such a common tax frame is favoured by common connections to the civil law concept GAAP and the emergence of Requirement to maintain accounting records, but it can be necessary, considering the condition that the ML shall

[155] See *Prop. 1975:104* p. 179.
[156] See *Prop. 1999/2000:2* Part 2 p. 179.

be interpreted EU law conform, to accept that the division of entrepreneurs and consumers must differ where income tax and VAT are concerned.

A person is according to the preparatory work to the BFL entrepreneur and thereby required to maintain accounting records for 'all activities of an economic nature and of such a character that it can be classified as professional' (Sw., "*all verksamhet som är av ekonomisk natur och av sådan karaktär att den kan betecknas som yrkesmässig*").[157] The prerequisites for Requirement to maintain accounting records aren't incompatible with the prerequisites for taxable person according to Article 4(1) of the Sixth Directive. He who's required to maintain accounting records and thus entrepreneur doesn't make the transactions in question as an employee. The professionalism refers to the purpose of making money also here and the activity shall be an economic one, and a profit prerequisite is neither stipulated according to the preparatory work to the BFL.

3.2.3.3 Activity, minimum level for E-VE: can right of deduction and E-VE exist without a direct and immediate connection between acquisitions and taxable transactions?

The expression E-VE in the Sixth Directive can in itself be claimed to be a totally objective concept.[158] However, such a determination of the expression doesn't mean anything for the trial of who's an entrepreneur and can belong to the VAT system, if it isn't set in relation to the subjective prerequisite of independence. The thereby necessary prerequisite of a purpose of making money, to give the person in question the character of taxable person, means that only a possession of property can't mean that such an E-VE is at hand which is meant by Article 4(1) of the Sixth Directive. To acquire property can be an activity, but it isn't an E-VE in the sense here if it e.g. only is for a hobby purpose. Therefore the emergence of Requirement to maintain accounting records is of a great evidence value for the question if somebody has the character of taxable person according to Article 4(1) of the Sixth Directive. The question then is if it so to speak is possible to establish any minimum level of the activity condition which thus lies in the purpose of making money. To only possess a tangible or intangible asset isn't enough, for the existence of E-VE; it must continuously generate incomes. A mandatory or dealer can be deemed on the topic taxable person so far as the Requirement to maintain accounting records indicates the existence of an E-VE and independence, but if it's

[157] See *Prop. 1998/99:130* Part 1 p. 381.
[158] See *EG-skatterätt* (Eng., EC tax law), p. 172, by Ståhl, Kristina and Persson Österman, Roger.

only about a possession of property the question will be: is there any kind of lowest degree of classification of asset for E-VE to be deemed to exist?

The emphasizing of Article 2 of the First Directive to describe the scope of the right of deduction of input tax according to Article 17 of the Sixth Directive has as mentioned been called a ”purist approach”. With respect of that view expressly or understood can be perceived as basic for the verdicts of the ECJ and the right of deduction being central for the determination of what’s VAT, it may be accepted and as well considered decisive for an E-VE to be deemed to exist at all according to Article 4(1) of the Sixth Directive. The basic principles according to Article 2 of the First Directive for the common VAT system interlace at the interpretation of the as separate prerequisites for the idea VAT, and can as mentioned be claimed to form a so called hermeneutic circle. The aim of the interpretation shall be a competition neutral application of the rules in the ML in relation to the rules if the Sixth Directive.

Thus, to find an answer to the question what level on activity is required for something to be qualified as E-VE it takes an overall judgement of the provisions for right of deduction. No right of deduction without an E-VE and vice versa. Therefore the provisions for a taxable person’s right of deduction according to Article 17(2) of the Sixth Directive need to be analyzed. The principle on reciprocity is stated in Article 17(1), but it’s not enough with somebody charging VAT on a delivery for the receiver to be deemed having an E-VE. The question now is first what the prerequisite in Article 17(2) on an acquired article of goods or service entitling the taxable person to deduction “[i]n so far as the goods and services are used for the purposes of his taxable transactions” (Sw., ”*[i] den mån varorna och tjänsterna används för den skattskyldiga personens skattepliktiga transaktioner*”) mean. Can an E-VE exist without connection to taxable transactions? If such a condition can’t be deemed to exist, the next question won’t be when an E-VE emerges, but if the existence of right of deduction presupposes that taxable transactions have been made first.

Of interest here is inter alia the statements of the Advocate General in the Advocate General’s ‘opinion’ (Sw., ‘*utlåtande*’) in the ”Midland Bank”-case. In item 24 of the opinion the Advocate General referred to the ”BLP Group”-case, where the issue concerned the scope of the right to deduct in connection with taxable transactions which were exempted from taxation. The Advocate General considered that although the question only concerned what sum could be deducted, it was ”still necessary to establish whether there is a direct and immediate link between the input and output

transactions, because even partial deduction of the VAT depends on that factor". The question is how strong the connection between acquisitions and taxable transactions shall be, for the acquisitions to entitle to deduct input tax. In that respect the Advocate General state in the same item in the Advocate General's opinion in the "Midland Bank"-case, with reference to the ECJ case C-230/94 (Enkler), that "where a taxable person carries on a business with the purpose of carrying out only taxable transactions, it is not necessary, for the purposes of deducting the whole of the VAT, that he should prove the existence of a direct and immediate link between each and every input transaction and a particular taxable output transaction. The Community legislature only requires that the goods and services can be used or be likely to be used 'for the purposes of … taxable transactions (Article 17(2) and (3) of the Sixth Directive)". The Advocate General points out furthermore that the plural form of the words "purposes" and "transactions" shows that in certain cases it isn't a necessary presupposition for right to deduct that there's a connection between every acquisition and certain transactions, but instead that it's sufficient with a connection between the acquisition and the activity (compare: the VE-part of E-VE).

If it in the purpose of making money lies a purpose to make taxable transactions, can thus the right of deduction exist just by the acquisitions having a connection with the E-VE. The right of deduction and thereby the E-VE can thus exist without direct and immediate connection to taxable transactions. Then the next question is if the right of deduction presupposes that taxable transactions have been made first in the E-VE, but before that it's as mentioned also a question of finding a lowest level of activity for an E-VE to exist.

3.2.3.4 Activity, minimum level for E-VE: trial without support of physical activity indicated by established books of account

It's shown by the items 27-30 in the "Enkler"-case that if the character of the asset to which right of title is acquired is like it can be used both for private consumption and for economic activity (compare: E-VE), must an overall view be made in the case at hand of all the circumstances, to determine whether the acquisition of the asset in question really has been made for the purpose of "obtaining income on a regular basis". Peter Melz makes the conclusion from the "Enkler"-case that "the threshold for taxability" is thereby probably set rather low, and that a higher threshold

would be desired, which however would demand an amendment, an alteration of the Sixth Directive.[159]

It's a procedural problem that the ECJ's and the Advocate General's emphasizing of the basic VAT principles in Article 2 of the First Directive aren't consistently regarded by national authorities and courts. In the "Abbey National"-case the ECJ seems to have had at least temporarily enough when the ECJ in item 41 of the verdict made its point that the question if basic VAT principles are fulfilled for the deduction in the case at hand first and foremost shall be tried by the national courts themselves. The SKV and the administrative courts often omitting the basic principles following by especially Article 2 of the First Directive have a tendency to lead to wrongly made deductions that the ECJ would have defined certain acquisitions as belonging to categories which already on an objective basis can't entitle to deduction. Since the SAC doesn't have to give motives to a decision not to grant a 'leave to appeal' (Sw., '*prövningstillstånd*'), can an omission by those applying the law of the basic principles mentioned for the common VAT system in practice lead to an evolution of a practice in conflict with the EU law, which as mentioned isn't allowed in the filed of VAT. The problem doesn't become less by Sweden as mentioned having a low profile with obtaining preliminary rulings from the ECJ concerning diffuse issues in fields like e.g. the VAT, despite the evolution of practice shall take place by regarding the EU law there. The Swedish system with leave to appeal in the last instance has also met negative criticism on an EU law basis. The Danish government suggest according to item 11 of the ECJ case C-99/00 (Lyckeskog) precisely that the system, in conflict with the ECJ's practice,[160] risk leading to a non-EU conform domestic practice, if only the highest instance of the courts is obliged to obtain prelimary rulings from the ECJ in pursuance of the third paragraph of Article 234 EC (formerly 177).

The ECJ doesn't express any principle that only the existence of transactions exempted from taxation would limit the right of deduction. Instead the ECJ state in the "BLP Group"-case that Article 2 of the First Directive, which inter alia describes the POTB-principle, and Article 17 of the Sixth Directive, which describes the right of deduction, mean the following. Notwithstanding the cases of exemption concerning insurance services and financial services to customers established in third countries, must a taxable person prove (make it likely) that an acquisition will be used

[159] See Liber Amicorum Sven-Olof Lodin, the chapter Who is a taxable person?, p. 164, by Peter Melz (pp. 158-172), by Andersson, Krister, Melz, Peter and Silfverberg, Christer.
[160] See the ECJ case "Hoffman-La Roche".

to make taxable transactions, for the acquisition to be deductible. In the ”Abbey National”-case, where the POTB-principle of Article 2 of the First Directive is equally emphasized, the ECJ treat also the deduction question as an issue of evidence. The ECJ note in item 40 that the criteria for deduction are that the purchaser in question can be deemed having common costs (overhead costs) in the part of the activity (compare: the VE-part of E-VE) where taxable transactions are made. In item 41 in that case one could thereby say that the ECJ more refer the case to national court for trial of whether these criteria are fulfilled than establish any new judgement in principle. The principles already exist and the topic of evidence is if deductions are passed on and thereby taxed in pursuance of Article 2 of the First Directive.

In an advanced ruling of the 6th of June 2003 concerning VAT, where the question concerned the right to deduct input tax on acquisitions of administrative, economic or juridical consultant services for the sale of shares in daughter companies, the SAC referred to inter alia the ”Cibo”-case and considered that right of deduction didn’t exist. In an advanced ruling of the 6th of June 2003 concerning VAT, where the question concerned the right to deduct input tax on acquisitions of administrative, economical or juridical consultant services for sale of shares in a daughter-company, the SAC referred to inter alia the ”Cibo”-case and deemed that right to deduct didn’t exist. The SAC established that in the ECJ cases where right of deduction had been found existing due to acquired services being part of the tax liable’s overhead costs for the E-VE didn’t any direct and immediate connection exist between acquired services and one or several from taxation exempted sales of shares in daughter-companies. Thus, it’s a question of what proof that can be presented, so that acquisitions shall be able to be deemed overhead costs included as cost components in an enterprise’s taxable products and entitle to deduction of input tax. Of interest is that the SAC in the advanced ruling, just like the ECJ does in inter alia the “Cibo”-case, emphasize that the latter mentioned principle aspect follows by Article 2 of the First Directive.[161] The author of this book pointed out in an article in 2002, inspired by the advanced ruling by *skatterättsnämnden* (SRN) – Eng., the Tax Law Council – of the 14th of February 2001 which the SAC later established by its verdict of the 6th of June 2003, that the SAC by its then to be trial of the case shouldn’t disregard the principle emphasized by the ECJ in inter alia the ”Cibo”-case, namely that the question on the scope of the right of deduction gets its procedural solution when the application of the law is done with regard of

[161] See the SAC case *RÅ 2003 Ref 36*.

the principles on POTB and taxation in the end of the deductions in form of output tax in Article 2 of the First Directive.[162] Thus, contrary to the RSV and others the SAC didn't do that oversight, but there are cases where the EU law isn't respected when trying the right of deduction and where leave to appeal might be denied only due to such a leave is never granted in evidence cases. It's above all cases which also concern the formal presuppositions to *exercise* (Sw., *utöva*) the right of deduction according to Ch. 11 of ML which then will sit in between.

The SAC can by the way be considered having expressed the same standpoint as in the case of 2003 already in an advanced ruling of 1978. The SAC then considered that a company within an industrial group of companies with a common 'staff fund' (Sw., '*personalstiftelse*') had the right to deduct input tax on acquisitions to 'leisure time cottages' (Sw., '*fritidsstugor*') within the staff fund. The right of deduction by the applicant company was considered to be limited only to the extent the group companies had mixed activities, i.e. to the extent that the applicant company's acquisitions to the staff fund couldn't be referred 'to such by the companies carried out activities which lead to liability to pay VAT' (Sw., "*till sådana av bolagen bedrivna verksamheter som medför skattskyldighet till mervärdeskatt*"). Otherwise the right of deduction only provided that the companies in question when calculating prices of their taxable products included as a cost element amongst all the others also the acquisitions to the staff fund. The intention that the VAT deductions sometime in the future would be taxed by the acquisitions being regarded as overhead costs when setting the price of the company's taxable products was at the time also sufficient for right of deduction to be deemed to exist.[163]

Thus, the level of the threshold, i.e. the lowest level of activity, which is acquired for an E-VE to be established, is set where evidence is concerned by the possibility in the actual case to 'make it plausible' (Sw., '*göra*

[162] See *Skattenytt* (Eng., the Tax news) 2002 p. 129, the article *Momsavdrag vid viss momsfri omsättning (igen) samt för nyemissionskostnader* [Eng., VAT deductionx at certain VAT free transaction (again) and for costs for issuing new shares], pp. 123-130, by Björn Forssén.

[163] See the SAC case *RÅ 1978 1:51*. See also *Skattenytt* (Eng., the Tax news) 2002 p. 125, the article *Momsavdrag vid viss momsfri omsättning (igen) samt för nyemissionskostnader* [Eng., VAT deductionx at certain VAT free transaction (again) and for costs for issuing new shares], pp. 123-130, by Björn Forssén. *RÅ 1978 1:51* (*RSV/FB Im 1978:1*) has by the way been commented by the same author already in books from before Sweden's accession to the EU: see *Mervärdeskatt En läro- och grundbok i moms* (Eng., Value added tax an educational- and handbook in VAT), p. 213, by Björn Forssén and *Mervärdesskatt En handbok* (Eng., Value added tax A handbook), pp. 291 and 292, by Björn Forssén.

sannolikt') that the overhead costs are sufficient to fulfill a purpose of making money by making taxable transactions.

If such evidence isn't obvious as with physical activities, where the emergence of the Requirement to maintain accounting records normally indicates also the E-VE according to the Sixth Directive, must an acquired asset, the possession itself, be likely to give continuous incomes which fulfill the purpose of making money and the question will then be of what the activity condition consist. Since a taxable person according to Article 4(1) of the Sixth Directive has such a character also when the person in question intend to make taxable transactions, can guidance be sought also from such activities to deem the level of the threshold for determining when E-VE emerge. The difference is only that taxable persons with the sole intention of making transactions exempted from VAT can't belong to the VAT system.

If such an exemption from taxation would be abolished, would such a taxable person belong to the VAT system just like a taxable person who today has an E-VE at least for the purpose of partly make taxable persons. The person in question would have a right to deduct input tax on his acquisitions.

Since any value added isn't defined in either the ML or the First or Sixth Directives, the lowest level – the threshold – for the question at hand is set equal to the possession of property being expected to generate continuous incomes for the person's in question own support. Then he's got such an E-VE that he according to Article 4(1) of the Sixth Directive has the character of taxable person. To find that threshold can inter alia the "Enkler"-case give further guidance.

From the "Enkler"-case follows that an overall view of all the circumstances in the case at hand must be made. Then a determination can be made whether the acquisition of an asset really is done with the intention to continuously give income, and that thereby an E-VE is established by the purchaser. Furthermore it follows by item 12 of the ECJ case C-333/91 (Sofitam) and of item 28 of the ECJ case C-142/99 (Floridienne) that an E-VE, which makes that the person in question can belong to the VAT system, is deemed to exist first when he devote administration time to an investment more than what's expected for investments made by a private person. In the ECJ case C-80/95 (Harnas & Helm) it follows by item 18 that the fact that an investment in itself generates income in the form of interest etc isn't enough for the owner of the asset to be deemed having

such an E-VE.[164] An external activity is required, and that is not just a case of administration of own capital, regardless how extensive such an occupation can be in itself.[165]

Thus, an activity with a certain duration and which is independently executed for the purpose of making money is required by a person, so that he shall distinguish himself from the consumers and be deemed to have such an E-VE that gives him the character of taxable person according to Article 4(1) of the Sixth Directive.

If an acquired asset in itself generates interest, can that income be deemed a transaction which is either taxable or exempted from taxation. The previously mentioned is the case when the asset e.g. is a patent, whereas the latter is the case according to Ch. 3 sec. 9 of ML e.g. for bank interest received. There's no general definition of interest in the tax legislation.[166] However, interests don't differ for VAT purposes from other payments received by a person.

If it's a question of consideration for an effort ordered, an article of goods or a service, a supply exist according to ML,[167] and it's taxable according to Ch. 3 sec. 1 first paragraph of ML, if not exemption is stipulated for the supply of the article of goods or the service in question in any one of sections of Ch. 3 of ML. It can at first seem astonishing that VAT could also be applicable to bank interest, but one part of the interest is the banks cost for loans to the bank, whereas another part of the interest is consideration for administration services, wages, rent of facilities, profit etc. Thus, one part of the interest consists of a typical value added, which would be included in the sum subject to value added taxation, if not bank interest would be exempted from taxation according to what's stated for that matter in Ch. 3 sec. 9 of ML for banking- and financial services.[168]

A bank is a taxable person, i.e. someone who *can* be subject to value added taxation, since the bank isn't a consumer, but occupies itself with administration of private persons and others loans to the bank for the

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[164] In the "Harnas & Helm"-case the ECJ refer to a similar decision in the ECJ case C-60/90 (Polysar).
[165] See commentary of the ECJ case C-155/94 (Wellcome Trust) in *SOU 2002:74* Part 1 p. 82.
[166] See *Prop. 1989/90:110* Part 1 p. 402.
[167] See Ch. 1 sec. 3 of ML.
[168] See *Mervärdesskatt En handbok* (Eng., Value added tax A handbook), p. 139, by Björn Forssén and reference there to *SOU 1989:35* Part 1 p. 192.

purpose of making a growth of value of them. A private person which e.g. has inherited a patent or money in a bank account can on the other hand not be deemed having an E-VE according to Article 4(1) of the Sixth Directive, only due to the asset generating royalty or interest. In pursuance of above all the ECJ cases ”Sofitam”, ”Floridienne” and ”Harnas & Helm” it isn’t enough with just the possession of the property; instead it’s first when the person in question devotes it more administration efforts than what’s done by a private person, i.e. by a consumer, that he can be deemed having an E-VE and the character of taxable person according to Article 4(1) of the Sixth Directive. Any physical activity in an ordinary meaning isn’t required, but the duration prerequisite in the ECJ cases mentioned for the purpose of making money with the possession of the property is the threshold which a person must pass, to be deemed having an E-VE and thereby leaving the consumers, i.e. thereby be considered a taxable person.

3.2.3.5 The duration prerequisite in the activity prerequisite for E-VE, interaction between E-VE and subjective prerequisites

The E-VE’s emergence is indicated by sufficient enough assets being acquired so that the acquisitions can’t be for the person’s in question own consumption, but for the purpose of he supporting himself by making money. As mentioned isn’t any value added defined in the Sixth Directive; instead the necessary duration of the purpose of making money is objectively indicated by the acquisitions of goods or services made establishing an E-VE which shall be separated from the person’s private economy. Thus, the determination of the emergence of E-VE according to Article 4(1) of the Sixth Directive consists of the described interaction between acquisition of assets and the subjective purpose of making money. The value added is thus not defined in either the Sixth Directive or the ML, but is rather only expressed in practice as a difference sum for the goods or services produced out of the *in spe* entrepreneur’s acquisitions, and that’s the difference between the price by him on his products, excluding VAT, and the costs excluding VAT which he in his calculation of prices allocate to the sale of the article of goods or the service.[169] Equally as little as there’s a definition of any value added is there any objective value concerning the amount of acquisitions of assets constituting an E-VE. Thus, what’s decisive for the existence of an E-VE is instead that it’s no longer a question of acquiring assets for one’s own consumption; instead the purchaser shall be expected thereby to compete with other entrepreneurs.

[169] See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), pp. 53etc, by Björn Forssén.

Then it's another question when the right of deduction emerges in the E-VE: already by the first investment expenses or first when taxable transactions have been made? That an E-VE which can lead to the right to deduct input tax on the acquisitions which made the E-VE exist has occurred is determined via the described trial of duration and purpose of making money by the acquisitions.

At that trial the civil law Requirement to maintain accounting records has an obvious evidence value: the prerequisites for the liability to maintain accounting records – 'activity … of economic nature' (Sw., "*verksamhet ... av ekonomisk natur*") which to its character 'can be described as professional' (Sw., "*kan betecknas som yrkesmässig*") – are complying with E-VE and that such VE shall be carried out "independently" (Sw., "*självständigt*"), i.e. with the prerequisites for the person in question being deemed a taxable person according to Article 4(1) of the Sixth Directive. The purpose of the Requirement to maintain accounting records is also to distinguish the person in question from the consumers. Although the distinction between consumer and entrepreneur, by the concept taxable person in the Sixth Directive, is of course made based on the independent concepts of the Sixth Directive, has above all the fact that someone actually is maintaining accounting records an evidence value for the acquisitions made by him not being perceived made for his own consumption where VAT is concerned.

If on the other hand accounting records don't exist, must the trial whether an acquisition establish an E-VE according to the Sixth Directive be made based upon whether the acquisition or acquisitions can be deemed made for the private consumption or that question is about a private person in that capacity making investments to secure his economy. It's according to the "Harnas & Helm"-case the activity with e.g. administration efforts exceeding what's expected from a private person that makes him deemed having an E-VE according to the Sixth Directive, where the judgement in principle consist of regarding the duration prerequisite also for the trial of the purpose of making money. It's in that interaction between the objective prerequisite E-VE and the subjective independence prerequisite in Article 4(1) of the Sixth Directive that both the emerging of E-VE and the person in question being deemed having the character of taxable person is decided. Furthermore it lies as mentioned in the purpose of making money that the person in question's activity isn't comprised by employment. The purpose of the concept taxable person and the therein included concept E-VE is to distinguish from the consumers the persons who can belong to the VAT system, and those are independent entrepreneurs. Thus, it's then above all

of evidence value at that trial to make a comparison with the civil law concept Requirement to maintain accounting records. That concept and GAAP aren't of prejudicial value to the question of whom the tax law considers a taxable person materially, but just for the question on allocation to a particular period. However, there's reason to mention here the Requirement to maintain accounting records and GAAP on the topic if the concepts yet can be deemed having an influence on the building of norms and if they support the maintenance of a common tax frame for income tax and VAT, when the distinction of entrepreneurs and consumers is concerned. However, that relation to the accounting rules is analyzed under the provision of the material analysis made otherwise here showing that such a common tax frame is possible.

For the trial of the EU law conformity with ML's reference to Ch. 13 of IL and the concept NAVE is inter alia the duration prerequisite for E-VE of guidance for the trial if that connection is EU law conform. The necessary analysis will be done partly on the structural level of the legislation, partly based on the Swedish practice in relation to that of the EU law. In connection thereof will the pros and cons with having or not having a lowest common denominator for determining who's an entrepreneur be illuminated, by the usage of a common tax frame between income tax and VAT for the sake of evidence. What's e.g. the importance in that context of all EU Member States and similar law systems having rules on book-keeping? Before that will the question *when* the right of deduction emerge in an E-VE which gives the person in question the character of taxable person. Thereby is the importance of taxable transaction for that judgement of interest. The deductions of that analysis are then of importance for the relation between the concepts tax liability and right of deduction in the ML. The structural analysis is of importance for the continuing analysis of the core issue about the reference to Ch. 13 of IL for the determination of who's got YRVE according to the ML, which must be conform with E-VE and taxable person in Article 4(1) of the Sixth Directive.

3.3 TAXABLE PERSON, WHEN DOES THE RIGHT OF DEDUCTION OCCUR AND ARE THERE CONDITIONS FOR ITS MAINTENANCE THEREAFTER?

3.3.1 When does the right of deduction occur? Resulting questions and different interpretation alternatives

3.3.1.1 Resulting questions

An E-VE can as mentioned exist without the acquisitions qualifying the activity as such connecting directly and immediately to taxable transaction. Now the question is therefore: does the emergence of the right of deduction provide that taxable transactions first exist in the E-VE?

The question on *when* a taxable person is entitled to deduct input tax according to Article 17(2) of the Sixth Directive is about, with respect of the idea of taxation of the deductions in the POTB-principle in Article 2 of the First Directive, deciding whether there's a condition that taxable transactions have been made first. If that's considered not to be the case, remains that the right of deduction occur already at the first investment expenses qualifying the activity as an E-VE according to Article 4(1) of the Sixth Directive. This question on when the right of deduction occur is linked above all to these resulting questions.

- Can right of deduction cease retroactively for some reason, e.g. because an acquisition proves to be of no use for the E-VE or that the E-VE can be deemed having ceased to exist due to a too low continuous activity because of lack of profitability?

- Can right to deduct expire retroactively due to lack of profitability consisting of under pricing of the taxable person's own supplies?

- Also in the question whether the right of deduction can expire retroactively lies the question on the idea of taxation of deduction with the POTB-principle and whether the pace of taxation of the deductions in the end is influencing. Is there any thought about a necessary degree of POTB thereby, when it comes to the deductions of input tax in the taxable person's E-VE being expected to be taxed in the end by the accounting of output tax on taxable transactions?

- If the right of deduction can't expire retroactively in the case of under pricing, is it otherwise of interest if measures of taxation instead can be taken by withdrawal taxation.

Before the question on the emergence of the right of deduction and the resulting questions will be treated, shall a review be made of different alternatives of interpretation, concerning when the right of deduction occur, with respect of Article 2 of the First Directive and the rules in question of the Sixth Directive.

3.3.1.2 Different alternatives of interpretation

Thus, the scope of the right of deduction according to Article 17 of the Sixth Directive connects to the concept taxable person in Article 4(1) of the Sixth Directive. Taxable person is someone who *can* be subject to value added taxation and is thereby entitled to deduct input tax by virtue of the intention to make taxable transactions with the acquisitions – or is it presupposed that they must have occurred first?

In the main rule in Article 2(1) of the Sixth Directive is stated that VAT shall be paid for delivery of goods or supply of services which the taxable person does as such.[170] On the contrary it's not possible to read that taxable transactions must have occurred in the E-VE, before the taxable person in question will be entitled to deduction on his acquisitions. In Article 17(2) of the Sixth Directive it's presupposed that the acquisitions are used for the purposes of his taxable transactions, but it does only mean that such use of the acquisitions shall occur sometime. The right to deduct input tax on the acquisitions doesn't presuppose a direct and immediate connection of the acquisitions to certain taxable transactions.

In Article 21(1a) of the Sixth Directive is stated that the taxable person is liable to pay output tax to the authorities, *when* he carry out a taxable delivery of goods or a taxable supply of services. Then according to Article 10(1a) tax liability has occurred, i.e. the chargeable event has occurred. Is that circumstance a presupposition for the occurrence of the right of deduction? The investigation *SOU 2002:74* does, concerning inter alia the expression taxable person, certain comparisons with other language versions than the Swedish, e.g. the English, but makes thus a reservation for not been able to thereby make any material analysis within the frames of its

[170] In Article 2(2) is stated that VAT shall be paid for importation of goods.

assignment. Also for that reason is it of value that such an analysis is made here.

It isn't expressed in the Sixth Directive, but although the scope of the right of deduction isn't limited by a condition of a direct and immediate connection to taxable transactions and an E-VE thus can be deemed established by acquisitions which are overhead costs to be used for taxable transactions, could the expression of the principle on reciprocity in Article 17(1) of the Sixth Directive give an interpretation result meaning that at least some taxable transaction actually must have occurred, before the right of deduction can be deemed in time to have occurred. There it's stated that "(t)he right to deduct shall arise at the time when the deductible tax becomes chargeable" (Sw., "*[a]vdragsrätten inträder samtidigt som skattskyldigheten för avdragsbeloppet*"), which means that the right of deduction for the acquisition presupposes that tax liability has occurred for the one delivering the article of goods or supplying the service in question to the taxable person in question. The idea of taxation of deductions in the POTB-principle according to Article 2 of the First Directive in conjunction with Article 2(1) of the Sixth Directive could, together with that expression of the strong principle on reciprocity in the field of VAT (also expressed by Article 2 of the First Directive), be given the systematical interpretation that the taxable person must have made at least some taxable transaction, before the right of deduction can be deemed in time having emerged.

What speaks against such an interpretation is a literal interpretation and comparison between the Swedish and English respectively directive text. In the Swedish language version of the Sixth Directive is '*skattskyldig person*' used in Articles 2(1), 4(1) and 17(2), but '*beskattningsbar person*' is used in Article 21(1a). Whereas in the English language version "taxable person" is used consistently in all of those directive rules. The Swedish language version could thus be more favourable for the entrepreneur, since he wouldn't have to be taxable to in his capacity of '*skattskyldig person*' be deemed entitled to deduct input tax on his acquisitions, provided only they are corresponding to chargeable transactions by the deliverer or supplier and the acquisition of the article of goods or the service in question is intended to be used for his own taxable transactions. Such a literal interpretation to the advantage of the taxable person is the SKV and the administrative courts obliged to apply.

What's vague is that it isn't about different language versions of the Sixth Directive in themselves giving different interpretation results, but the comparison with the English language version, and eventual other language

versions, giving a contrasting effect to the usage in the Swedish language version of the two expressions '*skattskyldig person*' and '*beskattningsbar person*'. It's a deeper analysis than the one made in *SOU 2002:74*, where the expressions in the different language versions are compared without an analysis of what they are supposed to express materially according to the Sixth Directive. However, the interpretation attempt here shows that the result can be to the taxable person's disadvantage instead. Why would 'taxable person' (Sw., '*skattskyldig person*') in Article 2(1) on when VAT shall be paid and 'taxable person' (Sw., '*beskattningsbar person*') in Article 21(1a) on who shall pay be given different meaning, when "taxable person" is used consistently in the English language version of those articles? Therefore should the interpretation attempts here continue with a systematical analysis of the articles in the Swedish language version of the Sixth Directive.

If '*beskattningsbar person*' isn't used in Article 17(2) of the Sixth Directive, can it be perceived as the Sixth Directive not presupposing any event giving rise to taxation according to Article 10(1a), before the right of deduction emerge for the taxable person's acquisitions. If '*skattskyldig person*' is a different concept and it's used in Article 4(1) to describe the character of the tax subject and also in Article 17(2) to determine the right of deduction, can the systematical interpretation result defend that the right of deduction can emerge without a taxable transaction previously made by the person in question. On the other hand it's thus possible to defend the opposite interpretation with respect of a systematical interpretation based on the basic principles of reciprocity and POTB according to Article 2 of the First Directive, if a completing literal interpretation doesn't fulfill the aim with the interpretation here, a competition neutral VAT.

A problem with the systematical interpretation is also that the Sixth Directive lacks accounting rules. The rules on procedure in Article 22 of the Sixth Directive only deal with identification for registration purposes, where in the Swedish language version both '*skattskyldig person*' and '*beskattningsbar person*' are used,[171] about the books of account for control purposes and about taxable person supposed to secure that invoice is issued by himself. However, there's no rule on when an invoice must be issued either.

[171] However, in the English language version is also in Article 22 of the Sixth Directive "taxable person" used consistently.

A lot seems to speak for the systematical interpretation result of a request that taxable transactions first must be made, before the right of deduction can be deemed emerging with one or several of the first acquisitions made by the taxable person. It can at first seem to better fulfilling the aim with a competition neutral VAR. However, neither such teleological interpretation is free of problems.

The one with much capital can otherwise build up a bigger supply in his enterprise and get quantity discounts from deliverers compared to his equally newly started competitors with at least as big a purpose of making money but with a smaller initial capital. The VAT would become a competition advantage in itself by the one with a strong capital thereby not only being able to keep lower prices due to quantity discounts, but that effect would be strengthened by lower costs of interest due to less capital tied up as a consequence of input tax on the acquisitions being reimbursed before the occurrence of taxable transactions. That difference in time could be rather big depending on the self-financing degree by virtue of the strong capital and at least as a tendency would such an order for the occurrence of the right of deduction strengthen the possibility to starve out the competitors with a weak capital from a market. A teleological interpretation aiming for internal neutrality can thus seem to give the interpretation result that the taxable transactions should rather be made before the taxable person gets the right to deduct input tax on the one or several acquisitions having qualified the person in question's activity as E-VE in the meaning of the Sixth Directive. The basic principles for the common VAT system could, considering that differences concerning initial capital shouldn't effect the competition via the VAT deduction, be deemed to be fulfilled most effectively with such an interpretation result to the topic in question.

However, that provides there's no request for a certain pace in the taxation of VAT deductions. A POTB-principle with such a request would have a tendency to be fulfilled more efficiently by a person with a low self-financing degree in his activity, if he'd have the right to deduction on his acquisitions already before he's made taxable transactions. He'd be depending on generating incomes rather immediately after the first investment expenses, to be able to pay interests on loans and not only for the acquisitions. High interests due to the external financing of the activity would give a tendency of higher costs and poorer competition conditions for the person in question compared to what would be the case for the one with a strong capital and high self-financing degree, if the need of external financing at the start of the activity would also apply to VAT expenses for the acquisitions. By adding a request of a certain pace of taxation of VAT

deductions would the aim with a competition neutral VAT have a tendency to be achieved more efficiently by the right of deduction emerging by the taxable person already before he's made taxable transactions.

However, with these questions in mind may the answer to the question if the emergence of the right of deduction presupposes that taxable transactions first have been made and the resulting questions be sought in the ECJ practice. Thus, the interpretation alternatives show that it's possible to defend different interpretation results to the question, and guidance must be found in the ECJ practice to that question and the resulting questions.

3.3.2 When does the right of deduction occur? Resulting questions. The ECJ practice

3.3.2.1 The emergence of the right of deduction: at the acquisition or first when taxable transactions have been made in the E-VE?

In the ECJ case C-400/98 (Breitsohl) has the ECJ established – despite the objections of the German government according to item 33 of the case – that the tax authorities by applying the rules on deduction have to make their judgement in the question whether reimbursement or credit of input tax shall be made "on a basis of a purely subjective declaration of intention" (Sw., "*på grundval av en rent subjektiv avsiktsförklaring*") from the individual on whether the acquisitions shall be used to make taxable transactions.[172] According to item 34 in the verdict the ECJ establish that under the provision of the intention to independently carry out E-VE being proved shall the person in question immediately have right of deduction already for his first investment expenses which can be used for taxable transactions, and thereby "without having to wait for the actual exploitation of his business to begin" (Sw., "*redan innan verksamheten faktiskt har inletts*").

In item 28 of the ECJ case C-137/02 (Faxworld) the ECJ by the way also notes, inter alia with reference to item 34 in the "Breitsohl"-case, that "[c]ontrary to what the German Government argues" (Sw., "*[i] motsats till vad den tyska regeringen har hävdat*") it follows from a settled case law that an individual, who acquires assets in connection with an E-VE of the meaning supposed in Article 4 of the Sixth Directive, shall be deemed as tax liable without limitation to what enterprise the E-VE in question can be referred. This 'also when the assets aren't immediately used for the E-VE

[172] See also *SOU 2002:74* Part 1 pp. 81, 82 and 163

mentioned' (Sw., "*även om tillgångarna inte omedelbart används för nämnda ekonomiska verksamhet*"). An 'unregistered partnership' (Sw., '*enkelt bolag*') formed for the sole purpose of building up a capital association in the form of a 'limited company' (Sw., '*aktiebolag*') was considered by the ECJ to have the right to deduct input tax on acquisitions, despite the unregistered company only would transfer its assets to the capital association when it's formed and the unregistered doesn't make any supply according to Article 5(8) of the Sixth Directive. The deductions were yet referring to transactions which the unregistered company – a German so called *Vorgründungsgesellschaft* – had made in the purpose of making possible taxable transactions which were planned to be carried out by the finally formed capital association.[173]

The ECJ point out in item 37 in the "Breitsohl"-case, with reference to "the principle of VAT neutrality" (Sw., "*principen om mervärdesskattens neutralitet*"), that another viewpoint than the emerge of the right of deduction not being independent of taxable transactions first occurring would "create an arbitrary distinction between investment expenditure incurred before actual exploitation of a business and expenditure incurred during exploitation" (Sw., "*innebära en godtycklig skillnad mellan investeringsutgifter som uppkommit innan en verksamhet faktiskt inleds och investeringsutgifter som uppkommer därefter*").[174]

Thus, different interpretations can be made of the question on when the right of deduction occur also with respect of the aim of a competition neutral VAT, but the ECJ establish in the "Breitsohl"-case that the emerge of the right of deduction cannot be so to speak suspensive and conditioned of the emerge of taxable transactions. The right of deduction, and thus the claim to be reimbursed by state of the VAT expense, is son fundamental for the VAT system that the rules must not open for any arbitrariness. That the competition neutrality could be disregarded at certain given circumstances for a certain market, with e.g. the entrepreneur with a strong capital attempting to starve out a new competitor with a low self-financing degree, exemplifies an extreme situation and the ECJ probably consider that also those have to stand back for the request of the rules concerning the question of the occurrence of the right of deduction being foreseeable. Arbitrary differences aren't accepted in the ECJ's interpretation of the rules of the Sixth Directive in that respect, and this means that the occurrence of the right of deduction cannot be depending on taxable transactions first being

[173] See item 41 in the "Faxworld"-case.
[174] The ECJ refer thereby to the ECJ cases: "Rompelman", item 23; C-110/94 (INZO), item 16; and the joint cases C-110-98-C-147/98 (Gabalfrisa and others), item 45.

made by the purchaser. In line with this is the ECJ already in the "Rompelman"-case establishing, with reference to the EU-commission's emphasizing of Article 17(1) of the Sixth Directive (the principle on reciprocity), that it would "be contrary to the purpose of the VAT system" (Sw., "*mot mervärdesskattesystemets anda*") with every other viewpoint than the "charge" (Sw., "*belastning*"), which is the input tax paid, supposed to be lifted off the first transaction (acquisition). The first activities carried out within the frame of the E-VE is to acquire assets forming it, and the ECJ points out that the VAT system has "the intention … precisely to relieve the trader entirely" (Sw., "*syftar … till att helt befria näringsidkaren*") of the economical "burden" (Sw., "*belastning*") on the assets consisting of input tax paid on the acquisitions of them.[175]

Is the intention to make taxable transactions with the acquisitions and is there a purpose of making money, wherein lies that the activity is intended to be enduring, the E-VE emerge and the right of deduction already by the initial acquisitions. The described extreme situation with the starving out of a competitor with a weak capital cannot motivate a request that taxable transactions actually have been made, before the right of deduction emerge for acquisitions establishing E-VE. It wouldn't be complying with a, from a perspective of legal rights of the individual, secure application of a general right of deduction. In the extreme situation could the individual furthermore have remedies to invoke in the form of the Competition Act [Sw., *konkurrenslagen (1993:20)*], which also shall be interpreted in the light of the EU law.[176] Thereby the affected entrepreneur can assume the position of party in the first instance court by the ECJ at his own initiative.[177] Contrary thereto may the entrepreneur dissatisfied with competition disturbing tax law, before he gets such a position, either rely on the question getting leave to appeal by the SAC and that, in case of uncertainty with the national act being EU law conform, preliminary ruling being obtained therefrom at the ECJ or try to make the EU-commission interested to open a case of breach of the EC Treaty against Sweden at the ECJ concerning the application of e.g. the ML or, if it's a question about a tax act in another EU Member State, try to get Sweden to open such a case of breach of the EC Treaty against that country at the ECJ.

Since the ECJ's judgement of the emergence of the right of deduction doesn't presuppose that taxable transactions are made first, i.e. that a

[175] See item 13 of the "Rompelman"-case.
[176] See Article 81 EC (formerly 85) and Article 82 EC (formerly 86).
[177] See *EG och EG-rätten* (Eng., the EC and the EC law), p. 126, by Allgårdh, Olof, Jacobsson, Johan and Norberg, Sven.

request isn't raised for POTB taking place in the tax subjects activity before he has the right of deduction for his acquisitions, will the question be if the pace in the taxation of deductions is of importance for the right of deduction to be referred to resulting questions whether the right to an original deduction can be revoked retroactively.

3.3.2.2 The maintenance of the right of deduction, can deduction be refused retroactively because of an acquired article of goods or service not becoming useful in the E-VE?

In item 38 of the "Breitsohl"-case the ECJ establish that the right to deduct input tax on the first investment expenses isn't depending on any formal decision from the tax authorities on the person in question having the character of taxable person. Has the person in question once proved his character as a taxable person and the deduction been approved with respect of the intention to make taxable transactions with the acquisition, can, with respect of justified requests on legal rights of the individual, deduction not be refused at a later point (retroactively) other than in cases of fraud or abusive practice when using his properties in the present respect.

It also follows by item 28 of the ECJ case C-97/90 (Lennartz) that the ECJ has established that Article 17 of the Sixth Directive can't even implicitly be deemed to contain any rule on limitation of the right of deduction in case of the usage of the acquisition in question in the E-VE being below a certain level. It follows of item 20 in the ECJ case C-37/95 (Ghent Coal) that the right of deduction will remain also if the acquisition couldn't be used for taxable transaction and that depends on circumstances over which the taxable person couldn't decide.[178]

Of item 35 in the "Breitsohl"-case follows that it's the taxable person himself who, by his planning of what to use investments in goods and services for, "gives rise to the application of the VAT system and therefore of the deduction mechanism" (Sw., "*bestämmer när mervärdesskattesystemet, och därmed också avdragsbestämmelserna, skall tillämpas*"). If there's a plan to make taxable transaction with the investment expenses right to deduct input tax exist for them, but not if the intention is private consumption. If right of deduction thus has emerged for the acquisition in question, the ECJ states in item 35 that "[t]he use to which the goods or services are put, or intends to be put, determines only

[178] See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), pp. 66, 69 and 70, by Björn Forssén.

the extent of the initial deduction to which the taxable person is entitled under Article 17 of the Sixth Directive and the extent of any adjustment in the course, which must be carried out under the conditions laid down in Article 20" (Sw., "*[d]et bruk som görs av varorna eller tjänsterna, eller som planeras för dessa, bestämmer endast omfattningen av det ursprungliga avdrag som den skattskyldige har rätt till enligt artikel 17 i sjätte direktivet samt omfattningen av eventuella jämkningar under påföljande perioder, vilka skall ske i enlighet med villkoren i artikel 20*") of the Sixth Directive. After the acquisition cannot any other measures of taxation exist concerning the VAT deducted than output tax being levied by the entrepreneur in question on his own supplies, withdrawal tax according to Articles 5 and 6 of the Sixth Directive or that it's an issue of mixed activity and the acquisition was of so called 'Capital goods' (Sw., '*investeringsvara*'), i.e. of during the fiscal year made acquisitions of certain building services of a certain extent on immovable property or of machines, inventories or similar fixed assets of a certain extent, which usage in the activity has changed after the acquisition with the consequence that an adjustment obligation has risen according to Article 20 of the Sixth Directive.[179]

In practice there'll be an evidence question on whether the person in question can prove that his intention with the acquisitions aren't private consumption, where a 'properly done book-keeping' (Sw., '*ordnad bokföring*') of course will be an interpretation data of great importance, but in principle is it as mentioned the individual self who determine, by his or her intention with the investment expenses, to what degree he or she shall belong to the VAT system. Concerning assets which thereby have entitled to VAT deduction – and which aren't Capital goods or comprised by any withdrawal taxation situation – can then not value added taxation measures apply to them due to the usage of the asset in the E-VE has come to be at a low level after the acquisition.[180] Thus, besides cases of fraud or abusive practice cannot deduction of input tax be reclaimed retroactively by the state. However, is then the resulting question. Can the E-VE in itself be

[179] Adjustment is caused by increased or decreased use of Capital goods in the deduction entitling part of the activity during the adjusment period (10 years for real estate and 5 years for other Capital goods) or because of the Capital goods being transferred before the end of the adjustment period. Adjustment of an original deduction of input tax on the acquisition can be caused at transfer of Capital goods consisting of real estate, although there's a full right of deduction in the activity (se 8a kap. ML). If an article of goods is moved from the taxable part to the exempted part of an mixed activity, can instead obligation of withdrawal taxation occur.

[180] See also items 41 and 42 in the ECJ case C-269/00 (Seeling) and items 30-33 in the ECJ case "Armbrecht".

deemed to have ceased to exist and the original deduction be reclaimed, if instead the whole activity which was the motive for the acquisition establishing the E-VE has come to decrease to a level so low that it can be questioned whether any E-VE according to Article 4(1) of the Sixth Directive exist anymore?

3.3.2.3 The maintenance of the right of deduction, can deduction be refused retroactively due to the E-VE being deemed to have ceased to exist?

Thus, a determination lacks of what extent the acquisitions shall have for the first investment expenses to qualify as E-VE. Can the person in question make it probable that it's an activity with certain duration and carried out independently for the purpose of making money, has he distinguished himself from the consumer. If the evidence furthermore is deemed sufficient to consider it proven that the intention is to use the acquisitions to make taxable transactions with them, shall they entitle to deduction already in connection with the expenses. Already the expenses to plan such an activity qualify it as E-VE according to Article 4 of the Sixth Directive.

The question now is whether the profitability issue can lead to the whole E-VE being deemed to have ceased to exist with the consequence that the right of deduction can be questioned retroactively. Thus, the idea of taxation of deductions in the POTB-principle could lead to such an interpretation result.

It has been established that if acquired goods or services are delivered or supplied free of charge by the purchaser, can he not be deemed to have an E-VE. The resulting question is then what conditions that can be made concerning the planned taxable transactions. The right of deduction is thus not originally depending on those occurring first, but what happens with it if the project proves to be unprofitable? Any value added is as mentioned not defined in either the Sixth Directive or the ML. Article 4(1) speaks about a taxable person "whatever the … results" (Sw., "*oberoende av ... resultat*"), which means that the person has such a character regardless whether the activity shows profit or loss. However, this doesn't stop a profitability request to apply for the acquisitions which entitle to VAT deduction. Therefore the questions arise whether lack of profitability can lead to deductions being possible to reclaim retroactively if the situation means that the E-VE can be deemed ceased to exist or if there's a basis for taxation measures due to under pricing. If not refusal of VAT deduction is possible, it would, if there would be a request of a certain pace of the

taxation of deductions, be logical that the state has the opportunity to withdrawal taxation in case of under pricing.

It follows from the ECJ case ”INZO”, item 25, that ‘already’ “the commissioning of a profitability study in respect of the envisaged activity” (Sw., ”*även beställningen av en lönsamhetsstudie avseende den planerade verksamheten*”) may be ’regarded an E-VE’ (Sw., ”*anses utgöra ekonomisk verksamhet*”) in the meaning of Article 4 of the Sixth Directive, “even if the purpose of that study is to investigate to what degree the activity envisaged is profitable” (Sw., ”*trots att studien enbart har till syfte att undersöka om den planerade verksamheten är lönsam*”). The ECJ considered that the individual (a company) may “not be withdrawn … except in cases of fraud or abuse …the status of taxable person … retroactively where, in view of the results of that study, it has been decided not to move to the operational phase, but to put the company into liquidation, with the result that the economic activity envisaged has not given rise to taxable transactions” (Sw., ”*inte med retroaktiv verkan frånkännas egenskapen av skattskyldig person, i annat fall än bedrägeri eller undandragande, när det mot bakgrund av studiens utfall har beslutats att den egentliga verksamheten inte skall påbörjas och att bolaget skall försättas i likvidation, vilket har medfört att den planerade ekonomiska verksamheten inte har givit upphov till skattepliktiga transaktioner*”). The ”INZO”-case is in line with inter alia the cases ”Breitsohl” and ”Faxworld”, but already in ”INZO” has the ECJ established that the right of deduction remain also if taxable transactions intended with the acquisitions never will be made.

Thus, the E-VE with the right of deduction remains when it once has emerged. ”Once the criteria are proved to have been fulfilled, the authorities have no discretion in treating the taxpayer as a taxable person”.[181] It’s first when the last asset has been sold and the intention no longer is to make new acquisitions in the E-VE that it can be deemed to have ceased to exist and the person in question no longer has the character of taxable person according to Article 4(1) of the Sixth Directive.

It’s by the way even so that the ECJ consider that the right of deduction can remain also after an activity has been liquidated. Then there’s no request either of a direct and immediate connection between acquisitions and taxable transactions, since they’ve stopped. The ECJ considered that if an E-VE for which right to deduct input tax applies cease to exist, but the

[181] See A Guide to the Sixth VAT Directive part A, p. 208, by Terra, Ben J.M. and Kajus, Julie, where they comment the ECJ case ”Rompelman”.

taxable person still must pay rent for the premises in which the activity is carried out, due to a 'non-overriding clause' (Sw., '*icke-hävningsklausul*') in the lease contract, the person in question will retain the right of deduction. That presupposes according to the ECJ only that a direct and immediate connection exists between continuing payments of rent and the E-VE and that absence of fraud or abusive practice can be established.[182]

Since rules are lacking on what's a value added, is thereby also the answer given that an under pricing can neither lead to the right of deduction on original acquisitions ceasing to exist retroactively. If the own supplies aren't delivered (goods) or supplied (services) free of charge, can the state not reclaim the VAT deductions at under pricing. The question is then if withdrawal taxation applies instead in such cases.

The ML stipulates withdrawal taxation not only for supplies free of charge, but also in the case goods and services respectively are supplied at a price below the purchase- or manufacturing cost for the article of goods in question or below the cost to perform the service in question.[183] However, the ECJ has disqualified the ML in that respect and the ML is therefore only EU law conform concerning that withdrawal taxation shall apply for supplies free of charge – not to the extent the ML thus stipulates withdrawal taxation on under pricing.[184] In the latter respect follows by the ECJ's judgement that ML's rules on withdrawal taxation are in conflict with the corresponding rules in Articles 5(6) and 6(2b) of the Sixth Directive, which only stipulate withdrawal taxation when goods are delivered or services are supplied 'free of charge' (Sw., '*gratis*' or '*utan ersättning*').

Since the circumstance that taxable income never would occur due to the project proving unprofitable doesn't effect the right of deduction on the original acquisition and an under pricing of an article of goods or a service in the E-VE will neither lead to withdrawal taxation, the resulting question is whether the right of deduction is effected by the number of transactions which the taxable person is planning to make or actually makes. Is there a request of a certain pace of the taxation of deductions for the right of deduction to remain?

[182] See the ECJ case C-32/03 (I/S Fini H).
[183] See Ch. 2 sec. 2 item 2 and Ch. 2 sec. 5 first paragraph item 1 respectively of ML.
[184] See the ECJ case C-412/03 (Hotel Scandic Gåsabäck).

3.3.2.4 The maintenance of the right of deduction, is a certain pace of the taxation of deductions necessary and is it sufficient with a temporary taxable transaction?

He who intend to make his supplies free of charge can as mentioned according to the ”Hong-Kong Trade”-case not be deemed to have the character of taxable person according to Article 4(1) of the Sixth Directive. An E-VE where right to deduct input tax on acquisitions of goods or services would apply doesn't emerge, if not a consideration is made for the person's in question own deliveries of goods or supplies of services. The question is then if the maintenance of the right of deduction is affected of the planned or actual pace of taxation of the VAT deductions.

The ECJ's disqualification partly of the ML's rules on withdrawal taxation, by the ”Hotel Scandic Gåsabäck”-case of the 20th of January 2005, has led to the same judgement by the SAC in an advanced ruling.[185] More remains to be done on the topic of EU law conformity with the ML's rules on withdrawal taxation. The ECJ case concerned the general rules on withdrawal, and it can be questioned if the special rules on withdrawal for own work on real estate in stock by building contractors and enterprises building with an otherwise VAT exempted activity respectively according to Ch. 2 sec. 7 and Ch. 2 sec. 8 respectively of ML are EU law conform. In her commentary of the ECJ case Eleonor Alhager leaves it open to continue such a debate,[186] but in the latter respect is there no connection to concepts in the IL of interest for the topic of this book. Concerning withdrawal for own work according to the special rule Ch. 2 sec. 7 of ML, where it's a connection to 'building business activity' (Sw., '*byggnadsrörelse*') in IL, is it neither of interest for the topic of this book, since the withdrawal rules are about the tax object and not about the tax subject, which shall be analyzed here, and furthermore are diversions from the Sixth Directive concerning ML's rules on supplying newly produced buildings and land for building examples of such diversions allowed according to the previously mentioned EU act on Sweden's accession to the EU (the EU act).

Here is instead a continuation of the question in the ”Hotel Scandic Gåsabäck”-case on withdrawal according to general VAT rules of interest. The ECJ didn't explicitly take up the question whether VAT deductions

[185] See the SAC case *RÅ 2005 Ref 20*.
[186] See *Skattenytt* (Eng., the Tax news) 2005 pp. 178-185, the article *Något om den svenska uttagsbeskattningen på momsområdet efter EG-domstolens dom i Hotel Scandic Gåsabäck* (Eng. Something about the Swedish withdrawal taxation in the field of VAT after the ECJ's verdict in Hotel Scandic Gåsabäck), by Eleonor Alhager.

must be taxed in a certain pace, for the POTB-principle according to Article 2 of the First Directive to be fulfilled. The ECJ stated only that it's sufficient to take out consideration for a supply to avoid withdrawal taxation of VAT. If the case were that the planned or actual pace of the taxation of deductions decided if someone can be deemed belonging to the VAT system, would it be of interest here. It can be established from the cases ”Hong-Kong Trade” and ”Hotel Scandic Gåsabäck” that the supplies in the activity must not be supplied free of charge, since it's a necessary prerequisite for the emergence of E-VE that the supplies are made for consideration, and that under pricing isn't a sufficient presupposition for the taxation measure withdrawal. The resulting question whether the maintenance of the right of deduction is effected by the number of transactions which the taxable person is planning or actually makes may be judged on the basis of a further analysis of the ”Hotel Scandic Gåsabäck”-case.

The ECJ case means that it's now enough with the subjective value of an actual payment for an article of goods or a service, although a symbolic sum, for withdrawal taxation not to arise according to the ML. It's sufficient thereby that the consideration can be 'expressed in money' (Sw., ”*uttryckas i pengar*”), i.e. thereby being an “actual consideration”.

The risk of actual but merely symbolic considerations to be used may according to the ECJ be solved by Sweden making a request according to Article 27 of the Sixth Directive for permission to introduce rules for the purpose of stopping tax escape or tax evasion.[187] Such rules have not previously been introduced in the ML for any situation. The special VAT scheme for investment gold which for the same purposes was introduced in the ML in 2000 is based on the directive 98/80/EC, i.e. technically on an amendment to the Sixth Directive. Those rules are thus not any national divergent rules based on Article 27.[188] Of interest for the context can be that it's decided for the building sector according to the act *SFS 2006:1031* the introduction of so called 'reverse charge' (Sw., '*omvänd skattskyldighet*') also for transactions between building contractors within the country. The Government has by *SFS 2006:1293* decided that these rules will come into force on the 1st of July 2007, and here is of interest that the motives for them are the same as for the special scheme for investment gold of 2000, namely to master the abusive practice of the right of deduction for input tax levied. The new rules in the building sector is however based on Article 27

[187] See items 21, 25 and 26 in the ”Hotel Scandic Gåsabäck”-case.
[188] See *Prop. 1998/99:69* p. 15.

of the Sixth Directive,[189] but since they are neither concerning the determination of the tax subject and the connection thereby to the IL, aren't they either of interest in this book.

Of interest here is that the ECJ concerning the common rules on withdrawal in the ML may be considered coming into contact with the idea on taxation of deductions in the POTB-principle, by – as Eleonor Alhager notes in her article – describing the purpose of the withdrawal taxation like the rules thereof are aiming to secure an equal application of the withdrawal situation compared to when an end consumer purchase the same kind of article of goods or service as the withdrawal concerns.[190] Although it's not expressed directly by the ECJ can the court thereby be deemed having taken into consideration Article 2 of the First Directive and that for the internal neutrality decisive POTB-principle. Otherwise would the ECJ have had reason to have an argumentation about whether the taxation of deductions was maintained when the consideration is just a symbolic sum.

In the same way would the ECJ have had to take on whether it's the idea VAT that can be deemed implemented with a legislation allowing more than the VAT deducted at a given moment to be passed on to the consumer, only because the enterprise then makes an under pricing sale of its article of goods or service in question. The ECJ may by the "Hotel Scandic Gåsabäck"-case be deemed confirming that the internal neutrality shall be respected, and that it means that it's the individual entrepreneur who decides when the ennobling value (the value added) of its supplies shall be value added taxed, except when supplies free of charge are concerned. Then withdrawal taxation occurs, but this exceeding VAT deductions made means materially application of something else than VAT and cannot be enforced by the state, since it would be in conflict with the protection of the idea VAT given by Article 2 of the First Directive compared to Article 33 of the Sixth Directive.

The ECJ may, by stating as sufficient for avoiding withdrawal taxation that a consideration – however symbolic – taken out in money for the supplied article of goods or service and by the principle on internal neutrality assumed to have been regarded thereby, also be perceived to mean that taxation of deductions by POTB may take as long time as it may. The number of transactions in the E-VE doesn't affect the maintenance of the right of deduction, when an E-VE once is established by acquisitions

[189] See *Prop. 2005/06:130* pp. 1, 13, 24, 25, 28-30, 32, 45 and 47.
[190] See item 23 in the ECJ case C-412/03.

intended to create taxable transactions. Since Sweden's EU-accession in 1995 the income tax law viewpoint with a market value as target of the withdrawal taxation doesn't apply in the field of VAT.[191] A 'roof' (Sw., "*tak*") is also set since then for the withdrawal taxation of VAT at the accumulated deductions of input tax, since it of the preparatory work to the alterations made then in the ML also follows that the purpose of withdrawal taxation in the field of VAT only shall be the state taking back a previously made VAT deduction.[192] If it's sufficient with one (1) Swedish crown in price and 25 Swedish cents in output tax thereon for the product sold and the product has caused VAT deductions of thousands or maybe millions of Swedish crowns, it's accepted that taxation of deduction will take unlimited time, since the aim with internal neutrality only motivates withdrawal in case of supplies free of charge.

It could taken by itself be argued for the duration prerequisite meaning that the idea of taxation of deduction in the POTB-principle presupposes that it's not only a question a temporary transaction, for the right of deduction to remain. If the ECJ would have thought that a temporary transaction in itself would disqualify someone as taxable person, would however the court in the "Hotel Scandic Gåsabäck"-case been likely to make a statement of such a meaning in connection with the court's reasoning on symbolic considerations. Therefore can it very well now be considered clarified that en E-VE in the meaning of Articles 4(1) and 4(2) of the Sixth Directive can be deemed to exist also in cases where consideration establishing supply is taken out as a one-time-payment, i.e. when a price one for all is settled for the supply in question. The investigation *SOU 2002:74* doesn't seem to be clear on this point, since the investigation first notes that the ECJ hasn't made a statement on the question of he distinction between temporary transactions and E-VE, and then express that one-time-payments 'should' (Sw., "*torde*") not lead to that it's a question of a temporary transaction.[193]

Thus, it should be clarified today that the pace of the taxation of deduction doesn't decide the maintenance of the right of deduction. Right of deduction can emerge in an E-VE without direct and immediate connection with taxable transactions. It's sufficient with an intention to make taxable transactions with the acquisitions, for the right of deduction to occur, but the acquisitions must prove the purpose of making money and that purpose that an E-VE has emerged by the initial investment expenses. The duration prerequisite with subjective signatures lies in the objective concept E-VE.

[191] See *Prop. 1994/95:57* p. 117 and *Prop. 2002/03:5* p. 52.
[192] See *Prop. 1994/95:57* p. 118 and *Prop. 2002/03:5* p. 53.
[193] See *SOU 2002:74* Part 1 pp. 94 and 95.

Otherwise follows by the ”Hong-Kong Trade”-case that an activity is disqualified as E-VE if it’s about supplying goods or services free of charge by using the acquisitions.

Thus, it may be deemed established that the Sixth Directive contains an ’activity-thinking’ (Sw., ”*verksamhetstänkande*”) to determine the tax subject. A ’transaction-thinking’ (Sw., ”*transaktionstänkandet*”) is also there, but that’s only the subjective part of the trial of who can belong to the VAT system and thus be entitled to deduction.[194] That taxable transactions actually occur isn’t a necessary presupposition for the emerging or maintenance of the right of deduction. As long as it’s not a case of supplies being made free of charge from the beginning, right of deduction emerges if the acquisitions establish an E-VE and taxation of deductions is intended to take place sometime by taxable transactions. The project in question proving unprofitable and it being closed without intended taxable transactions having occurred don’t mean that the original right of deduction can be reclaimed by the state retroactively other than in cases of fraud or abusive practice.

The question on the importance of only a temporary transaction being planned or occurring may in itself be of importance above all at successive supplies of services, and then concerning whether it’s the same effort (transaction) which shall be deemed supplied (turnover) over time for the same one-time-payment or if a new trial shall be made for the periods after the one when such a payment was received. That question can be of importance to decide if supplies can be deemed made free of charge and withdrawal taxation apply for such periods after the one when the temporary transaction was made. Sweden has by the way neither used the facultative rule in Article 4(3) of the Sixth Directive on introducing e.g. for activities with supplying new buildings and land to build on rules on temporary transactions establishing E-VE. Thus, to determine the tax subject is it the main rule on who’s a taxable person according to Article 4(1) of the Sixth Directive which shall be deemed implemented in the ML. The closest corresponding rule in the ML is Ch. 4 sec. 1 and the concept

[194] See also *Skattenytt* (Eng., the Tax news) 2003 p. 83, the article *Avdragsrätt för moms på nyemissionskostnader?* (Eng., Right of deduction for VAT on costs for issuing new shares?), pp. 75-88, by Madlen Espenkrona, where she, with reference to the ”Cibo)”-case, argue for that ’maybe is the ECJ trying by practice to create a right of deduction tied to an activity concept rather than to taxable transaction’ (Sw., ”*[k]anske försöker EG-domstolen genom praxis skapa en avdragsrätt som är knuten till ett verksamhetsbegrepp snarare än till skattepliktiga transaktioner*”). The Advocate General’s statements in item 24 in the ”Midland Bank”-case shows even that it could already be the case.

YRVE, where as mentioned item 1 connects to Ch. 13 of IL and the concept NAVE.

4. THE CONCEPT *VERKSAMHET* (E.G. THE VE-PART OF YRVE, *YRKESMÄSSIG VERKSAMHET*), CAN IT REMAIN IN THE ML AND WHEN DO VE, E-VE AND NAVE (*NÄRINGSVERKSAMHET*) RESPECTIVELY CEASE TO EXIST?

4.1 CAN THE CONCEPT *VERKSAMHET* (E.G. THE VE-PART OF YRVE) REMAIN IN THE ML?

4.1.1 The concept *verksamhet* (e.g. the VE-part of YRVE), EU law conformity in the structure of the ML

ML connecting the right of deduction to the tax liability-concept is taken by itself not EU law conform, which as mentioned is pointed out inter alia by the investigation *SOU 2002:74*, and that leads to the ML's structure not complying with the Sixth Directive not providing that liability to pay output tax has occurred, before the right to deduct input tax occur. However, it's in line with the Sixth Directive and 'activity-thinking' (Sw., '*verksamhetstänkande*') there that ML in YRVE has something like that to determine the tax subject, and the basic question in this book is whether the connection thereby to NAVE in Ch. 13 of IL is conform with taxable person in the Sixth Directive. Another thing is it that the ML accept that he who has that character can belong to the VAT system regardless of where in the world he's established, since temporary, single taxable transactions here (in Sweden) by a taxable person doesn't disqualify him as having an YRVE according to ML. Temporary, single transactions lead to tax liability for him, if not reverse charge is applicable and the customer instead will be tax liable.[195] That's EU law conform, but as mentioned not that the emergence of the right of deduction for acquisitions to the activity would be depending on taxable transactions first occurring in it, which is a problem depending on the structure of the ML itself which however lacks connection to the concepts of the IL.

The predecessor to the head office of the SKV – the RSV – has by the way as mentioned also expressed as late as in 2000 an 'activity-thinking', when

[195] See Ch. 1 sec. 1 first paragraph item 1 of ML which since Sweden's EU-accession in 1995 lacks the ending phrase 'which is carried out within the country' (Sw., "*som bedrivs här i landet*"), with reference to the YRVE, and Ch. 4 sec. 5 of ML and *Prop. 1994/95:57* pp. 155 and 175.

the RSV stated in its writ that 'the SKM (i.e. the tax authorities, nowadays the SKV) has to accept when applying the ML another country's judgement that an activity (i.e. the VE-part of YRVE) carried out in that country is YR' by the foreign entrepreneur.

The investigation *SOU 2002:74* draws – without mentioning the "Breitsohl"-case in the context – the conclusion that there's a need of a material change of the current law concerning the concept *verksamhet* (e.g. the VE-part of YRVE) when it's used in Ch. 8 sec. 3 first paragraph of ML concerning the right of deduction and draws the conclusion as far as to suggest it should be abolished totally from the ML, since the investigation argue that the SAC case *RÅ 1999 Not 282*, which concerned subsidised activity, shows that current law demand those alterations. The conclusion made by the investigation can probably be explained partly by the investigation's suggestion, which the investigation also explicitly points out, lacks an analysis of the material consequences of the suggestions, partly by the fact that the SAC-case came before the ECJ made its verdict in the "Breitsohl"-case on the 8th of June 2000.

In the first respect the analysis here may be deemed showing that there's no basis for removing the concept VE from the ML, although it's correct that the connection of the question of the emergence of the right of deduction to the concept 'tax liability' (Sw., '*skattskyldighet*') of the ML isn't conform with the Sixth Directive. That's a problem with the structure of the ML itself which lacks importance for the question on who can be liable to pay VAT, i.e. for the judgement of who's got the character of taxable person, and it's for that question that the ML makes the connection to the concept NAVE in Ch. 13 of IL for the determination of YRVE. The concept VE itself isn't defined in the ML, but it's got its place in YRVE and it's in that expression in the ML that taxable person of the Sixth Directive can be most likely to be deemed implemented.

The SAC refer in the advanced ruling *RÅ 1999 Not 282* to the ECJ cases "Sofitam", "Harnas & Helm", "Hong-Kong Trade", "Armbrecht" and "Lennartz". However do inter alia these confirm, according to the review previously made here, that an 'activity-thinking' is a part of the judgement of who's a taxable person and can belong to the VAT system.

A person can be taxable person without having any taxable transaction. If the person in question then actually makes a taxable transaction, shall he belong to the VAT system.

A person can be taxable person and belong to the VAT system, although there's a lack of direct and immediate connection between acquisitions establishing the E-VE and planned or actual taxable transactions.

In the "Breitsohl"-case the ECJ establish that it is the taxable person who by his planning determine to what degree he shall belong to the VAT system. This means there's a 'transaction-thinking' (Sw., '*transaktionstänkande*') in that judgement. Is the intention to make taxable transactions? However, this doesn't mean that a person cannot be a taxable person if no taxable transactions are planned, but transactions exempted from taxation, or if the acquisitions are overhead costs and not directly and immediately connected to planned or actual taxable transactions.

The "Breitsohl"-case doesn't present any contradiction for the 'activity-thinking' with determining whether a person has the character of taxable person. That determination is an interaction between the purpose of making money in the independence prerequisite and one or several of the acquisitions objectively indicated establishing the E-VE. No E-VE without the purpose of making money on the one hand and on the other hand no purpose of making money and taxable person without sufficient acquisitions to establish an E-VE with the purpose of making money.

What the ECJ is clarifying in the "Breitsohl"-case compared to its previous practice is that the taxable transactions don't have to have occurred, before the right of deduction emerge in the E-VE by a taxable person. It's sufficient that the person in question intend to (independently) support himself on the activity planned with the acquisitions, for him to be deemed having the character of taxable person. If it's not transactions exempted from taxation which are planned, can the person in question belong to the VAT system and have the right of deduction. That line of evidence is by the way not complicated, since the exemptions from taxation as mentioned shall be applied restrictively. If it isn't clear that it's a matter of making goods or services within care, education, financial services and insurances or another VAT exempted sector, can planned transactions very well be assumed to be taxable. Thus, it's not such a vast line of presenting evidence required to prove the emergence of the right of deduction, if jus the purpose of making money can be proved to exist. Thus, if a taxable person can prove that the acquisitions sometime are likely to lead to taxable transactions, has the right of deduction emerged for the input tax on the acquisitions in the E-VE. The acquisitions don't need to be connectable directly and immediately to taxable transactions.

Is the purpose instead private consumption with the acquisitions, doesn't any VE (i.e. the VE-part of E-VE) emerge which can give the person in question the character of taxable person, and he cannot belong to the VAT system and deduct any input tax on the acquisitions. Although if e.g. a thus acquired article of goods later would be sold and that transaction is taxable, doesn't tax liability occur due to the person in question not making the taxable transaction in his capacity of taxable person, but as a consumer.

An 'activity-thinking' in combination with a 'transaction-thinking' is thus motivated in the ML on the basis of the Sixth Directive and the ECJ practice. It would be unwise without the material analysis to follow the investigation *SOU 2002:74* and its suggestion of leaving an 'activity-thinking'. The only needed to be clarified in the ML is that the emergence of the right of deduction isn't depending on taxable transactions actually occurring first in the VE (here the VE used in CH. 8 sec. 3 first paragraph of ML). Thereby must the description of the emergence of the right of deduction in Ch. 8 sec. 3 first paragraph of ML be disconnected from the tax liability-concept in the ML. That leads either to a change of tense in the section, so that the right of deduction would be stated emerging for VE 'likely to' (Sw., '*kan komma att*') lead to tax liability, or that it would be stated in a new paragraph of the section that the emergence of the right of deduction 'isn't depending on' (Sw., '*inte är beroende av*') the tax liability first occurring. Today can the expression 'VE leading to tax liability' (Sw., "*verksamhet som medför skattskyldighet*") give the impression that the right of deduction cannot be deemed to have emerged, before taxable transactions and tax liability have occurred first. So far is *SOU 2002:74* right, and that impression is by the way strengthened of a systematical analysis of ML. Ch. 10 sec. 9 of ML is namely stating for newly started activities that so called 'reimbursement right' (Sw., '*återbetalningsrätt*') for input tax can emerge, before taxable transactions have occurred in the VE, only by the SKV deciding that such right has occurred after an application from the new entrepreneur and special motives thereto are deemed to be at hand. That rule is obsolete, since the ECJ's practice allows right of deduction already before taxable transactions actually have occurred in the VE. However, it's sufficient here to establish that the 'activity-thinking' not only can remain in the ML, but should do so. It is necessary for the determination of who's a taxable person, i.e. of who can become tax liable.

The conclusion is that the concept VE in the ML can and should be retained. It is complying with E-VE in the Sixth Directive, when it comes to determining who's a taxable person and can belong to the VAT system. The only revision required is that the emergence of the right of deduction

shall not continue to be connected in the ML to the tax liability first occurring, i.e. that taxable transactions actually have emerged first in the VE. Then it's as mentioned something to be analyzed here whether the determination of YRVE in the ML, by the reference to NAVE in Ch. 13 of IL, is complying wit taxable person in the Sixth Directive. However can, considering the great importance laid by the investigation *SOU 2002:74* to the SAC case *RÅ 1999 Not 282* for its suggestion on abolishing the concept VE from the ML, an analysis of that case be justified here. Thus, does the SAC case *RÅ 1999 Not 282* mean that a national practice is established in conflict with the Sixth Directive and the ECJ's practice?

4.1.2 The concept VE in the ML, is national practice according to the SAC case *RÅ 1999 Not 282* incompatible with the Sixth Directive and the ECJ's practice?

The SAC altered in *RÅ 1999 Not 282* the advanced ruling by the SRN and declared that the applicant was entitled to deduct input tax for consultation activity, but not for the VE otherwise, which was financed by subsidies. The SAC's decision in *RÅ 1999 Not 282* is in compliance with the EU practice, and the case doesn't cause any need to abolish the concept VE from the ML. The applicant in the advanced ruling *RÅ 1999 Not 282* has namely clearly stated that the incomes of the VE consisted partly of general allowances from the owners the state and 'the county council' (Sw., '*landstinget*'), partly of considerations from 'the county administrative board' (Sw., '*länsstyrelsen*') and others 'for the carrying out of various projects' (Sw., "*för genomförande av olika projekt*").

The question on deduction was about the right thereto for input tax referring 'to acquisitions for partly VE financed by the general allowances' (Sw., "*till förvärv för dels verksamhet som bestrids av de generella anslagen*") and 'partly projects for which consideration is received' (Sw., "*dels projekt för vilka ersättning erhålls*") from mandators. The applicant has thereby in his planning divided the activities in a consultant part, where the deducted input tax will be taxed by the mandators being charged output tax on the considerations for projects carried out, and a part where the acquisitions can be referred to activities fully depending on allowances (subsidies). There's no uncertainty in current law; instead the decision by the SAC in *RÅ 1999 Not 282* is fully complying with the ECJ's decision in the "Breitsohl"-case. The latter case isn't mentioned by the investigation *SOU 2002:74* in connection with its commentary of the SAC case *RÅ 1999 Not 282*, and it would therefore be dubious to remove the concept VE from

the ML, when national practice actually is complying with the ECJ's practice.

Furthermore is as mentioned the investigation's other motives to underpin the proposal misguiding. The right of deduction in the ML connected to the non-EU law conform concept tax liability lead only to the conclusion that it should be clarified in the ML that taxable transactions don't have to have occurred in time before the right of deduction for the emergence of the right of deduction. That change in the ML not only can, but should be carried out without the concept VE being abolished from the ML.

The RSV comment by the way also the SAC case *RÅ 1999 Not 282* in its writ of the 5th of May 2000 (Sw., *RSV:s skrivelse 2000-05-05*, *dnr 5056-00/110)*, but as well without having had the opportunity to take into consideration the "Breitsohl"-case. In the RSV's manual on VAT 2003 (Sw., *RSV:s Handledning för mervärdesskatt* 2003) are inter alia its own writ of the 5th of May 2000 and *RÅ 1999 Not 282* commented and in addition another writ from the RSV of the 28th of February 2001 (Sw., *RSV:s skrivelse 2001-02-28*, *dnr 2758-01/120*), where *RÅ 1999 Not 282* also is brought up concerning subsidy-financed activities,[196] but not the "Breitsohl"-case. That also goes for the SKV's manual on VAT 2005 (Sw., *SKV:s Handledning för mervärdesskatt* 2005).[197] However, the RSV is clear in its standpoint that 'the right of deduction isn't limited by a tax liable's costs being fully or partly financed by enterprise subsidies (subsidies from the state) or similar unrelated subsidies to a VE for which tax liability is at hand' (Sw., "*Avdragsrätten begränsas inte av att en skattskyldigs kostnader helt eller delvis bestrids genom näringsbidrag (statsbidrag) eller liknande oberoende bidrag till verksamhet för vilken skattskyldighet föreligger*"). The ECJ has also established that it isn't compatible with the description of the right of deduction in – particularly – the Articles 17(2), 17(5) and 19 of the Sixth Directive with the national VAT act specially stipulating that a taxable person, who only carries out taxable transactions, would only get a limited right to deduct input tax on acquisitions of goods or services, just because they are 'subsidised' (Sw., "*subventionerade*").[198]

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[196] See *RSV:s Handledning för mervärdesskatt* 2003 (Eng., The RSV's manual for value added tax 2003), pp. 99-105 and 379-380.

[197] See *SKV:s Handledning för mervärdesskatt* 2005 (Eng., The SKV's manual for value added tax 2005), pp. 123-130 and 435-437.

[198] See the ECJ case C-204/03 (the Commission vs Spain). With reference to that case the SAC has in the advanced ruling *RÅ 2006 Ref 47* established that the special rule on limitation of the right to deduct input tax for certain cultural activities in relation to them

Current law can be described as the right of deduction cannot exist in a VE completely based upon subsidies which aren't received for supplies, which the RSV and its successor, the SKV's head office, seem to mean too. The SAC refer in *RÅ 1999 Not 282* to the "Hong-Kong Trade"-case, where the supply of goods and services only was made free of charge and the subject in question therefore couldn't be considered a taxable person. The SAC mean that the outcome there would have been the same if consideration would have existed, provided that 'the whole part of the VE concerning supplies free of charge was separated so that it wouldn't be comprised by the value added taxation' (Sw., "*den del av den sammantagna verksamheten som avser vederlagsfria tillhandahållanden bryts ut så att den inte kommer att omfattas av mervärdesbeskattningen*"). That's completely in line with the "Breitsohl"-case. The SAC couldn't decide other than what was the case, since the applicant in his planning had separated the activities into a consultant activity, where the VAT deductions would become taxed and the POTB-principle thereby upheld, and a completely subsidy depending part of the VE where the idea is that so shall not be the case and thus no right of deduction exist.

It can be mentioned in the context that The Council on Legislation, in connection with certain alterations in the ML by *SFS 2002:1004*, couldn't see it necessary or apt to clarify that also 'subsidies' (Sw., "*bidrag*") constituting the price of a supply shall be deemed consideration, only because certain payments are called subsidies but actually constitute consideration for a supply from the receiver.[199] The Council on Legislation's viewpoint is in line with the SAC case *RÅ 1989 Ref 86*, where the SAC established that only naming something a 'group contribution' (Sw., "*koncernbidrag*") doesn't mean that a supply can't be deemed to exist where VAT is concerned, if it's actually about a consideration for a supply.

The Government followed the intentions of The Council on Legislation, and in the same way should the Government also here make a material trial of the questions about the right of deduction with respect of basic VAT principles, before the proposal from SOU 2002:74 on removing the concept VE from the ML is taken into consideration. There shouldn't be any alteration made of the concept VE in the rule on deduction in Ch. 8 sec. 3 first paragraph of ML, where it's a question of the concept expressing an activity prerequisite corresponding to E-VE of the Sixth Directive, so that

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receiving public subsidies, introduced into the ML as Ch. 8 sec. 13a in 1997, cannot apply to activities fully deductible, only to mixed activities.

[199] See *Prop. 2002/03:5* p. 109.

an independent person shall be deemed having the character of taxable person (the YR-part of YRVE) and being able to belong to the VAT system by fulfilling that prerequisite. Had the owners of the applicant company in RÅ 1999 Not 282 left allowances actually being considerations for supplies in form of e.g. consultant services (transactions), would the applicant of course also in that part been deemed having a 'VE causing tax liability' (Sw., "*verksamhet som medför skattskyldighet*"), Ch. 8 sec. 3 first paragraph of ML, and been entitled to deduct input tax also in that part.[200]

If a taxable person has a mixed activity, can the separation into branches of VE already today be deemed following a 'transaction-thinking'. Possibly can an alteration in the same direction as suggested by the investigation *SOU 2002:74*, i.e. a transition to a 'transaction-thinking',[201] be motivated as far as Ch. 1 sec. 7 of ML concerning the expression 'part of the VE' (Sw.,"*del av verksamheten*"), 'branch of VE' (Sw., '*verksamhetsgren*', being altered to connect directly to the taxable character of the planned supplies by the taxable person. However, it's also a question of such a change in the ML not only can, but should be carried out without the concept VE being removed from the ML. Also in a mixed activity rules, for the part of the activity or the activity entitling to VAT deduction, that the emergence of the right of deduction in time isn't depending on the planned taxable transactions occurring first. The problems with mixed activities have no bearing on the determination of the tax subject, i.e. of who's a taxable person, which person thus can have a VAT free activity. Taxable person is someone who can be value added taxed, and that can also a taxable person with a VAT free activity become, if he starts making taxable transactions too. Since this book concerns the determination of the tax subject and the connection thereby to NAVE according to Ch. 13 of IL, will questions on the EU law conformity with rules on mixed activity in ML not be dealt with here specifically.

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[200] See also the advanced ruling *RÅ 1999 Ref 33*, the advanced ruling *RÅ 2003 Ref 25*, *RSV:s Handledning för mervärdesskatt* 1998 (Eng., The RSV's manual for value added tax 1998), pp. 151etc, and *RSV:s Handledning för mervärdesskatt* 2002 (Eng., The RSV's manual for value added tax 2002), pp. 98etc, and *Skattenytt* (Eng., the Tax news) 1997 pp. 594-602, the article *Subventioner – en tolkning av reglerna i det sjätte mervärdesskattedirektivet (77/388/EEG) med utgångspunkt från subventioner från EU* (Eng., Subsidies – an interpretation of the rules in the Sixth Directive with reference to subsidies from the EU), by Ulrika Hansson and the advanced ruling *RÅ 2005 Ref 74* and the ECJ cases invoked by the parties C-8/01 (Taksatorringen), referred to by the SKV, and 102/86 (Apple and Pear Development Council), referred to by the applicant.

[201] See *SOU 2002:74* Part 1 pp. 151, 152 and 195.

The SAC case *RÅ 1999 Not 282* has by the way also been mentioned in other books, but without the topic of an 'activity-thinking' contrary to a 'transaction-thinking' being brought to attention like in *SOU 2002:74*.[202] However, it's sufficient here to establish that *RÅ 1999 Not 282* is complying with the Sixth Directive and the ECJ's practice. Since the ECJ's practice support that a concept VE is justified in the ML, remains to go further with the analysis whether the determination of YRVE in the ML, by the reference to the concept NAVE in Ch. 13 of IL, is complying with taxable person according to Article 4(1) of the Sixth Directive. However, before that can the analysis be made whether the connection from the ML to the IL is EU law conform, where the question on when a VE cease to exist is concerned.

4.2 WHEN DOES VE AND NAVE RESPECTIVELY CEASE TO EXIST?

4.2.1 E-VE, does the VE or the character of taxable person cease to exist?

4.2.1.1 E-VE, one or several VE?

Acquisition of assets is common for the ML and the Sixth Directive respectively where the judgement if a VE and E-VE respectively exists is concerned. Also a service enterprise must have some kind of first investment expenses, e.g. telephone subscription and other equipment for communicating with potential customers. It's the same also for the judgement whether NAVE according to IL exist. At the tax assessment of 2002 was 'the concept income source' (Sw., '*förvärvskällebegreppet*') abolished from the income tax legislation, and that shall be analyzed on the topic of compliance with the Sixth Directive for the judgement of inter alia when in time YRVE can be deemed to exist.

By Article 4(2) of the Sixth Directive can according to the Swedish language version the conclusion be drawn that E-VE is one single VE which 'shall comprise all VE' (Sw., "*skall omfatta alla verksamheter*") by a taxable person within a certain professional category, whereas the English language version with the plural form "economic activities" could be interpreted as stating that the same taxable person can have several E-VE:s. However, the interaction with the purpose of making money, for

[202] See *Svensk skattetidning* (Eng., Swedish tax journal) 2004 pp. 305-315, the article *"Out of scope of VAT" och avdragsrätt för ingående mervärdesskatt* (Eng., 'Out of scope of VAT' and right of deduction for input tax), by Ulrika Grefberg and Jan Kleerup.

determining if the person in question has the character of taxable person, means that E-VE is an objective concept on the subject level. He who is taxable person has "all activities" (Sw., "*alla verksamheter*"), i.e. all VE, in an E-VE. If the person in question has made acquisitions for transactions exempted from VAT, can he be taxable person, but can belong to the VAT system first if taxable transactions are made.

The concept VE is as mentioned not defined in the ML and lacks a direct equivalent in the Sixth Directive,[203] but the concept VE is joined with E-VE in the Sixth Directive, by an 'activity-thinking' has to be part of the trial whether a person has the character of taxable person. The judgement of who has YRVE depending on a concept VE in the ML is also in line with the ECJ in the "I/S Fini H"-case establishing that a taxable person can have that character and maintain the right of deduction for costs which can't be settled at once, although the VE has been liquidated.

Thus can already here be established that E-VE is a concept on subject level.. It doesn't matter whether it's a question of one or several VE by the taxable person. He must have liquidated all VE and not intend to make taxable transactions anymore, for him being deemed to have lost the character of taxable person. The E-VE doesn't expire just because all the assets in the VE have been sold. The taxable person can still have the character as such, if he's intending to do new transactions. Thus, the presuppositions for someone to be deemed taxable person don't cease to exist "[o]nce the criteria are proved to have been fulfilled". It's more of a procedural problem to decide when a person who once has achieved the character of taxable person makes the transition to be just a consumer. The question is instead whether such a person who has liquidated the assets which established the E-VE makes a new acquisition in the capacity of taxable person or as a consumer.

4.2.1.2 VE ending, treatment according to the ML of sale of single assets or of VE or part of VE

Transfer of single pieces of goods is exempted from taxation according to Article 13(B.c) of the Sixth Directive only if they are 'used wholly for an activity exempted" (Sw., "*enbart används i en verksamhet som är undantagen från skatteplikt*") under Article 13. That correspond to Ch. 3 sec. 24 of ML, where exemption from taxation is stipulated for 'transfer of other assets than current assets' (Sw., "*överlåtelse av andra tillgångar än*

[203] See *SOU 2002:74* Part 1 p. 194.

omsättningstillgångar"), if they haven't entitled to VAT deduction at the acquisition due to the assets being e.g. fixed assets in a care enterprise which transactions aren't comprised by exemption from taxation. However is it so that the exemption doesn't comprise current assets and the exemption is about the tax object. In the GML the taxation was limited in cases sale of fixed assets technically by the law stipulation a limitation of the YR-part of YRVE. In the preparatory work to the ML it was stated as a motive to alter the technical solution in the act that the transaction 'of course is YR to its nature' (Sw., "*givetvis är yrkesmässig till sin natur*").[204] Now is thereby the ML conform with the Sixth Directive in the respect that a taxable person has YRVE regardless whether supply of single or several fixed assets are exempted from taxation due to the acquisitions of them didn't entitle to VAT deduction.

Otherwise are transfers of assets exempted from taxation, regardless if current or fixed assets, only they are transferred together with transfer of a totality of assets, i.e. the whole VE, or part thereof, i.e. a whole branch of the VE, according to Ch. 3 sec. 25 of ML compared with Ch. 1 sec. 7 of ML. The same goes for mergers and similar measures.

4.2.1.3 Transfer of VE, mergers and similar, comparison between VAT and income tax

As mentioned there's no EU directive on when a person is entrepreneur for income tax purposes. Of the four existing EU directives in the field of income tax is the Merger Directive (90/434/EEC) of interest here, since it's to guidance for when a VE can be deemed to have been transferred to someone else. The Merger Directive lead to Swedish income tax rules on border crossing restructures within the EU, when Sweden became a member of the EU in 1995. The rules were made applicable also for national restructures, by 'the act on taxation at mergers, divisions (fissions) and transfer of enterprises' (Sw., '*lag (1998:1603) om beskattningen vid fusioner, fissioner och verksamhetsöverlåtelser*'). By the introduction of the IL the assessment year 2002 the rules in question were inserted in Ch. 37 and 38 of the IL instead. It's not a matter of definite tax relieves, but the income tax rules in question giving a postponement with the taxation.[205] Of interest here is transfer of enterprises and mergers and similar, since they concern the subject's own taxation.

[204] See *Prop. 1993/94:99* p. 156.
[205] See *Prop. 1998/99:15* p. 102.

The rules in question mean for transfer of enterprises exemption from immediate taxation, where a VE or a branch of a VE (Note, VE in these respects an IL concept) is transferred for consideration in shares in the purchasing company. It steps into the selling company's income tax situation.[206]

By 'the Companies Act' [Sw., '*aktiebolagslagen (2005:551)*', ABL] of 2006 is now divisions (fissions) possible also according to civil law.[207] Fissions were possible according to income tax law already before by the Merger Directive requesting legislation to make border crossing restructures easier within the EU.[208] Mergers as well as fissions are restructures comprising 'all assets and debts' (Sw., "*[s]amtliga tillgångar och skulder*") according to both the IL and the ABL.[209] The prerequisites 'all assets' rules also for transfer of VE according to the IL.[210]

A branch of a VE is according to the rules on postponement such a part of a VE suited to be separated into an independent VE.[211] That's complying with the SAC's judgement of when exemption from taxation for transfer of VE or part of VE applies according to Ch. 3 sec. 25 of ML, where a branch ['part of VE' (Sw., "*del av verksamhet*")] is considered consisting of 'an asset or aggregate or amalgam of assets' (Sw., "*en tillgång eller ett kollektiv av tillgångar*" (and in occurring cases of personnel) 'which in principal can continue functioning as a unit and contribute to realizing a specific aim with the VE' (Sw., "*som i princip kan fortsätta att fungera som en enhet och bidra till att realisera ett specifikt verksamhetsmål*".[212]

According to the income tax rules from 1998 can withdrawal taxation be omitted in certain cases of under pricing transfer of a single asset. That brought up the question on a corresponding alteration of Ch. 3 sec. 25 of ML.[213] Such an alteration has never been made.

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[206] See *Prop. 1998/99:15* p. 233.
[207] See Ch 24 of ABL and *SOU 2001:1* pp. 271-274.
[208] See Ch. 37 sec. 5 of IL and *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 9th edition, pp. 444 and 445, by Lodin, Sven-Olof, Lindencrona, Gustaf, Melz, Peter and Silfverberg, Christer.
[209] See Ch. 37 sec:s 3 and 5 of IL and Ch. 23 kap. sec. 1 first paragraph and Ch. 24 sec. 1 second paragraph item 1 of ABL.
[210] See Ch. 38 sec. 2 item 1 of IL.
[211] See *Prop. 1998/99:15* p. 137.
[212] See the SAC case *RÅ 2001 Not 99*, which concerned the interpretation of Ch. 3 sec. 25 of ML after Sweden's EU-accession.
[213] See *Prop. 1998/99:15* p. 173.

Problems were considered existing wut regard of VAT at restructures containing transfer of real estate, concerning adjustment of deducted input tax on Capital goods. Therefore it was clarified in 2001 in the ML that the rules on adjustment and the changed rules introduced then with the purchaser as main rule stepping into the obligations and rights of adjustment also apply to real estate included in the transfer.[214] Adjustment isn't made if the exemption from taxation according to Ch. 3 sec. 25 of ML applies. Supply of real estate is comprised by exemption from taxation already according to Ch. 3 sec. 2 of ML, but by the clarification the uncertainty was removed on whether liability to adjust the input tax deducted would arouse, just because real estate was included amongst the assets. The exemption from adjustment at transfer of VE fully taxable according to ML, when Ch. 3 sec. 25 of ML applies, applies without real estate included in the transfer of VE being treated differently from the other assets.[215] Where real estate comprised by so called 'voluntary tax liability' (Sw., '*frivillig skattskyldighet*') for letting of business premises etc according to Ch. 9 of ML are concerned, the new rules of 2001 apply to the real estate as such comprised by the SKV's decision on such tax liability according to ML. Transfer of such a real estate doesn't as a main rule cause liability to adjust either, and then the real estate itself can be deemed a VE or part of VE. It's still a matter of voluntary tax liability providing a decision thereof after application to the SKV. Otherwise there's no other rule which like the one's on income taxation now mentioned that exempt transfer of single assets from taxation according to ML than where it's a matter of a fixed asset acquired to a VAT free VE (Ch. 3 sec. 24 of ML).

The "Hotel Scandic Gåsabäck"-case means that withdrawal taxation of VAT isn't given rise to, when a consideration that can be expressed in money is received for transfer of an asset. Since the ML lacks rules on exemption from the POTB-principle at transfer of single assets other than where the VE itself hasn't entitled to deduction and input tax to tax isn't at hand, remain only Ch. 3 sec. 25 of ML and exemption for transfer of VE or part of VE to be compared with the described income tax rules on postponement which are based upon the Merger Directive.

4.2.2 Taxable person, change of character to consumer and comparison with when NAVE ceases to exist

[214] See *SFS 2000:500*; *bet. 1999/2000:SkU21*; *Prop. 1999/2000:82*; *SOU 1999:47*.
[215] See *SOU 1999:47* pp. 108 and 109.

4.2.2.1 Lack of accounting rules in the Sixth Directive, comparison instead via the rule on transfer of going concern

In the ML the accounting rules give guidance to when a VE cease to exist, namely when it's transferred. Then will a final accounting of output tax take place by the vendor according to Ch. 13 sec. 11 of ML for the accounting period when the transfer was made, unless liability to account has aroused for a previous accounting period. Thus, it's a matter of taxation of VAT deductions in the VE for the transfer of the VE as the last business transaction in the VE during the vendor's time.[216] By Ch. 10 sec. 37 of ML follows furthermore that the accounting shall be completed even to the accounting period under which the liquidation has been completed, if 'a VE is liquidated' (Sw., "*en verksamhet avvecklas*"). The Sixth Directive is as mentioned lacking accounting rules, but Article 5(8) of the Sixth Directive stipulates the presuppositions to transfer assets to someone else without liability to pay VAT on them, despite they've entitled to VAT deduction at the acquisitions.

Article 5(8) of the Sixth Directive has its closest equivalent in Ch. 3 sec. 25 of ML. There's a legislative technical difference with respect of the directive rule stipulating exemption from VAT taxation due to a transaction, delivery of goods, being deemed not to exist if "a totality of assets or part thereof" (Sw., "*samtliga tillgångar eller någon del därav*") is transferred, whereas the rule in the ML stipulate exemption from taxation for transfer of VE. From a 'transaction-thinking' can it be discussed whether the right of deduction can be limited retroactively due to the transfer of VE itself would mean that mixed activity emerge.[217] However,

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[216] See *Prop. 1993/94:99* p. 240 and reference there to *RSV Im 1984:2* (section 7).

[217] See *Skattenytt* (Eng., the Tax news) 2002 pp. 123-130, the article *Momsavdrag vid viss momsfri omsättning (igen) samt för nyemissionskostnader* [Eng., VAT deductionx at certain VAT free transaction (again) and for costs for issuing new shares], by Björn Forssén. That article was partly a reply on an article in *Skattenytt* (Eng., the Tax news) 2001 pp. 276-278, *EG-rättsliga aspekter på avdragsrätt för moms på fastighetsmäklartjänster (Eng., EC law aspects on right of deduction on real estate agent-services)*, by Eleonor Alhager, which in its turn was a reply on an article in *Skattenytt* (Eng., the Tax news), 2001 pp. 45-47, *Avdragsrätt för ingående moms trots koppling till viss skattefri omsättning?* (Eng., Right of deduction for input tax despite connection to certain VAT free transaction?) – by Björn Forssén. That article correspond to Appendix 1 (pp. 389-393) of *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), by Björn Forssén. See also *Skattenytt* (Eng., the Tax news), 2002 pp. 36 and 37, the article *Avdragsrätt för ingående mervärdesskatt – några EG-rättsliga synpunkter* (Eng., Right to deduct input tax – some EC law viewpoints), pp. 35-41, by Ulf Nilsson and *Skattenytt* (Eng., the Tax news) 2004 pp. 480-490, the article

now is for the procedural judgement of when a person who once was deemed having the character of taxable person has ceased to act as such, only of interest that transfer of VE or part of VE normally is considered made by the substance being transferred to another so that 'what's comprised by the transfer keeps its identity in the sense that the activities carried out by the vendor are continued or resumed by the purchaser' (Sw., "*det som överlåtelsen omfattar behåller sin identitet i den meningen att de aktiviteter som bedrevs av överlåtaren med hjälp av det överlåtna fortsätts eller återupptas av förvärvaren*"). Thus, the SAC has thereby considered that the Swedish VAT legislation is and were conform to the Sixth Directive already at Sweden's EU-accession in 1995.[218] How do those criteria correspond with the income tax law one's on when an entrepreneur can stop filing returns in that capacity?

4.2.2.2 Comparison of the Sixth Directive and the Merger Directive concerning transfer of VE or part of VE

Eleonor Alhager points out concerning questions about what shall be deemed "a totality of assets" (Sw., "*samtliga tillgångar*") according to Article 5(8) of the Sixth Directive, that a comparison with the Merger Directive isn't possible without regarding the basic difference between VAT and income tax meaning that VAT shall not become a cost in NAVE. The interpretation of Article 5(8) of the Sixth Directive should therefore be vaster than the organizationally motivated restructure cases comprised by the Merger Directive concerning income tax. Costs in the form of VAT due to withdrawal taxation could lead to competition distortion at transfers of VE.[219]

Those are of course questions of great interest for the scope of the exemption from taxation for transfer of assets along with transfer of VE according to Ch. 3 sec. 25 of ML, but here it's sufficient to establish that the secondary law on income tax at least partly is in line with the VAT law and the Sixth Directive's Article 5(8).[220]

Going concern-kravet vid överlåtelse av verksamhet i momssammanhang (Eng., the Going-concern-request at transfer of activity and VAT), by Eleonor Alhager.

[218] See the SAC case *RÅ 2001 Not 99* concerning Ch. 3 sec. 25 of ML in relation to Article 5(8) of the Sixth Directive and the SAC cases *RÅ 2001 Not 97* and *RÅ 2001 Not 98*, which concerned sec. 8 item 18 of GML, which corresponded to the current Ch. 3 sec. 25 of ML.

[219] See *Mervärdesskatt vid omstruktureringar* (Eng., VAT at restructuring measures), pp. 378 and 379, by Eleonor Alhager.

[220] See also *SOU 1994:100* pp. 9 and 10 and *Mervärdesskatt En handbok* (Eng., Value added tax A handbook), Supplement No. II 1994 (section 4, *SOU 1994:100* –

Although it can be discussed whether it's supported by the Merger Directive and, if that wouldn't be considered to be the case, whether the primary law could be invoked, is it of interest that the ECJ's preliminary ruling in the Swedish case "X AB och Y AB" led to Ch. 35 of IL already in 2000 being added a new section (2a). It means that 'the group contribution rules' (Sw., '*koncernbidragsreglerna*') shall be applied also to a foreign company established within the EEA-area, if just the receiving company is liable to tax in Sweden for the VE to which the contribution is referring.[221] The latter condition could possibly be considered non-compatible with the EU law considering the "Bosal Holding"-case, which concerned the Mother-daughter-company Directive (90/435/EEC) and where the ECJ seem to have accepted the provision of congruity in the national income tax legislation only for the same subject. However, that directive doesn't comprise the Swedish rules on group contributions. The question on the primary law with the principle on anti-discrimination expressed in the rule on the right of (freedom to) establishment in another Member State for a national of an EU Member State, Article 43 EC (formerly 52), and the other four freedoms of the EC Treaty is therefore of interest in the context of the topic of the ECJ's competence.[222] However is it sufficient here to establish that the secondary law in the field of income tax concerning postponement of taxation at transfer of VE or part of VE at least isn't in conflict with the Sixth Directive's exemption from taxation in such cases.

The Merger Directive comprise transfer of all or several VE branches, and with VE branch means all assets and debts in a part of a company which organizationally constitute a by itself functioning unit.[223] It's thus compatible with Ch. 3 sec. 25 of ML and the SAC's judgement in *RÅ 2001 Not 99* of that rule in relation to Article 5(8) of the Sixth Directive, where

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Beskattningen vid gränsöverskridande omstruktureringar inom EG, m.m.), p. 18, by Björn Forssén.

[221] See *Svensk skattetidning* (Eng., Swedish tax journal) 2002 p. 566, the article *Den europeiska gemenskapens diskrimineringsförbud och dess skattekonsekvenser: den svenska erfarenheten*, by Leif Mutén (pp. 561-573).

[222] See *Skattenytt* (Eng., the Tax news) 2004 p. 510, the article *EG-rättens betydelse på det direkta beskattningsområdet* (Eng., The EC-law's importance in the field of direct taxation), pp. 503-511, by Lars Pelin and also *Skattenytt* (Eng., the Tax news) 2003 p. 243, the article *Rättfärdigande av hindrande skatteregler mot bakgrund av EG-domstolens underkännande av ännu en svensk skatteregel* (Eng., Justification of obstructive tax rules with respect of the ECJ's disqualification of yet another Swedish tax rule), pp. 230-246, by Mats Tjernberg.

[223] See *Mervärdesskatt vid omstruktureringar* (Eng., VAT at restructuring measures), p. 378, by Eleonor Alhager and commentary there of Articles 2c and 2i of the Merger Directive.

as mentioned part of VE is also described as such an independent unit and the exemption also applies when all thereto belonging assets are transferred.[224] This judgement doesn't change in principle by an advanced ruling on income tax from the SAC concerning the concept part of VE. The SAC established the judgement made by the SRN that the exemption from immediate taxation at transfers of VE in Ch. 38 of IL is applicable to 'such part of a business activity fitted to be separated to form an independent business activity' (Sw., "*sådan del av en rörelse som lämpar sig för att avskiljas till en självständig rörelse*"). Since the parties in the case in connection with the appeal were agreeing to it, the SAC can be considered only having clarified that what's decisive thereby is 'how the part of VE function from the acquiring party's perspective and not whether the transfer from the vendor's point of view comprises a totality of assets in a part of VE' (Sw., "*hur verksamhetsgrenen fungerar ur förvärvarens perspektiv och inte om överlåtelsen för säljarens del avser samtliga tillgångar i en verksamhetsgren*").[225]

Regardless of the legislative technical difference between the rule in the ML and the rule in the Sixth Directive, the questions on transfer of VE, mergers and similar without value added taxation are about VAT specific questions which don't concern the question on the emergence of YRVE. Since the secondary law on income tax doesn't give any guidance for that aspect, is it, with respect of the limited guidance given by the Merger Directive to the question on when a VE 'expire' (Sw., "*upphör*"), of interest here to examine if precisely the latter question is handled by Swedish national income tax law in a way compatible with Article 5(8) of the Sixth Directive.

4.2.2.3 Comparison of the Sixth Directive and Swedish national income tax law concerning when accounting of VAT and accounting in the income tax schedule NAVE respectively no longer applies

If not the VE is transferred to someone, what rules according to the preparatory work to the income tax law current legislation is that 'an income source has not ceased to exist as long as some asset or debt is still

[224] The SAC case *RÅ 2001 Not 99* not mentioned in the standard book on questions on application of Ch. 3 sec. 25 of ML, *Mervärdesskatt vid omstruktureringar* (Eng., VAT at restructuring measures), by Eleonor Alhager, is thus explained by only one of the three cases which were decided the same day, and where *RÅ 2001 Not 99* was one of them, had had leave to appeal when that book was written, *RÅ 2001 Not 97* (*mål 3802-1996*). See p. 362 of the book mentioned.
[225] See the SAC case *RÅ 2006 Ref 57*.

left' (Sw., ”*[e]n förvärvskälla har inte upphört så länge någon tillgång eller skuld finns kvar*”), which today is of guidance to when NAVE expire.[226] Thus can ML's concept VE and the connection to NAVE according to Ch. 13 of IL be considered EU law conform, where the question on when a VE expire is concerned. All assets and debts must be settled for the income source (NAVE) to be deemed expired and that's compatible with Article 5(8) of the Sixth Directive and the request there that ”a totality of assets or part thereof” (Sw., ”*samtliga tillgångar eller någon del därav*”) shall be transferred, for a transfer of VE free of VAT shall be deemed to exist. Thus, the last business transaction shall either have been made by the sale of all the assets or by the whole VE being transferred to someone, for the VE to be deemed having ceased to exist. If remaining assets in the VE are transferred free of charge, withdrawal taxation come up for VAT purposes as well as for income tax as for the last business transactions.[227]

Thus, it's just a question of different perspectives to the question whether a person still has the character of taxable person, where the trial is if he has liquidated his E-VE by sale out or by transfer of it to someone and no longer intend to make taxable transactions and thus no longer can belong to the VAT system. Thus, the question if a person still has the character of taxable person can only be of procedural importance. Does the taxable person want to continue to belong to the VAT system, has he an E-VE and right of deduction if he with new acquisitions intend to make taxable transactions. Therefore it's only in the procedural perspective that transfer of ”a totality of assets or part thereof” (Sw., ”*samtliga tillgångar eller någon del därav*”) shall be viewed. However, so far can the income tax law be considered compatible with the Sixth Directive.

That an E-VE can contain several VE (”activities”) is only of interest to the judgement of the scope of the right of deduction in a mixed activity. According to Article 17(5) of the Sixth Directive is the right of deduction in such an activity determined by a 'transaction-thinking'. Acquisitions entitle to right to deduct input tax only for the ”proportion … attributable” (Sw., ”*andel ... som kan hänföras*”) to taxable transactions. For the procedural judgement of whether he who once was deemed having the character of taxable person intend to make acquisitions acting as such after the VE, the VE:s or the branches of VE have been liquidated apply again an 'activity-thinking'. An indication on the acquisition only being made in the capacity

[226] See *Prop. 1989/90:110* Part 1 p. 705.
[227] See *Prop. 1989/90:110* Part 1 p. 660 and the ”Hotel Scandic Gåsabäck”-case.

of consumer is above all that the person in question doesn't note it in the books of account. If it's instead noted there, is it evidence of him doing the acquisition for the purpose of making money and thus in his capacity of taxable person. Although the Sixth Directive lacks accounting rules is it in a procedural perspective possible with a common judgement of VAT and income tax concerning whether a person no longer has VE in the meaning YRVE and NAVE respectively to account for where VAT and income tax respectively are concerned. However, it doesn't mean that the connection from ML to IL for the judgement whether a person from the beginning has YRVE is EU law comform, and that will be analyzed here.

5. THE RELATION BETWEEN MATETRIAL TAX QUESTIONS, BOOK-KEEPING AND ‘QUESTIONS ON THE PROCEDURE OF TAXATION’ (Sw., ‘*FÖRFARANDEMÄSSIGA FRÅGOR*’)

5.1 ’PROPERLY DONE BOOK-KEEPING’ (Sw., ’***ORDNAD BOKFÖRING***’), EVIDENCE CONCERNING CHARACTER OF ASSETS AND OF PERSON

5.1.1 ’Activity-thinking’ (Sw., ”***verksamhetstänkande***”) and ’transaction-thinking’ (Sw., ”***transaktionstänkande***” combined with an ’asset-thinking’ (Sw., ”***tillgångstänkande***”) in cases of change of character of assets

Thus far in the book it’s been established that the concept VE has its place in YRVE, since it’s the closest equivalent in ML to E-VE in Article 4(1) of the Sixth Directive, where it’s stipulated that any person who independently carries out ’economic activity’ (Sw., ’*ekonomisk verksamhet*’, E-VE) has the character of taxable person. The YR-part of YRVE can be considered equivalent to the independence prerequisite.

Furthermore has been established that the concept VE should remain in the ML, since it wouldn’t be in compliance with the ECJ’s practice not to let an ’activity-thinking’ as an objective prerequisite to work together with a ’transaction-thinking’ to determine that a person has a purpose of making money and can belong to the VAT system. The ’transaction-thinking’ determine in a subjective sense to what degree such a taxable person belong to the VAT system and is entitled to deduct input tax on the one or several acquisitions establishing the E-VE. It has already been established here that it should be clarified in the ML that the right of deduction isn’t depending on taxable transactions to actually have occurred, before the right to deduct input tax emerge in the VE. However it is, contrary to what the investigation SOU 2002:74 has assumed without any analysis of material consequences, not anything making it necessary to abolish the concept VE from the ML. It’s instead necessary for the ML containing concepts corresponding to the concept pair E-VE and independence in Article 4(1) of the Sixth Directive, for the determination of who’s a taxable person and can belong to the VAT system.

It's even so that the 'activity-thinking' and the 'transaction-thinking' can be completed with an 'asset-thinking'. He who's acquired assets establishing an E-VE cannot belong to the VAT system, if they're to be used in a VE making from taxation exempted transactions of goods or services. If such assets change character to current assets, can the person in question become tax liable for supply of them the same way as if he would make acquisitions of e.g. goods to sell. The person in question goes from having a VAT free VE to having a mixed activity. The only difference between the assets used in the VAT free VE and those changing character from fixed to current assets and such new acquisitions that from the beginning had the character of current assets, is that deduction of input tax only can be made by adjustment in case the assets which have changed character due to the emerge of mixed activity were so called Capital goods.[228] The assets acquired to sell lead to right of deduction to the part they shall be supplied in the taxable part of the mixed activity. The deduction limitation for them occurs only if they shall take part underlying to the VAT free part of VE, e.g. food-stuff in connection with care. This way there can thus be a 'transaction-thinking', an 'activity-thinking' and an 'asset-thinking' interacting.

Although the books of account aren't prejudicial to the question whether someone can be considered a taxable person materially, the book-keeping and the civil law concepts such as GAAP have for that context an importance as evidence not only where the purpose of making money is concerned, but also where it's a question whether the tax object is such that tax liability according to ML is possible. Thus, the ML has connections to civil law besides the connection thereto via the concept NAVE in the IL and the book-keeping as evidence for that topic. The analysis here is about precisely the connection between the ML and the IL for the determination of the tax subject and then the 'asset-thinking' taken by itself can be disregarded since a taxable person has that character regardless whether he intend to make taxable transactions and can belong to the VAT system or if they are VAT free. However, the description here shows that in a case where a VE transition from VAT free to taxable due to a change of character of the assets, it's of importance to be able to prove it as early as possible, for the sake of avoiding cumulative effects and competition distortion due to a right of deduction for acquired non-Capital goods not

[228] See item 42 in the ECJ case C-184/04 (Uudenkaupungin kaupunki), where the ECJ establish that adjustment of input tax for Capital goods isn't limited so that adjustment wouldn't be possible to the advantage of the tax liable, just because "the capital goods were first used in non-taxable activity that was not eligible for deduction" and then within the adjustment time "in activity, subject to VAT".

occurring by adjustment, despite tax liability – as a consequence of the change of character – emerging for the sale of them.

Although the analysis here shall continue about the determination of the tax subject as someone who can be tax liable according to ML and the Sixth Directive, may hereby be deemed additionally proved the importance of a 'properly done book-keeping' as evidence concerning the material tax issues, by it having evidence value not only for the question whether a person is a taxable person, but thus also for the question of the character of his assets.

Before the analysis of the material tax questions continue shall therefore questions on the Requirement to maintain accounting records' and the concept GAAP's procedural importance be taken up, here only on the topic of when someone can be deemed having the character of taxable person. This will be done under the assumption of a common tax frame between VAT and income tax having a value in itself as evidence. Then it's something which thus shall be analyzed with reference to the material tax questions and the structure of the IL and national practice in the field of income tax if such an order is possible. Thus, for questions on the procedure of taxation it can have a value in itself that the ML's accounting rules connect to GAAP, where a so called connected area exist for precisely the question on allocation to a particular period between the books of account and the income tax law. It's even so that it would be possible with such a mutual view procedurally between VAT and income tax also if the analysis here would show that the ML cannot connect to the IL for the sake of determining the tax subject, since the Sixth Directive as mentioned lacks accounting rules.

5.1.2 The book-keeping as evidence for someone being a taxable person

The preparation of annual accounts is taken by itself effected by the EU law by 'the Annual Accounts Act' (Sw., '*årsredovisningslagen*') being interpreted with respect of e.g. 'the fourth company law directive' (78/660/EEC) – Sw., '*fjärde bolagsrättsliga direktivet*', but it's then about rules to give as 'true and fair view' (Sw., '*rättvisande bild*') as possible of result and balance concerning the business transactions which have occurred in the enterprise in question. That's of no prejudicial character in relation to the legal facts which are decisive for questions on the emergence of tax liability and right of deduction, i.e. in relation to what's deemed to be a business transaction. In the preparatory work to the BFL it's pointed out that 'true and fair view' (Sw., '*rättvisande bild*') is a concept based on 'an

international (European) standard' [Sw., "*en internationell (europeisk) standard*"] and it 'is a part of the EU law which meaning in the end is determined by the decisions of the ECJ' (Sw., "*är en del av EG-rätten vars innebörd ytterst bestäms av EG-domstolens avgöranden*"). The concept can according to the preparatory work mentioned sometimes have another meaning than 'GAAP' (Sw.,'*god redovisningssed*'), which express 'a national (Swedish) or possibly mutual Nordic standard for accounting' [Sw., "*en nationell (svensk) eller möjligen samnordisk standard för redovisning*"] and which is 'determined on a broader basis (e.g. on a sector-basis) than the request of 'true and fair view' which is aiming on the conditions in the enterprise at hand [Sw.,"*bestäms på en bredare basis (t.ex. branschvis) än kravet på rättvisande bild som tar sikte på förhållandena i det enskilda företaget*").[229]

The proposal in *SOU 2002:74* to abolish the connection to GAAP according to BFL where the accounting rules in ML are concerned can possibly be motivated by a certain risk of them leading to a domestic national meaning in conflict with the idea of community concepts given an autonomous European meaning. However, it may for the context also be mentioned the European Parliament's and the Council's Regulation (EC) No. 1606/2002 of the 19th of July 2002 [Sw., *EUROPAPARLAMENTETS OCH RÅDETS FÖRORDNING (EG) nr 1606/2002 av den 19 juli 2002*] on application of international accounting standards. It shall, according to the Governments committee directive *Dir. 2002:106* decided the 8th of August 2002, be seen with respect of the ongoing evolution of global accounting standards, mainly International Accounting Standards (IAS). All the IAS will be translated into the official languages within the EU, i.e. inter alia to Swedish.[230]

The Regulation is directly applicable in the EU Member States, also Sweden, and comprises companies 'quoted on the stock exchange' (Sw., '*börsnoterade*') – here: companies listed for trade on a regulated market in some EU Member State – from the first financial year which begins after the end of the year 2004. The EU-commission shall decide that certain international accounting standards issued or adopted by the IASB, inter alia IAS, shall be in force within the EU for the companies mentioned and publish these decisions in 'the Official Journal of the European Union' (OJ)

[229] See *SOU 1996:157* p. 362.
[230] See *FAR INFO 2/2002:45*, where it's mentioned that the International Accounting Standards Board (IASB), which by the way is the successor to the International Accounting Standards Committee (IASC), has committed itself to the EU to transalate all the IAS.

– Sw., '*Europeiska unionens officiella tidning*. However, for an accounting standard to be decided by the Commission it may not be in conflict with the fourth company law directive (78/660/EEC), and what follows by that directive concerning the accounting giving 'a true and fair view' of the company's result and balance. It will be voluntary for the Member States to decide whether the accounting standards shall apply, or be possible to apply, for other enterprises than companies quoted on the stock exchange, but everything seem thus speak for the tax law being able to refer to the civil law accounting rules for the question on allocation to a particular period without giving rise to any conflict with the EU law.

Although GAAP and the occurrence of the Requirement to maintain accounting records have influence on first of all the corporate tax law where the question on allocation to a particular period is concerned, have the civil law concept GAAP and the connection between accounting and taxation an influence for the evolution of norms in the field of income tax. Jan Kellgren uses the expression material connection where the books of account and not any particular tax rules shall decide the question on allocation to a particular period. The classification in 'stock items' (Sw., '*lagertillgångar*') and 'fixed assets' (Sw., '*anläggningstillgångar*') influence the decision of the time question on the topic of correct fiscal year. If the books of account thus are established in pursuance of GAAP with respect of the question on allocation to a particular period, are they for that question prejudicial in relation to the income taxation.[231]

Although the laws on accounting don't always give the answer, is it 'still necessary to consider and form an opinion concerning the question on what is GAAP' (Sw., "*ändå nödvändigt att ta ställning i frågan om vad som är god redovisningssed*"). Jan Kellgren thereby points out the need to be able to pursue the tax assessment procedure at all, and that, although the tax courts must in principal make an independent trial of the question, they often obtain the view of the BFN and follow then normally the BFN's statement on what's GAAP.[232] In the preparatory work to the BFL it's stated that the BFN's recommendations and statements aren't formally binding, but have the status of general advice, however thereby might having an indirect legal influence when a court or administrative authority

[231] See *Redovisning och beskattning – om redovisningens betydelse för inkomstbeskattningen* (Eng., Accounting and taxation – of the importance of accounting for the income taxation), pp. 105 and 107, by Jan Kellgren.

[232] See *Redovisning och beskattning – om redovisningens betydelse för inkomstbeskattningen* (Eng., Accounting and taxation – of the importance of accounting for the income taxation), p. 107, by Jan Kellgren.

in the actual case shall judge what's GAAP – which in practice means that the BFN's general advice are decisive for that question.[233]

Robert Påhlsson also points out that the BFN and 'the Swedish Financial Accounting Standards Council' (Sw., '*Redovisningsrådet*') as 'norm setter' for the external accounting have an influence for the taxation, by the request on 'distribution over a period of time' (Sw., '*periodisering*') of income and expenses in pursuance of GAAP and the request in Ch. 14 sec. 2 of IL that 'an enterprise's result for tax purposes is calculated according to book-keeping standard basis (Sw., "*ett företags skattemässiga resultat beräknas enligt bokföringsmässiga grunder*").[234] In the absence of general advice from the BFN for a certain business sector or situation, can GAAP be established in accordance with applied practice.[235] A description of GAAP which thereby may be mentioned is the one made in the preparatory work to the GBFL. In *Prop. 1975:104* GAAP is described on page 148 as 'the actually existing practice by a from the aspect of quality representative circle of persons required to maintain accounting records' (Sw., "*en faktiskt förekommande praxis hos en kvalitativt representativ krets av bokföringsskyldiga*"). Thereby was added inter alia that 'great importance for the meaning of the concept have of course the statements in accounting issues made by the professionally and theoretically active expertise in the field of accounting' (Sw., "*[s]tor betydelse för innebörden av begreppet har givetvis de uttalanden i redovisningsfrågor som görs av den praktiskt och teoretiskt verksamma expertisen på redovisningsområdet*". Thus, it's not a static concept, but it's constantly changing and updated in the BFN's general advice.[236]

The description of reality in terms of what's happened, and which are expressed in the books of account are evidence e.g. for the bicycle dealer being deemed precisely an entrepreneur, since the scope of purchases and sales according to the practice within the sector means that the person in question is required to maintain accounting records. Another concept

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[233] See *Prop. 1998/99:130* Part 1 p. 178 (with reference to *Prop. 1975:104* p. 205). See also *Prop. 1995/96:10* Part 2 pp. 11 and 181.

[234] See *Företagens inkomstskatt* (Eng., The enterprises' income tax), pp. 36 and 37, by Robert Påhlsson.

[235] See *Företagens inkomstskatt* (Eng., The enterprises' income tax), p. 37, by Robert Påhlsson.

[236] See also the preparatory work to the BFL, *Prop. 1998/99:130* Part 1 p. 178, where reference is made to the quotations in question, and *Prop. 1995/96:10* Part 1 p. 176 and inter alia *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 108, by Björn Forssén. See also *Prop. 1998/99:130* Part 1 p. 185 and *SOU 2002:74* Part 1 p. 514.

GAAP to separate the entrepreneur's private economy from the enterprise's and, where matters of evidence are concerned, the entrepreneur from the consumers than the civil law one cannot be made out without a certain uncertainty about legal rights of the individual. Here the material issue isn't about allocation to a particular period, but whether the person in question shall be deemed an entrepreneur at all. Since the prerequisites for the determination of who's an entrepreneur required to maintain accounting records according to the BFL doesn't conflict with the prerequisites for taxable person according to the Sixth Directive and the evolution in both respects is governing of and with respect of the EU law, can it at least lead to procedural evidence problems where the distinction of the entrepreneurs from the consumers is concerned, if the influence from the evolution of GAAP for the building of norms in the field of VAT would be interrupted but remain in the field of income tax.

Björn Westberg points out that 'there's … nothing in the preparatory work indicating a distinction in opinion on GAAP between judgements where income tax and VAT are concerned' (Sw., "*finns ... ingenting i förarbetena, som tyder på en åtskillnad i uppfattningen om god redovisningssed mellan inkomst- och mervärdesskatterättsliga bedömningar*").[237]

If the proposal from SOU 2002:74 on disconnecting the accounting rules in the field of VAT from the civil law concept GAAP will be pursued, would the so called connected area only remain for the income tax. The connection between accounting and taxation has its material meaning concerning the question on allocation to a particular period, and doesn't have a prejudicial effect for the material judgement of who's an entrepreneur for tax law purposes. Where the income tax and the corporate taxation are concerned Jan Kellgren also points out this, but that there's still required 'relatively solid reasons to motivate exceptions from books of account's standpoint in the subject issue' (Sw., "*förhållandevis tungt vägande skäl för att motivera avsteg från räkenskapernas ställningstagande i subjektsfrågan*"). He means that there's practically not a question of 'taxation of other subjects than those identified by the enterprises' books of account' (Sw., "*att beskatta andra subjekt än de som utpekas i företagens räkenskaper*").[238] Concerning the importance of the concept determinations

[237] See *Mervärdesskatt – en kommentar* (Eng., Value Added Tax – a commentary), p. 419, by Björn Westberg.

[238] See *Redovisning och beskattning – om redovisningens betydelse för inkomstbeskattningen* (Eng., Accounting and taxation – of the importance of accounting for the income taxation), pp. 90 and 91, by Jan Kellgren.

and classifications in accounting laws and in the enterprises' accounting for taxation Jan Kellgren consider that the accounting law forms 'something of a background for the tax rules' (Sw., "*något av en fond för skattereglerna*") within the field of corporate taxation. He consider that there may be deemed to exist a 'principal that diversions from the accounting laws in a normal case shall be explicit' (Sw., "*princip att avsteg från redovisningsrätten i normala fall ska framgå tydligt*"), but points out at the same time that there can be special reasons for a diverse view for tax law purposes to a question, especially if the method on accounting chosen 'appear cunning' (Sw., "*framstår som utstuderad*").[239] Here can at least be established that it would emerge problems in practical application, above all at registration to VAT and 'registration for corporation taxation' (Sw., '*F-skatteregistrering*') and in the taxation procedural, if the book-keeping as evidence on the topic of right accounting period and fiscal year respectively no longer would have a prejudicial effect for the VAT in contrast to the income tax.

If a common tax frame between VAT and income tax would not be able to maintain materially concerning the distinction between entrepreneurs and consumers, it will have to be accepted. However, it has a value for legal rights of the individual to be able to foresee one's character with regard of taxation on the basis of evidence available as far as possible for VAT and income tax at the same time. Thus, thereby a properly done book-keeping should be evidence of highest interpretation value and the benefits thereby of a joint view between VAT and income tax shall be mentioned some for the taxation procedural.

5.2 QUESTIONS ON REGISTRATION, TAX ACCOUNTING AND CONTROL

5.2.1 The question on allocation to a particular period, uncertainty on legal rights of the individual concerning incorrect information if a GAAP-concept for taxation exists beside the civil law concept

There have anyhow existed tendencies concerning the allocation to a particular period-issue of the tax authorities wanting to establish some kind of GAAP especially for taxation. For the VAT it has led to questions on allocation to a particular period-error and 'tax surcharge' (Sw., '*skattetillägg*'), by the SKV – or at least the predecessor RSV – claiming

[239] See *Redovisning och beskattning – om redovisningens betydelse för inkomstbeskattningen* (Eng., Accounting and taxation – of the importance of accounting for the income taxation), p. 97, by Jan Kellgren.

that the special rules in the ML on when the right to deduct input tax can be exercised would mean that if there's any formal error in the received invoice that's an actual incorrect information leading to tax surcharge (if used for the purpose of reimbursement or credit of input tax).

However, it's clarified by the ECJ that rights and obligations according to the VAT system aren't depending on decisions by the tax authority. Thus, there's no legally defined evidence describing when the right of deduction can be exercised. A systematical interpretation of the ML otherwise give rise to the question: why would the material right of deduction be described in Ch. 8 sec. 3 first paragraph of ML if Ch. 8 sec. 5 of ML with reference to the rules on content in invoice would be anything else but a rule of evidence? It also follows by the preparatory work to the introduction of the so called Invoicing Directive (2001/115/EC) which was implemented into Article 22(3) of the Sixth Directive and into Ch. 11 of ML on the 1st of January 2004, that the ECJ has established that the rules on content in invoice must not 'lead to it becoming practically impossible or unreasonably hard to exercise the right of deduction' (Sw., "*leda till att det i praktiken blir omöjligt eller orimligt svårt att utnyttja avdragsrätten*").[240]

The situation became clearer after four so called allocation to particular period-verdicts from the SAC on the 25th of March 1999, where RÅ 1999 Ref 16 was one of them.[241] The SAC established that the documentation was not the matter, but the business transaction, by removing the tax surcharge decided only because a correction had been necessary after the accounting period with respect of the requests on content of invoice in Ch. 11 of ML. That really only confirm what's already following from the preparatory work to the ML, namely that Ch. 8 sec. 5 of ML is just a rule of evidence.[242] The RSV expressed anyhow in a writ of the 9th of December 1999 (*dnr 11530-99/100*) a changed standpoint concerning the question of the importance of the layout of the invoice to the emergence of the right of deduction and accepts nowadays that deduction is possible although a wrong name of receiver is stated in the invoice. Neither the SAC nor the RSV have taken up what rules if a corrected invoice never can be received from the deliverer, but the preparatory work to the alterations in the ML in 2004 due to the Invoicing Directive from the EU can be invoked to support

[240] See *Prop. 2003/04:26* pp. 30 and 31 with reference to the following ECJ cases: joint cases 123 and 330/87 (Jeunehomme and others), 342/87 (Genius Holding), C-85/95 (Reisdorf) and C-141/96 (Langhorst).
[241] See the SAC case *RÅ 1999 Ref 16* and the SAC cases with case No. *1035-1997*, *3572-1997* and *3618-1997*.
[242] See *Prop. 1993/94:99* pp. 210, 211 and 217.

that other evidence than precisely the invoice can be valid. In the same preparatory work is also stated that the requests according to Ch. 11 of ML can be deemed fulfilled 'by several documents' (Sw., "*av flera handlingar*"), since therein isn't defined what's an invoice, rather just the requests on the content of an invoice.[243] Where evidence is concerned should *a fortiori* (here in the sense the bigger including the smaller) a properly done book-keeping be a proof of the highest interpretation quality.

In the context can the joint ECJ cases C-255/02 (Halifax and others) be mentioned, which were 'pending' (Sw., '*anhängiga*') for a long time but decided on the 21st of February 2006 by the ECJ. The ECJ can there, in connection with question on reimbursement of input tax, at least indirectly be considered having taken a view to the question if all the items in Ch. 11 sec. 8 of ML (previously Ch. 11 sec. 5 of ML) must be fulfilled for making it possible to exercise the right to deduct input tax regarding an acquisition. In item 90 of the verdict the ECJ notes that the Sixth Directive doesn't describe how the state could make a "recovery of VAT"; instead there are rules in Article 20 of the directive on adjustment of deduction of input tax on an acquisition of Capital goods. In item 92 the ECJ state that although "abusive practice" can be established on behalf of the tax liable's side, may the Member States' opportunity according to Article 22(8) of the Sixth Directive to introduce rules to prevent fraud – which opportunity according to the second paragraph inserted in the article by the Invoicing Directive implemented in the ML is limited by item 3 of Article 22 – not undermine the basic principle on the VAT's neutrality.[244] Under b in item 3 – i.e. in Article 22(3b) of the Sixth Directive – is stated the items corresponding to the items of Ch. 11 sec. 8 of ML (previously Ch. 11 sec. 5 of ML), and besides the limitation which thus follow by the actual directive rule Article 22(8), the ECJ may, by reference to the same and thereby indirectly to Article 22(3b), be considered having expressed support to its practice meaning that the formal requests must not 'lead to it becoming practically impossible or unreasonably hard to exercise the right of deduction' (Sw., "*leda till att det i praktiken blir omöjligt eller orimligt svårt att utnyttja avdragsrätten*"). Formal requests shall taken by themselves prevent

[243] See *Prop. 2003/04:26* p. 69. See also *Momsen och fakturan, m.m. – momsens krav på fakturainnehåll* (Eng., The VAT and the invoice, etc – the VAT's requests on content of invoice), by Björn Forssén, pp. 41 and 51 concerning inter alia the SKV writ on the 16th of March 2004 replacing the writ of the 9th of December 1999 without abandoning the changed standpoint of the RSV.

[244] In item 92 of the "Halifax and others"-case the ECJ refers by the way to the joint ECJ cases "Gabalfrisa and others", item 52, and to the EG-cases C-454/98 (Schmeink & Cofreth och Strobel), item 59, and C-395/02 (TransportService), item 29.

exercising a materially emerged right to deduct input tax. A legal definition of evidence with that consequence would lead to the opportunities to exercise the right of deduction being to some extent arbitrary in the actual case, which would be in conflict with the basic principle of a competition neutral VAT materially. The right of deduction's emergence is described in Ch. 8 sec. 3 first paragraph of ML, and it should be clarified in the text of that rule in the act that Ch. 8 sec. 5 of ML, which as mentioned refer to Ch. 11 of ML and the rules on content in invoice, is just an evidence rule and not the exclusive proof for exercising the right of deduction.

Of interest is that Jan Kellgren in his book *Redovisning och beskattning* (Eng., Accounting and taxation) refer to the first edition of this book, and establish – concerning that the books of account are a report on what's happened – that it is 'the business transaction which is the basic decisive event, not the report of the event. Another matter is that the tax law in certain cases is bound to the picture of the enterprise's business transactions given by the books of account' [Sw., "*affärshändelsen som är den i grunden avgörande händelsen, inte rapporteringen av affärshändelsen (se även Forssén 2004 s. 233). En annan sak är att skatterätten i vissa fall är bunden av den bild av företagets affärshändelser som ges i räkenskaperna*"].[245] Previously has also a certain support been received from Peter Melz concerning the standpoint that the layout of the invoice cannot be the matter, but instead precisely the business transaction, i.e. the acquisition or the delivery/supply.[246] However, it's sufficient here to establish that it nowadays should be undisputed that 'incorrect information' (Sw., '*oriktig uppgift*') as an allocation to a particular period-error cannot be deemed to exist just due to a formal error regarding the documentation of the business transaction; instead it must be regarding the actual business transaction. To abolish the connection to the civil law concept GAAP in the accounting rules of ML could stimulate tendencies on the SKV's side to establish some kind of GAAP especially for taxation. That would lead to uncertainty concerning current law with different concepts for the allocation to a particular period-question. Regardless whether a common tax frame can be upheld materially concerning who can belong to the VAT

[245] See *Redovisning och beskattning – om redovisningens betydelse för inkomstbeskattningen* (Eng., Accounting and taxation – of the importance of accounting for the income taxation), p. 79, by Jan Kellgren.

[246] See *Skattenytt* (Eng., the Tax news) 1999 pp. 633 and 634, the article *Redovisningstidpunkten för mervärdesskatt* (Eng., The time for accounting of VAT), pp. 626-636, by Peter Melz, where a reference is made to the article in *Skattenytt* (Eng., the Tax news) 1999 pp. 258-268, *Avgör inköpsfakturas utseende alltid rätten till avdrag för moms?* (Eng., Does the layout of purchaseinvoice always decide the right of deduction of VAT?) – by Björn Forssén.

system, has it a value for the security of the legal rights of the individual to be able to uphold a common connected area for the VAT and the income tax by the books of account. At least in the sense that it'll never be any doubt that incorrect information which can render the entrepreneur tax surcharge concern the question whether the business transaction accounted for has occurred or not, not the documentation of it. A GAAP for taxation beside the civil law concept would probably lead to uncertainty in that respect again.

It should also be considered having a value in itself that the tax procedural as far as possible could have a common set of evidence for the topic when a person can be deemed having the character of taxable person, even if it would be proved by the further analysis here that a common tax frame on that topic isn't possible with the ML referring to the concept NAVE in Ch. 13 of IL. A properly done book-keeping should benefit both the individual's relation to the tax system and the SKV's need of control, and it requires a few comments here.

5.2.2 Registration to VAT, not decisive for tax liability and right of deduction according to general VAT rules

A certain uncertainty seems to exist amongst the expertise concerning the ECJ's view on the question of the emergence of tax liability, and Roger Persson-Österman has, due to the "INZO"-case, stated that the ECJ, unlike himself, can be perceived not to consider that 'VAT liability emerge as a consequence of actual circumstances' (Sw., "*mervärdesskatteplikt uppstår till följd av ett faktiskt förhållande*"), rather 'because of an administrative decision being made' (Sw., "*av att ett administrativt beslut fattas*").[247]

Here will the special cases be disregarded where tax liability and the thereby connected right of deduction emerge after application by the SKV*s decision, e.g. letting of business premises (so called voluntary tax liability). Thereby doesn't either the necessary presupposition of the tax liable being a taxable person exist as instead is the case according to the general VAT rules. Even a private person can get a decision on voluntary tax liability for letting of business premises, since the rules once introduced in the interest of the tax liable lessee being able to deduct VAT just like the

[247] See *Skattenytt* (Eng., the Tax news) 1998 p. 590, the article *Några synpunkter på tolkning av svensk mervärdesskattelag efter inträdet i den Europeiska Unionen* (Eng., Some viewpoints on interpretation of Swedish VAT legislation after the accession into the European Union), pp. 584-593, by Roger Persson-Österman.

competitor carrying out his business in business premises of his own.[248] It's by the way optional for the EU Member States to have rules on voluntary tax liability for "letting and leasing of immovable property" (Sw., "*[u]tarrendering och uthyrning av fast egendom*").[249] However, it's just in such cases of voluntary tax liability that the SKV's decision to register has legal consequence materially for the tax liability and right of deduction, and then the asset, real estate, is the same as VE or part of VE just because a formal decision is requested besides a 'general notice for registration of taxes and contributions' (Sw., '*skatte- och avgiftsanmälan*') to be able to belong to the VAT system concerning supply in form of letting of business premises. There's also a rule on voluntary tax liability for artists with a low turnover, but it doesn't disconnect from the question whether the person in question is taxable person; it's instead an exception from artists with a low turnover as a main rule being exempted from tax liability.[250]

It has already been noted that the ECJ in item 38 of the "Breitsohl"-case establish that the right to deduct input tax on the first investment expenses isn't depending on any formal decision from the tax authority on the person in question being a taxable person. The Member States shall according to Article 22(1c-e) of the Sixth Directive have a system for registration to VAT, but the registration measure isn't decisive for rights and obligations vis-à-vis the VAT system shall emerge for the individual. It's first of all a matter of the SKV after registration for above all identification purposes being able administer tax collection and control the entrepreneur's relation to the VAT system.

Here may for support of the registration measure lacking legal consequence for the rights and obligations vis-à-vis the VAT system also a reference be made to inter alia the joint ECJ cases "Gabalfrisa and others". They confirm that tax liability and right of deduction in general emerge as a consequence of actual circumstances, i.e. by the business transactions made by the individual entrepreneur. According to the "Gabalfrisa and others"-verdict Article 17 of the Sixth Directive "precludes national legislation which makes the exercise of the right to deduct value added tax paid by a taxable person liable thereto before he starts regularly carrying out taxable transactions conditional upon the fulfillment of certain requirements such as the submission of an express request to that effect before the tax concerned becomes due and compliance with a time-limit of one year between that submission and the actual commencement of taxable

[248] See *Prop. 1978/79:141* p. 68.
[249] See Article 13(C.a) of the Sixth Directive.
[250] See Ch. 1 sec:s 2a and 2b of ML.

transactions, and which penalizes infringement of those requirements by forfeiture of the right to deduct or deferment of the exercise of that right until the time at which taxable transactions actually begin to be carried out on a regular basis" (Sw., "*hinder för en nationell lagstiftning enligt vilken en skattskyldig måste uppfylla vissa villkor för att få göra avdrag för mervärdesskatt som han har betalat innan han regelbundet genomför de skattepliktiga transaktionerna, exempelvis att han, innan skatten betalas, måste lämna in en anmälan om verksamheten och att det högst får gå ett år mellan denna anmälan och det att de skattepliktiga transaktionerna verkligen genomförs, varvid underlåtenhet att uppfylla dessa krav får till följd att avdragsrätten upphör eller att möjligheten att utnyttja avdragsrätten skjuts upp till dess att de skattepliktiga transaktionerna regelbundet börjar äga rum*"). The 'general notice for registration of taxes and contributions' (Sw., '*skatte- och avgiftsanmälan*') shall be made by the entrepreneur, but his rights and obligations vis-à-vis the VAT system aren't depending of it.

It has already been noted that the section 9 of Ch. 10 of ML is obsolete, since by a systematical interpretation of the ML and the relation to Ch. 8 sec. 3 first paragraph of ML and the stipulation on right of deduction in 'VE leading to tax liability' (Sw., "*verksamhet som medför skattskyldighet*") it could be deemed supporting that right of reimbursement or deduction of input tax presupposes that taxable transactions have occurred first. It's even amplified in ML that the expression 'VE leading to tax liability' means such a VE in which 'supply of goods or services lead to tax liability' (Sw., "*omsättning av varor eller tjänster medför skattskyldighet*"),[251] which ¨confirm the systematical interpretation that if not a newly started enterprise has applied for registration under a build-up stage with reference to special reasons according to Ch. 10 sec. 9 of ML it has no right of deduction until taxable transactions actually have been made. That viewpoint is in conflict with the ECJ's opposite standpoint according to the "Breitsohl"-case. Here shall only be mentioned that it sometimes exist arguments from the tax authority's side on decision being required from the SKV on registration in the described cases with newly started enterprises which have had expenses but not yet made taxable transactions, for them being able to lift off input tax on the first investment expenses. Ch. 10 sec. 9 of ML is thus obsolete, but it can be of interest to note that the described view for the sake of questions on the procedure of taxation is built on a wrong perception of different VAT systems being possible to be deemed to exist in the form of the rules on entrepreneurs with

[251] See Ch. 1 sec. 7 second paragraph of ML.

a yearly turnover not higher than SEK 1,000,000 accounting for VAT in the income tax return and, at higher turnover, on a monthly basis.[252]

In the SAC cases *RÅ 2002 Not 26* and *RÅ 1987 ref 115* is expressed that the question on reimbursement of input tax according to Ch. 10 sec. 9 of ML 'has … in itself no connection with registration' (Sw., "*har … i sig inget samband med registrering*"). From the 1st of July 2002 is an entrepreneur invoking the right of reimbursement according to Ch. 10 sec. 9 of ML on the basis of 'special reasons' (Sw., "*särskilda skäl*") considered liable to register,[253] which however thus doesn't change that the emergence of the right in question principally is independent from the registration. The "Gabalfrisa and others"-verdict correspond with the SAC case *RÅ 1987 ref 115*, where the SAC establish that the VAT registration doesn't have any other legal consequence than switching on and off the tax administrative control apparatus. Thus, what could use to lead to problems in practice is the misconception that the two different ways of accounting VAT would mean there are two VAT systems. Therefore may for clarity be emphasized that Sweden has *one* VAT system with two forms of registration: an enterprise with a yearly turnover not exceeding SEK 1,000,000 account for VAT on a yearly basis in the income tax return and other entrepreneurs, i.e. those with a higher turnover, account for VAT on a monthly basis in tax returns.[254] With Sweden's accession to the EU in 1995 and the changes of rules in ML then there was an expansion of 'the obligation to register to VAT … to all tax liable in principle, thus also to those who account for VAT in the income tax return' (Sw., "*skyldigheten att registreras till mervärdesskatt … till i princip samtliga skattskyldiga, således även till dem*

[252] See Ch. 10 sec. 31 of SBL.

[253] See Ch. 3 sec. 1 first paragraph item 4 of SBL according to *SFS 2002:391* and *Prop. 2001/02:127* pp. 163 and 164. See also *Skattenytt* (Eng., the Tax news) 1996 pp. 474-475, the article *Ett par frågor om mervärdesskatt och skattetillägg* (Eng., A couple of questions on VAT and tax surcharge), pp. 471-475, by Björn Forssén, where the SAC case *RÅ 1987 ref 115* is commented.

[254] See *bet. 1994/95:SkU7* p. 72. Of the preambles of the First and Sixth Directives follows that each Member State must have introduced "a system of value added tax" (Sw., "*ett mervärdesskattesystem*"). See also *Riksskatteverkets Rapport* (Eng., the RSV's report) *1994:3*, *Mervärdesbeskattningen i ett EG-perspektiv*, section 5.1 and *SOU 1994:88*, *Mervärdesskatten och EG*, section 9.4 and *Prop. 1994/95:57*, *Mervärdesskatten och EG*, section 4.7, where, in both the latter mentioned sources, the request on 'registration to VAT for all tax liable' (Sw., "*Mervärdesskatteregistrering för samtliga skattskyldiga*") follows already by the headlines and *Riksskatteverkets Rapport* (Eng., the RSV's report) *1993:8*, section 11.1.3, where it also already by the headline follows that it's a question of *one* VAT system, 'the system for administration of VAT' (Sw., "*Systemet för hantering av mervärdesskatt*").

som redovisar mervärdesskatten i självdeklarationen").[255] The 'request which the EU-control system present on registration of all VAT accounting entrepreneurs' (Sw., "*krav som EG:s kontrollsystem ställer på registrering av samtliga mervärdesskatteredovisande företag*") explain according to the Governments proposal of the changes in question of the rules made before Sweden making its accession to the EU in 1995 that 'he who account the tax in the income tax return should be deemed to have fulfilled his obligation to notice for registration by filing the return' (Sw., "*[d]en som redovisar skatten i självdeklarationen bör anses ha fullgjort sin skyldighet att anmäla sig för registrering genom avlämnande av deklarationen*").[256]

The newly started enterprises which have VAT expenses during a build-up stage, i.e. before they've had any income, do thus not need to especially leave an application to the SKV, in order to deduct such input tax, but account for VAT in the income tax return. Thus, there's neither any obstacle thereby where questions on the procedure of taxation are concerned such as the person in question so to speak has to be let in into the monthly form of accounting by way of some special decision from the SKV.

That any measure of registration is neither decisive for the emergence of tax liability follows inter alia by the ECJ case C-10/92 (Maurizio Balocchi), where the ECJ judged inter alia the concept "chargeable event" in Article 10 of the Sixth Directive and the relation to the obligation to file return of the Sixth Directive. The ECJ emphasize namely in item 27 of its verdict that different forms thereby must not mean that the individual must "pay VAT on transactions which have not yet been performed". The court says furthermore in that item that the rule of the directive is that the Member States shall "require VAT to be paid only in respect of transactions which have been performed".[257]

If there's ever been any doubt due to the "INZO"-case that the right of deduction and tax liability respectively emerge as a consequence of actual

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[255] See *Prop. 1994/95:57* p. 91.

[256] See *Prop. 1994/95:57* p. 92. See also *Prop. 1993/94:99* pp. 254 and 255, where it's stated that a trial of the right of reimbursement according to Ch. 10 sec. 9 of ML for newly started VE can be made in the income tax return.

[257] See also *Svensk skattetidning* (Eng., Swedish tax journal) 1997 pp. 215-216, the article *Direkt effekt av EG:s primär- och sekundärrätt – en analys med utgångspunkt i praxis vid EG-domstolen med särskild hänsyn till mervärdesskatteområdet* (Eng., Direct effect of the EU primary- and secondary law – an analysis with reference to the practice by the ECJ with special regard to the field of VAT), pp. 207-218, by Ulrika Hansson, where inter alia the "Maurizio Balocchi"-case is mentioned.

circumstances and not by any administrative decision, should it be removed by the cases ”Gabalfrisa and others” and ”Breitsohl” and also by the ”Maurizio Balocchi”-case.

However, a clarification would be welcome in Ch. 3 of SBL and so that therein would be clearly stated that VAT registration has no legal consequence for questions on the emergence of tax liability and right of deduction. In the preparatory work to Ch. 3 sec. 2 of SBL the head of Treasury suggest that the EU-accession in 1995 and Article 22(1a) of the Sixth Directive may have led to ‘a certain relief of the obligation to notice’ (Sw., ”*en viss lindring i anmälningsskyldigheten*”), but also that he who accounts for VAT in the income tax return ‘should notice in connection with the start of the VE’ (Sw., ”*bör göra en anmälan i samband med att verksamheten startar*”). Furthermore the head of Treasury mean that the rules on trade between EU Member States demand this so that ‘assigning of VAT-registration numbers can be made’ (Sw., ”*tilldelning av registreringsnummer kan ske*”).[258] The preparatory work to the SBL can be misleading and give the reader the notion that applicability of the material rules would be depending on a formal measure of registration. However, in the context it shall be noticed that the head of Treasury in connection with the statements mentioned only referred to the bill ‘*Mervärdesskatten och EG (Prop. 1994/95:57)*’ (‘The VAT and the EC’). The head of Treasury didn’t note that ’the tax committee’ (Sw., ’*skatteutskottet*’) on page 72 (*bet. 1994/95:SkU7*), due to it’s a question of *one* VAT system with the two forms of accounting mentioned, expressed that the individual is considered registered already in connection with the issuing of ’the certificate on registration for corporation taxation’ (Sw., ‘*F-skattebeviset*’), since he thereby is noted in ‘the tax register’ (Sw., ‘*skatteregistret*’).

5.2.3 Proof on tax status, aspects on questions on the procedure of taxation and tax case procedure questions

The judgement if an activity fulfills the prerequisites of taxable person is necessary to make in connection with the procedure of filing returns and in connection with a tax case. It’s been established here that the measure of registration lacks legal consequence where VAT is concerned for the emergence of tax liability and for the the emergence of right of deduction. The next stage where a judgement of evidence on the topic of taxable person is of interest is when the person in question shall file a return. Has a ’general notice for registration of taxes and contributions’ (Sw., ’*skatte- och*

[258] See *Prop. 1996/97:100* Part 1 pp. 528 and 529.

avgiftsanmälan') been rejected, can that topic be subject to a 'tax case' (Sw., '*skatteprocess*') by the person in question making a case on inhibition against the SKV's decision of rejection.[259] A tax case can also be about the same topic in connection with the ongoing procedure of investigation of filed income tax returns and tax returns by the SKV. Thus, registration being made is no obstacle against the SKV questioning whether the person in question has the character of taxable person. If that would prove not to be the case, can credited deductions of input tax be disqualified and accounted output tax shall be credited him. Whereas thus such measures of taxation cannot be made only because the project proves to be unprofitable. If it's shut down already before taxable transactions have occurred, can deduction of input tax not be disqualified retroactively if the person in question from the beginning had the character of taxable person.

Of interest for questions on the procedure of taxation about the judgement whether someone has the character of taxable person is that the ML besides the main rule on YRVE with the connection to the concept NAVE in Ch. 13 of IL (Ch. 4 sec. 1 item 1 of ML) has the SUPPLEMENTARY RULE in Ch. 4 sec. 1 item 2 of ML. By the so called SUPPLEMENTARY RULE in Ch. 4 sec. 1 item 2 of ML the concept YRVE is extended beyond NAVE according to Ch. 13 of IL to apply to VE which:

> 'is carried out in forms comparable with a to … NAVE referable activity (so called businesslike activity)' (Sw., "*bedrivs i former som är jämförliga med en till ... näringsverksamhet hänförlig rörelse" (s.k. rörelseliknande former*"), provided that the consideration for supplies carried out in the VE during the fiscal year exceed SEK 30,000 excluding VAT.

The SUPPLEMENTARY RULE lacks an equivalent in the Sixth Directive. There are instead special schemes for so called small undertakings in Article 24, and such are proposed by *SOU 2002:74*.[260] That would be about an exemption from tax (for taxable persons with an annual turnover below SEK 90,000). A similar system applied in the GML before 1991, but was based on a threshold amount of SEK 30,000 for the liability to account for VAT.[261] Here will be examined whether the existing SUPPLEMENTARY RULE concerning the concept YRVE is in conflict with the Sixth Directive or is obsolete. Now shall only the motives for the SUPPLEMENTARY

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[259] See the SAC case *RÅ 1988 ref 143*.
[260] See *SOU 2002:74* Part 1 pp. 19 and 401etc.
[261] See *Mervärdeskatt En läro- och grundbok i moms* (Eng., Value added tax an educational- and handbook in VAT), p. 41, by Björn Forssén.

RULE be mentioned in the perspective of questions on the procedure of taxation.

The SUPPLEMENTARY RULE was introduced for technical control reasons and not for technical tax reasons.[262] Anyhow was the motive not a fiscal one for introducing the rule; instead the extension of YRVE which the SUPPLEMENTARY RULE on businesslike activities means is aiming first of all to make it possible to adjust situations in which the VAT has a non-desirable effect on the competition. The SUPPLERMENTARY RULE has been used where a person otherwise showing signs of being taxed in 'the income tax schedule of earned income' (Sw., *inkomstslaget tjänst*) has such vast investments in equipment etc, and for which the mandator (the employer) doesn't pay the costs, that the person in question's customers would choose another supplier of the products (goods or services), if he couldn't lift off the input tax and the customers thereby would pay prices for the products that would contain latent VAT costs (so called cumulative effects would arouse).[263]

Thus, the SUPPLEMENTARY RULES aim to solve interface problems concerning whether e.g. a freelance-photographer (with one or a few mandators but own expensive camera equipment), a bee-keeper or an owner of one or several trotting-horses has NAVE or just a hobby (earned income). This causes no problem for income taxation today, since the individual by using the right of a free review of the return during a five-year-period can get a hobby retried to NAVE when the VE has been carried out for a couple of years and a judgement can be made in a longer perspective.[264] If a tax issue on VAT, like here concerning the YRVE, has a close connection to such a tax matter to be decided by the 'SKV tax council' (Sw., '*skattenämnden*'), should the question for both VAT and income tax be decided at the same time at the tax assessment.[265] Therefore, no obstacle exists to treat the question on deduction of input tax on e.g. the purchase of the first trotting-horse in connection with the income tax issue.

An issue on tax assessment is decided in the SKV tax council, if it's about reviewing a disputed question and the council hasn't tried the

[262] See *Prop. 1973:163* p. 60.
[263] See The RSV's manual on VAT 2001 (section 8.2.3), p. 118, and also The RSV's manual – VAT 1989 (section 22.3), p. 274, *Prop. 1973:163* pp. 31 and 62 and *EG-skatterätt* (Eng., EC tax law), p. 174, by Ståhl, Kristina and Persson Österman, Roger.
[264] See *Prop. 1989/90:110* Part 1 pp. 312 and 313.
[265] See *Prop. 1989/90:74* pp. 363 and 364.

circumstances and evidence invoked by the individual before.[266] Often are otherwise the matters on tax assessment decided by the officials at the SKV.[267] The issues on assessment are however decided by the council also where it's a question on fairness or judgement of essential economic importance for the tax liable or if they for any other reason in particular should be tried by the council.[268] In such a case it can e.g. be a question on VAT which normally is comprised by the procedure of SBL with decisions made by the officials due to the VE having low turnover and VAT is accounted for in tax returns, why the VAT shall be decided automatically according to what's accounted, but the review question has a strong inner connection with the tax assessment according to the TL with the deciding of the income tax. It can e.g. be about a judgement of a deduction which can be comprised by the so called prohibition of deduction of input tax on expenses for the purpose of 'entertainment and similar' (Sw., '*representation och liknande ändamål*') in Ch. 8 sec. 9 first paragraph item 2 of ML. That section of the ML connects materially to the limitations of the right of deduction in such cases according to Ch. 16 sec. 2 of IL. Then should a joint procedure of taxation be applied, where the question VAT deduction will be taken by the council together with the tax assessment question on the income tax deduction (which in the actual case ahs been deemed not possible to try by decision of an official). Uniformity in the judgement of `VAT and income tax increase the overview and thus the security of the legal rights of the individual.[269]

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[266] See Ch. 2 sec. 4 item 1 of *taxeringslagen (1990:324)*, TL [Eng., the Tax Assessment Act]. See also *Taxeringsprocess – en läro- och handbok* (Eng., Tax assessment procedure – an educational- and handbook), p. 69, by Björn Forssén.

[267] See 'The RSV manual on the procedure of tax assessment' (Sw., '*Riksskatteverkets Handledning för taxeringsförfarandet*', p. 65 (edition of 1996; *RSV 615* edition 1). See also *Taxeringsprocess – en läro- och handbok* (Eng., Tax assessment procedure – an educational- and handbook), p. 69, by Björn Forssén.

[268] See Ch. 2 sec. 4 items 2 and 3 of TL. See also *Taxeringsprocess – en läro- och handbok* (Eng., Tax assessment procedure – an educational- and handbook), p. 69, by Björn Forssén.

[269] See *Prop. 1989/90:74* pp. 331 and 332, where the motives for the introduction in the assessment year of 1991 of similar rules for the different procedures of taxation are stated, and 'the SKV's manual for tax payment 2004' (Sw., '*SKV:s Handledning för skattebetalning 2004*'), p. 44, where the SKV state tah decisions according to the SBL normally shall not be taken by the council, but that this can be done if the decision concern e.g. VAT and 'employer's contribution (for national social security purposes)' (Sw., '*arbetsgivaravgifter*') and has 'a close connection with an assessment issue which shall be taken by the council' (Sw., "*ett nära samband med en taxeringsfråga som ska behandlas i skattenämnd*"). See alsoi *Prop. 1989/90:74* pp. 363 and 364 and *Taxeringsprocess – en läro- och handbok* (Eng., Tax assessment procedure – an educational- and handbook), pp. 69 and 70, by Björn Forssén.

The SKV shall make sure the errands will sufficiently investigated,[270] which is complying with the so called official principle applying also to the administrative courts.[271] If not unnecessary, shall the tax liable be given opportunity to respond before his errand is decided.[272] Concerning information added to the errand by someone else but himself, has however the tax liable the right to take part of it and to be given opportunity to utter himself over it.[273] This means that if a decision by the SKV on deviation from the return is based on such information, it must be preceded by a so called 'consideration' (Sw., '*övervägande*') to the individual, who thereby has been 'communicated' (Sw., '*kommunicerats*') and has the opportunity to challenge the information before decision in the errand.[274]

Although the books of account aren't prejudicial for the question if someone has the character of taxable person, they have evidence value thereby. For the judgement of when someone has such character has it a great value in itself that it can be based on a as far as possible common set of proof. The existence of or absence of a properly done book-keeping should be deemed having a great evidence value for how the tax liable perceive his own tax status. Since a common building of norms is possible with respect of the EU law for VAT and income tax and a connection to the Requirement to maintain accounting records and the concept GAAP, i.e. to the civil law, where the question on allocation to a particular period is concerned, the non-fiscal motives of control for the SUPPLEMENTARY RULE shows that a consensus concerning evidence between VAT and income tax can be motivated by itself. That would mean a great uncertainty unless not on the whole the same material could be used in the tax case procedure for determining when someone has got the character of taxable person, just because GAAP no longer could be given the same content for VAT as for income tax and the connected area there.

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[270] See Ch. 3 sec. 1 of TL. See also *Taxeringsprocess – en läro- och handbok* (Eng., Tax assessment procedure – an educational- and handbook), p. 70, by Björn Forssén.
[271] See sec. 8 of *förvaltningsprocesslagen (1971:291)*. See also *Taxeringsprocess – en läro- och handbok* (Eng., Tax assessment procedure – an educational- and handbook), p. 70, by Björn Forssén.
[272] See Ch. 3 sec.2 first paragraph of TL. See also *Taxeringsprocess – en läro- och handbok* (Eng., Tax assessment procedure – an educational- and handbook), p. 70, by Björn Forssén.
[273] See Ch. 3 sec. 2 second paragraph of TL and sec. 17 of *förvaltningslagen (1986:223)* [Eng., the Administration Act]. See also *Taxeringsprocess – en läro- och handbok* (Eng., Tax assessment procedure – an educational- and handbook), p. 70, by Björn Forssén.
[274] See *Taxeringsprocess – en läro- och handbok* (Eng., Tax assessment procedure – an educational- and handbook), p. 70, by Björn Forssén.

If a review on the topic taxable person is made during the five-year-period of free review of the return, it has a great value for a tax case which maybe started late during that period to be able to consider first of all a properly done book-keeping for the actual accounting period and the actual year of assessment for matters of evidence for both VAT and income tax, although it would prove to be impossible in principle to uphold a common tax frame for the topic of the subject's tax status. E.g. the freelance-photographer's expensive camera equipment and other expenses noted in the books should be sufficient evidence of the person in question having the intention to support himself on making taxable transactions of images and that he's as well a taxable person as accounting is to be made in the tax schedule NAVE. E.g. can the absence of a properly done book-keeping show that the person in question shall not belong to the VAT system and that he shall be taxed for income of the activity in the tax schedule earned income, although it wouldn't be possible to retain the connection from ML to IL and the concept NAVE concerning who can be deemed having YRVE.

If the prohibition of deduction of input tax on expenses for the purpose of entertainment and similar shall remain in the ML, is it even from a material view on taxation an important reason to uphold a consensus on the question of evidence. The right of deduction has by the way such a central function for the VAT as an institute that it could be difficult to retain the limitation of deduction without a common tax frame between VAT and income tax about the question on who's a taxable person and can belong to the VAT system. Thus, the principle on reciprocity is stronger for VAT than it is for income tax and it shall therefore be examined especially here whether the prohibition of deduction in question's connection to the IL can work against the aim with internal neutrality for the VAT.

5.2.4 Aspects on control

5.2.4.1 Control possible regardless if registration or not

The ”Abbey National”-case can as mentioned be perceived as the ECJ pointing out that the basic VAT principles for inter alia right of deduction are evidence questions, and that they as such first of all shall be tried by the national courts themselves. The ”Breitsohl”-case confirms the importance of the evidence where the question on which degree of acquisitions is required for considering that the person making them shall belong to the VAT system and be entitled to deduct input tax is concerned. If the evidence indicates that private consumption is planned with the acquisitions, they shall be separated from the economy of the enterprise.

Since that function is central also by the Requirement to maintain accounting records, a properly done book-keeping has a great evidence value to questions concerning the person in question's tax status, i.e. where it's a question in the individual case of distinguishing the entrepreneur from the consumer. The two ECJ cases are examples of the EU law presupposing that the SKV can make control measures as well in connection with VAT registration as later when investigating the accounting. Since the measure of registration lacks legal consequence for the material questions on taxation, can the SKV perform control also of unregistered activities. Also books of account not properly done can be of evidence value indicating there's an obligation of VAT registration in the individual case.

5.2.4.2 Advantages for security of legal rights of the individual with consensus on the control issue between VAT and income tax about the connection to civil law

Thus, according to ECJ practice the SKV may require control material to obtain objective facts to go on when judging if the individual starting VE intends to make taxable transactions and if he's independent. In line with this the head office of the SKV states in its writ of the 28th of September 2004, *dnr 130 553888-04/111*, certain guidelines to judge a 'general notice for registration of taxes and contributions' (Sw., '*skatte- och avgiftsanmälan*') from a vendor to a Multi Level Marketing-enterprise on the topic of VAT registration or not. The SKV mention as examples of EU-cases where the concept economic activity (E-VE) has been judged "Rompelman", "Gabalfrisa and others", "Breitsohl", "INZO", "Enkler", "Lennartz" and C-396/98 (Grundstückgemeinschaft Schloßstraße). The SKV states that such a vendor shall be VAT registered if it after an investigation of the 'general notice for registration of taxes and contributions' can be established 'someone of the following circumstances' (Sw., "*någon av följande omständigheter*") concerning the person in question:

- 'if he can prove that he's made purchase of goods which cannot be only for household usage' (Sw., "*Om han kan styrka att han gjort inköp av varor som inte kan anses vara enbart för hushållsbruk*");
- 'if he can prove that he's made purchases for events which not only can be deemed as meetings with friends' (Sw., "*Om han kan styrka att han gjort inköp för sammankomster som inte enbart kan anses vara privata sammankomster med vänner*");

- 'if he can prove that he's acquired or rented premises especially for the VE' (Sw., "*Om han kan visa att han anskaffat eller förhyrt en särskild lokal för verksamheten*"); or
- 'if he's had costs for different measures of marketing which prove there's an intention to carry out a VE' (Sw., "*Om han haft kostnader för olika marknadsåtgärder som styrker att avsikt att driva verksamheten finns*").

In other cases, i.e. if the vendor cannot prove any such circumstance to exist, shall according to the SKV 'VAT registration not apply until further notice' (Sw., "*mervärdesskatteregistrering tills vidare inte ske*").

The SKV's judgement on handling a 'general notice for registration of taxes and contributions' may be deemed balanced and rimes also with the SAC's view on the independence by those arranging 'home-parties' (Sw., "*försäljningsfester*") in private homes on behalf of for instance cosmetics enterprises – see the so called "Tupperware"-case, *RÅ 1987 ref 163*. However, it would be desirable that the head office of the SKV would make guide-lines also for other sectors. Thereby would it due to the value of common evidence for questions on the tax assessment procedure and tax case procedure be an advantage with statements co-ordinated with the BFN, which as mentioned is responsible for the evolution of the concept GAAP and which thereby must respect the EU law. Furthermore it would in both these respects have a special value for the security of legal rights of the individual if the SKV's writs instead had the form of 'general advice' (Sw., "*allmänna råd*"). They'd thereby be binding for the officials at the SKV, if they cannot prove that the head office of the SKV with them is expressing something in conflict with the ML.[275] A co-ordinated handling in the 'tax council' (Sw., "*skattenämnden*") of questions concerning VAT and income tax would benefit from such an order.

Robert Påhlsson refer to an important viewpoint from Gustaf Petrén about the SAC at its judgements being influenced by what comes from the RSV (nowadays the head office of the SKV), since the SAC knows that the

[275] See sed 2 first paragraph item 2 of 'the regulation with instructions for the SKV' [Sw., "*förordning (2003:1106) med instruktion för Skatteverket*"], where it's stated that the SKV shall by general advice and statements work for 'lawfulness, consistency and uniformity' (Sw., "lagenlighet, följdriktighet och enhetlighet") at the application of laws concerning inter alia taxes. The regulation replaced on the 1st of January 2004 'the regulation with instructions for the tax authorities' [Sw., "*förordningen (1990:1293) med instruktion för skatteförvaltningen*"], where Ch. 2 sec. 2 first paragraph item 2 placed the same task upon the RSV. See also *Riksskatteverkets rekommendationer* (Eng., The RSV's recommendations), p. 118, by Robert Påhlsson.

RSV's recommendations to a certain solution influence 'hundreds of tax councils' [Sw., "*hundratals taxeringsnämnder*" (nowadays: *skattenämnder*)]. Unless the SAC is quite sure of wanting another solution and it's weighing for or against fifty-fifty, the practice will be accepted which the RSV establish by its 'directions and general advice' (Sw., "*föreskrifter och allmänna råd*").[276] Robert Påhlsson also points out in the context that the importance of a recommendation (nowadays: general advice) from the RSV changes (increase) when applied by the SACF. From 'just' (Sw., "*endast*") being the RSV's statements, the source will thereby form part of the precedent court's motives.[277]

The importance of a co-ordination between the head office of the SKV and the BFN where making general advice is concerned is also confirmed by Jan Kellgren's emphasizing of the accounting law – although it thus doesn't always gives the answer – being necessary concerning the question on allocation to a particular period to make it at all possible to do the tax assessment. Thus, Jan Kellgren also emphasizes that the administrative courts thereby, despite that they in principle shall make an independent trial of questions on GAAP, often asks the BFN. Jan Kellgren has also pointed out that the fact that tax law questions often are decided within the frame of administering lots of errands – which he calls 'the tax assessment work' (Sw., "*taxeringsarbetet*") but of course may as well reflect on the SKV investigating tax returns during the fiscal year – also motivate a discussion in particular of appropriate methods of law interpretation.[278] Thereby it's been as mentioned established that 'the aim based law interpretation' (Sw., '*målstyrda lagtolkning*') which Jan Kellgren propose as a teleological method in "*Mål och metoder vid tolkning av skattelag*" ('Aims and methods at interpretation of tax law') could be very well appropriate in the field of VAT with its expressed competition neutrality-principle. Here may be added that the co-ordination of building norms for accounting questions in the field of corporate taxes between VAT and income tax which is mentioned here will of course simplify the fulfillment of the so called 'official principle' (Sw., '*officialprincipen*') by the SKV and the

[276] See *Riksskatteverkets rekommendationer* (Eng., The RSV's recommendations), pp. 118 and 119, by Robert Påhlsson.
[277] See *Riksskatteverkets rekommendationer* (Eng., The RSV's recommendations), p. 119, by Robert Påhlsson. See also *Legalitetsprincipen vid inkomstbeskattningen* (Eng., The principle of legality at the income taxation), p. 159, by Anders Hultqvist.
[278] See *Svensk Juristtidning* 2002 p. 530, the article *Något om normativa resonemang i rättsdogmatisk forskning* (Eng., Something about normative reasoning in legal dogma research), pp. 514-530, by Jan Kellgren.

administrative courts, i.e. that as well accounting questions as material questions will be duly investigated as far as the actual errand demands.

That the RSV and the successor the SKV's head office during the last decade have gone from issuing general advice (previously: recommendations) to issuing writs in the field of VAT is thus not to any advantage for the evolution of the law.[279] In the preparatory work to the BFL it's stated that the BFN's recommendations and statements aren't formally binding, rather having the status of general advice, but that they thereby can have an indirect legal influence where a court or administrative authority in the actual case shall judge what GAAP is. That means in practice that the BFN's general advices often are decisive for that question.[280] The need of consensus in evidence issues between VAT and income tax which is emphasized here should, if it also from the entrepreneurs, the SKV and the administrative courts side can be perceived having a value in itself with such an order, lead to general advice once again being issued by the head office of the SKV at least in accounting questions concerning the corporate taxation and then in co-operation with the BFN.

A directly inappropriate evolution in the present context would be the head office of the SKV regarding that there's turned up at least one case where the Government, for interpretation gaps, presupposes that a certain rule on value added taxation of so called electronically services, which was introduced on the 1st of July 2003 in connection with thorough changes of the rules on value added taxation of such services, will be taken up by the RSV in its manual on VAT. The SKV's manual may as doctrine – like what's the case with writs – be deemed a more free form of a 'plea made by one party' (Sw., "*partsinlaga*"), if a procedural viewpoint would be given the tax law.[281]

The "BLP Group"-case can also be taken as support for the here suggested co-ordinated view on the VAT and the income tax for matters on control and evidence.

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[279] The RSV, and the successor the SKV's head office, have since the recommendation on the scope of the exemption from taxation in the fields care and similar was issued in 1996, *RSV S 1996:7*, only issued writs in the field of VAT. Instead have repeatedly older instructions and recommendations been revoked. See e.g. *RSV 2001:18*.By *SKV A 2005:4* were inter alia precisely *RSV S 1996:7* revoked.

[280] See *Prop. 1998/99:130* Part 1 p. 178 (with reference to *Prop. 1975:104* p. 205). See also *Prop. 1995/96:10* Part 2 pp. 11 and 181.

[281] See *Prop. 2002/03:77* p. 35 and *SFS 2003:220-222*.

The ECJ meant that BLP Group wasn't entitled to deduct input tax on banks', lawyers' and book-keepers' services in connection with the company selling 95 per cent of the shares in a German daughter-company, but not that the existence of the VAT-free sale of shares in itself disqualified right of deduction for acquired services. The ECJ only established that the acquisitions in question weren't objectively referable to a taxable transaction. Therefore the court couldn't regard the BLP Group's argument on the right of deduction not being limited just because the VAT-free sale of shares was "incidental". That would according to the ECJ create such vast demands on control for the tax authorities concerning the entrepreneurs' intentions that the idea of taxation of deductions would be counteracted.[282] The BLP Group had according to its own statement the perception that inter alia the book-keeping services "were used" also for the VAT-free sale of shares,[283] but couldn't present any investigation on to what degree acquired services were used for taxable transactions. Had the company been able to present an investigation making it probable that e.g. deductions for the book-keeping services were taxed by the costs for them being included in the amount for calculating output tax on the company's taxable transactions, would thus the court have had the possibility to approve right of deduction. In pursuance of the "Breitsohl"-case would thus the usage planned by the BLP Group of the acquired services in principle have determined the scope of the right of deduction, if only the evidence could have been presented that the company by the acquisitions intended to make taxable transactions.

Thus, it would with respect of the security of legal rights of the individual be an advantage to be able to foresee the need of evidence to prove the right of deduction for a project, where the burden of proof, in pursuance of the "BLP Group"-case, can be placed on the individual in a higher or lesser degree depending on the control capacity by the SKV. Since a co-ordinated view on issues on GAAP is possible between VAT and income tax with respect of the civil law accounting principles also regarding the EU-law, should therefore general advice be issued in co-operation between the head office of the SKV and the BFN rather than the ML's accounting rules being disconnected from the civil law concept GAAP as suggested by the investigation *SOU 2002:74*.

5.2.4.3 Registration control decreases the number of unnecessary tax cases

[282] See items 16, 17 and 24 in the "BLP Group"-case.
[283] See item 16 in the "BLP Group"-case.

'The suggestion of a more efficient tax authority' (Sw., "*Förslaget till en effektivare skatteförvaltning*") – as it was named in the press release by the Treasury – namely 'the new National Tax Board' [Sw., *'Det nya Riksskatteverket' (Ds 2002:15)*], has been introduced a long with the introduction of the SKV on the 1st of January 2004.

The proposal spoke about in a higher degree respecting the interests of the citizens and the entrepreneurs. However, there was nothing in that text about improving the activity with the SKV's head office (formerly the RSV) issuing general advice for the benefit of higher knowledge by the courts as well as by the public. Since knowledge in VAT in a true sense demands practical experience from working with the idea VAT, the principle about the court knowing the law (*jura novit curia*) often falls flat to the ground in VAT-cases. Specialized courts would be desirable in the field. That perception is obviously shared by the RSV, which concur with what the investigation *SOU 2002:47* (*Våra skatter?* – 'Our taxes?') argues for the need from a perspective of security with individual rights of specialization by the administrative courts.[284]

However, where the control issues are concerned there's nothing to be found about registration control in the preparatory work to the introduction in 2004 of the nation-wide covering SKV, which by *SFS 2003:642* replaced the National Tax Board and the 10 regional tax authorities.[285] Certain well directed criticism was directed to the lack of competence on page 39 of the Swedish National Audit Office's (Sw., '*Riksrevisionsverkets - nowadays Riksrevisionen*') audit report of the 10th of June 2003, *dnr 23 2000-1504*, but it only was about the local tax offices' knowledge in foreign questions and that the work with the proposal *Ds 2002:15* could be expected to increase that competence. However, the Swedish National Audit Office did neither take up anything on the actual registration control, i.e. on the control of who are let in into the VAT system. That's at least an equally as important control question as to control how entrepreneurs after registration e.g. use the VAT number in connection with trade with other EU Member States, etc.

On page 266 of the proposal (*Ds 2002:15*) it's spoken of 'the resources not always being possible to use where best needed' (Sw., "*resurserna inte alltid kan utnyttjas där de behövs bäst*"), and that a removal of 'the

[284] See RSV's writ of the 18th of June 2003, *dnr 10324-02/150*.
[285] See *Ds 2002:15* (*Det nya Riksskatteverket*) and *Prop. 2002/03:99* (*Det nya Skatteverket*).

boundaries between authorities' (Sw., "*myndighetsgränserna*") would give 'presuppositions to use the resources better' (Sw., "*förutsättningar för att utnyttja resurserna bättre*"). In *Prop. 2002/03:99* it's stated on page 228 that the introduction of one single authority, SKV, is supposed to eliminate the obstacles for where e.g. a tax audit is performed.

The experienced within the profession of tax law would of course want to add that it doesn't matter if you educate super auditors who can move freely between the counties, if it within the local tax office isn't made any efficient control of who is let in into the VAT system. A newly employed official has the capacity to read a 'general notice for registration of taxes and contributions' (Sw., '*skatte- och avgiftsanmälan*') and can by appropriate means of transportation go to a therein noted address, and control whether the car dealing business, the art gallery or the tobacco shop, the boat under construction with which hiring out of boats is supposed to be carried out etc at all really exists.

On page 229 in *Prop. 2002/03:99* it's stated that 'the number of employees by the new authority would be approximately 9,400 yearly employees (Sw., "*[a]ntalet anställda vid den nya myndigheten beräknas vid inrättandet komma att uppgå till ca 9400 årsarbetskrafter*"), so there are resources enough to make at least 9,400 so called tax visits (Sw., '*skattebesök*') according to Ch. 14 sec. 6 of SBL during one year in connection with the handling of 'general notices for registration of taxes and contributions', if all yearly employees are used for one such visit each, which would pay off many times, even if thereby only a few cases of abusive practice or fraud on the VAT system would be discovered. To send out auditors when several accounting periods have passed will often in such cases be a matter of stopping a flood, when drainage of VAT money from the tax account could have been stopped from even becoming a rivulet.

To the ordinary entrepreneurs would an extended registration control also mean that evidence questions aren't made to unnecessary matters of the law, just because the official handling the tax return too quickly use a noun (Sw., *substantiv*) instead of a verb (Sw., *verb*) to lable the VE in question, and thereby disregard or miss what the activity is about. I.e., instead of analyzing reality and what sort of activity he who's filed a 'general notice for registration of taxes and contributions' or accounted for VAT in his income tax return carry (note: verb) out, the official can be caught by some word in the notice or in an answer from the individual after questions made to him by the SKV thereafter not based on the context. 'The use of the word rent is construed by the SKV as indicating letting of business premises'

(Sw., ”*Benämningen hyra uppfattar skattemyndigheten som lokalupplåtelse*”) can it for instance be read in a consideration on taxation measures caused by such an answer, where the individual many times doesn’t even realize the importance of getting the official to go out and look for himself what kind of VE the person in question really is carrying out. Maybe would then the necessary verbs in the line of thinking be a sufficient filling out, for – without making a tax case of it – changing ’letting of business premises’ (Sw., ”*lokalupplåtelse*”) to the alternative noun ’leasing of business’ (Sw., “*rörelsearrende*”). That would change the picture from the individual assumed to supply a service exempted from taxation, with a possibility under certain conditions to apply for a voluntary entering to the VAT system, to him being considered supplying a service taxable according to the mandatory VAT rules and belonging to the VAT system – provided of course that he has YRVE. In connection with the continuous investigation of tax returns can a copy of a contract have been obtained that wrongly gives the impression of ’letting of business premises’, just because he who’s making the supply in question and who is now subject to an investigation has used a standard form bought in a bookstore and labeled Lease contract (Sw., *Hyreskontrakt*). The SKV may have refused the person in question VAT deduction with reference to a special application for voluntary tax liability not being received by the SKV. It may have continued with a tax case going on for long, before it’s clarified that it’s really a question of ’leasing of business’ at hand and that the person in question has a right of deduction according to the mandatory rules already in connection with his first investment expenses and without any request in particular of a decision on registration – if that’ll ever be clarified at all.

The described attitude should of course not be representative for the SKV, but sadly enough it’s not altogether unusual. In his report of *Momshandboken Enligt 1998 års regler* (Eng., The VAT handbook. According to the rules of 1998), by Björn Forssén, in *Svensk skattetidning* (Eng., Swedish tax journal) 1998 (pp. 479-485), Leif Krafft of the RSV suggest on page 481 there’s a deficit of VAT specialists within the tax authorities leading to a tendency of a more formal than material focus when handling VAT issues: Thereby Leif Krafft actually exemplifies with one in the reviewed book related case from the practice on rules of invoice content in Ch. 11 of ML leading to refusal of VAT deduction, just because the invoice received to ”*Kalles Livs AB*” (‘Chuck’s groceries Ltd’) wrongly states ”*Kalles Livs*” (‘Chuck’s groceries’) as receiver.

It's the actual circumstances which shall form the base for taxation measures, and today many tax cases exist only because an early 'steering' (Sw., '*uppstyrning*') never took place when the person in question so to speak entered the VAT system. The importance of the formal rules for the right to deduct input tax can as mentioned be discussed taken by themselves, but it may be emphasized here that the actual control work by the SKV isn't governed by formalism alone.

Important information from the authority about the rules might never have been given to the individual because relevant information never was obtained from him based on the 'general notice for registration of taxes and contributions'. If reality is subject to scrutiny, and in accordance with e.g. the "Rompelman"-case it's as mentioned nothing preventing the control activity, is often avoided that the authority and the individual speaks over each others heads in the exchange of writing. That leads to unnecessary tax cases being avoided. Before the nouns are established as judicial facts with the consequence of right of deduction or of tax liability, the verbs must, i.e. what the person in question actually does or intend to do, be analyzed. Then it's about obtaining information from reality, i.e. proof which indicate one or the other judicial fact. This is done in the field of VAT with advantage by using the above mentioned tax visit according to Ch. 14 sec. 6 of SBL.

In an article by Staffan Thulin in *Från Riksdag & Departement* ('From Parliament and Department') No. 28 2001 (p. 21) it's stated that 'In Skåne (county in the South of Sweden) VAT fraud is widely spread within the sector of food-stuffs concerning the trade with other EU Member States and concerning private import of passenger cars' (Sw., "*[i] Skåne finns ett utbrett momsfusk inom livsmedelshandeln med andra EU-länder och vid privatinförsel av bilar*") and in an article by Per-Anders Sjögren in *Från Riksdag & Departement* No. 4 2000 (p. 10) it's stated that Sweden according to a report from the EU-commission has the worst VAT control: the EU Member States don't do enough to stop VAT fraud and 'Sweden is the country with the smallest part of officials performing VAT control' (Sw., "*Sverige är det land som har den minsta andelen tjänstemän som utför momskontroller*"). It should at least be worth while that the SKV tried to prioritize registration control more than thus far, to keep the money drainage from the state a rivulet and focus the auditing resources on a better selection of VAT registered entrepreneurs which have belonged to the VAT system for a while. In the *RSV Rapport* (Eng., the RSV's report) 2000:8, the partly report 'Control of the roundabout-trade within the field of VAT' (Sw., "*Kontroll av karusellhandel inom momsområdet*"), it's also noticed that most of the other EU Member States lately have put more effort to the

registration control, which also is suggest for Sweden in the report.[286] Space would thereby be created for the SKV to further develop the information efforts to the entrepreneurs in the field of VAT. The number of errands leading to tax cases should decrease and those landing on the desk of the court should with an extended registration control also become better prepared. Both these aspects should appeal to the administrative courts. Gunnar Rabe from *Svenskt Näringsliv* (Eng., Swedish Trade and Industry) has brought ut the EU perspective on stopping VAT fraud, but without even mentioning registration control in the context.[287]

5.2.4.4 The importance of proposals to abolish the auditing duty for small businesses, etc

An analysis of the procedural value of having a properly done book-keeping is called for, before the auditing duty for small businesses is abolished, just because it's perceived as a burden nor not internationally motivated. From different directions such an abolishment is suggested, but the common thing for those making that proposal is that they haven't made the analysis mentioned.[288]

If the value of a properly done and audited book-keeping isn't analyzed, nobody knows what corresponding value concerning the security of legal rights of the individual to replace it with would the auditing duty for small businesses be abolished. The risk with such a measure made uncritical is the evolution of some kind of GAAP for taxation beside the BFL's concept. Who will then know to draw the lines for such norms to be in effect only for small businesses? The evolution the last decades has been that the companies' auditors more and more have come to audit also taxes, and the

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[286] See *RSV Rapport 2000:8* pp. 35 and 36.

[287] See *Skattenytt* (Eng., the Tax news) 2007 pp. 65-71, the article *Momssystemet under attack* (Eng., The VAT system under attack), by Gunnar Rabe.

[288] See *Ny Juridik* (Eng., New Law) 2/2006 pp. 19-25, the article *Revisionsplikten för små företag – börda eller komplement till brist på småföretagarpolitik?* (Eng., Auditing duty for small enterprises – burden or complement for lack of politics for small enterprises?) – by Björn Forssén. The articles with the suggestion of abolishing the auditing duty commented there are: an editorial in DN (i.e. *Dagens Nyheter* – the Daily News – the leading morning paper in Sweden) on the 4th of October 2005, by Pernilla Ström; *Konsulten* 6/2005 p. 12, the article *Revisionsplikten har överlevt sig själv* (Eng., The auditing duty has survived itself), by Per Ölund; and *Skattenytt* (Eng., the Tax news) 2005 pp. 620-625, the article *Slopad revisionsplikt i små aktiebolag* (Eng., Abolished auditing duty in small companies), by Kerstin Nyquist. In all these three articles references are made to a report from the professors Per Thorell and Claes Norberg: *Rapporten Revisionsplikten i små aktiebolag* ('The Report the Auditing duty in small companies'), of March 2005.

connected area should thus be seen as a guarantee for the security of legal rights of the individual with respect of rights and liabilities for the individual being foreseeable by the evolution of norms.

If the proposal of the investigation *SOU 2002:74* on abolishing the connection to the civil law concept GAAP in the ML is combined with the auditing duty for small businesses being abolished, the incentives to maintain a properly done book-keeping decrease. The morass will be even greater if such proposals as introducing 'taxation on a standardized basis' (Sw., '*schablonbeskattning*') like in Spain or Italy for certain sectors such as hairdressers (Sw., '*frisörer*') and sweetshops (Sw., '*smågodisbutiker*') will be realized.

That persons carrying on small businesses with normally an annual 'net sales' (Sw., '*nettoomsättning*') not exceeding twenty 'basic amount' (Sw., '*prisbasbelopp*' – SEK 794,000 for 2006) may continue to use a cash basis-method (Sw., '*kontantmetod*'), also called 'binder-method' (Sw., '*pärmmetod*'),[289] is also an example of problems with deviations from general rules. They are thereby allowed only to do themselves the disservice it means not getting the overview of the economy in the VE which is given by a continuous and properly done book-keeping. The amount limit in question for applying the cash-basis-method was by the way raised on the 1st of January 2007 to SEK 3,000,000, by *SFS 2006:874*. He who has the right to use the cash basis-method may, if he asks for it in the 'general notice for registration of taxes and contributions', account the VAT according to 'the annual accounts-method' (Sw., '*bokslutsmetoden*'), which is a modified cash basis-method where the VAT on the outstanding 'trade debtors' (Sw., '*kundfordringar*') and 'trade creditors' (Sw., '*leverantörsskulder*') is accounted for only in the annual accounts and otherwise when payments are received or made. According to the so called 'invoicing-method' (Sw., '*faktureringsmetoden*'), which is the main rule, the accounting of VAT connects to the book-keeping and the concept GAAP, where VAT is accounted for along with the continuous notifications in the books of account, which thus give a better overview and for that reason should apply without exceptions.[290]

The cash basis-method is by the way mentioned in connection with investigations on introduction of precisely the so called 'taxation on a standardized basis'. Thereby it's emphasized that such a taxation based on

[289] See *Förenklingsutredningens betänkande Kontantmetod för småföretagare* (*SOU 1999:28*).
[290] See also *SOU 2002:74* Part 1 p. 515.

the turnover must not 'come into conflict with the VAT directives of the EU' (Sw., "*komma i konflikt med EG:s momsdirektiv*").[291] In *Rapport* (Eng., report) *2002:3*, *Schablonbeskattning? – en principskiss*, ('the report Standardized taxation? – an outline of principles') which shall be read in the light of the RSV's *Rapport* (Eng., report) *2000:12*, the RSV means – without taking a stand for or against a standardized taxation – that would it be introduced it shall be based on a VE's average capacity of making money and be limited to apply for certain kinds of activities and corporate forms. To a beginning could it according to section 4.5 of the RSV's *Rapport 2002:3* be a system of standardized taxation for e.g. hairdressers, small restaurants (pizzerias) and sweetshops and then for the corporate forms one-man businesses (Sw., '*enskilda firmor*') and partnerships (Sw., 'handelsbolag'). In the report is thus mentioned that systems for standardized taxation already exist in Italy and Spain and they are described therein, but very much in summary. In the RSV's *Rapport 2002:3* the RSV repeat that a system of standardized taxation mustn't come into conflict with the VAT rules: in section 4.7 of the report the RSB states that the EU rules taken by themselves allow 'standardized VAT but how big differences that can be accepted between standardized VAT and VAT calculated on actual turnover isn't clear and must be given a closer examination' (Sw., "*schabloniserad moms men hur stora fel som kan accepteras mellan schablonmoms och moms beräknad efter faktisk omsättning är osäkert och måste undersökas närmare*"). Thus, it's hard to overview problems of application taken by themselves with standardized taxation beside general rules. The standard rules which can be taken into consideration should therefore be limited to such simplifications for decisions on and handling of VAT which can apply for small undertakings and farmers according to Articles 24 and 25 of the Sixth Directive. They don't mean any exemption from liability to charge and account for VAT to the state, but only that the accounting can be based on either sales or purchases according to the book-keeping.[292] The problem is that one simplification piled on the other decrease the incentive to maintain a properly done book-keeping.

In connection with the writing of this book and *Momsen och fakturan, m.m.* (Eng., The VAT and the invoice, etc) the author of this book interviewed on the phone on the 14th of January 2004 Madeleine Tunudd at the Treasury, who wrote the bill on the implementation of the Invoicing Directive in the ML (*Prop. 2003/04:26*). The author of this book had also written the reply on the investigation preceding that bill from the Swedish Bar Association

[291] See section 2.2.7 in *Riksskatteverkets Rapport 2000:12*, *Schablonbeskattning?*
[292] See also *SOU 2002:74* Part 1 p. 405.

(Sw., *Sveriges advokatsamfund*) to the Treasury and made a warning for an evolution of a GAAP for taxation and legally defined evidence.[293] The rather elaborate reply wasn't at all commented in the bill, but led only to a note of the warning mentioned with legally defined evidence 'in the field of VAT about the emergence of tax liability and right of deduction respectively' (Sw., "*i mervärdesskattesammanhang vad gäller uppkomsten av skattskyldighet respektive avdragsrätt*").[294] In the interview the representative of the Treasury disregarded the warning of decreased incentives of maintaining a properly done book-keeping where a standardized taxation would be introduced with such a reform being possible to combine with the suggestion that statements could be made addressing the sectors comprised by it reminding them of thereby still being obliged to maintain such a book-keeping. That might have a certain effect, but hardly if on the top of the suggestions from SOU 2002:74 and the proposal of introducing standardized taxation would be added that the sectors in question thereto would no longer be comprised of the annual auditing duty.

With an abolished auditing duty for small businesses would the possibilities of a common building of norms for VAT and income tax where accounting issues are concerned decrease and work in a burdening direction for the SKV's and the administrative courts' obligation to investigate the errands and cause a decreased security for legal rights of the individual in evidence questions. That also makes it harder for the SKV to establish as a kind of common administrative law-principles certain practical adjustmens to the conditions in reality. Concerning questions on when the measures of making notes in the books of account shall be made the SKV express in its manual on the connection between accounting and taxation, – Sw., *Handledning för sambandet mellan redovisning och beskattning* – that the possibility to, as a case of special reasons, delay the fulfillment of entering such a note into the books of account that 'to make a rational usage of the services of the book-keeping agencies possible' (Sw., "*för att möjliggöra ett rationellt utnyttjande av redovisningsbyråernas tjänster*") shall be deemed in accordance with GAAP also for the entrepreneurs doing the book-keeping themselves.[295] If small businesses weren't comprised by the

[293] See the Swedish Bar Association's reply to the Treasury of the 20th of August 2003, "*Nya faktureringsregler när det gäller mervärdesskatt*" (*Fi2003/3465*), *dnr R-2003/0656*.
[294] See *Prop. 2003/04:26* p. 68.
[295] See the SKV's manual *Handledning för sambandet mellan redovisning och beskattning* (Eng., Manual for the connection between accounting and taxation), p. 334, edition of 2004.

auditing duty anymore, it would of course make it harder for the SKV to work for that kind of important practical solutions.

Instead of abolishing the auditing duty for small businesses, should thus the value of maintaining a properly done book-keeping be given a thorough examination, where the procedural value will be judged. Thereby shall not just the evidence value before the administrative courts be evaluated, but also the connections to questions on 'accounting crimes' (Sw., '*bokföringsbrott*'), crimes of 'making control of taxes harder to perform' (Sw., '*försvårande av skattekontroll*') and 'tax fraud' (Sw., '*skattebrott*') and thus the value for the security of legal rights of the individual in the procedures at the general courts.

6. ANALYSIS OF YRVE IN THE ML IN RELATION TO NAVE IN CH. 13 OF IL ON THE TOPIC OF EU LAW CONFORMITY

6.1 STRUCTURING AND LIMITING THE CONTINUING ANALYSIS

6.1.1 Tax liability for supplies 'beside' the main rule Ch. 1 sec. 1 first paragraph item 1 of ML

6.1.1.1 The three cases of special rules on tax liability according to the ML: Ch. 6, Ch. 9 and Ch. 9c

The analysis here is first of all about the necessary prerequisite fro tax liability in Ch. 1 sec. 1 first paragraph item 1 of ML expressed YRVE (Sw., "*yrkesmässig verksamhet*" – abbreviated YRVE). Taxable transactions within the country in such a VE means tax liability, and the trial here is whether that prerequisite can connect to the concept NAVE in Ch. 13 of IL, by the reference there to Ch. 4 sec. 1 item 1 of ML. However is it also of interest to mention that there are certain rules on tax liability in special cases, where it formally isn't about tax liability 'for such a transaction mentioned in' (Sw., "*för sådan omsättning som anges i*") Ch. 1 sec. 1 first paragraph item 1 of ML.[296] They are 'special rules on who's tax liable in certain cases' (Sw., "*[s]ärskilda bestämmelser om vem som i vissa fall är skattskyldig*" according to 'Ch. 6, Ch. 9 and Ch. 9c' (Sw., "*6 kap., 9 kap. och 9c kap*" of ML.[297] These three cases are thus formally about tax liability 'beside the' (Sw., "*vid sidan av*") main rule Ch. 1 sec. 1 first paragraph item 1 of ML. The question is what it means to the trial of the concept YRVE.

Concerning Ch. 9c of ML it's a case of the treatment of goods in certain warehousing arrangements for VAT purposes. Ch. 9c of ML concern the tax object in connection with the trade of goods with other countries, and exemption from taxation of goods and services linked to the international goods traffic, and exemption from taxation for supply of goods or services in connection with the article of goods in question treatment under different arrangements and schemes for storage, customs warehousing, free zone and

[296] See Ch. 1 sec. 2 first paragraph item 1 of ML.
[297] See Ch. 1 sec. 2 § last paragraph of ML.

tax warehouses, etc. Here it's sufficient to establish that the rules of Ch. 9c is a part of the so called "transitional arrangements for the taxation of trade between Member States" (Sw., '*övergångsordningen för varuhandeln mellan EU-länderna*') and as such comprised by external neutrality for the VAT.[298] Thus, the rules of Ch. 9c of ML don't concern the determination of the tax subject and questions about the internal neutrality. Although he who makes transactions mentioned in Ch. 9c of ML must do so in an YRVE regardless of where in the world he's established, to be able to belong to the Swedish VAT system. Therefore is Ch. 9c of ML in itself not of any particular interest here.

The case Ch. 9 of ML concerns as mentioned voluntary tax liability for letting of immovable property such as business premises etc under certain conditions. It's not of interest here, since voluntary tax liability according to that chapter is based on a facultative rule, Article 13(C.a) of the Sixth Directive beside the Sixth Directive's and the ML's rules on mandatory tax liability and the voluntary tax liability furthermore thus isn't limited to landlords with YRVE. Here shall only be mentioned something about that connecting rules in the ML to Ch. 9 of ML have been adjusted with respect of the competition neutrality where letting of business premises to foreign entrepreneurs is concerned, as support to that also voluntary accession to the VAT system is made with respect of basic VAT principles for the applicants as well as the SKV.

The adjustment made with respect of the competition neutrality-principle concerning voluntary tax liability for letting of business premises etc along with the reform on the rules on Capital goods in 2001 was the clarification that the lessee can be a foreign entrepreneur or a foreign embassy, provided that such an entrepreneur or embassy fulfill the conditions for reimbursement of input tax in Ch. 10 sec. 1 or Ch. 10 sec. 6 of ML.[299]

A question which someone else or the author of this book may return to in another context is the new and alternative voluntary tax liability which was introduced at the reform in 2001 for cases of so called build-up stages. The RSV considered in a writ of the 2nd of March 2001 (*dnr 2962-01/100*) that the new rules according to Ch. 9 sec. 2 of ML wouldn't give the right to deduct input tax retroactively on acquired building services according to Ch. 9 sec. 8 second paragraph of ML, just because that section only refer to

[298] See Article 28(c.) of the Sixth Directive and Article 16 of the Sixth Directive, where the directive rules corresponding Ch. 9c of ML are to be found. The transitional arrangements in question (91/680/EC) are thus in Articles 28(a)-28(n).
[299] See Ch. 3 sec. 3 second paragraph of ML, its wording according to *SFS 2000:1358*.

the ordinary case of voluntary tax liability according to Ch. 9 sec. 1 of ML where the applicant already has lessees. The author of this book asked on account of a client the RSV on the 23rd of May 2001 if not the rules on retroactive deduction should apply by he who's used the new and alternative voluntary tax liability applying for a retrial with reference to the ordinary way of such liability being applicable when he's got lessees and income from the letting. The head office of the SKV answered on the 3rd of March 2005, but avoided thereby to answer precisely the retrial question.[300] However, here can, with reference to what's mentioned in this book about the basic VAT principles and different EU objectives, be noted as a not too farfetched conclusion that it may be deemed in conflict with the directive law's principle on internal neutrality and the ECJ's practice with cumulative effects, if it for VAT purposes would lead to different treatment materially of competitors that the landlords so to speak have used different entrances to the VAT system. The landlord would according to the RSV be referred to the rules on adjustment, to be able to exercise the right of deduction, and that would in neither one of the two ways be valid for time before a voluntary registration, just because the person in question didn't wait until the lessees moved in and applied then for registration according to Ch. 9 sec. 1 of ML, but before that used the new and alternative way of voluntary entrance to the VAT system already during a build-up stage according to Ch. 9 sec. 2 of ML. The rules on voluntary tax liability for letting of business premises etc are thus introduced in the interest of the VAT liable lessees,[301] and they are effected by the VAT as a cost in an arbitrary way, depending on whether their landlord has chosen 'the wrong door' (Sw. "*fel dörr*") into the VAT system. Furthermore, the "Uudenkaupungin kaupunki"-case speaks against more than for the RSV viewpoint concerning the alternative possibility to deduction by adjustment of deduction of input tax for acquired building services as so called Capital goods. The ECJ establishes there that adjustment of input tax for Capital goods isn't limited so that "adjustment" wouldn't be possible to the advantage of the tax liable, just because the Capital goods first are used in a VAT-free activity and thereafter within the adjustment period in activity causing liability to pay VAT.

[300] See the SKV's writ of the 3rd of March 2005, *dnr 130 344-04/1152*.

[301] Note otherwise in the context that the legislator already when the system with voluntary tax liability was introduced on the 1st of July 1979, and Sweden so to speak was long away from becoming an EC member, had the Sixth Directive taken into consideration (see *Prop. 1978/79:141* p. 69).

The rules on refund of VAT expenses to foreign entrepreneurs are by the way also based on directives on VAT from the EU.[302] They shall of course also be in compliance with the competition neutrality-principle. Thus, they may not work against the fundamental Sixth Directive. In that respect can it be of interest that the Government, with reference to inter alia the ECJ case C-302/93 (Debouche), initiated a change of the rules in ML on refund of VAT to foreign entrepreneurs, and which was made on the 1st of January 2003.[303] It was considered necessary to accomplish harmonization in those rules when the same supply has different tax character in Sweden and another EU Member State respectively. When the rules on refund of Vat expenses to foreign entrepreneurs were introduced in Sweden in 1991 by *SFS 1991:119* it was stated in the preparatory work to that legislation an opposite standpoint compared to the ECJ's point of view in the later "Debouche"-case. The Government considered at the time that 'it should … be of no importance whether the entrepreneur's VE cause tax liability in his own country' (Sw., "*[d]et bör ... inte ha någon betydelse om företagarens verksamhet medför skattskyldighet i hans hemland*"), where the judgement of the right of refund is concerned.[304] Instead the ECJ considered in the "Debouche"-case, which concerned lawyer services, that exemption from taxation for such services in Belgium lead to a Belgian lawyer not having a right of refund according to the eighth directive for VAT expenses in Holland, where such services were taxable. The ECJ's standpoint in principle may be deemed meaning that the exemption from taxation in one of the EU Member States affects the judgement of the supply in the other EU Member State in question where it was taxable. The Government referred in connection with the change in the ML in 2003 to the ECJ in item 18 in the "Debouche"-case emphasizing that "it is not the purpose of the Eighth Directive to undermine the scheme introduced by the Sixth Directive. According to the third recital in the preamble, the Eighth Directive is intended rather to eliminate discrepancies between the arrangements then in force in the Member States, which can give rise in some cases to deflection of trade and distortion of competition" [Sw., "*syftet med det åttonde direktivet (enligt tredje strecksatsen i preambeln) inte är att underminera ordningen enligt det sjätte direktivet. Åttonde direktivet syftar till att eliminera diskrepanser mellan länderna som kan ge*

[302] See the EC's eighth council directive of the 6th of December 1979 concerning refund of VAT to foreign entrepreneurs from another EU-country than Sweden (79/1072/EEC) and the EC's thirteenth council directive of the 17th of November 1986 concerning refund of VAT to entrepreneurs from third countries (86/560/EEC).
[303] See the new item 2 in Ch. 10 sec. 1 first paragraph of ML introduced by *SFS 2002:1004*.
[304] See *Prop. 1990/91:72* p. 6.

upphov till konkurrenssnedvridning"]. The ECJ established the principle that a "taxable person" (Sw., *skattskyldig person*) cannot in any case be entitled to refund of input tax, if he wouldn't be entitled to deduct input tax in the country where he's established.[305] In the same way the ECJ state that a right of deduction cannot exist according to the Sixth Directive in the country where the taxable person is established, just because transactions which otherwise as exempted from taxation aren't generating right of deduction would be made as intra-Community acquisitions to another EU Member State where the transactions are taxable. In items 36-40 in the ECJ case C-240/05 (Eurodental) the ECJ establish with reference to the POTB-principle in Article 2 of the First Directive and the principle of neutrality that it would be in conflict with the purpose of the Sixth Directive, since taxation of VAT deductions would become completely lost within the Community in such cases.

Concerning the case Ch. 6 of ML is it more complicated to judge if it has any importance for the determination of the tax subject deviating from the prerequisite YRVE. An analysis requests a separation of the different special cases of tax liability described in Ch. 6 of ML.

6.1.1.2 Something about special cases of tax liability according to Ch. 6 of ML

Knowingly has never any deeper analysis been made of the special cases of tax liability stipulated in Ch. 6 of ML. The investigation *SOU 2002:74* does neither make that. The investigation suggest as mentioned a disconnection of the main rules on accounting output and input tax in Ch. 13 sections 6 and 16 of ML from the civil law concept GAAP, whereas the investigation propose to retain the rules on accounting VAT on advance payments and payments on account.[306] The only alteration proposed concerning the rules on special tax liability is that they would be moved from Ch. 6 to a new chapter (1a) on taxable person (Sw., "*beskattningsbar person*") and that they in consequence with a changed terminology instead will be described applying to 'taxable person in certain cases' (Sw., "*Beskattningsbara personer i vissa fall*").[307] Here shall something be mentioned about the rules in Ch. 6 of ML, to show that there should be a material analysis, like the one made here, before the proposals of *SOU 2002:74*, which investigation as mentioned make a reservation for not having done

[305] See *Prop. 2002/03:5* p. 84, where the Government concerning that principle also refer to the ECJ case C-136/99 (Siena).
[306] See *SOU 2002:74 Del 1* p. 20.
[307] See *SOU 2002:74* Part 1 pp. 69-70 and *SOU 2002:74* Part 2 pp. 22-23.

precisely the material analysis, are realized concerning the accounting rules. Previously in this book it's been shown that a disconnection from the civil law concept GAAP can lead to negative effects for the building of norms and lead to a negative evolution of questions on trial of evidence. What can be added thereto with reference to the rules in Ch. 6 of ML is that they in certain cases are perceived as accounting rules, and that a separation of them into different categories is required to make an analysis of to what extent they are important for the question of YRVE for the determination of the tax subject.

Ch. 6 sec. 6 of ML isn't of any particular interest here, since the section is about public bodies (Sw., '*offentliga verksamheter*') and this book is focused on the question of separating for VAT purposes the enterprises (entrepreneurs) from the consumers. However, it has a comparative value for the analysis of the rules in Ch. 6 of ML. The section is necessary to determine that when the state as a subject makes transactions via one of its 'Government business units' (Sw., '*statliga affärsverk*'), the unit is liable to tax according to ML.

Ch. 6 sec. 1 of ML is also considered necessary to make value added taxation of transactions in VE:s carried out by partnerships (Sw., *handelsbolag*, including *kommanditbolag*) and so called European Economic Interest Groups (Sw., *europeisk ekonomisk intressegruppering*, EEIG) possible. These subjects are thereby deemed tax liable to VAT on a company level and not on the partner level. Whereas the IL lays, like the predecessors KL and SIL, the tax liability for such subjects on the owners.[308] The question is however whether a special regulation of the tax liability for the subjects in question became obsolete already by the ML, unlike the GML, as mentioned does not connect to the concept world of the income tax law other than where so is explicitly stipulated in a rule in the ML. The ML doesn't connect to the sections of the IL disqualifying partnerships and EEIG:s as tax subjects. Thus, there's nothing in the IL that would make these subjects not accepted as tax subjects for VAT purposes. Instead the ML connects as mentioned to Ch. 13 of IL and what's defined as NAVE for the determination of YRVE, regardless of corporate form.

The connection to the IL of interest here on the topic of corporate form is instead that the ML for the limitation of who can be deemed having YRVE in Ch. 4 sec. 8 of ML refer to IL concerning non-profit-making

[308] See Ch. 2 sec. 3 first and fourth paragraphs of IL and Ch. 5 kap. sec:s 1 and 2 of IL. See also *Taxeringsprocess – en läro- och handbok* (Eng., Tax assessment procedure – an educational- and handbook), p. 39, by Björn Forssén.

organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*). What's to be examined thereby is thus the difference that the limitation of belonging to the VAT system for non-profit-making organizations is made with reflection on the tax subject according to Article 13(A) of the Sixth Directive, where exemption from taxation for certain transactions made by such organizations are stipulated, whereas Ch. 4 sec. 8 of ML is aiming for the corporate form, i.e. the tax subject as such.

Thus, it can be questioned if not Ch. 6 sec. 1 of ML is obsolete, but with respect of the traditional explanation to why the section exist, can it of course remain as a clarification that the ML accepts partnerships and EEIG:s as tax subjects, regardless of these not being taxed themselves according to the IL. In 'the final considerations by the simplification investigation' (Sw. '*slutbetänkandet av Förenklingsutredningen*'), 'New partnership taxation' [Sw., '*Ny handelsbolagsbeskattning*' (SOU 2002:35)], it's suggested by the way that also the income taxation of partnerships (Sw., *handelsbolag* including *kommanditbolag*) shall be made on the company level. Until such an alteration is made in the IL should thus the special rule in Ch. 6 sec. 1 of ML remain for partnerships and EEIG:s.

Before the other rules in the Ch. 6 are mentioned shall briefly be mentioned the special intermediary rule (Sw., '*mellanmansregeln*') in Ch. 6 sec. 7 of ML.[309] It's about an intermediary trading goods or services in his own name and him receiving payment from the customer. Under these circumstances is the article of goods or the service in question deemed supplied by the intermediary as well as by his mandator. The rule in question has no direct equivalent in the Sixth Directive, but the closest comparable rules are 'Article 5(4c) about transfer for commission of goods and Article 6(4) about supplying services on behalf of another in one's own name' (Sw, "*artikel 5.4c om förmedling av vara mot provision och artikel 6.4 som avser förmedling av tjänst i eget namn*").[310]

Ch. 6 sec. 7 of ML is often debated and should be given an analysis of itself on the topic of EU law conformity, since the transaction question leads to difficult judgements. It's above all about whether the intermediary can be considered subject to the same limitation of the right of deduction which may apply to the mandator with a VAT free turnover, despite the intermediary service actually made by the intermediary and generating the

[309] See also Ch. 6 sec. 8 of ML, whereof it follows that Ch. 6 sec. 7 applies also to producers' enterprises formed by producers to sell their products at auctions.
[310] Se SOU 2002:74 Del 1 s. 653.

commission which he keeps after accounting to the mandator is taxable according to the ML.

However may here only be noted that thus far has in practice been deemed that the intermediary must have YRVE himself to be able to belong to the VAT system.[311] A recently employed can thus taken by himself make a taxable transaction, but can neither in this special case of tax liability be deemed tax liable, since he lacks an YRVE of his own. Ch. 6 sec. 7 of ML and the predecessor, item 3 first paragraph of the instructions to sec. 2 of GML, have their common origin in 'the common tax on goods' (Sw., '*allmänna varuskatten*') of 1960 and an EU law analysis would be desirable. It may be noted that the investigation *SOU 2002:74* isn't suggesting any material change of the rule, except for what thus follows from the investigation's proposal to replace inter alia the tax liability-concept in general with *beskattningsbar person* ('taxable person').[312]

What's important here is to establish that Ch. 6 sec. 7 of ML cannot be deemed causing a tax liability without the tax liable having YRVE. Thus, the state and other public bodies aren't comprised by the prerequisites of Ch. 4 sec. 1 of ML to be able to be deemed having YRVE.[313] However, that prerequisite comprises on the whole all other enterprises. Ch. 6 sec. 7 of ML is therefore of a comparative interest to other cases of tax liability in special cases according to Ch. 6 of ML. It's not a case of the rules in Ch. 6 of ML forming some new case of YRVE beside the concept included as a necessary prerequisite for tax liability in Ch. 1 sec. 1 first paragraph item 1 of ML. Instead there are certain cases of extension of the concept YRVE in Ch. 4 sections 2 and 3 of ML in relation to Ch. 4 sec. 1 of ML and which apply regardless of what person is concerned. The rules otherwise in Ch. 6 of ML which comprise enterprises are therefore to be perceived as accounting rules, where the question is whether a person can account for VAT for several persons' VE (Ch. 6 sec. 2 of ML) or whether a person shall make the final accounting for another person's VE with regard of VAT (Ch. 6 sections 3 and 4 of ML).

That partners in a unregistered partnership (Sw., *enkelt bolag*) or in a partner-owned shipping enterprise (Sw., *partrederi*) by virtue of Ch. 6 sec. 2 of ML appoint a 'one-man liable' for accounting the VAT amongst them can be compared to when entrepreneurs (Sw., *näringsidkare*) apply for

[311] See the SAC cases *RÅ 1987 ref 163*, *RÅ 1992 Ref 62*, *RÅ 1996 Not 192*, *RÅ 1997 Not 82* and *RÅ 2002 Ref 9*.
[312] See *SOU 2002:74* Part 1 p. 653 and *SOU 2002:74* Part 2 p. 23.
[313] See Ch. 4 sec:s 6 and 7 of ML.

group registration to VAT according to Ch. 6a of ML and appoint amongst them a head of the group as responsible of accounting the VAT for the group. What's common with Ch. 6 sec. 7 of ML is that there's no new kind of YRVE created by the rules, and Ch. 6 sec. 2 of ML which is expressly a special rule for the accounting of VAT.[314] When it comes to Ch. 6 sections 3 and 4 of ML it's a bit more complicated, since these two special rules concern the final accounting of transactions in another person's VE.

Here can also be mentioned that Ch. 6 sec. 3 of ML about the tax liability of the bankrupt's estate (Sw., *konkursboet*) has already been described by Jesper Öberg.[315] The author of this book has also mentioned that rule and Ch. 6 sec. 4 of ML on tax liability for the estate of a deceased person (Sw., *dödsbo*).[316] The bankruptcy question is however mentioned also in this book in connection with the ending question if a claim on input tax against the state can be enforced although the actual rule in the ML materially is describing something else than VAT. That question is a VAT specific one, but although of a pedagogical value to this book.

The bankrupt's estate and the estate of a deceased person are procedural figures which can be described as taking over via Ch. 6 sections 3 and 4 of ML the accounting of the bankrupt's and the deceased where VAT is concerned. If not tax liability was stipulated for the bankrupt's estate in Ch. 6 sec. 3 of ML, wouldn't it be tax liable for transactions after the bankruptcy decision. To determine the necessary prerequisite YRVE in Ch. 1 sec. 1 first paragraph item 1 of ML for tax liability Ch. 4 sec. 1 item 1 of ML refer as mentioned to IL, and there's no support for a bankrupt's estate becoming tax liable for income. The income tax liability has in practice been considered lying on the person in bankruptcy (Sw., *gäldenären*).[317] However, that situation wouldn't occur for the estate of a deceased person, since it's stipulated in the IL that the estate 'is tax liable for the deceased's and the estate's incomes' (Sw., "*är skattskyldigt för den dödes och dödsboets inkomster*").[318] Thus, the estate of a deceased person is fully

[314] See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 97, by Björn Forssén.
[315] See *Mervärdesbeskattning vid obestånd* (Eng., Value added taxation at bankruptcy), pp. 115etc, by Jesper Öberg.
[316] See *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), pp. 97, 98, 147-149 and 227, by Björn Forssén and *Skattenytt* (Eng., the Tax news) 1997 pp. 467-468, the article *Två frågor om moms* (Eng., Two questions on VAT), pp. 467-468, by Björn Forssén.
[317] See *Mervärdesskatt vid obestånd* (Eng., Value added taxation at bankruptcy), p. 194, by Jesper Öberg.
[318] See Ch. 4 sec. 1 first paragraph of IL.

accepted as a judicial person according to the IL, and such an estate accounts for income during the year of the death occurring as if the deceased was alive and thereafter calculation of tax applies as for a judicial person. However, the income tax liability is an obligation laid on the estate as judicial person from the year of the death.[319]

The problematic thing with the special rule on tax liability for estates' of deceased persons, Ch. 6 sec. 4 of ML, lies instead in it stipulating tax liability for supplies in the VE after the death occurring, 'if a tax liable has died' (Sw., "*[o]m en skattskyldig har avlidit*"). Thereby is a resemblance with the special rule on tax liability for a bankrupt's estate, Ch. 6 sec. 3 of ML, but in practice the difference is that an estate of a deceased person can stay undivided (Sw., *oskiftat*) for a long period of time, which can cause problems would there be alterations of the tax liability according to ML in the mean time in different areas. On the 1st of January 1997 copyrights became generally taxable according to ML. Earlier patents and similar were taxable but nowadays there's a general taxation in the field of intangible rights with different VAT rates for patents and similar and rights to visual arts or books etc respectively. This means that if e.g. a composer died before 1997 and nowadays taxable royalties for musical rights are received by the estate, which thus yet can be undivided, can it be questioned whether the estate becomes tax liable according to Ml, when the deceased wasn't 'tax liable' (Sw., "*skattskyldig*") due to the rights weren't taxable at the time according to the ML. In connection with the introduction of ML on the 1st of July 1994 the word transaction (Sw., *omsättning*) was entered into both the special rules on taxation for a bankrupt's estate and an estate of a deceased person, to avoid problems with who's tax liable for incomes after the bankruptcy decision or the death, the person in bankruptcy or the bankrupt's estate and the deceased or the estate of the deceased person respectively.[320] However, there was no attention given to the problem with undivided estates of deceased persons and changes of different transactions' VAT characters during the time after the death.[321]

The part described here of the presuppositions for tax liability according to ML can thus be a problem for estates' of deceased persons, but not the YRVE-issue which first of all is treated in this book. The judicial persons in

[319] See Ch. 4 sec. 1 first and second paragraphs of IL. See also *Taxeringsprocess – en läro- och handbok* (Eng., Tax assessment procedure – an educational- and handbook), p. 39, by Björn Forssén.
[320] See *Prop. 1993/94:99* p. 189.
[321] See *Skattenytt* (Eng., the Tax news) 1997 pp. 467-468, the article *Två frågor om moms* (Eng., Two questions on VAT), pp. 467-468, by Björn Forssén.

question aren't established to carry out YRVE, but the bankrupt's estate and the estate of a deceased person are for VAT purposes their functions for accounting VAT on continuing transaction 'in the VE' (Sw., "*i verksamheten*") after the bankruptcy decision and the death respectively. An estate of a deceased person could taken by itself begin a new VE since it has a stronger character of judicial person than the bankrupt's estate, which has that character more expressly for the sake of forming a procedural figure necessary to liquidate the VE. However, the common expressions in both the actual sections indicate that the function of both the special rules on tax liability shall be to regulate continuing transactions by the VE which was carried out by the person in bankruptcy and the deceased respectively.

When the rules in Ch. 6 of ML aren't or aren't deemed to be necessary for a certain subject not being able to avoid taxation or for a certain unit by a tax subject becoming subject to taxation (Ch. 6 sections 1 and 6 of ML), and they neither are about regulating the accounting of transactions in certain intermediary situations (Ch. 6 sec. 7 of ML), it's thus a question of regulating the accounting of VAT for persons who want to appoint a 'one-man liable' for accounting (Ch 6 sec. 2 of ML) or of a final accounting of transactions so that they won't be missed in the case of bankruptcy or death (Ch. 6 sections 3 and 4 of ML). Since the Sixth Directive doesn't contain any exemption on who shall be considered having the character of taxable person with respect of corporate form, it's probably not in conflict with the Sixth Directive to have the special rules in Ch. 6 of ML. Thus, the Sixth Directive doesn't contain any rules on accounting of VAT. Notwithstanding the question whether Ch. 6 sec. 1 of ML is obsolete and the question whether Ch. 6 sec. 7 of ML is conform with the closest corresponding intermediary rules in the Sixth Directive, the question will be raised for the other rules in Ch. 6 and then above all for sections 3 and 4 whether the special rules on tax liability according to ML themselves can cause Requirement to maintain accounting records. While establishing that the rules in Ch. 6 of ML don't present any problem in particular for the question on YRVE can thus something be mentioned about whether the actual cases of special accounting rules in the ML affect the civil law.

6.1.1.3 Can special rules on tax liability in Ch. 6 of ML cause Requirement to maintain accounting records?

Of interest by comparison is that the BFN in its statement *BFN U 90:2* on the occurrence of the Requirement to maintain accounting records began with a reservation for not having expressed itself concerning 'what's the

right accounting period according to ML' (Sw., "*vad som är rätt redovisningsperiod enligt ML*"). In the general advice from the BFN on the continuing book-keeping replacing that statement, *BFNAR 2001:2*, the BFN doesn't repeat that reservation. However, the BFN still of course cannot give statements about questions on advance payments and payments on account where Ch. 13 sec. 6 and Ch. 13 sec. 16 of ML contain special rules explicitly deviating from GAAP and instead stipulating accounting of VAT according to a 'cash principle' (Sw., '*kontantprincip*').[322] Otherwise Ch. 13 sections 6 and 16 of ML refer to GAAP as the main rule for accounting output and input tax, and that rules as long as the proposal by the investigation *SOU 2002:74* won't become realized meaning that the ML*s rules on accounting would be disconnected from the civil law concept GAAP which the BFN is responsible for developing.

Although the proposal from the investigation SOU 2002:74 on disconnecting the ML's main rules about accounting from the civil law concept GAAP would be carried out, it still remains, if the proposal isn't altered in other parts now concerned, the question which is relevant already today, namely whether the special rules on tax liability in Ch. 6 of ML cause Requirement to maintain accounting records. I.e., whether the liability of value added taxation itself cause Requirement to maintain accounting records. Above all this is of interest for the bankrupt's estate which thus has the character of judicial person in the first place to form a procedural figure which can liquidate the person in bankruptcy's assets and debts. Bankrupts' estates are exempted from Requirement to maintain accounting records according to BFL,[323] but for VAT purposes can it be questioned if not a bankrupt's estate should have books of account for transactions and – if transactions then occur – also for acquisitions after the bankruptcy decision regarding GAAP by reference to that concept from the main rules on accounting in Ch. 13 sections 6 and 16 of ML. However, there is thus no income tax motives to obligate a bankrupt's estate to have books of account. The question doesn't seem to have been raised previously of anyone.

E.g. the partnership as a comparison gets, and then like e.g. companies and economic associations (Sw., *ekonomiska föreningar*), a Requirement to maintain accounting records as judicial person directly when registered as such, i.e. based directly on the rules in the BFL on Requirement to maintain accounting records for judicial persons as a main rule.[324]

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[322] In such cases the ML takes over as *lex specialis* in relation to the BFL as *lex generalis*.
[323] See Ch. 2 sec. 5 item 2 of BFL.
[324] See Ch. 2 sec. 1 of BFL.

The same seem to rule also for the estate of a deceased person, since it isn't listed amongst judicial persons exempted from the main rule in BFL on judicial persons being required to maintain accounting records already in their capacities of precisely judicial persons.[325] Apart from physical persons who thus are in principle Required to maintain accounting records provided that they actually carry out a VE of economic nature and of a professional character. If estates of deceased persons wouldn't be Required to maintain accounting records already as judicial persons according to BFL, the same question will be raised as for bankrupts' estates, i.e. if they can be deemed required to have books of account due to the special rule on tax liability in Ch. 6 of ML becoming applicable for them if transactions occur in the VE of the deceased also after his death. For estates of deceased persons would such a corporate tax based requirement to maintain accounting records thus also have income tax motives.

Such questions on Requirement to maintain accounting records based on the special rules on tax liability in Ch. 6 of ML itself can thus also be of interest, but here is first of all the reversed situation of interest. I.e., the corporate tax law's connection to the civil law concept GAAP when the activity which can cause Requirement to maintain accounting records and tax liability and right of deduction is first of all tried here for the person who has once started the YRVE in question. Thereby has it already been pointed out here that it for good reasons can be deemed having a value in itself with a consensus about the properly done book-keeping as evidence for both VAT and income tax. I.e., although if it in the continuing analysis will be proved impossible with a common tax frame for determining who's a taxable person, shouldn't the proposal from SOU 2002:74 on disconnecting the accounting rules in ML from the civil law concept GAAP be carried out.

6.1.2 The analysis is limited to the main rule, the SUPPLEMENTARY RULE and the two cases of temporary transactions, where ML for the determination of YRVE also connect to IL

6.1.2.1 The analysis concerns entrepreneurs regardless if established abroad or in Sweden

The analysis continues with the limitation to the main rule for tax liability in Ch. 1 sec. 1 first paragraph item 1 of ML, where thus the concept YRVE

[325] See Ch. 2 sec. 1 of BFL compared to Ch. 2 sec:s 2-5 of BFL.

is one of the necessary prerequisites for tax liability. The others are that taxable transaction of an article of goods or a service will be done in such a VE within the country.

The analysis here is first of all about whether the concept YRVE and the connection to the Swedish income tax law-concept NAVE in Ch. 13 of IL is EU law conform. The trial concerns subjects established anywhere in the world. Is it a question of a foreign entrepreneur has it already been established that he can become tax liable for taxable transaction within the country (Sweden) also in the case of temporary, single transactions here, since the ML was adapted to the Sixth Directive at the EU-accession in 1995, by the prerequisite that it was supposed to be an YRVE 'carried out within the country' (Sw., "*bedrivs här i landet*") being abolished from Ch. 1 sec. 1 first paragraph item 1 of ML. It's stated in Ch. 4 sec. 5 of ML that 'a foreign entrepreneur's VE (Sw., *verksamhet*) is YR (Sw., *yrkesmässig*) in Sweden or abroad, if the entrepreneur carries out VE corresponding to YRVE according to sec. 1' (Sw., "*[e]n utländsk företagares verksamhet är yrkesmässig i Sverige eller i utlandet, om företagaren bedriver verksamhet som motsvarar yrkesmässig verksamhet enligt 1 §*") in Ch. 4 of ML. It shall be noted that the concept foreign entrepreneur in Ch. 1 sec. 15 of ML has no equivalent in the Sixth Directive.[326] On the 1st of January 2002 was thus the corresponding income tax-concept equivalent in wording to the concept *fast driftställe* (permanent establishment) replaced with *fast etableringsställe* (fixed establishment). Of interest here is that the corresponding concept in the Sixth Directive is only used in certain rules to determine the place of the supply.[327] In ML it's used to determine also the status of the subject as non-domestic subject where VAT is concerned. However, that's of no importance here, since also subject established abroad shall be tried on the topic of YRVE, i.e. whether they can belong to the Swedish VAT system, with respect of Ch. 4 sec. 1 of ML. The RSV has as mentioned expressed that the Swedish tax authorities concerning the YR-part of YRVE according to ML by a foreign entrepreneur will have to accept 'another country's judgement that a VE carried out in that country is YR' (Sw., "*ett annat lands bedömning att en verksamhet som bedrivs i det landet är yrkesmässig*"). If it would prove to be impossible, the SKV has support in Ch. 4 sec. 5 of ML for the same trial applying to foreign subjects as for Swedish where the question what's YRVE according to Ch. 4 sec. 1 of ML is concerned. The question here is whether YRVE with the connection in item 1 of that section to the concept NAVE in Ch. 13 of IL is

[326] See *Prop. 2001/02:28* p. 62.
[327] See *Prop. 2001/02:28* p. 44.

conform with taxable person according to the Sixth Directive, regardless whether the trial concern domestically established or foreign entrepreneurs.

The difference between entrepreneurs established abroad and Swedish is instead that for Swedish subjects there are a couple of references to IL for determining YRVE at certain temporary transactions. Namely in Ch. 4 sec. 3 first paragraph items 1 and 2 of ML. Otherwise both abroad established and Swedish entrepreneurs are comprised by the main rule on YRVE in Ch. 4 sec. 1 item 1 of ML with the connection to the concept NAVE in Ch. 13 of IL and by the SUPPLEMENTARY RULE on YRVE under so called businesslike forms in Ch. 4 sec. 1 item 2 of ML.

It may be so that other cases of YRVE according to Ch. 4 of ML, where any reference isn't made to IL for that determination, also should be analyzed on the topic of EU law conformity. Where enterprises are concerned it is Ch. 4 sec. 2 of ML, about personnel restaurant at an employer with a VE VAT free according to ML, and Ch. 4 sec. 4 of ML that stipulate that the amount limits in items 1-3 are comprise the VE as a whole and not each part owner in cases of unregistered partnerships (Sw., *enkelt bolag*) or joint ownership (Sw., *samägande*) of VE. Due to the limitation of this book it won't be mentioned more. In Ch. 4 sec. 3 first paragraph item 3 of ML it's stated that letting of real estate mentioned in item 2 of the same section is comprised by the concept YRVE in cases of voluntary tax liability. However, it's of no interest here, inter alia due to voluntary tax liability according to Ch. 9 of ML as mentioned can comprise also non-taxable like private persons.

Here it's sufficient to note that if both the cases of YRVE for temporary transactions which connect to IL, i.e. letting of 'felling right' (Sw., '*avverkningsrätt*') or sale of 'products of the forest' (Sw., '*skogsprodukter*') for one-time-consideration (Ch. 4 sec. 3 first paragraph item 1 of ML) and sale of products from 'private real estate' (Sw., '*privatbostadsfastighet*') or 'private residential enterprises' (Sw., '*privatbostadsföretag*'), Ch. 4 sec. 3 first paragraph item 2 of ML, are EU law conform and shouldn't be abolished, should Ch. 4 sec. 5 of ML be altered to comprise also these two cases. Otherwise it can mean that the connection to IL for the determination of YRVE becomes too restricted for foreign entrepreneurs, by Ch. 4 sec. 5 only referring to Ch. 4 sec. 1 of ML.

With this reservation for foreign entrepreneurs can the analysis of the connection to Ch. 13 of IL to determine who's entrepreneur for VAT purposes and can belong to the VAT system continue. Thus. It's Ch. 4 sec.

1 of ML which is of interest regardless if it's a question of a Swedish or abroad established entrepreneur. Of interest here is also to test that rule against Ch. 4 sec. 8 of ML, where the connection to IL is about determining exemptions from YRVE for non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*). Thereby shall it thus be examined also if the limitation of value added taxation for these two forms of associations can be made precisely with reference to the tax subject, and not like in Article 13(A) of the Sixth Directive with respect of the tax object.

6.1.2.2 Public body-activities aren't analyzed

The analysis here is limited to the entrepreneurs. The exemption from taxable person for the public's, public bodies, exercising of authority in Article 4(5) of the Sixth Directive isn't about any trial on the topic distinguishing entrepreneurs from consumers and in Ch. 4 sections 6 and 7 of ML is the determination of YRVE for public body-activities made with respect of the tax object without any connection to concepts in the IL.[328] Therefore there's no reason to in this book to take up public body-activities and the interface between 'exercise of authority' (Sw., '*myndighetsutövning*') and taxable person.

6.1.3 The prohibition to deduct input tax for 'entertainment and similar' (Sw., '*representation och liknande ändamål*') will be analyzed

Thus, it's been established that ML's tax liability-concept isn't EU law conform when it at a systematical interpretation of ML leads to the emergence of right of deduction not possible to occur before taxable transaction first actually being made in the VE. The analysis continues with the question whether the connections to IL to determine YRVE are EU law conform. Furthermore is it of interest to examine the prohibition to deduct input tax for acquisitions to make entertainment and similar with the connection to IL in that respect, since the right of deduction is so central as it is for determining what's VAT.

6.1.4 Finally will the concept 'tax liable' (Sw., "*skattskyldig*") and its importance to the taxation of intra-Community acquisitions of goods which are VAT free in another EU Member State but taxable in Sweden in accordance with the Sixth Directive be treated

[328] See otherwise Ch. 6 sec. 6 of ML, where it's as mentioned clarified for public body-activities that if a transaction is made by a Government business unit (Sw., *statligt affärsverk*) is the unit tax liable.

Finally will something be mentioned about the situation headlined here for intra-Community acquisitions, to additionally illuminate the questions on competence and sovereignty. What does it mean thereby that Ch. 2a sec. 3 first paragraph item 3 of ML, which describes the main case of intra-Community acquisition by the purchaser in Sweden, contain the concept 'tax liable' (Sw., "*skattskyldig*") concerning the vendor in the other EU Member State involved? It may already be noted that the investigation SOU 2002:74 seems unaware of the application problems which will be brought up here. In connection with this case of tax liability it will again be referred to the "Debouche"-case and the legislative alteration in 2003 in the ML concerning the conditions for refund of VAT to foreign entrepreneurs.

6.1.5 Finally will also the question be treated if a claim for input tax against the state can be enforced even if the actual rule in ML materially is describing something else than VAT

Like the question on intra-Community acquisition is finally also something mentioned about the VAT system as 'tax collection system' (Sw., '*uppbördssystem*'). It's thus a question whether over compensation can apply formally supported by the ML, but where the ML with respect of the basic VAT principles can be deemed describing something else than VAT. That question is lacking, like the question on intra-Community acquisition, connection to IL, but can as mentioned be of interest pedagogically and then especially since it's knowingly never been brought up before.

6.2 YRVE

6.2.1 Continuing analysis, YRVE in relation to the other prerequisites in the main rule on tax liability in Ch. 1 sec. 1 first paragraph item 1 of ML

6.2.1.1 YRVE in relation to transaction within the country

The continuing analysis is thus about whether the distinction between entrepreneurs and consumers, by reference in CH. 4 sec. 1 item 1 of ML concerning YRVE to the concept NAVE in Ch. 13 of IL, is in compliance with taxable person according to Article 4(1) of the Sixth Directive. YRVE is one of the necessary prerequisites for tax liability according to the main rule in Ch. 1 sec. 1 first paragraph item 1 of ML.

It's already been established that the equally necessary prerequisite for the emergence of tax liability, namely that transaction made in the YRVE shall take place within the country, isn't of interest here. An entrepreneur established abroad will be tax liable in Sweden also for temporary, single transactions here, since Ch. 1 sec. 1 first paragraph item 1 of since Sweden's EU-accession in 1995 doesn't contain the prerequisite that YRVE shall be carried out 'within the country' (Sw., "*här i landet*"). Reverse charge for such transactions within the country take place by the customer in most cases since the 1st of July 2002, if the customer is VAT registered here. Then the foreign entrepreneur has the option to apply for voluntary tax liability and accession to the Swedish VAT system instead. That change of the act is also based on EU-directive on VAT, 2000/65/EC. Regardless whether the customer shall be charged with VAT or comprised by reverse charge and taxed for the acquisition, is thus ML EU law conform with respect of enterprises established abroad being comprised by the Swedish VAT system on the same conditions as for Swedish subjects where the concept YRVE is concerned. The differences which can exist with respect of transactions within the country are based on EC directives. The difference between entrepreneurs established abroad and Swedish entrepreneurs are two cases of temporary transactions in Ch. 4 sec. 3 first paragraph items 1 and 2 of ML referring to IL for determination of YRVE, and only comprising Swedish subjects. The main rule on YRVE in Ch. 4 sec. 1 item 1 of ML with the connection to the concept NAVE in Ch. 13 of IL and the SUPPLEMENTARY RULE on YRVE under so called businesslike forms in Ch. 4 sec. 1 item 2 of ML are as mentioned comprising entrepreneurs established abroad as well as Swedish subjects.

With the difference between Swedish and foreign subjects noted the analysis here will continue whether the Swedish VAT system is EU law conform where the determination of who can belong to it with respect of the main rule, the SUPPLEMENTARY RULE and the two cases of temporary transactions, where reference also is made to the IL for determining YRVE.

If the connections in question to IL for determining YRBE mean that someone, in relation to what would otherwise rule when applying the Sixth Directive's taxable person, is shut out from the VAT system and the possibilities to use the right to deduct input tax on acquisitions, has the directive direct effect and authorities and courts shall disregard the reference in question to the IL.

If the interpretation result of the connection in question from ML to IL to determine who has YRVE lead to the VAT system in Sweden overcompensating so that persons which aren't taxable persons according to the Sixth Directive are given access to and possibility to deduct input tax on their acquisitions, the state will thus have to accept that they exercise that opportunity. The state on the other hand cannot enforce obligations on accounting for and paying output tax, if they don't want to belong to the VAT system in such a case. The principle of legality for taxation applies as mentioned despite the ML since 1995 shall be interpreted first of all in relation to the Sixth Directive.

The special rules on tax liability for certain subjects have thus no importance for the question about the scope of YRVE. Therefore the importance of the association form is here limited to only the question on who has YRVE and the reference to IL in Ch. 4 sec. 8 of ML concerning non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*) .

6.2.1.2 YRVE in relation to taxable transaction (the tax object)

The remaining necessary prerequisite for tax liability according to the main rule Ch. 1 sec. 1 first paragraph item 1 of ML is the request of a taxable transaction of an article of goods or a service in the YRVE. The tax object's character isn't primarily of interest here, since the work here is limited to the EU law conformity with the reference to IL for the determination of YRVE, i.e. of the tax subject's character. However it are of a certain interest that there are rules in Ch. 3 of ML with a VE-concept determining the character of the supply (the object) as taxable or exempt from taxation, and which thus is based on an income tax law business activity-concept or a business activity-concept from the civil law.

6.2.2 Structuring of judgement of YRVE in relation to NAVE and vice versa

The prerequisites for the emergence of tax liability according to the main rule Ch. 1 sec. 1 first paragraph item 1 of ML has since the ML came into force on the 1st of July 1994 only been adjusted by the abolishing at the EU-accession in 1995 of the request that it for such liability had to be a case of taxable transactions in an YRVE 'carried out within the country' (Sw., "*som bedrivs här i landet*"). For the determination of YRVE according to the main rule thereof in Ch. 4 sec. 1 item 1 of ML it's however referred to the whole Ch. 13 of IL and the concept NAVE therein. In the

preparatory work to the ML it's stated that the main rule only would comprise 'the income tax legislations rules on subjective tax liability' (Sw., "*inkomstskattelagarnas regler om subjektiv skattskyldighet*"),[329] and until the 1st of January 2001 this was also upheld formally, by Ch. 4 sec. 1 item 1 of ML referring to NAVE according to sec. 21 of KL.

The purpose has ever since the time of the GML been that the professionalism where VAT is concerned shall be determined by reference to the income tax law's subjective prerequisite for NAVE, which in the preparatory work to the ML was expressed by the statement that it would be a case of 'the VE having such a character – duration, independence, purpose of making profit etc – that it is NAVE according to sec. 21 of KL' (Sw., "*verksamheten har en sådan karaktär – varaktighet, självständighet bakomliggande vinstsyfte m.m. – att den utgör näringsverksamhet enligt 21 § KL*").[330] Sec. 21 of KL correspond to Ch. 13 sec. 1 first paragraph second sentence of IL, where it's stated that 'with NAVE means activity carried out for the purpose of making money professionally and independently' (Sw., "*[m]ed näringsverksamhet avses förvärvsverksamhet som bedrivs yrkesmässigt och självständigt*"). When the IL replaced the KL (and the SIL) at the tax assessment of 2002 this wasn't regarded, but the reference to NAVE to determine YRVE according to the main rule Ch. 4 sec. 1 item 1 of ML came to comprise the whole of Ch. 13 of IL, i.e. the whole income tax schedule NAVE and not only what's fulfilling the subjective prerequisites for NAVE. This problem wasn't noted by the investigation *SOU 2002:74*. The investigation only refers to that it in the preparatory work to IL is stated that 'the reference in Ch. 4 sec. 1 of ML to Ch. 13 of IL' (Sw., "*hänvisningen i 4 kap. 1 § ML till 13 kap. IL*") would be kept while awaiting precisely the investigation (*SOU 2002:74*), and consider itself therefore not having any reason to go into the different rules on NAVE in Ch. 13 of IL.[331] The problem in question may thus be taken up here instead. The change in 2001 can hardly be intended, but formally has thus the concept YRVE according to the main rule in Ch. 4 sec. 1 item 1 of ML been expanded, by the reference comprising the whole income tax schedule NAVE.

The analysis here begins with the reference from Ch. 4 sec. 1 item 1 of ML to Ch. 13 of IL and the subjective presuppositions for NAVE in sec. 1 first paragraph second sentence of the chapter. Is the formal connection from

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[329] See *Prop. 1993/94:99* pp. 164, 165 and 169. Note on page 169 that the genitive-s in '*inkomstskattelagarnas*' in the quoted text is missing.
[330] See *Prop. 1993/94:99* pp. 164 and 165.
[331] See *SOU 2002:74* Part 1 p. 79 with reference to *Prop. 1999/2000:2* Part 2 pp. 759-760.

ML to IL EU law conform in that respect? Then will due to the formal change mentioned in 2001 with the reference to the whole Ch. 13 of IL an analysis be made structurally whether a subject which wouldn't be deemed belonging to the VAT system without that change is comprised by YRVE. In that case should the reference to the concept NAVE be limited to be referring only to Ch. 13 sec. 1 first paragraph second sentence.

In connection with the analysis of the reference to the subjective presuppositions will also the SUPPLEMENTARY RULE in Ch. 4 sec. 1 item 2 of ML be treated which states that YRVE also can comprise an activity which is 'carried out in forms comparable with a business comprised by NAVE' (Sw., "*bedrivs i former som är jämförliga med en till [sådan] näringsverksamhet hänförlig rörelse*"), provided that the annual turnover exceeds SEK 30,000. Is that item in the section necessary to describe an entrepreneur in pursuance of what's meant with taxable person according to the Sixth Directive? If not, should it be abolished from ML, since it formally even opens for YRVE also meaning a subject whose incomes aren't even comprised by Ch. 13 of IL at all.

It's also of interest to follow up with the VAT aspects on a commentary from The faculty of law at the University of Lund (Sw., *Juridiska fakulteten vid Lunds universitet*) in connection with the introduction of IL. The faculty considered that it in Ch. 13 of IL already in the beginning should be stated that the delimitations to other income tax schedules are relevant only for a 'one-man business' (Sw., '*enskild näringsidkare*'), since a company (Sw., *aktiebolag*) only has one income tax schedule – NAVE. The legislator considered that the faculty's suggestion would lead to consequences hard to foresee, 'inter alia concerning the delimitation to the tax free area' (Sw., "*bl.a. när det gäller avgränsningen mot det skattefria området*").[332] Here shall only be mentioned what it means for a judicial person, e.g. a company or an economic association (Sw., *ekonomisk förening*), only requested to have incomes in the income tax schedule NAVE to be able to belong to the VAT system, since Ch. 4 sec. 1 item 1 of ML as mentioned refers to the entire Ch. 13 of IL. However, it's also of interest whether YRVE shall comprise activities which give incomes that are income tax free because they fall outside the income tax schedules.

[332] See *Prop. 1999/2000:2* Part 2 p. 161 and also p. 191, where it's noted that after the commentary of 'the Sedish Auditors' society SRS' (Sw., '*Svenska Revisorssamfundet SRS*') the word "*verksamheten*" – compare: VE – was changed to "*näringsverksamheten*" (NAVE) in the proposal of Ch. 13 of IL, to avoid that tax free incomes would be taxed.

6.2.3 YRVE, the reference to Ch. 13 of IL and the subjective prerequisites for NAVE in sec. 1 first paragraph second sentence of the chapter

6.2.3.1 The prerequisite of profit

In pursuance of the preparatory work to the predecessor to Ch.13 sec. 1 first paragraph second sentence of IL, sec. 21 of KL, the subjective prerequisites for NAVE are, besides that the VE according to the legislative text shall be carried out professionally (Sw., *yrkesmässigt*) and independently (Sw., *självständigt*), that it's carried out with duration (Sw., *varaktigt*) and with a purpose of making profit (Sw., *vinstsyfte*).[333] The independence-prerequisite gives a delimitation of the income tax schedule NAVE to earned income (Sw., *inkomst av tjänst*), i.e. employment and similar, whereas the purpose of making profit gives a delimitation to hobbies and a delimitation to the income tax schedule capital is achieved by the duration-prerequisite.[334]

The purpose of profit-prerequisite isn't complying with the presuppositions for taxable person according to Article 4(1) of the Sixth Directive. That follows thus of the rule in the article, which states that a person can have the character of taxable person whatever the purpose or "results" (Sw., "*resultat*") of the E-VE ("economic activity"). In e.g. the German VAT act (Ger., "*Umsatzsteuergesetz*") is also clarified that the question on who has the character of taxable person (Ger., "*Unternehmer*") is decided without any request that the person in question shall have a purpose of making profit with his activity, although such a prerequisite is stipulated by the income tax law.[335] If Swedish national practice was assumed to uphold a purpose of making profit-prerequisite for the determination of NAVE, would it be necessary to abolish the formal connection to that concept for the determination of YRVE according to ML. That a 'purpose of making money' (Sw., '*förvärvssyfte*') is requested for the subjective prerequisites for NAVE to be deemed fulfilled, in a way similar way as for the

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[333] See *Prop. 1989/90:110* Part 1 p. 310 and also p. 649.

[334] See also *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 9th edition, pp. 231etc, by Sven-Olof Lodin and others.

[335] See the commentary to the German VAT act [i.e. to *Umsatzsteuergesetz 1980 (UStG 1980), neugefasst durch Bekanntmachung vom 9. Juni 1999*], *Umsatzsteuergesetz*, p. 2, 4 § 2, by Karl Ringleb and others, where it concerning the question "*Wer ist Unternehmer?*" ('Who's a taxable person?') is stated that 'a purpose of making profit' (Ger., "*Eine Gewinnerzielungsabsicht*" (Sw., *vinstsyfte*), as for the income tax law-concept 'entrepreneur' (Ger., "*Gewerbetreibenden*"), isn't required.

determination of taxable person in the Sixth Directive, follows directly by the concept of 'purpose of making money-activity' (Sw., '*förvärvsverksamhet*') being used in the rule Ch. 13 sec. 1 first paragraph second sentence of IL.[336]

Already before the big tax reform in 1990 there were suggestions on abolishing the 'purpose of making profit'-prerequisite. However, the problem with the delimitation between hobby and business activity, and above all the possibilities to make control measures and the difficulties thereby with judging the purpose of making profit for newly started businesses which often 'run with a loss' (Sw., "*går med förlust*"), were the reasons for introducing instead the system with 'carrying forward' (Sw., "*rulla*") deficit in NAVE, and having the opportunity to retry an activity which the SKV from the beginning deemed as being a hobby (i.e. earned income – Sw., *inkomst av tjänst*) as later on within the retrial-period being deemed as NAVE.[337]

However has the 'profit-prerequisite' become thin in practice. The importance of the 'profit-prerequisite' lies above all in delimiting business activity (NAVE) against the income tax schedule earned income (Sw., *inkomstslaget tjänst*) to the part that income tax schedule by the big tax reform in 1990 was expanded to comprise the previously tax free bobby activities.[338] The reform meant by the way that business activity (Sw., *rörelse*), together with the previously existing income tax schedules letting of real estate (Sw., '*annan fastighet*') and farming (Sw., '*jordbruk*'), formed the income tax schedule NAVE (i.e. here the abbreviation of *näringsverksamhet*). By the expansion of the income tax schedule earned income to comprise previously tax free hobby activities that income tax schedule (i.e. earned income) became a 'gathering income tax schedule' (Sw., '*restinkomstslag*') in relation to NAVE. Earlier the opposite ruled, i.e. that 'business activity' (Sw., '*rörelse*') was a 'gathering income tax schedule' in relation to earned income.[339]

The 'profit-prerequisite', if at all mentioned in verdicts and advanced rulings from the SRN, is more mentioned as a part of what's referred that the individual has expressed. In doctrine is stated concerning the 'purpose

[336] See the SKV's manual on taxation of income and wealth etc (Sw., *SKV:s Handledning för beskattning av inkomst och förmögenhet m.m.*) at the tax assessment 2006 Part 2, p. 48.
[337] See *Prop. 1989/90:110* Part 1 p. 312.
[338] See the SKV's manual on taxation of income and wealth etc (Sw., *SKV:s Handledning för beskattning av inkomst och förmögenhet m.m.*) at the tax assessment 2006 Part 2, p. 48.
[339] See *Prop. 1999/2000:2* Part 2 p. 160.

of making profit' as a prerequisite for NAVE that 'this request has become thin and hardly at all existing for judicial persons' (Sw., "*detta krav kommit att uttunnas och knappast alls föreligger för juridiska personer*").[340] However, any difference with respect of corporate form should hardly exist for the issues in question, since Ch. 4 sec. 1 item 1 of ML as mentioned refers to the entire Ch. 13 of IL where the subjective presuppositions for NAVE in Ch. 13 sec. 1 first paragraph second sentence of IL are included. The circumstance that incomes by judicial persons always are referred to the income tax schedule NAVE according to Ch. 13 sec. 2 of IL isn't relevant. Where the actual judgement whether earned income or business activity (NAVE) shall be deemed to exist is concerned the courts – or the SRN – instead find support in objective circumstances such as how many mandators the person in question or his company has or is expected to have, i.e. the 'independence-prerequisite' (Sw., '*självständighetskriteriet*') is what in practice is of importance for the judgement in question – not the 'profit-prerequisite'.

The SAC refer in *RÅ 2000 Not 189* to a number of verdicts where the tax authority (nowadays: the SKV) argued a person himself, and not his company (Sw., *aktiebolag*), shall be taxed for consideration from a mandator, and that 'significant' (Sw., "*kännetecknande*") for the SAC's standpoint that the person in question was comprised by earned income rather than business activity (NAVE) 'has in general been the company having but one or a few mandators' (Sw., "*har i allmänhet varit att aktiebolaget haft bara en eller ett fåtal uppdragsgivare*").[341]

The SAC has by the way concerning the situation that a daughter-company in a 'group of companies' (Sw., '*koncern*') has paid consideration to the mother-company for work which its owner has performed in the daughter-company considered that the daughter-company was independent and that the owner shouldn't be taxed directly, but that he would be taxed first when receiving wages from the mother-company. The SAC emphasized for its decision that 'group contributions' (Sw., '*koncernbidrag*') could be divided free between the companies in the group and then there was not 'any reason to distinguish between work performed in a directly owned company and in

[340] See *EG-skatterätt* (Eng., EC tax law), p. 172, by Ståhl, Kristina and Persson Österman, Roger.

[341] In the case the SAC refer to *RÅ 1983 1:40* and *RÅ 1984 1:101* as examples of cases where the person's in question company wasn't 'penetrated' (Sw., '*genomlyst*') and to *RÅ 1969 ref 19*, *RÅ 1973 Fi. 85*, *RÅ 1974 A 2068* and *RÅ 1981 1:17* as examples of when the person in question shall be taxed personally for the consideration from the mandator. See also *SOU 1975:1* p. 723.

one owned indirectly in the form of a fully owned daughter-company' (Sw., "*[n]ågot skäl att göra åtskillnad mellan arbete som utförs i ett direkt ägt aktiebolag och i ett som ägs indirekt i form av ett helägt dotterbolag*").[342]

The SAC case *RÅ 1998 Ref 10* concerned question on tax liability for a 'non-profit-making association' (Sw., '*ideell förening*') and the SAC stated there that 'at least for the question on judicial persons activities rules … according to practice that the lack of a purpose of making profit' (Sw., "*åtminstone i fråga om juridiska personers verksamhet gäller ... enligt praxis avsaknaden av ett vinstsyfte*" doesn't prevent NAVE (*rörelse*) from emerging, 'provided that it isn't of a too limited scope' (Sw., "*förutsatt att den inte har alltför begränsad omfattning*"). The SAC considered that NAVE isn't even ruled out if 'an activity has been carried out on cost price basis or even without covering the costs' (Sw., "*en verksamhet har bedrivits på självkostnadsbasis eller t.o.m. utan full kostnadstäckning*").[343]

Thus, it can be established that legal practice at present can be described as EU law conform materially concerning the reference in CH. 4 sec. 1 item 1 of ML to the concept NAVE to the part national law doesn't stipulate any 'profit-prerequisite', but practice even accepts that NAVE shall be deemed to exist in absence of full cost coverage.

If not the evolution of the law change to the SAC emphasizing a 'profit-prerequisite' for the judgement of NAVE in Ch. 13 of IL, would thus an abolishment of the connection to that concept from Ch. 4 sec. 1 item 1 of ML at the judgement of YRVE be only a formal measure. With the existing national practice in the respect concerned would thus such a measure not mean anything materially for the question whether YRVE in the ML is conform with taxable person in Article 4(1) of the Sixth Directive. The Swedish administrative courts have when applying the ML for over a decade now had to regard a current law including the EU law, and the evolution with disregarding a 'profit-prerequisite' for the trial of NAVE makes the actual connection from ML to IL for the determination of the tax subject EU law conform materially at least in that respect.

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[342] See the SAC case *RÅ 2004 Ref 62*.

[343] See *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 9th edition, pp. 233 and 234, by Sven-Olof Lodin and others. See also reference to the case in *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 31, by Björn Forssén. In the case the SAC refer for its judgement also to *RÅ 1997 Ref 16*, which is a VAT case, which will be mentioned more later on in this book.

6.2.3.2 The independence-prerequisite

An independence-prerequisite (Sw., *självständighetsrekvisitet*) corresponding to the one in Article 4(1) of the Sixth Directive is found in Ch. 13 sec. 1 first paragraph second sentence of IL. It's as already established here EU law conform – compare Article 4(4) of the Sixth Directive – by it according to a since a long time established national practice by the SAC being dedicated to distinguish the entrepreneurs from persons employed. Also in this respect is thus the actual connection from ML to IL to determine the tax subject EU law conform materially.

6.2.3.3 The duration-prerequisite

Where the duration-prerequisite (Sw., *varaktighetsrekvisitet*) is concerned is such a prerequisite isn't stipulated explicitly in Ch. 13 sec. 1 first paragraph second sentence of IL, but it can be considered lying in the professionalism-prerequisite (Sw., *yrkesmässighetsrekvisitet*) there and follows as mentioned by the preparatory work to the income tax legislation.

It's been established previously here that the ML isn't EU law conform in the sense that a systematical interpretation of Ch. 8 sec. 3 first paragraph of ML and Ch. 10 sec. 9 of ML give the interpretation result that with 'VE leading to tax liability' (Sw., "*verksamhet som medför skattskyldighet*") is understood that taxable transactions actually must have occurred, before right of deduction for input tax on acquisitions in the VE can emerge. However, it's a question of tempo which doesn't mean that the concept VE needs to be abolished from the ML. Instead the analysis here has showed – opposite to what the investigation *SOU 2002:74* claims – that the 'activity-thinking' (Sw., "*verksamhetstänkandet*") is necessary. If the VE-concept in YRVE should be removed, would ML for the determination of the tax subject lack a correspondence to E-VE in the Sixth Directive's taxable person. The 'activity-thinking' is necessary for the determination of who can belong to the VAT system, and the 'transaction-thinking' (Sw., "*transaktionstänkandet*") is necessary to determine to what degree taxable person belong to the VAT system and the right of deduction for input tax and his liability to account for output tax.

However, the analysis here is about the first mentioned question, i.e. who can belong to the VAT system. Thereby it's been established that it is necessary with an objective VE-concept to indicate that sufficient acquisitions are made by the person in question to support his purpose of making money and thus character of taxable person. The duration-

prerequisite which is stipulated by the ECJ practice with distinguishing the entrepreneur from a person who's only devoting acquired assets the administration time expected for investments made by a private person can be described by this interaction between the objective acquisition and the subjective purpose of making money. The question is whether such a duration-prerequisite is to be found in Ch. 13 of IL.

Thus, the VAT distinguish itself from e.g. the income tax first of all by the fact that it's only in the VAT system that an entrepreneur can have a claim on input tax against the state. Thus, it's not the meaning that the IL shall resemble the EU's VAT directive where the POTB-principle is concerned and taxation of deductions, i.e. concerning the 'transaction-thinking'. Whereas Ch. 13 of IL must express an 'activity-thinking' and purpose of making money corresponding to what's meant by taxable person in Article 4(1) of the Sixth Directive, so that the reference in ML to Ch. 13 of IL and the concept NAVE for the determination of YRVE shall be EU law conform.

The 'activity-thinking' is, as already has been established here, EU law conform where the judgement whether a VE has 'expired' (Sw., "*upphört*") is concerned. Objectively it's a question of according to the Sixth Directive as well as the preparatory work to the Swedish income tax legislation all assets and debts being liquidated. The question now is whether the duration-prerequisite stated by the preparatory work to the income tax legislation and which can be deemed lying in the professionalism-prerequisite is complying with the described duration-prerequisite according to the ECJ's practice. With it shall be determined whether the person in question can be taxed for incomes in the income tax schedule NAVE, which presupposes duration of the activity to underpin the purpose of making money in the professionalism- and independence-prerequisites. Whether the duration-prerequisite is complying with the ECJ's practice is a question which require an analysis of the SAC's practice in the field of income tax thereby.

Thus, the question now is whether a duration-prerequisite is established by Swedish income tax law-practice, for the determination of the subjective prerequisites for NAVE in Ch. 13 sec. 1 first paragraph second sentence of IL, which fulfill the function of objectively describing the emergence of an activity comprised by the Sixth Directive's E-VE. It's still about determining the tax subject. The concept VE on an object level is not of interest here, but it may thereby just be noted that there are questions which aren't finally examined also in that respect. Above all – as showed

previously here – such as if and when subsidies (Sw., *bidrag*) limit the right of deduction. Before Swedish national practice concerning the duration-prerequisite will be treated may something be said about 'the concept income source' (Sw., '*förvärvskällebegreppet*') being abolished from the IL in the assessment year of 2002.

Since the tax assessment 2002, when the KL and SIL were replaced by the IL, is stipulated that 'all NAVE carried out by an entrepreneur is considered one single NAVE' (Sw.,"*[a]ll näringsverksamhet som bedrivs av en enskild näringsidkare räknas som en enda näringsverksamhet*").[344] The fact that 'the concept income source' was abolished from the income tax legislation IL means that the classic question whether a person has an income source in the income tax schedule NAVE or has incomes which shall be taxed in that income tax schedule no longer exist. It was taken by itself more a question on way of writing in verdicts and doctrine, and any material difference isn't intended. Concerning judicial persons ruled by the way already before that all taxable incomes were allocated to the income tax schedule NAVE. According to the preparatory work shall the reform with the introduction of IL be regarded as legislative technical and lingual with few material alterations. The delimitation of the income tax schedule NAVE in Ch. 13 of IL shall according to the preparatory work not cause material consequences such as tax free incomes becoming taxable. The incomes which 'normally were taxed in NAVE' (Sw., "*normalt beskattas i näringsverksamheten*") belong there also today.[345] For the questions on when an activity which cause that incomes shall be accounted in NAVE emerge or expire is it sufficient to establish that the IL only for legislative technical and lingual reasons use NAVE ("*näringsverksamheten*") to clarify that Ch. 13 of IL only comprise incomes in NAVE. 'The purpose of making money-activity' (Sw., "*förvärvsverksamheten*"), which was used in sec. 28 of KL and item 1 of the instructions to that section, before it was abolished at the 1990 tax reform when all active NAVE was made to one income source, is thus left in the legal definition of NAVE in Ch. 13 sec. 1 first paragraph second sentence of IL.[346] That income source was abolished doesn't mean any material change of the prerequisites for determining that someone is entrepreneur for income tax purposes. For the questions here is it also of no interest that the definition of active NAVE was moved to 'the

[344] See Ch. 14 sec. 12 first sentence of IL.
[345] See *Prop. 1999/2000:2* Part 1 p. 476 and *Prop. 1999/2000:2* Part 2 pp. 157, 161, 184, 185, 190 and 191. See also *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 9th edition, pp. 35 and 384, by Sven-Olof Lodin and others.
[346] See also *Prop. 1999/2000:2* Part 2 pp. 184, 190 and 191.

act on public insurance' (Sw., '*lagen (1962:381) om allmän försäkring*') and that a division in different income sources for each activity was abolished in 1993.[347]

In the latter respect can be mentioned that according to the preparatory work to the ML can guidance be found in the concept VE used in sec. 18 of KL, before the division in different income sources was abolished in 1993, for determining the meaning of the concept VE according to ML. Thereby not meaning an income source in the income tax schedule NAVE. Instead it referred to a VE which according to sec. 18 of KL was part of or was an income source. However, exceptions to that rule were made so that several VE:s with a 'natural connection' (Sw., "*naturlig anknytning*") to each other were deemed one single VE and income source. However, the legislator considered that the delimitation where income tax is concerned of the concept VE could be of guidance for the corresponding concept in the ML in those cases where the special needs of the VAT don't make it unfit, above all where the distinction between the taxable and exempted area in a mixed activity is concerned.[348]

The connection in question from ML to IL concerns the concept NAVE. Thus. It's not materially influenced by the concept income source being abolished from the IL in the assessment year of 2002. Here it's therefore sufficient to look into whether the national income tax law-practice with respect of the duration-prerequisite is complying with the ECJ's practice concerning when an E-VE can be deemed to have emerged according to the Sixth Directive. Already in the preparatory work to the ML was it noted that the older VE- and income source-concept in the KL from the time before the 1st of January 1994 only could be of a certain guidance for the ML's VE-concept, and that such a connection mustn't give unwanted results for the value added taxation.[349] Legislation shall as everyone knows not be done in the preparatory work, and also with regard of the statements in the preparatory work to the ML on certain guidance from older income tax law has the trial of the meaning of the VE-concept been provided to be made with respect the special conditions for the VAT. The trial whether a VE has emerged which makes the person in question deemed having YRVE and thus able to belong to the VAT system may, where the connection to the subjective prerequisites for NAVE are concerned, thus from the beginning be deemed to concern the duration-prerequisite in the

[347] See *Prop. 1999/2000:2* Part 2 p. 185 and *Prop. 1993/94:50* p. 222.
[348] See *Prop. 1993/94:99* pp. 163 and 165.
[349] See *Prop. 1993/94:99* p. 165.

'purpose of making money-prerequisite' in Ch. 13 sec. 1 first paragraph second sentence of IL which express 'the purpose of making money'.

The ECJ's practice meaning that an E-VE provide that an investment is devoted more administration time than what's expected from a person who invest in assets in the capacity of private person (consumer) and the SAC's practice concerning the duration-prerequisite, for distinguishing capital income from NAVE, not giving rise to a material difference between the ML and the Sixth Directive where the determination of the tax subject is concerned.

A physical person who makes an investment for pure speculation, e.g. acquire one or several shares with no intention to be supported by the return on investment, is taxed for income of capital and is deemed according to the EU law not having an E-VE. If on the other hand one or several persons make so many transactions of shares, purchases and sales, that they can be deemed carrying out 'professional trade of securities' (Sw., '*värdepappershandel*') or is not just about administration of the own wealth, but to supply to the public or certain investors investment objects, i.e. that the person or persons in question have customers, and question thus is of such trade for that reason, is business activity – NAVE (*rörelse*) – deemed to exist where income tax is concerned. It follows by a decision in the SAC, where two persons in their company made approximately 50 transactions of approximately SEK 2,556,000 in purchases and approximately 2,961,000 in sales the actual year, why the company was considered carrying out a business activity (Sw., *rörelse* – compare today: NAVE).[350] The same conclusion can be made from another decision by the SAC, where taken by itself a person who purchased and sold shares via a partnership in which he was a partner was considered to have had an extensive such activity, but since it was a case of the kind of portfolio administration which is focused on short term profits on speculation and not about gaining an even return on investment or 'securing of real value' (Sw., '*realvärdesäkring*'), could however professional trade of securities (Sw., *rörelse*) not be deemed to exist, where also was regarded that it was a question of the own and the company's administration of wealth and not of supply of shares to the public or certain investors.[351]

Thus, the limit between capital and NAVE in national practice corresponds well with the limit drawn up by the EU law between private economy and E-VE, where a minimum request is that the person in question shall devote

[350] See the SAC case *RÅ 1988 Not 276*.
[351] See the SAC case *RÅ 1981 1:4*.

administration time to an investment more than what's expected for investments made by a private person, to be considered having an E-VE.

Of interest is also that assets cannot be deemed 'business related' (Sw., '*näringsbetingade*') just because they are held by a judicial person, but it's requested that they are held as a part of a VE in which business is carried out. An administration enterprise which only contains money cannot be deemed carrying out a business activity (NAVE) in that sense.[352] This can also be taken as support for 'professional trade of securities' (Sw., '*värdepappershandel*'), as an example of business activity in the meaning '*rörelse*' in a more restricted sense than NAVE as a whole, being an example of an activity which, by the subjective prerequisites for NAVE being fulfilled, makes a common dividing line for what's comprised by Ch. 13 sec. 1 first paragraph second sentence of IL and E-VE in Article 4(1) of the Sixth Directive respectively.

Thus, it can be established that Swedish income tax law-practice concerning the duration-prerequisite gives an EU law conform interpretation result where the determination of YRVE via the reference to Ch. 13 of IL is concerned. In any case, concerning the subjective prerequisites for NAVE in Ch. 13 sec. 1 first paragraph second sentence of IL is the reference from Ch. 4 sec. 1 item 1 of ML for that determination conform with Article 4(1) of the Sixth Directive and the ECJ's practice concerning who's a taxable person and thus can belong to the VAT system. The next question now is the EU law conformity with Ch. 4 sec. 1 item 2 of ML, where YRVE is extended to comprise also activities which are 'carried out in forms comparable with a business comprised by' (Sw., "*bedrivs i former som är jämförliga med*") NAVE according to Ch. 13 of IL.

6.2.4 YRVE, the SUPPLEMENTARY RULE on forms comparable with NAVE

Also here is the trial restricted to concern the relation to the subjective prerequisites for NAVE in Ch. 13 sec. 1 first paragraph second sentence of IL. By the so called SUPPLEMENTARY RULE in Ch. 4 sec. 1 item 2 of ML is the concept YRVE in the ML extended to beyond NAVE according to Ch. 13 of IL comprise a VE 'carried out in forms comparable with a business comprised by NAVE' (Sw., "*bedrivs i former som är jämförliga med en till ... näringsverksamhet hänförlig rörelse*"), provided that the

[352] See *Prop. 1999/2000:2* Part 2 pp. 44 and 45 and the RSV's manual on taxation of income and wealth etc (Sw., *RSV:s Handledning för beskattning av inkomst och förmögenhet m.m.*) at the tax assessment 2003 Part 1, p. 70.

consideration for the transactions in the VE during the fiscal year exceed SEK 30,000 excluding VAT.

To support an extension of YRVE to comprise such activities carried out under so called businesslike forms (Sw., '*rörelseliknande former*') can as mentioned Article 24 of the Sixth Directive about a special scheme for small undertakings be invoked. If the proposal from *SOU 2002:74* about introducing such rules for small enterprises is realized, with exemption from taxation for taxable persons with an annual turnover below SEK 90,000, will the SUPPLEMENTARY RULE, which by the way lacks an equivalent in the Sixth Directive, be obsolete for that reason.

The SUPPLEMENTARY RULE is obsolete already today, since it was introduced during a time when the connection to the income tax law for the determination of the tax subject meant that the at the time expressed 'profit-prerequisite' for NAVE caused problems with the delimitation against hobby activities. The SUPPLEMENTARY RULE was supposed to, as has been mentioned previously here, make it easier to control that certain categories of professionals with large investment expenses weren't excluded from the VAT system and from the possibility to deduct input tax on their acquisitions. A typical case is as mentioned the freelance photographer with expensive camera equipment, who thereby shows an entrepreneur risk which at least is similar to the one existing for NAVE, but who can totally lose incomes and has the activity beside an employment supporting him on a more continuous basis. Since the SAC case *RÅ 1998 Ref 10*, which states that NAVE can be deemed existing also for activities which are showing loss, and actually already by an advanced ruling on VAT, *RÅ 1996 Not 168*, can it be considered established that the SUPPLEMENTARY RULE is obsolete.

The income tax case from 1998 can be considered confirming that the main rule in Ch. 4 sec. 1 item 1 of ML doesn't refer to any current law meaning that a 'profit-prerequisite' would exist for NAVE. In the advanced ruling on VAT, *RÅ 1996 Not 168*, the SAC confirmed the judgement of the SRN,[353] which meant that a church foundation (Sw., *kyrklig stiftelse*), which including subsidies on approximately SEK 50 million/year had an annual turnover of approximately SEK 130 million, was considered having a VE of the 'character and scope' (Sw., "*arten och omfattningen*") that the foundation carried out NAVE according to sec. 21 of KL (nowadays Ch. 13

[353] See the SAC case *RÅ 1996 Not 168*. See commentary of the case in *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), pp. 27 and 62, by Björn Forssén.

sec. 1 first paragraph second sentence of IL). The foundation was considered having YRVE according to ML, despite that the services which the application concerned, i.e. attendant services (Sw., *vaktmästartjänster*), were supplied to customers at cost price (Sw., *självkostnadspris*).[354]

In the case (RÅ 1996 Not 169) are both the main rule on YRVE according to Ch. 4 sec. 1 item 1 of ML and the SUPPLEMENTARY RULE in question according to Ch. 4 sec. 1 item 2 of ML mentioned. For that reason did the author of this book ask the presenter (Sw., *föredraganden*) in the SRN, Niclas von Oehlreich, which of the two rules SRN applied for its judgement. The answer was that the SRN applied the main rule in Ch. 4 sec. 1 item 1 of ML. Already at the time (1996) had the SRN a couple of years ago toned down the importance of the 'profit-prerequisite' in such cases (which by the way coincide with Sweden's EU-accession in 1995).[355] This supports that current law from a national perspective isn't such as there would be a need for the SUPPLEMENTARY RULE in question about an expansion of the concept YRVE compared to the main rule in Ch. 4 sec. 1 item 1 of ML.

The SUPPLEMENTARY RULE has no direct equivalent in the Sixth Directive. It isn't in conflict with the Sixth Directive, since it thus could be considered supported by Article 24 on small undertakings. However, the SUPPLEMENTARY RULE is a reminiscence from the time when national practice caused a need of avoiding competition distortions in the sense that certain categories of professionals which due to their investment expenses into an activity should belong to the VAT system were shut out from it and the possibility to deduct input tax on the acquisitions to the activity. Thus, the SUPPLEMENTARY RULE is obsolete and should be abolished from the ML without waiting for whether or not special schemes for small enterprises will be introduced. There is, as has been established previously in this book, not any fiscal motive for the SUPPLEMENTARY RULE, but it can lead to uncertainty about the legal rights of the individual would it's existence be taken as support by lower courts for a systematical interpretation meaning that it still could be argued that there's a 'profit-prerequisite' for YRVE according to Ch. 4 sec. 1 item 1 of ML. Since far from all such signs of changes of direction in current law in verdicts from lower courts will be granted 'leave to appeal' (Sw., '*prövningstillstånd*') by the SAC, is it of importance that the SUPPLEMENTARY RULE Ch. 4 sec. 1 item 2 of ML, as a clarification in the present respect, will be abolished

[354] See also the SAC case *RÅ 2001 Not 15*.
[355] Confirmation obtained in good order in connectiuon with the work on this book at a conversation with SRN's Niclas von Oehlreich on the 12th of March 2003.

from the ML. Furthermore is it thus so that if there's a problem with the reference for YRVE according to the main rule to the entire Ch. 13 of IL, can the problem with persons who shouldn't belong to the VAT system with respect of who can be considered taxable person according to the Sixth Directive become even greater, by the SUPPLEMENTARY RULE being able to perceive meaning that persons in addition to that being considered having YRVE according to the ML.

6.2.5 YRVE, two cases of temporary transactions with reference to IL: one-time-consideration for letting for all future of 'felling right' (Sw., '*avverkningsrätt*') or sale of 'products of the forest' (Sw., '*skogsprodukter*') and sale of products from 'private real estate' (Sw., '*privatbostadsfastighet*') or 'private residential enterprises' (Sw., '*privatbostadsföretag*')

Ch. 4 sec. 3 first paragraph item 1 of ML stipulates that the concept YRVE is extended to comprise also letting for all future of felling right or sale of products of the forest where the consideration according to Ch. 45 sec. 8 of IL is treated as one-time-consideration for letting for all future.

Ch. 4 sec. 3 first paragraph item 2 of ML also means an expansion of the concept YRVE to comprise sale of an article of goods from real estate which is a private dwelling real estate according to Ch. 2 sec. 13 of IL or from a private residential enterprise according to Ch. 2 sec. 17 of IL, usually a 'tenant-owners' association' (Sw., '*bostadsrättsförening*').

The two rules shall first of all be tried against that the main rule on who's a taxable person according to Article 4(1) of the Sixth Directive as mentioned in Article 4(2) first stipulate different cases of E-VE, and thereafter expand it to comprise "[t]he exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis" (Sw., "*[u]tnyttjande av materiella eller immateriella tillgångar i syfte att fortlöpande vinna intäkter därav*"). The request that incomes shall be intended to be generated on a continuing basis can be construed as that it could be questioned whether temporary transactions, such as one-time-considerations, are disqualifying the receiver as taxable person thereby. If it's ever been unclear, may thus the ECJ by the "Hotel Scandic Gåsabäck"-case, where withdrawal taxation couldn't be deemed taking place if only a consideration – however symbolic – was charged for the article of goods or service supplied, be considered having clarified that one-time-considerations don't disqualify in themselves when judging if an E-VE exist. If the fact that a price as a one-time-consideration would lead to that

any E-VE with VAT-deduction to tax by levying output tax on the charge wouldn't emerge, would the ECJ in that case have had all reason to bring up the question on the emergence of E-VE too. The taxation measure would in such a case have been that right of deduction for input tax couldn't be deemed to exist from the beginning, since any E-VE didn't emerge. If the 'continuing basis'-criterion in Article 4(2) yet could be considered creating a problem for that question, can the two cases of temporary transactions be deemed having support in Article 4(3) of the Sixth Directive, where it as mentioned is stipulated that the Member States can deem as taxable persons also those who temporarily make transactions.

The facultative rule in Article 4(3) of the Sixth Directive has never been invoked by the legislator for support to deem that the two sorts of temporary transactions in question in Ch. 4 sec. 3 of ML also shall be considered made in YRVE. Instead it's stated in the preparatory work to the legislative changes caused by Sweden's EU-accession in 1995 just that inter alia Ch. 4 sec. 3 of ML connects to the income tax legislation and any adjustment wasn't suggested.[356] An adjustment had been made already in connection with the ML replacing the GML on the 1st of July 1994, but it consisted only in the change of the taxation of services in 1991 meaning that rights which previously were equaled with goods fell outside the area of value added taxation. In connection with the introduction of ML the old order was reestablished, by Ch. 4 sec. 3 of ML stipulating that not only goods from the actual sorts of real estate, but also letting of felling right is such temporary transaction which also shall be deemed taking place in YRVE.[357]

If anyone gets a one-time-consideration as for letting for all future for sale of a real estate according to Ch. 45 sec. 8 of IL, doesn't it mean that the income cannot be taxed in the income tax schedule NAVE according to Ch. 13 of IL instead of in the income tax schedule capital. That means on the other hand not that taxation must take place in the income tax schedule NAVE. Concerning the other case is it a question of consideration in another income tax schedule than NAVE, where private dwelling real estate according to Ch. 2 sec. 13 of IL or real estate owned by a tenant-owners' association according to Ch. 2 sec. 17 of IL are concerned, since no sort of 'private dwellings' (Sw., "*privatbostäder*") can be contained in the income tax schedule NAVE.[358]

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[356] See *Prop. 1994/95:57* p. 175.
[357] See *Prop. 1993/94:99* p. 168.
[358] See Ch. 13 sec. 1 second paragraph second sentence of IL.

Ch. 4 sec. 1 item 1 of ML can thus to the part the reference to Ch. 13 of IL concern sec. 1 first paragraph second sentence – with respect of current national income tax law-practice – be considered conform with the concept taxable person in Article 4(1) of the Sixth Directive. By the ”Hotel Scandic Gåsabäck”-case possible to perceive as meaning a clarification that one-time-considerations don’t disqualify an activity as E-VE according to the main rule in Article 4(1) of the Sixth Directive, can thereby the two items Ch. 4 sec. 3 first paragraph item 1 of ML and Ch. 4 sec. 3 first paragraph item 2 of ML respectively be more or less obsolete. A competition neutral selection of entrepreneurs is achieved in practice already according to the main rule Ch. 4 sec. 1 item 1 of ML, although temporary transactions are concerned.

If the real estate in question is devoted more administration efforts commercially than what can be expected from a private investor, is there no need for the extension of the concept YRVE which Ch. 4 sec. 3 first paragraph items 1 and 2 of ML mean in relation to the main rule Ch. 4 sec. 1 item 1 of ML for the selection of tax subjects.

If the limitation suggested in this book of the reference in Ch. 4 sec. 1 item 1 of ML to concern only Ch. 13 sec. 1 first paragraph second sentence of IL is realized, should instead be added in Ch. 4 sec. 1 item 1 of ML that YRVE exist also in such a case when it in Ch. 13 sec. 1 second paragraph of IL is stipulated that private dwellings cannot be comprised by NAVE. The question whether YRVE exist should thus be disconnected from the real estate-concept. That Ch. 13 sec. 1 second paragraph on the other hand stipulates that a business-real estate (Sw., *näringsfastighet*) always is considered as NAVE leads by the way to problems on the same topic, when a real estate for private use is owned by a judicial person, since it due to the owner being precisely a judicial person thereby automatically is deemed business-real estate. That problem will be treated further on in this book.

If not the two changes recently mentioned are realized, can taken by itself Ch. 4 sec. 3 first paragraph items 1 and 2 of ML remain, since the items in question thus can be deemed having support in Article 4(3) of the Sixth Directive. The two items should also be left unchanged for the case that the continuing basis-criterion in Article 4(2) of the Sixth Directive could be deemed creating a problem with one-time-considerations on the topic E-VE, despite the ”Hotel Scandic Gåsabäck”-case. However should in such cases the limit amount stated in the second paragraph of the section, for application of Ch. 4 sec. 3 first paragraph item 2 of ML, still be abolished. Such limit amounts aren’t accepted in the Sixth Directive, unless it’s a

question of rules on exemption from tax liability for small undertakings and taxation on a standardized basis of farmers respectively according to Articles 24 and 25 respectively of the Sixth Directive. Such rules don't exist in the ML.

The investigation SOU 2002:74 only makes an overview of Ch. 4 sec. 3 first paragraph items 1 and 2 of ML, but has thus also made a general reservation for not making any analysis of the material rules on taxation.[359]

6.2.6 Exemptions from YRVE, non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*)

6.2.6.1 The relation between Ch. 4 sec. 8 of ML and IL, national Swedish practice

YRVE in the ML is limited expressly only for two forms of associations, namely non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*). The limitation follows by Ch. 4 sec. 8 of ML. It's stipulated there to comprise non-profit association (Sw., *ideell förening*) for which tax liability doesn't apply according to Ch. 7 sec. 7 first and second paragraphs of IL and registered religious congregations for which tax liability don't apply according to Ch. 7 sec. 14 of IL.[360] By the way is, according to Ch. 4 sec. 8 second paragraph of ML, the limitation in question stated also to concern such a association which got to remain as registered at the introduction of 'the 1987 act on economic associations' (Sw., '*1987 års lag om ekonomiska föreningar*'), provided that it qualifies as non-profit association according to the IL.[361]

Registered religious congregations aren't exempted from taxation according to the rules in question just because of the registration itself, but the trial of the qualified exemption from taxation for non-profit associations shall also be made concerning them, which follows by the reference to sec. 7 in Ch. 7 of IL.[362]

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[359] See *SOU 2002:74* Part 1 pp. 91, 93 and 130-134 and *SOU 2002:74* Part 2 p. 21.
[360] See Ch. 4 sec. 8 first paragraph of ML.
[361] See Ch. 4 sec. 2 of 'the law on introduction of the IL [Sw., '*lagen (1999:1230) om ikraftträdande av IL*'], whereto reference thus is made in Ch. 4 sec. 8 second paragraph of ML.
[362] See *Prop. 1998/99:38* pp. 2 and 210. See also *Skattenytt* (Eng., the Tax news) 2002 p. 691, the article *De registrerade trossamfunden och beskattningssystemet* (Eng., The

Where the non-profit associations are concerned is it about those who previously were named being of 'public utility' (Sw., '*allmännyttiga*'). Therefore aren't e.g. trade unions (Sw., '*fackföreningar*') – which satisfies the economic interest of its members and not any 'public utility'-interest – comprised by the exemption. In the previously mentioned VAT case *RÅ 1997 Ref 16* was a trade union considered having a from the other VE separated activity with taxable transactions of 'piecework-control-services' (Sw., '*ackordskontrolltjänster*') for the members. Therefore was taxable YRVE according to ML considered to exist under the circumstances. The case was as mentioned invoked also in the income tax case *RÅ 1998 Ref 10* at the judgement whether NAVE would be deemed to exist. The SAC seems thus not ruling out that the ML, and thereby indirectly the Sixth Directive, can be of guidance at the judgement of questions on the purpose of making money in the field of income tax as well as vice versa. The SAC considered in both cases that NAVE according to sec. 21 of KL – which section as mentioned nowadays has its equivalent in Ch. 13 sec. 1 first paragraph second sentence of IL – existed, and in *RÅ 1998 Ref 10* were the qualified requests on aim etc in sec. 7 mom. 5 of SIL, which nowadays has its equivalent in Ch. 7 sec. 7 first and second paragraphs of IL and Ch. 7 sec. 14 of IL in question, for exemption from taxation deemed to be fulfilled. It was thus not considered the case in *RÅ 1997 Ref 16*.

The SAC's practice according to the two cases shows that the limitation of the concept YRVE which is made by the connection from Ch. 4 sec. 8 of ML to the qualified exemption from taxation for non-profit associations and registered religious congregations according to Ch. 7 sec. 7 of IL and Ch. 7 sec. 14 of IL (previously sec. 7 mom. 5 of SIL) is working with respect of the VAT principle on internal neutrality. In line with this is also an advanced ruling, where the SAC has considered that a trade union's sale of 'advertising space' (Sw., '*annonsplatser*') in 'the members' paper' (Sw., '*medlemstidningen*') was a taxable special NAVE. The advertisement activity was considered competing with advertisement enterprises and thereby being separated from the edition of the paper which the trade union was running without a purpose of making profit.[363]

Although if it also exist formal aspects with respect of the equivalent in Article 13(A) of the Sixth Directive as mentioned describes the scope of the

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registered religious congregations and the tax system), pp. 690-699, by Dan Hanqvist and 'the RSV manual on foundations and non-profit associations' (Sw., '*RSV:s Handledning för stiftelser och ideella föreningar*'), p. 156.

[363] See the SAC case *RÅ 2005 Ref 37*.

exemption from value added taxation in the field of non-profit-making-organizations as an exemption concerning the tax object, i.e. the transaction of goods or services, and not like in Ch. 4 sec. 8 of ML concerning the character of the subject, can the trial of whether the limitation in question of the value added taxation is EU law conform be made first of all with respect of the aim with a competition neutral VAT.[364]

If that trial doesn't show a need to move the regulation in question of the limitation of value added taxation for non-profit-making-organizations from Ch. 4 sec. 8 of ML to Ch. 3 of ML, where the exemptions from taxation of goods and services are listed, can the two decisions from the SAC of 1997 and 1998 be deemed giving additional support for bringing the income tax law closer to the ML as well the other way around, if it would be possible to maintain a common tax frame between VAT and income tax where the distinction of entrepreneurs from consumers is concerned. At least does that rule in that case with respect of the analysis of Ch. 4 sec. 1 item 1 of ML in relation to the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL. It has thus shown that Swedish income tax law-practice is compatible with the determination of the tax subject according to the concept taxable person in Article 4(1) of the Sixth Directive. The concept YRVE according to the thus EU law conform main rule in Ch. 4 sec. 1 item 1 of ML can be described as tried against Ch. 4 sec. 8 of ML by the cases of 1997 and 1998. The limitation of the concept with respect of the IL's limitation of the taxation to, where non-profit associations and registered religious congregations are concerned, apply only to 'such NAVE which is described in Ch. 13 sec. 1' (Sw., "*sådan näringsverksamhet som avses i 13 kap. 1 §*") in the IL, provided that the aim condition etc according to Ch. 7 sec. 7 first paragraph of IL is fulfilled, works on subject level according to the SAC, and although if it's unclear whether the ECJ has competence for the income tax law problems in question, is there nothing that stops the IL from being brought closer to the ML as well as the other way around in the present respect.

It's neither any problem with the connection from Ch. 4 sec. 8 of ML to IL where the relation to foreign subjects is concerned. If foreign non-profit associations make temporary fund raising in Sweden for some non-profit cause, aren't they out competed by any harder taxation in Sweden, but the whole activity will be exempted from taxation here if the incomes are

[364] See also *SOU 2002:74* Part 1 pp. 258-263.

mainly qualified for tax exemption according to the rules in question in the.[365]

The question now is whether it's conform with the Sixth Directive that the limitation of the value added taxation for non-profit-making-organizations only comprise the two association forms 'public utility'-non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*). Any such limitation to certain forms of subject isn't stipulated in Article 13(A) of the Sixth Directive, which as mentioned concern certain activities for which exemption from taxation shall apply for non-profit-making-organizations.

6.2.6.2 The relation between Ch. 4 sec. 8 of ML and Article 13(A) of the Sixth Directive

The analysis of Ch. 4 sec. 8 of ML and the reference to the rules on qualified tax exemption for non-profit-making-organizations and registered religious congregations is thus now focused on whether there's any risk for a Swedish evolution of the law which would cause competition distortion due to the connection to the IL. Furthermore the focus will be on the question whether Ch. 4 sec. 8 of ML and the connection mentioned give a selection of tax subjects which is in compliance with the limitation of the value added taxation which is stated for non-profit-making-organizations by exemption with respect of the tax object according to Article 13(A) of the Sixth Directive. If there's no such risk, and the existing solution works materially, for determining who shall be a tax subject, there's no reason to revoke Ch. 4 sec. 8 of ML or to transfer the rules to Ch. 3 of ML.

In Article 13(A) of the Sixth Directive is stipulated that transactions of goods and services which are made by non-profit-making-organization, religious institutions and similar are comprised by exemption from taxation for transaction of goods or services. Thus, has in the ML another legal technical solution been chosen so that the scope of exemption from value added taxation is determined there with respect of the tax subject.

The income tax cases *RÅ 1987 ref 153* and *RÅ 1999 Ref 50* show that the SAC's practice the last years has gone towards a 'more modern' (Sw., "*modernare*") line concerning what by tradition shall be considered 'non-profit incomes' (Sw., '*ideella inkomster*'): from the sports association's

[365] See the income tax case *RÅ 1987 ref 153*. See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 31, by Björn Forssén.

(Sw., *idrottsföreningens*) traditional bingo evenings and lotteries to music concerts.[366] A dynamic evolution of national practice in the present respect is very important, so that any discrepancy won't arise with respect of one rule in the ML being interpreted in the light of the purpose with the corresponding rules in the Sixth Directive. That purpose will of course be changed along with society changing; the sports association won't have as much funds for purchasing equipment from the bingo evenings anymore, but must maybe arrange e.g. rock concerts. Thus, a historical viewpoint on interpretation doesn't fit at all in the field of VAT, where instead a teleological interpretation is preferable. Without a dynamic national evolution of practice in the area in question, will with necessity competition distortion arise, which expressly isn't acceptable for the application of the exemption from value added taxation in Article 13(A) of the Sixth Directive. In the case *RÅ 1999 Ref 50* the SAC altered the advanced ruling by the SRN of the 28th of January 1998, and accepted that rock concerts nowadays of tradition can be deemed something used for financing 'non-profit-work' (Sw., '*ideellt arbete*'), which also were the standpoint of the minority of the SRN.

The SAC notes in the advanced ruling on income tax *RÅ 2005 Ref 67* partly that 'bingo games have since long ago been considered a traditional source of financing non-profit-making-organizations' (Sw., "*[b]ingospel har sedan lång tid tillbaka utgjort en hävdvunnen finansieringskälla för allmännyttiga ideella föreningar*"), partly that the circumstance that a non-profit-making-organization gets help from another judicial person and that they in co-operation carry out the VE hasn't been deemed leading to the VE not possible to consider as traditional in the present sense. In any case the SAC – who referred to the recently mentioned advanced ruling on income tax *RÅ 1999 Ref 50* – meant this, provided that the members of the association take part in the work. Therefore the SAC considered in the advanced ruling *RÅ 2005 Ref 67* that an association which had joined a bingo alliance with about fifty other associations didn't lose its exemption from taxation according to Ch. 7 sec. 7 of IL, just because the bingo activity was carried out by a service company owned jointly by the associations. The association was considered only to have obtained help from another concerning the practical arrangements for the VE. In two other advanced rulings on income tax with which the SAC made comparison had the exclusiveness to the goodwill which was linked to the association been transferred for advertising- and marketing purposes to a

[366] See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 31, by Björn Forssén.

partnership (*RÅ 1993 Ref 100*) and the right to use for marketing purposes the association's name had been let to a company (*RÅ 2000 Ref 53*). Then could it according to the SAC not be a question on VE which totally or partly was carried out by the non-profit-associations themselves, and they could not be considered exempted from tax liability for the income in the partnership and the income from the letting respectively.

Contrary thereto has the SAC – on the topic of 'tradition' (Sw., '*hävd*') – in an advanced ruling considered that the supply of 'subscription' (Sw., '*abonnemang*') for on-line games on the Internet isn't comprised by the qualified exemption from taxation for non-profit-association according to IL. The incomes therefrom could not by tradition be considered source of finance for the 'public utility'-purpose with the association or even have a natural connection to that purpose.[367]

In two advanced rulings has the SAC made statements on playing rights in a golf association.[368] In the first of the two has the SAC not considered that the requests for qualified tax exemption according to IL for non-profit-making-organizations – here a golf association – no longer are fulfilled, just because that the members' loans to the association were transferred to playing rights for them. The VE in the association cannot just because of that measure immediately be considered to have been transferred to benefit the members' own economic interests and the request on openness in the association wasn't either put aside thereby. The SAC marked however that thereby no standpoint was taken to whether the measure in the long run could mean such an alteration of the direction on the association's VE that the conditions for qualified exemption from taxation no longer would be met, since that question wasn't subject for judgement with the application for advanced ruling. Although a source of finance by tradition can be considered devoted the 'non-profit' aim with the association, can of course not an evolution otherwise of what can be comprised by the qualified requests for exemption from taxation change that one of the necessary prerequisites for such an exemption is precisely that the activity mustn't be altered to benefit the members' of the non-profit-association own economic interests. A trial may as mentioned as usual be made in a five-year-perspective of the presuppositions for the association's limited tax liability according to IL.[369] At the holder's sale of such a playing rights shall by the way according to the judgement of the SAC in the other advanced ruling the rules on taxation of sale of 'personal assets' (Sw., "*personliga*

[367] See the SAC case *RÅ 2005 Not 96*.
[368] See the SAC cases *RÅ 2005 Ref 4* I and II.
[369] See the SAC case *RÅ 2005 Ref 4* I.

tillgångar") – whereby shall be considered also other than 'personal property' (Sw., '*lösöre*') – in Ch. 52 of IL be applied.[370]

The SAC's hereby described 'modernization' in the present issues may be considered have taken place under regard of the competition neutrality-aspect, since such considerations concern precisely the determination of the scope of the limitation of the tax liability according to the income tax rule in question in the same way as generally applies in the field of VAT. Thus, with the existing national practice, the connection from Ch. 4 sec. 8 of ML to Ch. 7 sections 7 and 14 of IL just means another legal technical solution than the one in the Sixth Directive. It may be considered EU law conform materially, since the present dynamic national evolution of the law, where the determination of the tax subject is concerned, prevents competition distortion in the field.

Remains only the question whether the present order with Ch. 4 sec. 8 of ML and the connection in question to IL cause a risk for a future domestic evolution of the law leading to competition distortion.

The question is whether Ch. 4 sec. 8 of ML can be expected to function in relation to Article 13(A) of the Sixth Directive also in the future, where the delimitation of the value added taxation of non-profit-activities is concerned.

In Ch. 7 sec. 15 of IL – whereto reference isn't made from Ch. 4 sec. 8 of ML – is stipulated that churches and certain other institutions only are tax liable for NAVE according to Ch. 13 sec. 1 of IL. This is in line with the main rule in Ch. 4 sec. 1 item 1 of ML, for the determination of the scope of YRVE, should connect formally to precisely the rule on the subjective prerequisites for NAVE in the IL, and not to the entire Ch. 13 of IL. Of interest is that Ch. 7 sec. 15 of IL, amongst the judicial persons which are tax liable only for VE which fulfill the subjective prerequisites for NAVE, mention 'hospital institutions which aren't carried out in a profit purpose' (Sw., "*sjukvårdsinrättningar som inte bedrivs i vinstsyfte*").

A church etc which isn't a registered religious congregation is formally not comprised by any exemption from value added taxation by the limitation of YRVE according to Ch. 4 sec. 8 of ML, since any reference therein isn't made to Ch. 7 sec. 15 of IL. The exemption from taxation for transaction of goods or services by such religious institutions in Article 13(A) of the Sixth

[370] See the SAC case *RÅ 2005 Ref 4* II.

Directive does however comprise also such care and education which also are exempted from taxation according to Ch. 3 (sections 4-8) of ML.

That the Sixth Directive in the fields in question intend to limit the taxation of otherwise taxable transactions, whereas Ch. 4 sec. 8 of ML is aiming for the question on purpose of making money, i.e. on the character of the subject, mean thus not a conflict between the ML and the directive just because Ch. 4 sec. 8 of ML doesn't refer also to Ch. 7 sec. 15 of IL, but only to Ch. 7 sec. 7 first and second paragraphs and sec. 14 of IL.

The religious congregations which aren't registered are usually organized as non-profit-associations,[371] and since registered religious congregations are exempted from taxation on the same conditions as for non-profit-associations doesn't any competition distortion occur materially just because Ch. 4 sec. 8 of ML doesn't refer to subjects according to Ch. 7 sec. 15 of IL. There's no national civil law legislation on 'non-profit-associations' (Sw., '*ideella föreningar*'),[372] and also religious institutions which aren't registered religious congregations should fulfill the qualified requests on aim etc for exemption from taxation according to Ch. 7 sec. 7 of IL as non-profit-making-organizations. However it is formally more right that the technique for limitation of the value added taxation here follows the Sixth Directive and the limitation of taxation is determined with respect of the tax object. Such a formal conformity between the ML and the Sixth Directive exist only for the on-profit-associations by the exemption from taxation in Ch. 3 sec. 11a of ML for their (or the state's or a municipality's) supply of entrance for audience to sports events and for fees for those exercising sports.[373]

According to Ch. 7 sections 16 and 17 of IL are certain foundations (Sw., *stiftelser*) and other judicial persons only tax liable for incomes from holding of real estate. Since any exemption from YRVE isn't stipulated in Ch. 4 sec. 8 of ML to these two sections in the IL, the judicial persons in question are comprised by YRVE according to the main rule in Ch. 4 sec. 1 item 1 of ML.

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[371] See *Prop. 1998/99:38* p. 210.

[372] See *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 9th edition, p. 479, by Sven-Olof Lodin and others.

[373] In the field of sports is there by the way a double regulation today of the scope of exemption from value added taxation by Ch. 4 sec. 8 of ML which concerns the tax subject and Ch. 3 sec. 11a of ML which concerns the tax object. See *Svensk skattetidning* (Eng., Swedish tax journal) 2003 pp. 135 and 135, the article *Förslag till nya momsregler för ideell verksamhet* (Eng., Suggestions to new VAT rules for non-profit activity), pp. 127-137, by Peter Iwarsson.

That the ML formally is only conform with the Sixth Directive in the field of sports concerning the technique to determine the scope of exemption from value added taxation, means there's a risk for competition distortion by e.g. religious activities under the form of foundations not being comprised by the exemption from YRVE in Ch. 4 sec. 8 of ML,[374] and can thereby according to ML be value added taxed for transactions of goods and services for which Article 13(A) of the Sixth Directive is stipulating exemption from taxation. For that reason should Ch. 4 sec. 8 of ML concerning non-profit-making-organizations and registered religious congregations be revoked, and proper completions be made of the rules on exemption from taxation for transactions of goods and services in Ch. 3 of ML for such activities in relation to intended scope of exemption from taxation for them according to Article 13(A) of the Sixth Directive.

Thus, the conclusion is that a common tax frame can be upheld between VAT and income tax where the determination of the tax subject is concerned, if YRVE according to the main rule in Ch. 4 sec. 1 item 1 of ML is tried against the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL. In that respect can the income tax law be adjusted to ML just as well as the opposite formally rules according to the ML today. The analysis here shows on the other hand on the topic of EU law conformity that the limitation of the value added taxation for non-profit-making-organizations cannot be restricted to the association forms 'public utility'-no-profit-making-organizations and registered religious congregations, and that rules on such limitation for such organizations shall be written with reference to the tax object instead, which thus mean that Ch. 4 sec. 8 of ML would be revoked and competitions made in Ch. 3 of ML.

Since the rules in Ch. 3 of ML concern the VAT's specific concept world with a 'transaction-thinking' concerning questions on cumulative effects with a all too extensive application of exemptions, can it be expected that it will be harder for the SAC to decide in questions on qualified exemption from taxation for 'public utility'-non-profit-making-organizations and registered religious congregations according to IL with guidance of ML after an adjustment of the regulation in Ch. 4 sec. 8 of ML and transfer of it to Ch. of ML.

[374] See concerning church foundation, the SAC case *RÅ 1996 Not 168*.

The investigation SOU 2002:74 also mention these questions, but the investigation's proposal to revoke Ch. 4 sec. 8 of ML is more as a consequence of the general suggestion from the investigation to revoke inter alia the concept YRVE and replace it with 'taxable person' (Sw., '*beskattningsbar person*').[375] If it would be an argument in itself that it 'within the EC is … only the VAT rules which decide whether taxation shall occur' (Sw., "*[i]nom EG är ... endast mervärdesskattereglerna som avgör om beskattning skall ske*"),[376] would the comparison yet made by the investigation between different language versions of the Sixth Directive not be necessary for the investigation's proposal on replacing YRVE with taxable person. It's instead the case that the Sixth Directive doesn't formally prevent a reference to the IL to decide who's a taxable person. Otherwise would it be equally as pointless to – as the investigation does – make a reservation for the investigation's work not intending to be an analysis of the material rules on taxation. The analysis in this book would be unnecessary if it only was a question of mechanically listing which concepts in the ML connect to other legislation.

6.2.7 YRVE, how the determination of the tax object in certain cases can influence the determination of the tax subjects in certain respects

In the SAC's practice concerning the criteria for business activity – *rörelse* or the nowadays used NAVE – has it never been accepted any additional prerequisite besides duration and independence and the in older practice regarded 'profit-prerequisite'. In line with this has also the SAC, in a case concerning a taxi business for which license is required, considered that it has been taxable according to IL, despite the required license wasn't issued for it.[377] However, the SKV has argued that license or authorization, where so is requested in a sector, would be some kind of 'fourth prerequisite' for NAVE. However, the case in question clarifies for the present context, that when EU law conformity with the formal connection from Ch. 4 sec. 1 item 1 of ML to the subjective prerequisites for NAVE in Ch. 13 sec. 1 first paragraph second sentence of IL is tried, is it only a question about the three prerequisites mentioned. Since *RÅ 1998 Ref 10* is it by the way thus clarified in practice that the 'profit-prerequisite' is obsolete and that the purpose of making money which is expressed by the concept 'purpose of making money-activity' (Sw., '*förvärvsverksamhet*') shall be tried against the other two prerequisites, duration and independence.

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[375] See *SOU 2002:74* Part 1 p. 18.
[376] See *SOU 2002:74* Part 1 p. 257.
[377] See the SAC case *RÅ 2005 Ref 14*.

A ’fourth prerequisite’ for YRVE could only be about the prerequisite taxable transaction for tax liability according to Ch. 1 sec. 1 first paragraph item 1 of ML. Thus, it’s about the VAT’s specific concepts without connection to the IL. However can it as mentioned exist rules on precisely the tax object in Ch. 3 of ML, where its VAT character – taxable or exempted from taxation – is determined by a VE-concept based on a business activity-concept from the civil law. Even if the tax subject’s character is determined without any ‘fourth prerequisite’, can such a relationship influence at least for matters of evidence and concerning questions on procedure when it shall be tried whether someone is entrepreneur for VAT purposes and can belong to the VAT system. If the person in question isn’t expected to create taxable transactions due to the lack of a license according to the actual rule in Ch. 3 of ML making him not able to become tax liable in that respect, can it have repercussions on the trial whether the person in question has the character of taxable person. Would a rejection of a ’general notice for registration of taxes and contributions’ (Sw., ’*skatte- och avgiftsanmälan*’) concerning VAT registration be given inadequate motives concerning whether the person in question fulfills the prerequisites duration and independence, can he himself or a court which is trying an appeal of the decision become less observant on the following circumstances. Tax liability may have occurred in the mean time due to a taxable transaction of an acquired asset being made which wasn’t comprised by the trial according to Ch. 3 of ML or to an asset which was comprised by the trial having changed character from fixed asset to current asset and shall lead to accounting and payment of output tax in pursuance of Ch. 3 sec. 24 of ML and Article 13(B.c) of the Sixth Directive, despite that the acquisition of it didn’t entitle to deduction of input tax.

The concept YRVE is used to determine what’s a service according to ML. According to Ch. 1 sec. 6 second sentence of ML is it ‘everything else but’ (Sw., ”*allt annat*”) an article of goods and which ‘can be supplied in YRVE’ (Sw., ”*kan tillhandahållas i yrkesmässig verksamhet*”). An article of goods means according to the first sentence of the same section ‘material things, amongst the real estate and gas and heat, cold and electric power’ (Sw., ”*materiella ting, bland dem fastigheter och gas samt värme, kyla och elektrisk kraft*”). An ‘asset-thinking’ is thus of importance for the judgement of whether a question on the tax object concern if taxable or from taxation exempted transaction exist for an article of goods or a service. It can lead to questions like whether exemption from value added taxation applies although any other exemption in Ch. 3 of ML doesn’t apply, e.g. Ch. 3 sec. 25 of ML on transfer of VE. If it isn’t about an asset

which is tangible or gas, heat, cold or electric power, the question is if it can be supplied in an YRVE. If this isn't possible, cannot a withdrawal of the asset be value added taxed although it isn't made for consideration, i.e. it's made free of charge, and it has as part of an acquired article of goods entitled to deduction of input tax, since it per definition in the ML isn't a matter of supply of a service. The principle of legality for taxation doesn't prevent taxation in such a case, since the tax object and the general tax liability is described as 'transaction of goods and services' (Sw., "*[o]msättning av varor och tjänster*") in Ch. 3 sec. 1 first paragraph of ML. Such questions about the tax object won't be mentioned more here; instead it's of interest in this book how an exemption from taxation for transaction of goods or services in Ch. 3 of ML can have the described repercussions on the trial of the tax subject where questions on evidence or procedure are concerned. Thereby can just be mentioned that it for the question on an assets change of character from fixed asset to current asset can exist a difference between Ch. 3 sec. 24 of ML and Article 13(B.c) of the Sixth Directive, since the rule mentioned in ML stipulates exemption from taxation of other 'assets' (Sw., "*tillgångar*") than current assets for which right to deduct VAT didn't exist at the acquisition, whereas the directive rule describes the same but only concerning 'goods' (Sw., "*varor*") which are used in the VE. Assets according to ML include both goods and services, such as patent in a VAT free care enterprise, but such a fixed asset wouldn't be comprised by exemption when sold with support of the Sixth Directive. However, such VAT specific questions are disregarded here and instead are a couple of examples mentioned on when the determination of the tax object can give the described problems with evidence and procedure for the determination of the tax subject, due to Ch. 3 of ML establishing certain exemptions from taxation on a concept VE based on an income tax-concept business activity or a concept business activity from the civil law.

Both the cases mentioned here concern the field of real estate. There applies actually a main rule on general exemption from taxation according to Ch. 3 sec. 2 of ML, why the two cases here stipulating tax liability for letting of real estate can be described as examples from Ch. 3 sec. 3 of ML on 'exemptions from the exemption' (Sw., '*undantag från undantaget*').

The ML use a real estate concept based on civil law, i.e. the Swedish 'Code of Land Laws' (Sw., '*jordabalken*'), which also is the case according to IL. This cause certain VAT specific problems, i.e. problems without connection to the IL, so that the interface goods or services is different in the ML compared to the Sixth Directive. In item 25 of the ECJ case C-409/98 (Mirror Group) the ECJ talk about 'letting of immovable property'

according to Article 13(B.b) of the Sixth Directive, which article correspond to Ch. 3 sec. 2 first paragraph of ML. By the ECJ case 173/88 (Henriksen) follows by the way that 'the exemption from the exemption' for the letting of premises and sites for parking vehicles according to Article 13(B.b2) of the Sixth Directive cover "the letting of all places designed to be used for parking vehicles". However does "immovable property" (Sw., '*fast egendom*') comprise more than the ML's 'real estate' (Sw., "*fastighet*"), since the concept according to ML concern immovable property (Sw., '*fast egendom*') which is divided into real estates (Sw., '*fastigheter*'). Thus, the main rule on exemption from taxation in the field of real estate according to Ch. 3 sec. 2 first paragraph of ML doesn't comprise such public place for which a municipality (Sw., *kommun*) is principal.[378] This means that 'the exemption from the exemption' in ML which correspond to Article 13(B.b2) of the Sixth directive on tax liability for letting of place for parking vehicles, namely Ch. 3 sec. 3 first paragraph item 5 of ML, isn't the only basis for value added taxation of letting of place for parking vehicles. A municipality's letting of place for parking vehicles on a square which isn't divided into real estate constitute taxable transaction already due to the main rule on exemption for letting of *real estate* (Sw., *fastighet*) according to Ch. 3 sec. 2 ML not being applicable.[379] The main rule on general tax liability for goods and services according to Ch. 3 sec. 1 first paragraph of ML applies in the situation, since exemption according to any rule in Ch. 3 of ML doesn't apply. The same problem exist for letting of the square for 'market trade' (Sw., '*torghandel*'), festivals etc. Here is however not such Vat specific problems of interest.[380] Instead is the interesting here that Ch. 3 sec. 3 first paragraph item 5 of ML stipulates value added taxation for letting of parking places in a 'parking place-activity' (Sw., "*parkeringsverksamhet*").

What's meant by 'parking place-activity' can cause a trial of the concept with respect of the Swedish constitution's *lex scripta*-condition for taxation. Of interest is an advanced ruling, *RÅ 2003 Ref 80*, which concerned

[378] See Ch. 6 sec. 26 of 'the planning and building act' (Sw., ' *plan- och bygglagen*'), whereof follows that the municipality shall be the principal of public space within areas which are planned in detail, if there are no special reasons for another arrangement.

[379] See Ch. 6 of 'the planning and building act' and inter alia sec:s 28, 31 and 37 teherin, whereof – indirectly – follow that streets, squares, parks or other such public places aren't comprised by division inte rela estate.

[380] Here's just noted that the RSV in the real estate-recommendation *RSV Im 1993:4*, which by the way was 'revoked' (Sw., "*upphävts*") by the RSV's general advice *RSV 2001:18*, stated that letting of e.g. 'land for streets, squares and market places' (Sw., '*gatumark, torg- och marknadsplatser*') should be comprised by the exemption from taxation according to the main rule thereof in the field of real estate

whether a 'tenant-owners' association' (Sw., '*bostadsrättsförening*') would be considered tax liable for letting of parking places externally, i.e. to non-residents of the association. The SAC mentioned the Danish "Henriksen"-case from the ECJ, but never mentioned that the Swedish legislative text contain the central word 'parking place-activity' (Sw., "*parkeringsverksamhet*") or the *lex scripta*-condition. The SKV refer in writs, to support value added taxation of such lettings of place for parking vehicles, to as well the decision by the SAC as the ECJ case, but does neither mention the *lex scripta*-condition.[381] Whereas the Swedish Bar Association, in connection with a reply on the 22nd of December 2004 to the Treasury on a proposal of an EC regulation with certain instructions on application of certain rules in the Sixth Directive, has brought up inter alia precisely Ch. 3 sec. 3 first paragraph item 5 of ML concerning value added taxation of letting of place for parking vehicles and the complex of problems with the need to try the *lex scripta*-condition against the wording of the rule in question in the ML and the therein central word 'parking place-activity' (i.e. one word in Swedish "*parkeringsverksamhet*"). The author of this book – also member of the Swedish Bar Association – took part in the work with writing the Bar Association's reply to the Treasury, and may, to illuminate the problems with repercussions from the judgement of the tax object on judgements of the tax subject, mention differences in the way of reasoning between the majority and the minority by the SRN in *RÅ 2003 Ref 80*. The SAC established the majority's standpoint that the tenant-owners' association would be considered tax liable for the letting of parking places externally.

The majority by the SRN concluded that the letting to non-residents of the association was a from the real estate administration separated YRVE. Therefore was the letting considered causing tax liability according to ML. The majority pointed for its judgement on the letting externally constituting approximately 60 per cent of the total number of parking places in the association's garage.

The minority by the SRN made for its opposite standpoint also an economically based judgement, which as well may be deemed being made with respect of the basic VAT principle on competition neutrality, but pointed out that size of the garage didn't exceed the number of parking places which were made to create good living standards for the tenant owners. The need of parking places for them could fluctuate due to

[381] See the SKV's writs on the 22nd of September 2004, *dnr130-557045-04/113*,on the 1st of November 2004, *dnr 130 624085-04/111* and on the 22nd of December 2004, *dnr130 735843-04/111*.

unforeseen circumstances when the garage was planned, and the letting externally could according to the minority be considered due to low demand from the tenant owners to avoid or reduce loss as a result of failing incomes of garage fees, which were calculated in the association's economical plan.

The minority's by the SRN material trial of the question if a special YRVE existed concerning the external letting can be perceived to have been made with respect first of all of the economy of the association, whereas the majority can be perceived to have made its judgement more based on a customers' perspective, when the scope of such letting was considered constituting a from the real estate administration separated YRVE.

The minority by the SRN makes however a more thorough analysis where it points out that the word 'parking place-activity' (Sw., "*parkeringsverksamhet*") without intending any change materially replaced older law, where the word 'parking place-business' (Sw., "*parkeringsrörelse*") was used. The change was only a consequence of the income tax schedule NAVE replacing at the big tax reform in 1990 the income tax schedules farming (Sw., '*jordbruk*'), letting of real estate (Sw., '*annan fastighet*') and 'business activity' (Sw., '*rörelse*'). The minority by the SRN can thereby be perceived having emphasized an 'activity-thinking', when it concludes that the external letting of parking places is comprised by the administration of the residential houses and cannot be considered contained in 'a special income source concerning business activity' (Sw., "*en särskild förvärvskälla avseende rörelse*").

The majority can at least by comparison be perceived to represent a 'transaction-thinking', which can be argued for especially considering that the concept that will be tried – 'parking place-activity' (Sw., "*parkeringsverksamhet*") – has been placed in the rule on tax liability, not in the rule on YRVE.

The review of *RÅ 2003 Ref 80* shows that the judgement of the tax object should be based on a 'transaction-thinking', and that it should be preceded by a trial whether YRVE at all can be deemed to exist by the subject. That trial should however be done in accordance with an 'activity-thinking', like the minority in the SRN may be perceived doing in the case. It's first then that the connection between the bases for the person in question – here the tenant owners' association – being able to deem as a tax subject, i.e. someone who can be taxed according to ML, and that question is about a taxable transaction (the object) can be regarded with respect of the

precisely in this case common business activity-concept thereby. It's of course important too to emphasize the lack in the case concerning the 'parking place-activity'-concept not being tried against the *lex scripta*-condition for taxation, but generally is it all the more important to regard that the trial of the tax object's character mustn't be done disregarding the trial of the subject's character. If the economic implications with each judgement respectively would be greater than they seem to have been in the related case, can a business activity-concept (Sw., *rörelsebegrepp*) from a rule on the tax object's character influence the judgement of the subject.

If the decision in *RÅ 2003 Ref 80* would have been the opposite, would the advanced ruling for the tenant owners' association first and foremost have had a value even if it showed more precisely what economic factor that made that the association couldn't be deemed having YRVE. Were the subjective prerequisites for NAVE fulfilled or not? The customer's perspective is important for the VAT with its expressed competition neutral aim, but the question whether a VE which is YR according to ML has emerged at all is decided – in pursuance of the ECJ practice according to first of all the "Breitsohl"-case – mainly with respect of what's been planned with the investment in the garage in question. The minority's in the SRN trial with respect in the first place of the economy in the association is more appropriate for deciding whether the tenant owners' association could be deemed having an YRVE. The majority should really not have expressed anything on YRVE, since it for its judgement thereby seem to have been influenced by the customer's perspective instead of trying the subjective prerequisites for NAVE first.

Thus, Ch. 3 sec. 3 first paragraph item 5 of ML is an example on that problems can arise indirectly for the determination of the tax subject, where precisely the rule on the tax object also contain the income tax law concept business activity. Ch. 3 sec. 3 first paragraph item 4 of ML is the other example on the problems in question; the difference is that the concept business activity in that rule comes from the civil law.

Letting of rooms in hotels constitute taxable transaction of service according to Ch. 3 sec. 3 first paragraph item 4 of ML and requires permission from the local police authority. In the rule is the concept 'hotel business activity' (Sw., "*hotellrörelse*") used, which thus can be described as based on the civil law – with influences from public law by the request of permit.

The problem with the concept 'hotel business activity' being used in the section on taxable transaction can however be rationalized away with that the rule on taxation for letting of rooms in hotels according to the preparatory work to the GML was based on 'the 1966 act on hotel- and pensions-activity' (Sw., '*lagen från 1966 om hotell- och pensionatsrörelse*'),[382] and that the concept has been transferred materially unchanged to Ch. 3 sec. 3 first paragraph item 4 of ML.[383] The section can therefore be described as containing another business activity-concept than the one of the tax law. The subjective prerequisites for NAVE according to IL, which correspond to those for the KL's business activity (Sw., *rörelse*), can comprise also letting of rooms in hotels which not at the same time comprise at least nine guests or at least five guest rooms, i.e. which is of a scope which wouldn't constitute 'hotel business activity' according to the 1966 act thereof.

The concept 'hotel business activity' according to that legislation concern thus not the problems which can exist where the distinction of the entrepreneurs which can belong to the VAT system from the consumers is concerned. Any 'fourth prerequisite' in addition to the subjective prerequisites for NAVE has never existed. On the other hand can described problems with evidence and procedure for that question and the judgement of YRVE in such a perspective be caused by the determination of the tax object containing a business activity-concept with the ingredient of permit being mandatory. He who's had his notice on VAT registration rejected due to letting of rooms in hotels which required permit didn't exist, can e.g. be considered making a taxable storage service.[384] If the person in question or the court in connection with the trial of an appealed decision on rejection don't include into the picture that the prerequisites for YRVE were fulfilled, can the for the subject emerged tax liability for the storage service be disregarded.

The review of the two 'exemptions from the exemption' according to Ch. 3 sec. 3 of ML in the field of real estate confirm partly that an 'activity-thinking' is important for judging the purpose of making money and

[382] See *Prop. 1968:100* p. 67 and *Prop. 1989/90:111* p. 107.
[383] See *Prop. 1993/94:99* p. 149.
[384] See *Prop. 1989/90:111* p. 196, whereof it follws that a storage service is a taxable transaction according to the mandatory rules, whereas letting of storage premises to someone who do the storaging of goods himself is comprised by the exemption from taxation in the field of real estate (nowadays Ch. 3 sec. 2 of ML). In the latter situation the one doing the hiring out must apply for voluntary tax liability according to Ch. 9 of ML, to be able to belong to the VAT system. See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 178, by Björn Forssén.

whether a person at all can be deemed being a tax subject, i.e. someone who can become tax liable according to ML, partly the importance of making that trial before the tax object is judged according to ´the VAT's specific concepts. Another question, which isn't treated in particular here, is of course whether a civil law request on permit is EU law conform, where the determination of taxable and from taxation exempted transactions are concerned. In precisely the case of letting of rooms in hotels seems the conclusion that so is the case possible to make directly by the wording of the actual directive rules, since it in Article 13(B.b1) of the Sixth Directive, which corresponds to the 'exemption from the exemption' in Ch. 3 sec. 3 first paragraph item 4 of ML, is stated that the supply of lodging (Sw., *logi*) within the hotel sector is taxable, as such lodging is "defined in the laws of the Member States" (Sw., "*definieras i medlemsstaternas lagstiftning*").

6.2.8 YRVE, especially about judicial persons only accounting income of NAVE and otherwise about the reference to the concept NAVE in the entire Ch. 13 of IL

6.2.8.1 The importance of judicial persons only accounting incomes in the income tax schedule NAVE

Judicial persons' incomes and expenses are according to Ch. 13 sec. 2 of IL always considered belonging to the income tax schedule NAVE. Although the incomes or the expenses aren't always included in a NAVE according to Ch. 13 sec. 1 of IL. Here may be noted that for Swedish partnerships (Sw., *handelsbolag* – which also include *kommanditbolag*) are the partnership's incomes and expenses treated the same way as for other judicial persons, such as companies (Sw., *aktiebolag*), which follows by Ch. 13 sec. 4 first paragraph of IL which refer to Ch. 13 sec. 2 of IL. Despite it can be a question of capital profit and capital loss means according to Ch. 13 sec. 2 of IL just the fact that the subject is a judicial person that it has NAVE. This regardless whether the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL are fulfilled or not. Therefore is the analysis now about the circumstance that the reference in Ch. 4 sec. 1 item 1 of ML for the determination of YRVE concerns the whole of Ch. 13 of ML. What importance will the structure of Ch. 13 of IL have for the determination of YRVE in the ML? The formal reference to the entire Ch. 13 of IL is thus not an intended change compared to the previous reference to sec. 21 of KL, which corresponded to the present Ch. 13 sec. 1 first first paragraph second sentence of IL. However is the formal change interesting in the

meaning it isn't EU law conform to the parts it means that persons which cannot be considered having the character of taxable person according to the Sixth Directive are comprised by the determination of the concept NAVE in Ch. 13 of IL beyond what follows by a trial with respect only of the subjective prerequisites for that concept. What then are those parts?

First it's noted that it for the judicial persons do exist a particular risk for a wrong selection of tax subjects, when a judicial person owns real estate. Of Ch. 13 sec. 1 second paragraph of IL follows s mentioned that possession of business-real estate (Sw., *näringsfastighet*) always is considered as NAVE. Of interest thereby is that a real estate held by a judicial person always is deemed as business real estate.[385] A physical person's real estate is classified on the basis of the character of the building and the use of it. If it leads to a business real estate is deemed to exist, is then, to allocate business income as income for work or income on capital, an activity classification made, where 'the owner's activity in the as one-man business fully carried out NAVE is regarded' (Sw., "*ägarens aktivitet i den totala enskilt bedrivna näringsverksamheten beaktas*").[386] The activity based classification is in compliance with the activity request which is lying in E-VE according to the Sixth Directive. For a judicial person is it however sufficient to establish that it just owns a real estate, and then that judicial person is automatically considered having NAVE concerning its incomes and expenses deriving from the real estate. This means that a trial whether the presuppositions for extending the concept YRVE according to Ch. 4 sec. 3 first paragraph items 1 and 2 of ML, where as mentioned ML also connect to the concepts of IL, isn't necessary, if the owner of the real estate is e.g. a company. The company has thereby automatically an YRVE already according to Ch. 4 sec. 1 item 1 of ML, due to that section referring to NAVE in the whole of Ch. 13 of IL and not only to sec. 1 first paragraph second sentence there. Even if the company just sells a tree from its real estate and it's held for private use, has it a right to deduct input tax on expenses to make the transaction. A liability to levy output tax and account to the state for the sale arise however only if the company claim for VAT deduction on the expenses thereby, since the company according to the ECJ's practice can hardly be deemed acting in a capacity of taxable person. The duration prerequisite for E-VE which confirm the character of taxable person according to Article 4(1) of the Sixth Directive can hardly be considered fulfilled in the described situation. In this book is as mentioned

[385] See Ch. 2 sec. 14 of IL, *Prop. 1989/90:110* Part 1 p. 501 and *RÅ 1994 Not 302*.
[386] See *Inkomst av näringsfastighet i enskild näringsverksamhet Arbetsinkomst eller kapitalinkomst?* (Eng., Income of business real estate in one-man business Income of work or of capital?) – p. 392, by Urban Rydin.

a limitation suggested of the reference to Ch. 4 sec. 1 item 1 of ML to only concern the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL. However should, with respect of the described situation with judicial persons' possessions of real estate, that suggestion be combined with that it in Ch. 4 sec. 1 item 1 also will be expressed that YRVE doesn't exist only on the basis of the VE consisting of possession of a real estate constituting business-real estate (Sw., *näringsfastighet*).

Of interest otherwise concerning the reference in Ch. 4 sec. 1 item 1 of ML to the entire Ch. 13 of IL and the circumstance that judicial persons only can account incomes in the income tax schedule NAVE is e.g. the advanced ruling on income tax *RÅ 2001 Ref 60*. This case means that if for instance a company (Sw., *aktiebolag*) which is a partner in a partnership (Sw., *handelsbolag* – which includes *kommanditbolag*) only fulfills its obligations as partner in the partnership, aren't the subjective prerequisites for NAVE fulfilled for the company.

According to the SAC's advanced ruling the same day – the 16th of November – 2001 – in the Vat question (case No. 4453-2000) it means that 'any taxable transaction' (Sw., "*någon skattepliktig omsättning*") – of services – between the company who's a partner in the partnership and the partnership, which is the so called invoicing unit in relation to external customers, can't be deemed to exist. For its judgement the SAC referred merely to the decision of the income tax issue in *RÅ 2001 Ref 60*, why it may be considered being of importance for the question on YRVE.

For the question on belonging to the VAT system the two decisions by the SAC on the 16th of November 2001 mean first of all that a partner company can't be so lacking in independence that it lacks possibility according to the partner agreement to have other customers than the partnership (the invoicing unit). Then the prerequisite YRVE isn't fulfilled. That gives for the VAT a more EU law conform national practice than if the advanced ruling *RSV/FB Dt 1985:33* still would be of guidance to the question. The RSV's board of matters of the law, i.e. the predecessor to the SRN, stated therein that a company which account for income only due to being partner in a partnership with a business activity was considered entitled to deduct from the income wages to a stockholder who on behalf of the company had been active in running the partnership's business

activity.[387] Secondly the advanced rulings on the 16th of November 2001 mean a confirmation of that tax liability for a transaction presupposes that agreement on transaction of an article of goods or a service exist with the payer, also where a daughter-company is concerned. It's not sufficient that e.g. the civil law rules of 'the act on partnerships' (Sw., '*lag (1980:1102) om handelsbolag och enkla bolag*') contain rules on calculation and division of 'gross profit' (Sw., '*bruttoöverskott*') in a partnership between the partners. In the SAC case *RÅ 2005 Ref 19* was a company, which was unlimited partner (Sw., *komplementär*) in a partnership (i.e. a so called *kommanditbolag*, which is a partnership with at least one limited partner), not considered having made any taxable transaction of service to the partnership, when the company only in its capacity of unlimited partner had administered real estate owned by the partnership. The SAC couldn't see any other basis for considering that transaction existed. Whereas transaction is deemed to exist if e.g. a group contribution (Sw., *koncernbidrag*) actually constitute consideration for an ordered article of goods or service from the paying company in a group of companies (Sw., *koncern*), which the SAC established already in *RÅ 1989 Ref 86*.

In line with the described viewpoint on the prerequisites YRVE and taxable transaction are two other advanced rulings from the SRN. In the SRN's advanced ruling of the 23rd of June 2005 (appealed, but dismissed on account of revocation), the SRN consider that two companies which are partners in a partnership make taxable transactions of building services to their common partnership. The SRN refer to that the partners here 'contrary to what's been the case in the situations of similar character which have been subject for the SAC's judgement' (Sw., "*till skillnad från vad som har varit fallet i de situationer av liknande art som har varit föremål för Regeringsrättens bedömning*") don't receive 'any part of profit from the partnership's VE but consideration for supplied goods and services' (Sw., "*del i någon vinst från handelsbolagets verksamhet utan ersättningar för tillhandahållna varor och tjänster*"). With reference to the ECJ case C-

[387] See *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 27, by Björn Forssén; the RSV's writ on the 3rd of July 2002, *dnr 4860-02/120*; the SRN's advanced ruling on the 23rd of January 2003 (not appealed); *Svensk skattetidning* (Eng., Swedish tax journal) 2002 pp. 720-727, the article *Moms i paraplyorganisationer* (Eng., VAT in umbrella-organizations), by Torbjörn Boström; *Svensk skattetidning* (Eng., Swedish tax journal) 2002 pp. 455-470, the article *Paraply – överspelad (?) organisationsform* [Eng., Umbrella – an outplayed (?) organizationform], by Sune E. Jansson; and *Svensk skattetidning* (Eng., Swedish tax journal) 2002 pp. 582-584, the article *Paraplyorganisation – en kommentar i anledning av Sune Janssons artikel* (Eng., Umbrellaorganization – a commentary on account of Sune Jansson's article), by Brita Munck-Persson.

23/98 (Heerma) the SRN deemed that the partners thereby, 'in a way corresponding to what was the case' (Sw., "*på motsvarande sätt som var fallet*") in that ECJ case, could be 'deemed acting individually on their own account towards the partnership and not as administrator of the partnership' (Sw., "*anses handla enskilt för egen räkning gentemot bolaget och inte som förvaltande i bolaget*"). Partners in the partnership were a physical person and his wife. The person in question was considered a taxable person according to Article 4(1) of the Sixth Directive, despite that his only economic activity was letting of real estate to the partnership. Thus, the limitation didn't exist where the one hiring out due to the wording of a partnership agreement only could hire out to the partnership. In another advanced ruling the SRN made the opposite conclusion on the 16th of May 2005 (not appealed), i.e. that transaction according to the ML couldn't be deemed existing, just because of the case being that the applicant which took part in an 'unregistered partnership' (Sw., '*enkelt bolag*') only received share of profit from the unregistered partnership's activity, which by the way consisted of VAT free lottery activity. See also the advanced rulings on VAT *RÅ 1995 Not 224* and SRN of the 12th of January 2007.

Just the possession of proportions or shares in a company with a business activity gives thus not the holder the character of taxable person. The possession of shares etc can not in itself establish E-VE according to Article 4(1) of the Sixth Directive. As mentioned a certain activity is requested with administration measure indicating a purpose of making money with the possession, for the person in question becoming distinguished from the private investors (i.e. consumers). The individual has no problem with foreseeing the taxation consequences of precisely a sale of a share, since it's exempted from taxation according to Ch. 3 sec. 9 of ML regardless whether it's a question of just a possession for the purpose of speculation as by a private investor or of 'professional trade of securities' (Sw., '*värdepappershandel*'), i.e. E-VE. Tax liability won't emerge according to Ch. 1 sec. 1 first paragraph item 1 of ML due to the shares not being tax objects for VAT purposes and thus no right to deduct input tax according to Ch. 8 sec. 3 first paragraph of ML exist for such an E-VE.

Where it's about a judicial person's possession of real estate applies the comparison with possession of shares only to acquisition and sale of the real estate or the letting of it. The main rule is that the sale is exempted from taxation according to Ch. 3 sec. 2 of ML. However is as mentioned e.g. the company's possession of the real estate business-real estate (Sw., *näringsfastighet*). Would the incomes instead be sale of products from the

real estate, can thus the company choose to belong to the VAT system, since both the prerequisites for tax liability according to Ch. 1 sec. 1 first paragraph item 1 of ML – besides the transaction supposed to take place within the country – are fulfilled: YRVE by virtue of the reference in that respect to the IL comprising the whole Ch. 13 and the sale if only of a single tree (article of goods) from the real estate is a taxable transaction.

A company's or another judicial person's possession of proportions or shares in another company, where the actual activity is placed with invoicing to customers, means thus that the distribution of profit will be income of NAVE and formally income in YRVE just because that judicial persons only account in the income tax schedule NAVE and Ch. 4 sec. 1 item 1 of ML refers to the entire Ch. 13 of IL. Such a partner company will instead be outside the VAT system due to the lack of an agreement to make transactions to the invoicing company in which it owns the proportions or the shares. The division of profit between the partners isn't sufficient in itself to establish transaction to the company in which the proportions or the shares are held. Would the possession however be a direct ownership of a real estate has the company in question not only YRVE formally, but the it can choose to belong to the VAT system even if the asset doesn't constitute an E-VE to confirm such purpose of making money that it could be considered having the character of taxable person according to Article 4(1) of the Sixth Directive, provided that the real estate generates income which isn't from taxation exempted transaction according to Ch. 3 of ML however merely temporary and single.

Previously in this presentation has it thus been established that a person which isn't devoting his investments more administration measures than what a private investor does can't be deemed having an E-VE. The ECJ considers in such a case that the person in question can't be deemed having an E-VE which leads to the character of taxable person according to Article 4(1) of the Sixth Directive.[388] The "Heerma"-case confirms that standpoint, where holding companies and their "holdings" in other activities are concerned. The expression holding company is by the way not defined in Swedish law, and neither in e.g. Danish law. The expression is vague and the general company and tax law acts will instead apply when a holding

[388] See the ECJ cases "Sofitam" (item 12) and "Floridienne" (item 28), "Harnas & Helm" (item 18) and also "Wellcome Trust", and "Polysar". See also Liber Amicorum Sven-Olof Lodin, the Chapter Who is a taxable person?, p. 168, by Peter Melz (pp. 158-172), by Andersson, Krister, Melz, Peter and Silfverberg, Christer.

company is formed.[389] It's clear anyhow that such rules aren't concerning anything else but what's applying to the partner as a partner in the company, and that the legislation in itself doesn't give the partner character of taxable person.

It's also of interest that the SRN and the SAC have support also for the described viewpoint on the transaction issue by the ECJ's practice. It's previously been established according to item 18 of the "Harnas & Helm"-case that the fact that an investment in itself give return on investment in the form of e.g. interest isn't sufficient for the holder of the investment to be deemed having an E-VE. According to item 27 of the ECJ case C-465/03 (Kretztechnik) the ECJ consider furthermore that any transaction isn't made by a company in its capacity of taxable person according to Article 2(1) of the Sixth Directive due to a "share issue" (Sw., *nyemission*) in itself. Thereby emerge according to the ECJ not any VAT free transaction of financial service which would limit the right of deduction in the activity. According to item 37 of the verdict is "expenses … in the context of the share issue" deductible "provided … all the transactions carried out … in the context of" the company's "economic activity constitute taxed transactions". The ECJ refers in items 19 and 20 of the verdict inter alia to precisely the "Harnas & Helm"-case and to the ECJ case C-77/01 (EDM). In item 65 of the "EDM"-case the ECJ notes, with reference to item 17 of the ECJ case C-306/94 (Régie dauphinoise) and a similar reasoning there, that it of the ECJ's practice follows that "interest received by a holding company in consideration of loans granted to companies in which it has shareholdings cannot be excluded from the scope of VAT, since that interest does not arise from the simple ownership of the asset, but is the consideration for making capital available for the benefit of a third party" (Sw., "*att räntor som uppbärs av ett holdingbolag som ersättning för lån som det beviljat bolag i vilka det äger andelar inte skall undantas från mervärdesskattens tillämpningsområde, eftersom betalningen av dessa räntor inte följer enbart av egendomsinnehavet, utan utgör vederlag för tillhandahållande av kapital till förmån för tredje man*"). In the loan situation arises a transaction in the form of an interest which isn't based only on the possession of shares in the daughter-company. The transaction is comprised by the VAT rules, and since it's exempted from taxation according to Article 13(B.d1) of the Sixth Directive is the right to deduct input tax on the acquisitions in the VE limited. Of interest here is

[389] See *Skattenytt* (Eng., the Tax news) 2001 p. 237, the article *Beskattning av "danska holdingbolag" – dansk internationell skatterätt i svensk jämförelse* (Eng., Taxation of 'Danish holding companies – Danish international tax law in Swedish comparison), pp. 236-254, by Mattias Dahlberg.

that the SRN's and the SAC's viewpoint meaning that a separate agreement on transaction of goods or services must exist between the holding company and the company in which it possess proportions or shares beside the actual agreement on forming the company or the partnership, for a payment between the companies becoming comprised by the VAT's rules, also corresponds with the ECJ's practice.

The reference to the concept NAVE in Ch. 13 of IL for the determination of YRVE according to ML lead thus only to the problem where judicial persons are concerned, that they only account for income in the income tax schedule NAVE and that they thereby can come to belong to the Vat system for activities which aren't fulfilling the prerequisites for someone being considered having the character of taxable person. Compare with the example previously given about him buying and selling one bicycle isn't deemed having YRVE. Although the person in question is making a taxable transaction, can it not be deemed as anything else than the acquisition of the asset being made in the capacity of consumer. Therefore shall the person in question not belong to the VAT system, contrary to the bicycle dealer, who has YRVE. He who forms a company can formally make a VE, which materially doesn't correspond to anything but the activity which occur at private consumption, into an YRVE. It can thus lead to competition distortions and the reference in Ch. 4 sec. 1 item 1 of ML should be limited to concern the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL. I.e., the order should be restored to what applied before 2001 when the reference concerned sec. 21 of KL. Let alone as the review in this book is showing that the Swedish income tax law practice is EU law conform where the determination of the tax subject is concerned, i.e. of who can belong to the VAT system. In the context it may be noted that the SAC in an advanced ruling on income tax has stated that already a newly formed inactive company, can be considered carrying out NAVE and that it's continuing until the company cease to exist. The statement was made in connection with questions on group contributions, and with reference to a company's incomes and expenses not being referable to another income tax schedule than NAVE.[390] That confirms, for the question on the connection to the concept NAVE for the determination of YRVE, furthermore the need to formally restore the order from the time before 2001.

The presentation continues with illuminating that the reference to the entire Ch. 13 of IL in Ch. 4 sec. 1 item 1 of ML can lead to persons not fulfilling

[390] See the SAC case *RÅ 2006 Ref 58*.

the conditions for taxable person being deemed having YRVE formally, regardless whether they are physical or judicial persons.

6.2.8.2 Other things about the reference to the income tax schedule NAVE according to the whole of Ch. 13 of IL

Other cases where the formal extension of the concept YRVE according to the main rule in Ch. 4 sec. 1 item 1 of ML is giving a non-EU law conform result, by the reference therein to the concept NAVE in the whole of Ch. 13 of IL, are described in the following.

A physical person's sale of his proportion in a Swedish partnership (*handelsbolag*) cause YRVE already formally according to ML, since *Ch. 13 sec. 5 of IL* for certain cases stipulates that the capital gain thereof belong in the income tax schedule NAVE. The VAT's rules become applicable, regardless if there's a purpose of making profit, and that's not in compliance with the concept taxable person according to Article 4(1) of the Sixth Directive. Another matter is it thus that the tax liability or right of deduction doesn't emerge due to the exemption from taxation for shares and other rights of claim according to Ch. 3 sec. 9 of ML. The situation will be the same concerning so called forbidden loans according to Ch. 21 sections 1-7 of ABL or sec. 11 of 'the act on securing of pension commitment etc' [Sw., '*lagen (1967:531) om tryggande av pensionsutfästelse m.m.*'] referred to the income tax schedule NAVE according to *Ch. 13 sec. 3 of IL*. According to *Ch. 13 sec. 4 first paragraph of IL* the rules for judicial persons also apply a partnership (Sw., *handelsbolag* including *kommanditbolag*), but for partners in such a partnership is the partnership's capital profits and capital losses on business-real estate (Sw., *näringsfastighet*) and business-tenants owner association rights (Sw., *näringsbostadsrätter*) not considered belonging to NAVE, but to the income tax schedule capital and forbidden loan according to what's stated recently to the income tax schedule earned income (Sw., *inkomstslaget tjänst*). In that sense won't thus the problems which are brought up here with the reference to the whole of Ch. 13 IL arise concerning such a partner's income tax status, since the incomes in the described situations aren't in themselves leading to the income tax schedule NAVE becoming applicable to the partner.

A physical or judicial person which receives consideration in the form of royalty or periodic fee is considered carrying out NAVE according to *Ch. 13 sec. 11 of IL*, if it's not a matter of the royalty or the fee being

based on employment or temporary activity beside NAVE – in which case the income instead belong to the income tax schedule earned income. Also this is in conflict with the mere possession of the tangible or intangible asset which is the basis for the right to the royalty or the fee not establishing E-VE in the senses of the Sixth Directive. Royalty etc are today about taxable rights. From 1997 are as mentioned copyrights such as an author's right to royalty no longer exempted from taxation according to Ch. 3 of ML and commercial rights such as patents became taxable already on the 1st of July 1986. Here emerge formally tax liability and right of deduction according to ML just because of the possession of the right to royalty, and that state of things isn't EU law conform.

In *Ch. 13 sec. 9 of IL* is stipulated that dividends from a company or economic association aren't referred to the income tax schedule NAVE, although the share entitling to the dividend isn't an asset in NAVE according to *Ch. 13 sec. 7 of IL*, if the dividend is paid in relation to purchase (i.e. discount) or sales (i.e. supplement – Sw., *pristillägg*) made in the NAVE. The person carrying out NAVE shall be taxed in that income tax schedule for a discount received due to a business transaction with the one paying the discount even if the receiver owns shares in the company or association leaving dividend and the share or shares isn't included in one of that person carried out 'professional trade of securities' (Sw., '*värdepappershandel*'). This is in compliance with the Sixth Directive, since the directive and ML respectively isn't admitting that taxable transactions are excluded from taxation when made in the E-VE and VE respectively.

A discount is however considered a new business transaction and, if the company or the economic association has chosen to reduce the original base of calculating the VAT and issue a credit invoice thereof to the purchaser/receiver, has previously ruled that the discount cause an increase of the VAT by the receiver by reduction of the originally deducted input tax, provided that the purchaser/receiver was entitled to right of deduction or reimbursement.[391] This freedom of choice has been hard to combine with Article 11(A.3a) of the Sixth Directive meaning that the base of calculation of the VAT mustn't be reduced due to conditional discounts. With support of a certain sovereignty given to the Member States concerning price reductions after the transaction

[391] See *Prop. 1993/94:99* p. 240 and Ch. 7 sec. 6 first paragraph and Ch. 13 sec:s 24, 25 and 26 of ML.

according to Article 11(C.1) of the Sixth Directive, has, by *SFS 2002:1104* and with effect from the 1st of July 2003, a possibility been introduced in Ch. 7 sec. 6 of ML for the seller and the buyer to make an agreement on bonus and discount not reducing the base for calculation of the VAT after the original transaction has taken place.[392] Otherwise the rule is from that date that such a reduction must be made. If the possibility to choose that discount after the transaction shall be included in the base for calculation of the VAT is used, will, similar to what's been the case since the IL was introduced, the received discount in itself mean that the receiver has YRVE according to ML. That effect of the reference in Ch. 4 sec. 1 item 1 of ML referring since 2001 to the entire Ch. 13 of IL is thus not EU law conform, and was obviously disregarded at the alteration of the ML by *SFS 2002:1004*.

Otherwise Ch. 13 sec. 7 of IL doesn't in itself cause any problem on the topic here with the connection from ML to the entire Ch. 13 of IL, since partners' rights (Sw., *delägarrätter*), rights for claim (Sw., *fordringsrätter*) and proportions (Sw., *andelar*) in Swedish partnerships and such 'personal assets' (Sw., "*personliga tillgångar*") described in Ch. 52 of IL aren't assets referred to NAVE, if they are held by 'a one-man business' (Sw., '*en enskild näringsidkare*'). This is thus in line with the SAC's standpoint in the previously here mentioned case *RÅ 2005 Ref 4* II concerning sale of playing rights in a golf association. It neither means any problems on the topic in question that *Ch. 13 sec. 8 of IL* stipulates that the debt of a one-man business referred to assets which according to Ch. 13 sec. 7 of IL aren't considered assets in NAVE is nor considered referable to the NAVE. Whereas it is a problem on the topic in question with a selection of entrepreneurs which shall be conform with taxable person in the Sixth Directive, that Ch. 13 sec. 12 of IL stipulates that a physical person's proportion of all incomes and expenses in a foreign judicial person with low taxed incomes is referred in itself to the income tax schedule NAVE. It's the same about *Ch. 13 sec. 6 of IL*, where it's stipulated in the second paragraph there that a one-man business can choose to refer capital profit and capital losses on business-real estate and business-tenants owner association rights, which otherwise according to the first paragraph of the section would be referred to the income tax schedule capital, to the income tax schedule NAVE, if the sale leads to right to deduction for 'allocation to replacement reserve' (Sw., '*avsättning till ersättningsfond*') according to Ch. 31 sec. 5 of IL. Such a right of deduction emerge namely not only in

[392] See *Prop. 2002/03:5* p. 73.

the case of the sale being a part of rationalization of farming (NAVE), but according to that section it emerge in certain cases just because of an expropriation or other compulsory sale has taken place.

In one case Ch. 13 of IL does however not give a wrong selection of entrepreneur for VAT purposes beside the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph of IL. That's Ch. 13 sec. 10 of IL. By the way can it first be noted that *Ch. 13 sec. 1a* refers to cases of NAVE in the form of building business activity, trade with real estate and physical person's sale of share in a so called shell company (Sw., *skalbolag* – often used for tax evasion purposes in Sweden), but these cases aren't of interest here, since section 1a doesn't in itself stipulate that the income tax schedule NAVE shall apply, but refer for these cases to such a determination in Ch. 27 of IL and Ch. 49a of IL. Ch 4 sec. 1 item 1 of ML doesn't refer thereto for the determination of YRVE, and building business activity according to IL only comes in into the picture with the special regulation of withdrawal taxation of building services in Ch. 2 sec. 7 of ML, which as mentioned is of no interest here, since it's about the tax object.

According to *Ch. 13 sec. 10 of IL* one-man businesses are taxed in the income tax schedule NAVE for dividends from a community (Sw., *samfällighet*), e.g. a road community, in which the person's in question business-real estate is a part owning real estate. That Ch. 13 sec. 10 of stipulates that dividends which a one-man business is receiving due to his business-real estate being part owning real estate in the community leaving dividends are referred to the income tax schedule NAVE isn't in conflict with the Sixth Directive, since it's a question of a physical person's business-real estate. He must thus use the real estate in his activity for it being deemed business-real estate and not private dwelling real estate.[393] It's not sufficient with the possession itself for the real estate to be considered having that character, apart from judicial persons which as mentioned only can have business-real estate. Any tax liability according to ML won't emerge otherwise for the receiver of the dividend, if it doesn't constitute consideration for an article of goods or a service ordered by the community from the person in question. A factor of ordering is namely a necessary presupposition for a transaction occurring at all according to Ch.

[393] See Ch. 2 sec:s 8, 13 and 14 of IL. See also *Inkomst av näringsfastighet i enskild näringsverksamhet Arbetsinkomst eller kapitalinkomst?* (Eng., Income of business real estate in one-man business Income of work or of capital?) – p. 392, by Urban Rydin.

2 sec. 1 of ML.[394] E.g. taxation of the dividend will come up if the one-man business receives it for maintenance work on the road in question if it's a question of a road community. The road community on its side will be tax liable too under the provision that a taxable transaction is made. It's about 'the exemption from the exemption' in the field of real estate in Ch. 3 sec. 3 first paragraph item 10 of ML which concerns letting of road for traffic becoming applicable, by the letting being made externally and that the supply concern other than the needs of the part owning real estates themselves.[395]

That the reference in Ch. 4 sec. 1 item 1 of ML to the entire Ch. 13 of IL doesn't give a non-EU law conform distinction between entrepreneurs and consumers precisely concerning Ch. 13 sec. 10 of IL seems only to be coincidental and not anything intended by the legislator. However, it doesn't change the overall need to restore the order before 2001. I.e., the reference in Ch. 4 sec. 1 item 1 of ML for determining YRVE should be restricted to concern only Ch. 13 sec. 1 first paragraph second sentence of IL and thus the subjective prerequisites for NAVE, so that the distinction between entrepreneurs and consumers can be considered conform with taxable person of the Sixth Directive.

6.2.9 YRVE, the importance of certain incomes falling beside the income tax schedules in the IL

The extension in 1990 of the income taxation to comprise also previously tax free hobby activities meant however not that there are no cases at all where a consideration falls outside all the income tax schedules without being a case of inheritance (Sw., *arv*), gift (Sw., *gåva*) or another 'acquisition free of charge' (Sw., '*benefikt fång*').

The income taxation is normally made in one of the three income tax schedules NAVE, earned income or capital. That value added taxation doesn't exist for incomes in the income tax schedules earned income and capital, but only concerning NAVE is thus EU law conform materially. In any case as long as YRVE can be determined in relation to the subjective

[394] See Ch. 1 sec. 3 first paragraph second sentence of ML. See also the ECJ case C-16/93 (Tolsma); RSV's writ of the 12th of April 1999, *dnr 3254-99/120*; and *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 249, by Björn Forssén.

[395] See the advanced ruling *RÅ 2002 Ref 13*. Compare also the previously mentioned *RÅ 2003 Ref 80* where the importance of the members' of the tenant owners' association needs for garage places is concerned for the question on YRVE.

prerequisites for NAVE in Ch. 13 sec. 1 first paragraph second sentence of IL, but with respect of Swedish income tax law practice. However there are incomes that completely fall beside the income tax schedules and aren't leading to any income taxation at all. An income which cannot be referred to any of the three income tax schedules is tax free and the same rules for certain incomes which expressly are tax free according to Ch. 8 of IL.

The interests, subsidies and payments from insurances which are listed in Ch. 8 of IL as tax free at the income taxation don't constitute transactions for VAT purposes, since they aren't considerations for ordered goods or services,[396] why they are causing neither tax liability nor exemption from value added taxation. Although inheritances, wills, gifts or 'division of the joint property between husband and wife' (Sw., '*bodelning*') are income tax free according to Ch. 8 (sec. 2) of IL, which also are examples of what's not constituting transaction where VAT is concerned.

The recently mentioned income tax free interest etc fall completely beside a tax return or income tax return, since they are leading neither to taxable transactions nor to transactions exempted from taxation according to ML. Gift as an 'acquisition free of charge', which also can occur at 'division of joint property between husband and wife',[397] can however lead to taxation of withdrawal according to Ch.2 sec. 1 of ML if the gift concerns assets in a business activity or to a from taxation exempted transaction according to Ch. 3 sec. 25 of ML if the gift comprise the whole business activity. Any uncertainty does however not exist between the ML and Ch. 22 of IL concerning what can be subject to taxation of withdrawal; the differences – besides that withdrawal as mentioned not exist for under pricing according to the "Hotel Scandic Gåsabäck"-case – are instead lying in the ML, contrary to the IL, doesn't base such taxation on market value since Sweden's EU-.accession in 1995.[398] Then (in 1995) was by the way the important adjustment concerning the presuppositions for taxation of withdrawal of services made in the ML meaning that it no longer is

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[396] See Ch. 1 sec. 3 first paragraph second sentence of ML and *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), pp. 32 and 33, by Björn Forssén.

[397] See *Mervärdesskatt En handbok* (Eng., Value added tax A handbook), p. 243, by Björn Forssén and *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 32, by Björn Forssén.

[398] See Ch. 22 sec. 7 first paragraph of IL, where the income tax meaning of taxation of withdrawal is described as 'withdrawal of an asset or a service being treated as if it was transferred for a consideration equal to market value' (Sw., "*[u]ttag av en tillgång eller en tjänst skall behandlas som om den avyttras mot en ersättning som motsvarar marknadsvärdet*").

requested that the services also normally are supplied externally, which prerequisite wasn't deemed having any support by the Sixth Directive.[399] The prerequisite is however retained in the rule Ch. 2 sec. 7 of ML concerning taxation of withdrawal of 'building services on own buildings in stock' (Sw., '*egenregibyggnation*'), which rule as mentioned exist as a special solution in relation to the directive law supported by the EU act (on Sweden's accession to the EU).

Apart from the differences mentioned has congruity existed between the VAT and the income tax also concerning withdrawal taxation of services since the big tax reform in 1990, when rules on taxation of withdrawal were introduced for the first time also for services in the field of income tax.[400] Thereby was referred to then already existing rules on withdrawal taxation of services in the field of VAT, which speaks for the legislator seeing a value in congruity between VAT and income tax in the present respect.[401]

Bortsett från dessa reflektioner på temat omsättning återstår att bedöma om intäkter som helt faller utanför de tre inkomstslagen, genom kopplingen från 4 kap. 1 § 1 ML till inkomstslaget näringsverksamhet i IL, medför att momsbeskattningen begränsas i strid mot sjätte direktivet. Skulle intäkterna kunna utgöra inkomster i yrkesmässig verksamhet, om det inte vore för kopplingen till näringsverksamhetsbegreppet i IL? Thereby is an older case, *RÅ 1964 ref 16*, which isn't commented in the doctrine,[402] of interest.

The extension of the scope of what's comprised by the income taxation, which was made by the big tax reform in 1990, means that the income in the case in question could be subject to income taxation today, but the case is brought up here only in the sense that certain incomes can fall completely beside the income taxation, which in principle still rules.[403]

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[399] See *Prop. 1994/95:57* p. 117. See also *Svensk moms i EU* (Eng., Swedish VAT in the EU), p. 24, by Björn Forssén.
[400] See *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 9th edition, p. 242, by Sven-Olof Lodin and others and *Prop. 1989/90:110* Part 1 p. 660.
[401] See *Prop. 1989/90:110* Part 1 p. 660.
[402] See e.g. *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 9th edition, p. 664, by Sven-Olof Lodin and others and *Det svenska skattesystemet* (Eng., The Swedish tax system), p. 592, by Johansson, Gunnar and Rabe, Gunnar, where the case is missing in the case-inventories.
[403] See *Prop. 1989/90:110* Part 1 pp. 307 and 308 and also *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 9th edition, pp. 66 and 67, by Sven-Olof Lodin and others and *Inkomstbeskattning vid konkurs och ackord* (Eng., Income taxation at bankruptcy and compound with creditors), p. 95, by Pelin, Lars and Elwing, Carl M.

RÅ 1964 ref 16 concerned question on tax liability for consideration for transfer of a 'right of tenancy' (Sw., '*hyresrätt*'). It concerned business premises and the woman holding the right died. Thereafter the business activity was transferred to one of the husband and three grown up children formed company, but the right of tenancy was transferred on the request of the landlord to the surviving husband, who let the premises in his turn to the company. When also he died the estate after him intended to transfer both the right of tenancy and the shares in the company. The National Board of tax matters (Sw., *Riksskattenämnden* – a predecessor to the SRN) considered that a consideration for the right of tenancy didn't constitute taxable income for the estate of the deceased. The surviving husband could by the subletting (Sw., *andrahandsuthyrningen*) not be deemed having carried out business activity and neither he himself nor his estate could be considered having acquired the right of tenancy by any 'capital gain founding acquisition' (Sw., '*realisationsvinstgrundande fång*'). The SAC established the board's judgement, whereby one 'Justice of the SAC' (Sw., '*regeringsråd*') was dissentient (Sw., *skiljaktig*) and considered that taxation for such a consideration would take place in income tax schedule 'temporary purpose of making money-activity' (Sw., ' *tillfällig förvärvsverksamhet*'), which today is included in the income tax schedule capital.

A transaction consisting of transfer or letting of right of tenancy to premises is exempted from taxation according to Ch. 3 sec. 2 first paragraph of ML, why value added taxation cannot be caused by such a supply, which has been the case since the VAT was introduced in Sweden in 1969.

However doesn't value added taxation emerge even if it according to ML would be a case of taxable transaction of a right (service) under circumstances which otherwise corresponded to those in the case of 1964. A right which isn't acquired to be included in the production of taxable or from taxation exempted transactions, cannot by itself establish E-VE. It's lacking an acquisition to create taxable transactions making the holder of the right a taxable person, why a transaction of the right isn't made by him in an YRVE and thus not lead to tax liability according to Ch. 1 sec. 1 first paragraph item 1 of ML.

The SRN has in a legally binding advanced ruling of the 21st of December 2005 on VAT, where the author of this book assisted the applicants, considered that a 'consideration for standstill' (Sw., '*stilleståndsersättning*') to enterprises with owners who are members in a

'trade association' (Sw., '*branschorganisation*'), which service company paid the consideration, was made for such a 'commission of trust' (Sw., '*förtroendemannauppdrag*') by the receiving company's owner (i.e. the member), that the consideration couldn't be deemed constituting 'any of the company carried out NAVE according to Ch. 13 first paragraph of IL or thereby comparable business activity' (Sw., "*någon av bolaget bedriven näringsverksamhet enligt 13 kap. första stycket IL eller därmed jämförlig rörelse*").

The applicants, the trade association's service company and a company which owner was member of the trade association, had inter alia invoked *RÅ 1964 ref 16*, and that the consideration for standstill was of such a personal character and linked to the member as a trusted member that it would be falling beside the income tax schedule NAVE. Since the consideration was meant to cover fixed costs (Sw., *fasta kostnader*) in the member's company during the time of standstill due to the member being occupied with performing the commission of trust, was also invoked that it couldn't be deemed paid for any 'personal employment like relation' (Sw., '*personligt tjänsteförhållande*') to the member, which the counterparty in the errand – the SKV – had argued for. The circumstances were described by the applicants to exist regardless of size of the receiving enterprise and number of partners thereof etc. The SRN didn't in any sense accommodate the SKV's arguments. The SRN only expressed as a reservation that the question on the service company's right of deduction became of no interest due to the receiving company not being considered tax liable according to ML for the consideration for standstill and that question was therefore not answered by the SRN.

The SKV represented a contradictory (Sw., *kontradiktorisk*) approach. If the consideration for standstill isn't included in YRVE, it must constitute earned income by the member/enterprise's owner personally. Such a viewpoint is contradictory: if not taxation one way it must be taxation another way. The applicants represented an open contradictory approach (Sw., *konträrt synsätt*), i.e. that both the topic of value added taxation by the company and of taxation by its owner could be false.

The applicants claimed that the trial where VAT is concerned was about whether the consideration for standstill during existing circumstances concerns the interface transaction contra non-transaction. Secondly they argued for it concerning the topic transaction within contra beside the receiving company's E-VE, and that the consideration couldn't be deemed belonging to anyone but the receiving company – contrary to the SKV's

perception that the consideration belonged to the member personally and that the application therefore should be rejected. The SRN did not reject the applicants and didn't question in its advanced ruling that the consideration for standstill belonged to the member's company, but the commission of trust could 'not be deemed constituting any by the company carried out NAVE according to Ch. 13 sec. 1 first paragraph of IL or thereby comparable business activity' (Sw., "*inte anses utgöra någon av bolaget bedriven näringsverksamhet enligt 13 kap. 1 § första stycket IL eller därmed jämförlig rörelse*").

Thereby could neither by the trial against Article 4 of the Sixth Directive liability to pay VAT emerge for the consideration for standstill according to the SRN. Any rejection was thus not decided, and the advanced ruling means that the consideration for standstill belong to the member's company. It's taxed per definition in NAVE since incomes in companies only are comprised by that income tax schedule, but the consideration isn't comprised by the more restricted meaning of the concept NAVE which, according to Ch. 13 sec. 1 first paragraph second sentence of IL, provides that the subjective prerequisites for NAVE are fulfilled. Since Swedish income tax law practice thereby as mentioned is conform with the determination of taxable person according to Article 4(1) of the Sixth Directive and taxation neither shall be made in the income tax schedule earned income by the member personally, the consideration for standstill is falling beside the income tax schedules. It constitutes according to the formally wider definition of NAVE according to Ch. 13 of IL only a 'miscellaneous income' (Sw., '*övrig intäkt*') in NAVE by the member's company. Since that company didn't wish to exercise a possibility for value added taxation of the consideration for standstill, the advanced ruling means that it doesn't belong to the VAT system with respect of the consideration.

The chairman of the SRN, Carl-Gustaf Wingren, who took part in the decision on the 21st of December 2005, commented the advanced ruling in *Skattenytt* (Eng., the Tax news) No. 4 of 2006 (pp. 166-167). Thereby follows that the consideration for standstill shall not be value added taxed either due the lack of YRVE or due to the transaction prerequisite lacking as well and the SRN's chairman notes that the discussion whether the consideration for standstill belonged to the company or the shareholder took place before the decision. The question on the alternative earned income was thus not forgotten at the decision by the SRN, just because it's not mentioned explicitly in the advanced ruling. The application wasn't rejected either despite the SKV's solicitor arguing for that as mentioned. Of

interest is by the way that Håkan Söderberg at the SKV's head office (formerly the RSV) in *Svensk skattetidning* (Eng., Swedish tax journal) No. 2 of 2006 (p. 197) comments the advanced ruling in question the same way as the chairman of the SRN did, namely meaning that neither the transaction prerequisite nor the prerequisite YRVE are fulfilled concerning the consideration for standstill.

The SRN can be described to have expressed that the consideration is completely falling beside the three income tax schedules, and has stated explicitly that because of the subjective prerequisites for NAVE in Ch. 13 sec. 1 first paragraph second sentence of IL couldn't be deemed fulfilled the prerequisite YRVE in Ch. 4 sec. 1 items 1 and 2 of ML failed, which trial the SRN stated had to be 'considered being in compliance with the Sixth Directive' (Sw., "*anses vara i överensstämmelse med sjätte mervärdesskattedirektivet*"), to be precise Article 4 of the Sixth Directive. The SRN considered for its judgement there was no need to refer to the constitutional principle of legality for taxation invoked by the applicants, which may be perceived meaning that the SRN consider the connection from Ch. 4 sec. 1 item 1 of ML to Ch. 13 of ML and the concept NAVE materially EU law conform, where the scope of the concept YRVE with respect of the subjective prerequisites for NAVE is concerned.

That interpretation of the advanced ruling is confirmed by the SRN pointing out that Article 4(1) of the Sixth Directive determine who's a taxable person, regardless of the purpose or results with the E-VE. The SRN's standpoint may thus at least be understood as taken with regard of that national legal practice doesn't present any profit prerequisite materially for the trial of what's considered constituting NAVE. As a support to this interpretation can also be mentioned that the applicants as an alternative basis for the consideration for standstill not leading to tax liability for the receiver according to Ch. 1 sec. 1 first paragraph item 1 of ML, which inter alia stipulates that both YRVE and taxable transaction are necessary prerequisites for the emergence of such liability, inter alia argued for the consideration only constituting a cost sharing (Sw., *kostnadsdelning*) between the enterprises which owners were members in the trade association to make it possible to have a standstill in the VE when performing the commission of trust, and that tax liability thereby didn't emerge due to the transaction prerequisite, which is specific for the VAT, was lacking, but the SRN has in its decision only taken up the concept YRVE.

At the interpretation of the advanced ruling in question is it important to think about that it concerned a trade association's service company. It was thus a question on cost sharing between enterprises, and for comparison can cases concerning trade unions be mentioned. In the previously mentioned RÅ 1997 Ref 16 was it a question whether the trade union made transactions where VAT is concerned by supplying the members 'piecework-control-services' (Sw., '*ackordskontrolltjänster*'). In the advanced ruling *RÅ 2006 Ref 31* was an enterprise considered making transactions for VAT purposes, when it hired out its labour to carry out tasks in the activity of the trade union where the workers were members. The case of 1997 was about judging the trade union's activity with supplying the 'piecework-control-services' to the members as support in their negotiations on wages with the employer, and if it could be deemed constituting a special YRVE where such transactions were made by the trade union. The trade union was judged to that part as an entrepreneur comprised by liability to pay VAT, i.e. both the subject and the object issue were judged. In the case of 2006 was however only the object question judged, since it was assumed that the employer carried out YRVE (the subject question), and the advanced ruling only concerned the hiring out of labour to another person (the object question). That the person was the trade union organizing the labour hired out by the entrepreneur didn't change the fact that an agreement on supply of the service hiring out of labour existed between the employer in the capacity of entrepreneur and the trade union as customer, and that the entrepreneur thereby was deemed making a transaction for VAT purposes. The cases from 1997 and 2006 cannot be about cost sharing in the same way as in the SRN's advanced ruling of the 21st of December 2005, since that case basically concern cost sharing between entrepreneurs. The entrepreneurs in the SRN's advanced ruling of the 21st of December 2005 share via the service company costs for a standstill with each other when an owner an enterprise in question is performing the commission of trust to the benefit of the own enterprise and the collective of other enterprises which owners are members in the trade union. That cost sharing issue is relevant both to the subject and the object question.

The consideration for standstill in question is taken up as a miscellaneous income in NAVE by the member's company, but cause in itself that the company may choose to belong to the VAT system for it. This since judicial persons' all incomes are referred to the income tax schedule NAVE. The SKV can however not force the company to account for and pay output tax for the consideration in question, regardless if the proposal in this book to limit the reference in Ch. 4 sec. 1 item 1 of ML to Ch. 13

sec. 1 first paragraph second sentence of IL is carried out. Whereas, as long as that measure isn't made, a judicial person like the company in question – unlike a physical person – can choose to belong to the VAT system also for an income which is falling beside the income tax schedules. The income in question isn't comprised by NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL and thus not neither of earned income as a 'gathering income tax schedule' (Sw., '*restinkomstslag*'). Formally does however the reference to the entire Ch. 13 of IL today mean that YRVE according to Ch. 4 sec. 1 item 1 of ML can comprise also such an income by a judicial person. It's not conform with who's considered having the character of taxable person according to Article 4(1) of the Sixth Directive, but when ML is giving a wider space for deduction than the Sixth Directive, is it thus up to the company in question to decide whether it will exercise the right of deduction and belong to the VAT system. First if this is done can the SKV enforce a claim on accounting and paying output tax for the sort of incomes now in question. Precisely in the case with the consideration for standstill does however not that choice exist, since the consideration neither can be deemed corresponding to a transaction, which is a question specific for the VAT without connection to the concepts of the IL. Here it's however sufficient to establish that the difference, which means that judicial persons but not physical persons can choose to let an income falling beside the income tax schedules be comprised by YRVE, can lead to a competition distortion in conflict with the aim of the VAT. That difference is thus another reason to limit the reference in Ch. 4 sec. 1 item 1 of ML for the determination of YRVE to concern only the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL.

6.3 THE RIGHT OF DEDUCTION

A systematical interpretation of the rule in the general right to deduct input tax in Ch. 8 sec. 3 first paragraph of ML and the rule on registration to VAT under a build-up stage for newly started enterprises in Ch. 10 sec. 9 of ML can as mentioned lead to the non-EU law conform conclusion that the emergence of the right of deduction cannot occur, before taxable transaction first has been made in the VE. The concept 'VE causing tax liability' (Sw., "*verksamhet som medför skattskyldighet*") in the section first mentioned should be clarified in that respect. Whereas the ML otherwise is conform with the Sixth Directive where the necessity of the concept VE in YRVE is concerned so that the ML shall contain a concept corresponding to the directive's E-VE, for determining that a purpose of making money

exist which makes that the person in question can be deemed having the character of taxable person and thereby able to belong to the VAT system.

Since the right of deduction is central for determining what's VAT, the analysis now continuous with the connection that exist to Ch. 16 sec. 2 of IL for determining the scope of the prohibition of deduction for expenses for the purpose of entertainment and similar (Sw., *representation och liknande ändamål*) according to Ch. 8 sec. 9 first paragraph item 2 of ML. Prohibition of deduction is as mentioned possible to retain in Sweden for the time being after the EU-accession in 1995 according to Article 17(6) second paragraph of the Sixth Directive. However, it doesn't mean that application of such a prohibition of deduction can be made without respect of the EU law in the field of VAT. Of interest is therefore whether the connection to IL is EU law conform that sense. The other prohibitions of deduction in CH. 8 sec. 9 of ML, above all for acquisitions referable to permanent dwelling (Sw., *stadigvarande bostad*), and the prohibition of deduction for acquisitions of passenger cars (Sw., *personbilar*) and motor cycles in Ch. 8 sec. 15 item 1 of ML don't connect to the concepts of IL and are therefore not treated here. Since the income tax law concept private dwelling (Sw., *privatbostad*) has been mentioned previously may it just be mentioned that permanent dwelling is considered a specific VAT concept, where the character of a room or premises is judged, apart from the income tax law concept which is based on actual use.[404]

In the joint ECJ cases C-177/99 and C-181/99 (Ampafrance and others) the ECJ considered that national French legislation wasn't EU law conform, since therein, with support of Article 27(1) of the Sixth Directive for avoidance of tax evasion and tax loss, exemption from the general right of deduction in Article 17 of the Sixth Directive was introduced concerning the tax liable's acquisitions for entertainment of goods and services. Divergence from the rules in the Sixth Directive can according to the ECJ not be accepted, if they mean that a limitation of the right of deduction is based on the objective character of an acquisition without respect of whether it in the actual case can be proven that it's concerning expenses which have occurred in the business activity. If the individual at application of the deduction limiting rule has no possibility to prove that tax evasion or avoidance doesn't exist, and thereby not being able to exercise the right of deduction, the rule constitute, "as Community law now stands" (Sw., "*på gemenskapsrättens nuvarande stadium*"), as the ECJ put it, not a mean

[404] See e.g. *RÅ 2003 Ref 100*, where reference is made inter alia to *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 176, by Björn Forssén.

which, according to the so called principle of proportionality in Article 5 EC (formerly 3b third paragraph), stands in proportion to the aim to prevent tax evasion and avoidance, and influence then the aim and principles of the Sixth Directive in a far too large extension.

The ECJ's interpretation of Article 27 was made in the case in comparison to precisely Article 17(6) second paragraph of the Sixth Directive, where the court inter alia pointed out that "[i]t 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" (Sw., "*[a]v fast rättspraxis följer att den rätt till avdrag som avses i artikel 17 och följande artiklar i sjätte direktivet är oskiljaktigt förenad med mervärdesskatteordningen och därför i princip inte kan inskränkas*"). According to the ECJ 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" (Sw., "*i minsta möjliga utsträckning påverkar direktivets mål och principer*"), i.e. inter alia the POTB-principle and competition neutrality-principle. The prohibitions of deduction may thus not limit the otherwise general right of deduction in a non-EU law conform way so that the basic VAT principles are set aside.

Of a particular interest here is thus the prohibition of deduction in Ch. 8 sec. 9 first paragraph item 2 of ML, concerning expenses for entertainment and similar, since thereby for the judgement of what shall be deemed constituting non-deductible input tax on such expenses, reference is made to what shall be considered non-deductible entertainment and similar according to Ch. 16 sec. 2 of IL. The principles of the income tax law concerning the limitation of the scope of deductible internal or external entertainment seem not to be EU law conform, if Swedish current law in the field is considered. A trial will have to be made on the topic whether the costs which formally are concerned with a prohibition of deduction have occurred in the business activity and shall entitle to deduction, where concern must be given to whether the expenses can be deemed constituting general costs and not abnormal for an enterprise within the in the individual case actual sector. That possibility isn't expressly given today in pursuance of Swedish national practice, which instead may be perceived based on objective judgements in the present respect.

The problem with a non-EU law conform evolution of the law concerning inter alia the right of deduction for entertainment and similar is brought up

by the author of this book in an article.[405] In that article is by comparison another article by the author of this book mentioned,[406] to illustrate that any difference in right of deduction shouldn't exist where VAT is concerned between investments in e.g. 'home-computers' (Sw., "*hemdatorer*"), i.e. computers acquired by the employer for the purpose of loaning them to the employee for personal use, compared to investment in human capital (Sw., *humankapital*), where the question is whether an expense for internal entertainment in the enterprise can be considered to have emerged in the business activity.

As well by comparison is in the article brought up that practice in the field of care concerning what shall be comprised by the exemption from taxation according to Ch. 3 sections 4-7 of ML already is moving in a 'more liberal' direction, where with child care according to Ch. 3 sec. 7 of ML nowadays, according to *RÅ 1998 Ref 40*, shall be understood also a private enterprise's 'taking care of children' (Sw., '*barntillsyn*') temporarily in the employee's home. The VAT can thus be perceived to have begun to let go of 'institution-Sweden' (Sw., *"institutions"-Sverige*) as a model concerning the view on the right of deduction for investments in human capital and making trials more adjusted to the needs. Is an acquisition of an article of goods or a service necessary in terms of personnel care for the enterprise to stay in its field of competition over time, should the input tax of the acquisition be deductible. In the article is an evolution described where it's no longer a question of the entrepreneurs only buying 'cards for taking

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[405] See *Balans* (Eng., Balance) 6-7/2000, pp. 34-41, the article *Personalvård, går utvecklingen mot en vidare avdragsrätt på momsområdet än på inkomstskatteområdet?* (Eng., Personnel care – is the evolution going to a wider right of deduction in the field of VAT than in the field of insome tax?) – by Björn Forssén. The article is also to be found as Appendix 2, *Bilaga 2* (pp. 394-407), in *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), by Björn Forssén. In the article are, besides *RSV S 1997:2* and *RSV S 1998:40*, also the RSV's writs in the field of the 11th of July 1991 (*dnr 14360-91/D19*), of the 3rd of February 1999 (*dnr 851-99/100*) and of the 12th of March 1999 (*dnr 271-99/120*) and the investigation *SOU 1999:94*, *Förmåner och ökade levnadskostnader*, mentioned.

[406] See *Skattenytt* (Eng., the Tax news) 1998 pp. 848-854, the article *Momsavdrag på inköp av "hemdatorer"* (Eng., VAT deduction on purchases of 'home-computers'), by Björn Forssén. There are two writs from the RSV on home-computers mentioned: *dnr 875-98/900*, of the 3rd of February 1998, and *dnr 7115-98/900*, of the 17th of August 1998. The latter caused by two advanced rulings from the SRN on the 10th of July 1998 (*RÅ 1999 Ref 37* and *RÅ 1999 Not 176*), but which are of little guidance, since the SRN assumed that the computer equipment couldn't be acquired in the VE. In those cases are referred besides to the "BLP Group"-case to the ECJ case C-258/95 (Julius Fillibeck Söhne). See *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 70, by Björn Forssén.

exercise' (Sw., '*motionskort*') to their employees, but of them through the entrepreneur as employer being allowed access to 'way of life-institutes' (Sw., "*livsföringsinstitut*") with programs containing 'diet advice' (Sw., '*kostrådgivning*'), individually adjusted training and other things going way beyond what an ordinary 'workout gymnasium' (Sw., '*gym*') can offer with respect of the demands of today on 'corporate health care' (Sw., '*företagshälsovård*').

The delimitation which according to the RSV's recommendation *RSV S 1997:2* is drawn up for income tax purposes is however more standardized, where the distinction of internal entertainment from private life is concerned. In the recommendation that delimitation is drawn up in a rather blunt way between what is or is not belonging to 'social life' (Sw., "*sällskapslivet*"). That's still the case in the later introduced general advice and messages from the SKV's head office, *SKV A 2004:5* and *SKV M 2004:4*. With respect of the "Ampafrance and others"-case not allowing prohibition of deduction which isn't giving the opportunity to prove that it's a question of an expense in business activity, should thus the connection from Ch. 8 sec. 9 first paragraph item 2 of ML to Ch. 16 sec. 2 of IL be revoked. The risk is otherwise that the ML formally refers to a prohibition of deduction for entertainment and similar which isn't supported by the Sixth Directive. Although the authorities and courts shall disregard such a domestic practice in conflict with the Sixth Directive, it leads to uncertainty with the legal rights of the individual that formal rules aren't corresponding with the material rules. Everyone might not understand to appeal a false foundation based decision on refused right of deduction from the SKV and all appeals don't as mentioned reach the SAC and thereby the possibility to get uncertainties in the legislation straightened out by preliminary rulings from the ECJ.

That the income tax doesn't keep up with the more dynamic evolution of the law for the VAT in the field in question is confirmed inter alia also by the RSV's recommendation on income tax *RSV S 1998:40*, where the employer's right of deduction for personnel care is made depending on whether a private benefit for the employee being of a less value or not shall be taxed as a benefit. Any cases of deduction in the 'span' from more or less public regulated care efforts (corporate health care etc) to such efforts individually tied are not stated. If a trial whether a cost can be deemed having occurred in the business activity shall be made, must it in the field of VAT also be able to occur without limitation to standardizations of what's supposed to be of less value, regardless if the amount frames set by the RSV (or the successor the SKV's head office) concerning deductible

entertainment or similar follows directly by Ch. 16 sec. 2 of IL concerning 'meal expenses' (Sw., 'måltidsutgifter'). The purpose of introducing income tax law rules which meant a specification and limitation of the right of deduction for costs of entertainment and similar purposes, which was made the assessment year of 1964 (i.e. before Sweden even had introduced its VAT system), was to prevent abusive practice of the right of deduction. Previously deduction was granted also for such costs with support of the general rule according to sec. 20 of KL (nowadays: Ch. 16 sec. 1 first paragraph first sentence of IL) about the costs (expenses) supposed to be for generating and keeping revenues (incomes).[407] That purpose is thus, in pursuance of the ECJ's standpoint, not sufficient to motivate a system in the field of VAT with standardizations or amount frames for e.g. entertainment expenses, if it isn't allowing the individual to prove that tax evasion or avoidance doesn't exist and thereby being able to exercise the right of deduction. According to item 28 of the "Lennartz"-case the ECJ thus consider that Article 17 of the Sixth Directive cannot even implicitly be deemed to contain any rule on limitation of the right of deduction for the case usage in the E-VE is below a certain level.[408] This combined with the "Ampafrance and others"-case supports that the prohibition of deduction for entertainment and similar, if it at all shall remain, should not connect to the standardized concepts of the income tax.

The RSV has in writs of the 3rd of February 1999 (*dnr 851-99/100*) and of the 12th of March 1999 (*dnr 271-99/120*) neither given any guidance to a completing interpretation of the 'span' mentioned, but states only that a 'personnel care benefit' (Sw., '*personalvårdsförmån*') of less value shall be considered constituting acquisition in the VE where VAT is concerned, despite the existence of a certain private consumption. The RSV has in a writ of the 11th of July 1991 (*dnr 14360-91/D19*) considered that a certain 'card for taking exercise' (Sw., *Friskis & Svettis-kort*) for SEK 500 per semester or SEK 1,000 per year constitute 'exercise at a simple level)', Sw., "*enklare slag av motion*", but the EU law means thus that such amount frames from the income tax law mustn't prevent a trial whether such costs or costs of a more sophisticated character, e.g. as when an entrepreneur who's an employer gives his employees access to the above mentioned

[407] See *Prop. 1998/99:32* p. 80.

[408] See also *EG-skatterätt* (Eng., EC tax law), p. 191, by Ståhl, Kristina and Persson Österman, Roger, where they with erspect of the "Lennartz"-case argue that Swedish law can come into conflict with the EU law 'by the request in Ch. 8 sec. 15 of ML of a more than 'less usage' for right of deduction in a certain situation for passenger cars' (Sw., "*genom kravet i 8:15 ML på mer än 'ringa användning' för avdragsrätt i visst fall för personbil*").

'way of life-institutes', have emerged in the business activity and shall entitle to deduction.

The connection from Ch. 8 sec. 9 first paragraph item 2 of ML to Ch. 16 sec. 2 of IL should thus be revoked, so that also a formally correct description is given of current law, where the scope of the prohibition of deduction for input tax on expenses for entertainment and similar purposes is tried independently and without regard of the Swedish national income tax law's corresponding principles. As a suggestion can thus the expression 'for which the tax liable has no right to make deduction at the income taxation according to Ch. 16 sec. 2 of the income tax act' (Sw., "*för vilka den skattskyldige inte har rätt att göra avdrag vid inkomsttaxeringen enligt 16 kap. 2 § inkomstskattelagen (1999:1229)*") be abolished from Ch. 8 sec. 9 first paragraph item 2 of ML, since the connection to IL concerning the prohibition of deduction for input tax which is referable to 'expenses for entertainment and similar purposes' (Sw., "*utgifter för representation och liknande ändamål*") give rise to the risk that the general right of deduction is limited in conflict with Article 17 of the Sixth Directive.[409]

[409] The investigation *SOU 2002:74* does however not make any suggestion of revoking the connection to the IL for the determination of the scope of the prohibition of deduction for entertainment and similar according to Ch. 8 sec. 9 first paragraph item 2 of ML (see *SOU 2002:74* Part 2 pp. 68 and 69).

7. MISCELLANEOUS QUESTIONS

7.1 THE CONCEPT 'TAX LIABLE' (Sw., "*SKATTSKYLDIG*") IN CONNECTION WITH TAXATION OF INTRA-COMMUNITY ACQUISITIONS OF GOODS WHICH ARE VAT FREE IN ANOTHER EU MEMBER STATE BUT `WHERE SWEDEN APPLIES TAXATION ACCORDING TO THE SIXTH DIRECTIVE

To further illuminate the competence- and sovereignty questions shall as mentioned the main case of taxation of so called intra-Community acquisitions (Sw., *gemenskapsinterna förvärv*), Ch. 2a sec. 3 first paragraph item 3 of ML, be treated.

To get rid of the distortion for the taxation of import here which arise if another EU Member State unlike Sweden has an exemption from taxation for transaction of goods beyond what's admitted by the Sixth Directive, must the expression 'tax liable' (Sw., "*skattskyldig*") in Ch. 2a sec. 3 first paragraph item 3 of ML be altered to 'taxable person' (Sw., "*skattskyldig person*") or another thereto closer lying concept than 'tax liable'. Otherwise will Sweden have to, to see to justified needs of decisions on taxation being foreseeable concerning imports from other EU Member States which aren't following the Sixth Directive in this respect, report such countries for breach of the EC Treaty, so that the ECJ can enforce an EU law conform application of rules on exemption from taxation by them. The question is thus about the external neutrality and is lacking connection to the IL, but has as mentioned a pedagogically value for the presentation concerning the hierarchy of law sources in the field of VAT since Sweden's EU-accession in 1995.

In one case the EU-commission reported Germany for breach of the EC Treaty. Germany had, like Luxembourg, before the year of 2000 exemption from taxation in its national VAT act for so called fine gold (Sw., *finguld*), unlike inter alia Sweden, that followed the Sixth Directive. This was deemed by the commission to be in conflict with Article 2 of the Sixth Directive and Article 28(a.1a) of the Sixth Directive, where intra-Community acquisition is defined.[410] The commission considered that 'the

[410] See the ECJ case C-432/97. The case against Germany was for a long time pending (Sw., *anhängigt*) and was removed (Sw., *avfördes*) on the 7th of July 2000 [see www.europa.eu.int (curia) or www.curia.eu.int]. See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 423, by Björn Forssén. New rules on exemption from taxation of fine gold as investment gold was

exemption' (Ger., "*die Befreiung*") for fine gold 'was in conflict with' (Ger., "*verstößt ... gegen*") both those articles.[411]

An EU Member State has thus its tax sovereignty left in the field of VAT only in the sense that another EU Member State, which VAT system is distorted by the country in question applying exemption from taxation in conflict with the directive, must seek to achieve a change of the situation with the help of the ECJ. E.g. Sweden, which followed the Sixth Directive and didn't stipulate exemption from taxation for fine gold, could thus not influence German or Luxembourg VAT legislation, but the competence lies by the ECJ. It can issue 'claim for damages' (Sw., '*skadeståndsanspråk*') after a breach of the EC Treaty against the country in question on the initiative of another EU Member State or the commission. Germany incurred itself thus a suit by the commission for breach of the EC Treaty.

The described situation meant however also a question whether the constitutional *lex scripta*-request for taxation measures allowed to enforce the liability for an entrepreneur in Sweden purchasing fine gold from Germany or Luxembourg meaning that the person in question would be subject to taxation for intra-Community acquisition according to Ch. 2a sec. 3 first paragraph item 3 of ML, where that rule stipulates that the vendor in the other EU Member State shall become 'tax liable' (Sw., "*skattskyldig*") for VAT there.

Although purchaser is an 'entrepreneur' (Sw., "*näringsidkare*") and that concept in the ML correspond with taxable person in the Sixth Directive, the *lex scripta*-request puts up an obstacle for value added taxation in Sweden in the described situation. The concept tax liable in ML is thus lacking a direct equivalent in the Sixth Directive, since its usage presupposes that a standpoint has been taken in both the questions on YRVE and on taxable transaction (within the country). With tax liable according to ML is meant he who due to both these prerequisites being fulfilled is liable to account for and pay output tax.[412] Whereas the Sixth Directive makes a difference between taxable person according to Article 4(1) and persons liable to pay VAT according to Article 2(1).

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introduced in the Member States' legislations on the 1st of January 2000, and thus with support of the directive 98/80/EC. See *SFS 1999:640*; *Prop. 1998/99:69* p. 13.

[411] See the commentary to the German VAT act, *Umsatzsteuergesetz*, pp. 26-27, *151 § 4 Nr. 8*, by Karl Ringleb and others.

[412] See Ch. 1 sec. 1 first paragraph, sec. 2 and sec. 8 first paragraph of ML and *Prop. 1993/94:99* pp. 107 and 127.

The vendor can by exemption from taxation for the transaction in the other EU Member State not be considered 'tax liable' (Sw., "*skattskyldig*") in the sense of the ML. Although the purchaser in Sweden is taxable person, he does under such circumstances not any intra-Community acquisition here obligating him to account for a calculated output tax, despite the article of goods in question is taxable according to the ML. To enforce the duty in question against the purchaser in question would mean a duty in conflict with the constitutional principle of legality for taxation and the *lex scripta*-request for taxation measures.

That the previously in this presentation described alteration in the ML in 2003 concerning the presuppositions for foreign entrepreneurs for refund of Swedish VAT expenses, based on the ECJ's interpretation of the "Debouche"-case of the eighth directive, shall cure discrepancies between Sweden and another EU Member State, concerning the situation that a supply has different tax character in the countries in question, without distorting the order according to the Sixth Directive, confirm the analysis here of the expression 'tax liable' ("*skattskyldig*") in Ch. 2a sec. 3 first paragraph item 3 of ML. The condition for reimbursement meaning that also the entrepreneur's VAT situation in the other EU Member State (the home country) would be regarded demanded according to the *lex scripta*-request an amendment in Ch. 10 sec. 1 of ML, to enforce a taxation measure in the form of refused reimbursement for the case the foreign entrepreneur didn't carry out activity entitling to deduction or reimbursement in the home country. It's not possible to fill a 'gap' (Sw., "*lucka*") in the taxation within 'the VAT country which is the EU' (Sw., "*mervärdesskattelandet EU*"), if it means an interpretation in conflict with the constitutional principle of legality for taxation. A tax loss due to the situation and competition distorting effects will the state have to stand for and shall not be the individual's responsibility.

In line with what recently has been said is by the way also a decision from the SAC to the individual's favour, where levying of VAT in invoice of supply which is VAT free according to ML is concerned.[413] A wrongly levied VAT in an invoice did the SAC not consider causing tax liability for the one issuing it on account of the transaction in question not being taxable. Any tax liability according to Ch. 1 sec. 1 first paragraph item 1 of ML didn't occur due to the transaction's VAT free character. One of the necessary prerequisites for tax liability in the section in question was missing. Thereby had according to the SAC the fact that Article 21(1d) of

[413] See the SAC case *RÅ 2005 Ref 81*.

the Sixth Directive stipulates liability to pay VAT also for a thus wrongly levied VAT in an invoice to stand back for the constitutional principle of legality for taxation with a *lex scripta*-request for taxation measures which mean duties to the individual. The directive rule mentioned must be implemented expressly in the ML to be given such a legal consequence.

The problems in question for the taxation of intra-Community acquisitions create great problems for the application, which the author of this book has brought up on different occasions.[414] The Swedish Bar Association also brought up the issue in its reply of the 22nd of December 2004 to the Treasury on the proposal of an EC regulation with certain instructions on application of certain rules in the Sixth Directive. The author of this book took as mentioned part in the work with writing the Bar Association's reply to the Treasury. Let alone will the usage of 'tax liable' (Sw., "*skattskyldig*") in Ch. 2a sec. 3 first paragraph item 3 of ML cause for the described situation with deviations from the Sixth Directive in the VAT legislation of the other EU Member State involved, where the scope of the exemptions from taxation for goods, uncertainty about the legal rights of the individual at the trial of tax fraud (Sw., *skattebrott*) in connection with border crossing trade of goods with other EU Member States.

The investigation *SOU 2002:74* seems however not aware of the described application problems with the usage of 'tax liable' (Sw., "*skattskyldig*") for the description of the main situations with intra-Community acquisitions in the ML. The investigation suggest an adjustment of Ch. 2a sec. 3 first paragraph item 3 of ML, but only so that 'tax liable' (Sw., "*skattskyldig*") will be replaced with the of the investigation generally proposed 'taxable person' (Sw., "*beskattningsbar person*"), and which as mentioned shall replace also YR (Sw., "*yrkesmässig*") and 'entrepreneur' (Sw., "*näringsidkare*"). Where the problems in question with differences in tax

[414] See *Ny Juridik* (Eng., New Law) 4/2000, the article *Momsfritt i EU – moms i Sverige?* (Eng., VAT free in EU – VAT in Sweden?), pp. 69-83, by Björn Forssén, *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), Appendix 3 (*Bilaga 3*) sections 3.2.2 and 4.5 (pp. 420etc and 436etc), by Björn Forssén, *Svensk skattetidning* (Eng., Swedish tax journal) 2005 pp. 118-133, the article *EG-förordning om tillämpning av sjätte momsdirektivet* (Eng., EC-regulation on application of the Sixth Directive), by Björn Forssén, *Ny Juridik* (Eng., New Law) 1/2005 pp. 66-85, the article *EG-förordning om tillämpning av sjätte momsdirektivet* (Eng., EC-regulation on application of the Sixth Directive), by Björn Forssén, and lecture at the Swedish jurist meeting (Sw., *Svensk juriststämma*) on the 14th of November 2001, *Moms och omsättningsbegreppet. Karusellen hos skatte- och ekobrottsmyndigheten* (Eng., VAT and the transaction-concept. The roundabout at the tax authority and National Crimes Bureau), by Björn Forssén (published on www.forssen.info).

character tax in the other EU Member State involved with border crossing trade of goods between EU Member States are concerned, they aren't mentioned by the investigation. The proposed adjustment of the wording of the section in question is only joined with the investigation, in consequence of the proposed introduction of rules on tax exemption for small undertakings in pursuance of Article 24 of the Sixth Directive, also suggesting that intra-Community acquisitions won't emerge if the vendor in the other EU Member State is exempted from taxation there according to corresponding rules there for small undertakings.[415] The investigation doesn't seem to perceive at all the problems in question with different character of the article of goods (transaction) in Sweden and another EU Member State respectively.[416]

The investigation's proposal leads to a replacement of 'tax liable' (Sw., "*skattskyldig*"), which presupposes YRVE and taxable transaction of an article of goods or a service, with "*beskattningsbar person*", i.e. with an equivalent to "*skattskyldig person*" of the Sixth Directive, which concept corresponds today inter alia to YRVE in the ML. Thereby would, if the proposal is carried out, a 'gap' (Sw., "*lucka*") in the taxation of intra-Community acquisitions within 'the VAT country which is the EU' not emerge in the cases when the ML stipulates taxation for an article of goods, whereas the EU Member State from which it's brought here has exemption from taxation for it in its national VAT legislation beyond what's admitted by Articles 13-16 of the Sixth Directive. However, it's a lack that the investigation *SOU 2002:74* doesn't mention this problem, and it should be treated without awaiting of the investigation leading to a proposal on change of the act with stating a date of coming into force. For the time being should thus "*skattskyldig*" ('tax liable') in Ch. 2a sec. 3 first paragraph item 3 of ML be replaced with "*skattskyldig person*" ('taxable person') or "*näringsidkare*" ('entrepreneur'), which is used concerning the purchaser according to the second paragraph of the section and in rules in the ML on the placing of the transaction, e.g. Ch. 5 sec. 7.

7.2 CAN THE CLAIM ON INPUT TAX AGAINST THE STATE BE ENFORCED EVEN IF THE ACTUAL RULE IN THE ML MATERIALLY IS DESCRIBING SOMETHING ELSE THAN VAT?

Now as mentioned it's an issue about the VAT system as a 'tax collection system' (Sw., '*uppbördssystem*'). Can an over compensation in the form of

[415] See *SOU 2002:74* Part 2 pp. 31 and 32.
[416] See *SOU 2002:74* Part 1 pp. 662, 677 and 678. See also *Prop. 1994/95:57* p. 164 and *Svensk moms i EU* (Eng., Swedish VAT in the EU), p. 67, by Björn Forssén.

credit of or reimbursement of a claim on input tax against the state be enforced by the individual, despite that the actual rule in the ML materially can be considered describing something else than VAT? That question is lacking, like the recent question about intra-Community acquisition, connection to IL, but can as mentioned be of interest pedagogically and then especially since it's knowingly never been brought up before.

Sweden has as mentioned in its capacity of EU Member State an obligation to have a VAT system. Already according to Swedish VAT law from the time before Sweden's EU-accession is the entrepreneur considered as a 'tax collector' (Sw., '*uppbördsman*') for the state where the VAT is concerned and that perception is confirmed by e.g. the British viewpoint on the VAT system: "the taxpayer" is considered an "agent for the Commissioners" (Inland Revenue Commissioners).

Both the EU-commission and the ECJ are confirming the importance of the right of deduction to the VAT as such. The basic VAT principles in Article 2 of the First Directive on competition neutrality, reciprocity and POTB are about a deduction of input tax becoming taxed by levying an output tax on the value added of the supply in form of an article of goods or a service created with the acquisitions to the activity in question. An application of the VAT rules with a competition- and consumption neutral aim doesn't allow arbitrary differences in the possibilities for the entrepreneurs which shall belong to the VAT system to be credited or reimbursed the claim on input tax on the acquisitions to the VE by the state. That right to deduct input tax also decides in a so called Wilmot-test if another tax resembles the VAT to the degree that it's a question of an unallowed competing VAT.

Thus, the question now concern the situation that ML would contain a rule on deduction which isn't just giving a greater scope to the right of deduction than according to Article 17 of the Sixth Directive, but a right of deduction which isn't based on any acquisition which the entrepreneur in question is doing materially. Is the state obliged to credit or pay an input tax to the entrepreneur in such a situation, just because he formally according to the rule in question in ML can account on the line for input tax in the income tax return or the tax return?

If 'the error in writing' (Sw., '*felskrivningen*') in ML is such that two entrepreneurs would be given right to VAT deduction for the same acquisition from a deliverer (double deduction), should the rule at least on one of the two sides be deemed describing something else than a real input tax, and one of the two purchasers not being entitled to deduction. Note that

hereby isn't referred to the situation that a physical delivery direct from the beginning to the end of a chain of entrepreneurs leads to invoicing in several links, since thereby a transaction and a corresponding acquisition is made in each link. The intention here is instead to describe that just because a rule on VAT deduction is written in the ML it doesn't give the right to deduction for that reason alone. The rule can be describing something else than real VAT, and then shall of course not the state be obliged to pay money from its 'tax account' (Sw., '*skattekontot*') twice just because one of the entrepreneurs has been mislead by 'an error in writing' in the ML to account for a part of an expense as for VAT deduction in the VAT part of the income tax return or the tax return. Such an over compensation of the individual entrepreneur whose expense doesn't correspond to any acquisition isn't motivated by the VAT system. In practice the situation, which thus isn't about the deliverer having invoiced twice, presupposes that there's a rule which isn't referring to the rules on content of invoice where the possibilities to exercise the right of deduction is concerned. In theory could it also be about a material rule on deduction formally allowing two to deduct for an acquisition made only by one of them.

The author of this book brings up the phenomenon in an article.[417] It's about the technique with so called 'affidavit-VAT' (Sw., '*intygsmoms*') which before 2001 was applied at transfer of real estate which was comprised by so called voluntary tax liability. It was introduced along with the rules on voluntary tax liability for letting of business premises etc on the 1st of July 1979. Now like then was the actual transfer of real estate exempted from taxation. The system with affidavit-VAT meant that previous VAT deductions to a certain extent and depending on how long voluntary tax liability had ruled were 'brought back' (Sw., '*återfördes*') by the vendor at the transfer. If the purchaser within a certain time limit applied for and got a decision on voluntary tax liability for the real estate in question, could he normally lift off the VAT in the affidavit on the 'bringing back' (Sw., '*återföring*'). At Sweden's EU-accession in 1995 was adjustment of input tax for Capital goods introduced, which as mentioned applies to inter alia real estate. The systems ran parallel until 2001 when affidavit-VAT was abolished and the adjustment system, which has been mentioned previously in this presentation, was reformed in the field of real estate. Here is the comparison from the article between cases on over compensation in the system with affidavit-VAT from the early nineties and in the adjustment-VAT from 2001 developed. Can there be such cases

[417] See *Svensk skattetidning* (Eng., Swedish tax journal) 2006 pp. 375-377, the article *Gamla momsfrågor som nya – intygsmoms då, korrigeringsmoms nu* (Eng., Old VAT questions as good as new – affidavit-VAT then, adjustment-VAT now), by Björn Forssén.

today where the ML should be adjusted to avoid the dilemma with the rules giving the entrepreneur a right of deduction formally which isn't motivated materially?

On the 1st of July 1994, i.e. in connection with ML replacing GML, it was added to the rule on the right to deduct affidavit-VAT that the vendor of the real estate for which voluntary tax liability was decided would have to actually have paid the VAT to be brought back to the state due to the sale of the real estate, before the purchaser by virtue of the affidavit could exercise the right of deduction for VAT brought back by accounting it in his tax return after applying for voluntary tax liability for continuing the letting of premises at the real estate in question.

Before that change of the act or, depending on whether there really was any reason for the measure materially, the clarification certain tax authorities admitted to purchasers of real estate deduction of input tax according to an affidavit from the vendor, despite the vendor being a company in bankruptcy which didn't pay the VAT according to the affidavit which the company in bankruptcy had accounted for in its VAT return as brought back VAT. The purchaser got deduction for the same VAT as the building contractor and others had invoiced the company in bankruptcy without that company being considered having invoiced a real VAT by the affidavit. It wasn't so that the company in bankruptcy in its turn made the same transactions as its deliverers once made, and for which the company in bankruptcy had made deduction for expenses concerning levied input tax. Nevertheless the purchaser of the real estate was thus allowed by certain tax authorities to deduct the same VAT, despite that the company in bankruptcy had not refilled the state's VAT account and thereby equalized the situation where VAT is concerned with the situation which would have existed if the purchaser instead had made the acquisitions for which the company in bankruptcy deducted VAT directly on the basis of invoices from building contractor etc.

In an article in *Svenska Dagbladet* (Eng., the Swedish Daily paper) of the 4th of March 1993 by Björn Dickson was an example given, where a person purchasing a real estate which was comprised by decision on voluntary tax liability from a bankrupt's estate (Sw., *konkursbo*) for SEK 40 million which was worth precisely SEK 40 million then got SEK 16 million from the state, just because the person in question after his voluntary accession to the VAT system for letting of the commercial real estate filed a VAT return with the affidavit-VAT noted on the line for input tax. The purchaser could of course not be considered having made a real

VAT expense, since the situation wasn't equalized with acquisition directly from deliverers by any actual payment to the state's account from the person in bankruptcy, i.e. the one issuing the affidavit.

Those tax authorities allowing the described double deduction of the same input tax considered the word "*återföring*" ('bringing back') in GML not giving rise to any request of payment, but the company in bankruptcy could with full effect for the purchaser of the real estate issue the affidavit as long as the company in bankruptcy had noted the VAT in the affidavit as a debt on the line of output tax in its VAT return.

In Björn Dickson's article was a decision by the SAC mentioned to come, which became *RÅ 1993 Ref 78*, but it came to concern only a part of the problem, namely whether the liability of bringing back concerning Vat deduction lied on the person in bankruptcy or the estate or the bankrupt's estate at the estate's sale of the real estate. The SAC decided on the latter to rule, which, due to the following problem with the bankrupt's estate thereby also becoming bankrupt, lead to that it in Ch. 9 sec. 5 of ML was stipulated that the person in bankruptcy was obliged to bring back deductions referable to the time before the bankruptcy, when ML on the 1st of July 1994 replaced GML.

Jesper Öberg mention in *Mervärdesbeskattning vid obestånd* (Eng., Value added taxation at bankruptcy) the SAC case *RÅ 1993 Ref 78*, but only concerning the question on obligation to bring back lied on the person in bankruptcy or the bankrupt's estate.[418] That question had by the way the author of this book treated already in 1993, and then with respect of the principle of legality for taxation and whether the procedural figure the bankrupt's estate at all could be deemed comprised by the rule on taxation of the bringing back before the 1st of July 1994, when the rule at that time, sec. 15 sixth paragraph of GML, stipulated liability of bringing back for 'the owner of the real estate' (Sw., "*fastighetsägaren*"). Any transfer of the real estate from the person in bankruptcy to the bankrupt's estate isn't made due to the bankruptcy. With respect of the principle of legality for taxation was it an obvious lack that the SRN disregarded that 'the owner of the real estate' was liable for the bringing back according to the rule thereof, to instead base the advanced ruling that the bankrupt's estate would be comprised of that liability on the accounting rule sec. 5a fourth paragraph of GML. That's an argument a fortiori, i.e. an argumentation as if the

[418] See *Mervärdesbeskattning vid obestånd* (Eng., Value added taxation at bankruptcy), pp. 219-222, by Jesper Öberg.

accounting rule as the bigger would include the taxation rule as the smaller, and of the same function and nature as a deduction by analogy. The SRN's underpinning of the advanced ruling was in conflict with the principle of legality for taxation which doesn't allow analogy deductions for taxation measure. The SAC, which in *RÅ 1993 Ref 78* established the SRN's advanced ruling, disregarded this lack in the reasoning by the SRN and mentioned only the bankruptcy law otherwise.[419] Jesper Öberg mention neither the tax law question on the principle of legality for taxation in connection with the question whether the person in bankruptcy or the bankrupt's estate is tax liable for the VAT to bring back, and the question on the double deduction has not been mentioned in either doctrine or by the SAC.

The question on double deduction at acquisition of a real estate with voluntary registration could have become obsolete, by the legislator thus already when ML replaced GML on the 1st of July 1994 introduced in Ch. 9 sec. 3 first paragraph item 2 of ML precisely request of an actual payment of VAT brought back to the state from the vendor of the real estate in question, for the purchaser becoming entitled to deduct VAT with support of an affidavit on bringing back from the vendor. However can it comparatively be considered to have got a renewed interest in connection with the mentioned reform of the adjustment system in 2001 by *SFS 2000:500*, where the field of real estate is concerned. The reform is treated in Eleonor Alhager's *Mervärdesskatt vid omstruktureringar* (Eng., VAT at restructuring measures), but nor there is the present question on over compensation from the VAT system mentioned.[420]

If the system with affidavit-VAT could be deemed leading to the state being obliged to over compensate in the described way, should it interest at least the Treasury whether similar situation can exist today due to the wording of the ML.

If it's assumed that the VAT system as well before as after Sweden's EU-accession constitutes a 'tax collection system', should the state not have been considered having any obligation to compensate for non-expenses of input tax according to affidavit (over compensation). Another issue would it thus have been if it actually was the one purchasing the real estate from

[419] See *Mervärdeskatt En läro- och grundbok i moms* (Eng., Value added tax an educational- and handbook in VAT), p. 196, by Björn Forssén and *Mervärdesskatt En handbok* (Eng., Value added tax A handbook), pp. 268-270, by Björn Forssén.
[420] See *Mervärdesskatt vid omstruktureringar* (Eng., VAT at restructuring measures), pp. 453etc by Eleonor Alhager.

the bankrupt's estate that had made acquisition directly from the building contractor and others, and not the person in bankruptcy. Then would the purchaser of the real estate have had an expense of a real levied input tax, and wouldn't have had to insure himself of the VAT in the invoice from e.g. the building contractor actually being paid by him to the state, to be able to exercise the right of deduction. The latter said more for the sake of comparison. It has never been the case that right of deduction according to general rules presupposes that the deliverer actually is fulfilling his liabilities of accounting and payment of output tax to the state, before the purchaser of the article of goods or the service in question is allowed to exercise the right of deduction for a corresponding input tax levied in invoice from the deliverer.[421] The question now is whether the existing system with adjustment of VAT is raising a similar question on over compensation after the revision of that system on the 1st of January 2001.

The adjustment system for Capital goods has as mentioned since 2001 as a main rule that a transfer of a real estate which is comprised by voluntary tax liability just lead to the purchaser taking over from the vendor the obligations and rights according to ML concerning the acquisitions of work on the real estate which have been of such a scope that the constitute Capital goods.[422] The vendor and the purchaser can however have 'made an agreement that the vendor shall adjust' (Sw., "*träffat avtal om att överlåtaren skall jämka*").[423] If the latter is done with the consequence that the vendor goes bankruptcy because of the liability to pay input tax which thus is comprised by adjustment and the real estate cannot be won back by the bankrupt's estate, the question will be raised whether the purchaser thereby has not taken over any obligation at all according to ML concerning acquisitions to the real estate which taken by themselves constituted Capital goods but which were made during the vendor's time of possession.

In the ML is just stated that liability to adjust emerge when 'an owner of the real estate' goes bankruptcy and that the state may make a claim due to adjustment in the bankruptcy, if it emerges due to the debtor going bankruptcy.[424] However it's not stated anything about the state being able to lay upon the purchaser of the real estate in the situation described any

[421] See *SOU 1964:25* p. 382 and *Rå 1984 1:67*, which as mentioned is a reference also after Sweden's EU-accession in 1995 according to *RÅ 2001 Not 99* and *RÅ 2004 Ref 65*. See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), pp. 74-76, by Björn Forssén.
[422] See Ch. 8a sec. 12 first paragraph first sentence of ML.
[423] See Ch. 8a sec. 12 first paragraph second sentence of ML.
[424] See Ch. 8a sec. 4 first paragraph item 6 and second paragraph of ML.

liability of adjustment for the rest of the adjustment period after the purchase.

It seems as if the protection against double deduction which was achieved on the 1st of July 1994 by the introduction of the request of actual repayment from the vendor in Ch. 9 sec. 3 first paragraph item 2 of ML, concerning the system with affidavit-VAT, is lacking an equivalent in the adjustment system which alone rules in the cases in question with real estate-VAT since the 1st of January 2001. Is it or should it be possible for the state to make the purchaser of the real estate liable of adjustment for his altered use or sale in his turn within the adjustment period, if the vendor hasn't fulfilled an agreement made that he 'shall adjust' (Sw., "*skall jämka*"), by him either having not even accounted input tax to repay or having made such accounting but not repaid to the state?

The advantages with acquiring a commercial real estate from a company in bankruptcy can since the year of 2001 become very much alike those allowed existing during the time of the affidavit-VAT before the 1st of July 1994. The competition neutrality on the market is distorted due to the ML's described law techniqual solution, which thus is in conflict with the VAT's overall principle. The question on double compensation from the state's account which was never tried in RÅ 1993 Ref 78 concerning the affidavit-VAT is then of a renewed interest by the change of the act in 2001. The question has only been modified to concern double compensation by VAT not being paid to the state's account in connection with transfer of commercial real estates in companies in bankruptcy, instead of as previously the state over compensating by payment from the VAT account.

Unless the SAC gives sufficient guidance, should it lie upon the legislator to take care of the existing described situation in the adjustment system. It should not be considered reasonable that the VAT system as a 'tax collection system' shall allow rights which materially cannot be deemed compatible with the basic VAT rules on competition neutrality, reciprocity and POTB. Concerning the phenomenon with over compensation in the system with affidavit-VAT can it be questioned whether it was VAT at all in a real sense (real VAT) that was paid to the one purchasing the real estate from the bankrupt's estate. In such cases should it be considered as a matter of course that an error in writing in the ML shall not by itself give any right at all to get money from the tax collection system as if it was a question of compensation for an expense containing real VAT.

Remember that voluntary tax liability thus is possible to get also for he who's letting business premises etc without for that matter having YRVE. If a private person could be deemed having had right to get out "VAT" from the state on account of the interpretation of the word "*återföring*" ('bringing back') in the rule on such liability without the expense assumed to contain VAT doing so, could it as well be argued for an error in writing in the ML by itself founding a right also for consumers to get out a claim on "VAT" from the state. It's not possible to draw parallels directly to the adjustment system from 2001, but the advantages with purchase of the real estates in question from a bankrupt's estate can thus become very much alike those – by certain tax authorities – considered existing in the system with affidavit-VAT before the 1st of July 1994. The common denominator is above all that the question on the purchaser's of the real estate in question liability to adjust input tax is neither concerning an own VAT expense to the one supplying the building service. The purchase of the real estate is a new business transaction for which the purchaser by 'agreement' (Sw., "*avtal*") can be exempted from the main rule to take over the obligations concerning the VAT deducted by the vendor on the building service for which VAT has been levied. Therefore should it be taken into consideration by the SKV, the Treasury and maybe also by the academic world if the expression 'made an agreement that the vendor shall adjust' (Sw., "*träffat avtal om att överlåtaren skall jämka*") shall be allowing that similar effects are given the state's account in the existing adjustment system as certain appliers of the law allowed before the 1st of July 1994 concerning the interpretation of the word "*återföring*" ('bringing back') concerning the system with affidavit-VAT. The author of this book has only brought up the issue for pedagogical reasons, to illuminate that the law also has a tax collection-side. The words don't create anything in themselves, but the VAT system shall first of all be seen for what it is: a tax collection system. The words in the ML cannot create a "VAT" outside the frames of the idea, i.e. beside the basic VAT principles. In a corresponding way as the individual has a protection against tax measure in the constitutional principle of legality for taxation, cannot the legal system force the state as a subject to make payments from its account when the ML no longer can be deemed describing VAT. That's not how the tax collection system is supposed to be used. Such compensation isn't the people as "owner" of the subject the state owing the individual.

8. SUMMARY AND FINAL VIEWPOINTS

8.1 THE MAIN QUESTION OF THIS BOOK

8.1.1 The determination of YRVE in ML can be made with reference to the subjective prerequisites for NAVE in Ch. 13 sec. 1 first paragraph second sentence of IL

The trial of the conception YRVE (”*yrkesmässig verksamhet*”) is limited to the distinction between entrepreneurs and consumers. Public activities can also have YRVE according to ML, but then that determination is made with respect of the tax object without any connection to IL, why the trial of the concept YRVE at public bodies according to ML in relation to Article 4(5) of the Sixth Directive isn't of interest here (see sections 3.1.3 and 6.1.2.2). Here the trial of the main question in this book concerns the concept YRVE according to ML in relation to Article 4(1) of the Sixth Directive and who in the capacity of entrepreneur can be deemed having the character of taxable person according to that article rule, and which thus can belong to the VAT system.

The main question is whether the formal connection in ML to IL's conception NAVE (“*näringsverksamhet*”) for the determination of the tax subject is EU law conform (see section 1.1). The answer is given conditionally from two different aspects.

- If Swedish income tax law practice isn't returning to upholding the profit prerequisite as previous traditionally was upheld along with the prerequisites on independence and duration, for determining whether NAVE exist, is the formal connection to that concept from Ch. 4 sec. 1 item 1 of ML to Ch. 13 of IL compatible with the concept taxable person in Article 4(1) of the Sixth Directive (see sections 3.1.1, 6.2.3.1 and 6.2.9).

- That connection is however only EU law conform in the respect mentioned to the part it concern Ch. 13 sec. 1 first paragraph second sentence of IL, where the subjective prerequisites for NAVE on 'purpose of making money-activity' (Sw., ”*förvärvsverksamhet*”), professionalism (Sw., ”*yrkesmässighet*”) and independence (Sw., '*självständighet*') are stipulated (see sections 6.2.8.1 and 6.2.8.2).

Although it isn't an axiom that a common tax frame for VAT and income tax shall exist concerning the selection of who's an entrepreneur, is the conclusion in this book that it is possible, with respect to the current national income tax law practice, if the reference in Ch. 4 sec. 1 item 1 of ML for the determination of YRVE is limited to refer to the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL. This would mean that the order before 2001, when the reference in question concerned sec. 21 of KL, would be restored (see section 6.2.2).

Article 4 of the Sixth Directive does the same delimitation as the Swedish income tax law has done since the beginning, where the independence prerequisite is concerned, namely that it mustn't be a question of employment for the person in question.

A settled Swedish case-law corresponds with the EU law where the separation of the entrepreneurs from the employees is concerned for income tax purposes as well as for social security contributions (see sections 3.2.1 and 6.2.3.2).

An activity prerequisite can be interpreted from the second prerequisite for taxable person, E-VE ("*ekonomisk verksamhet*"), already by comparison with the French and English language versions of Article 4(1) of the Sixth Directive (see sections 2.4, 3.2.2 and 3.2.3.4). In the activity prerequisite for E-VE lies a duration prerequisite, to distinguish an activity from those which can be expected from a private investor. The person in question shall in that respect devote his investment more administration efforts than that, to distinguish himself as entrepreneur from the consumers (see section 3.2.3.4). The duration prerequisite in the activity prerequisite means that the determination of taxable person is made in an interaction between that it objectively can be established that investments have been made which indicate that it's a question of the person in question having the purpose of making money on the activity, and that purpose is at the same the presupposition for an acquisition being able to be deemed made in the E-VE (see section 3.2.3.5).

Swedish income tax law practice, where the line to be drawn between NAVE and capital is concerned, correspond with the EU law and the described duration prerequisite for who can be considered having the character of entrepreneur, taxable person (see section 6.2.3.3).

The formal connection in ML to IL to determine the tax subject is by comparison with other EU Member States and comparable countries otherwise uniquely Swedish (see section 1.2). Although VAT concepts, unlike the income tax law, are generally governed by the EU law according to the primary law, is the Swedish model not prohibited by the Sixth Directive. A connection to Ch. 13 sec. 1 first paragraph second sentence of IL is compatible with the principle on concepts of an autonomous European meaning (see section 1.1), since the subjective prerequisites for NAVE according to current national case-law are compatible with the ECJ's practice concerning taxable person according to Article 4(1) of the Sixth Directive. The problems with whether the ECJ has competence in the field of income tax, concerning questions where directives are not issued, can therefore be disregarded here. Should the ECJ try Ch. 13 of IL with respect of the four freedoms or the right of (freedom to) establishment in another Member State for a national of an EU Member State according to the EC Treaty, would a disqualification not cause any problem for the connection in question, since it doesn't concern any such question on external neutrality (see sections 1.1 and 2.2.2).

Here the question is whether the ML is EU law conform for the determination of the tax subject, i.e. of who can belong to the VAT system, and thereby is the aim internal neutrality. The secondary law act from the EU in the field of income tax which has been of a certain interest for that analysis is the Merger Directive (see section 4.2.2.2). The sections under 2.3 show that the basic principles for the VAT according to Article 2 of the First Directive, meaning that the aim with a competition- and consumption neutral VAT is achieved by the VAT deduction becoming taxed by the passing on of the tax burden (POTB), are lying as the base for distinguishing the entrepreneurs (the tax subjects) from the consumers (the tax carriers), although the ECJ hasn't always explicitly referred to that directive rule. The secondary law on income tax and the Merger Directive have a certain comparative value for the analysis of the concept VE ("*verksamhet*") in YRVE. Where the trade with other EU Member States is concerned and thus the external neutrality doesn't any problem arise, since the tax liability according to the main rule thereof in Ch. 1 sec. 1 first paragraph item 1 of ML doesn't discriminate taxable transactions within the country made by entrepreneurs established abroad; the request that it should be a question of YRVE 'carried out within the country' (Sw., "*som bedrivs här i landet*") was abolished from the section when Sweden made its EU-accession in 1995, so that the four freedoms and the right of (freedom to) establishment in another Member State for a national of an EU Member State, which principles are necessary for the internal market, would be

regarded in the ML (see sections 1.1, 2.1, 2.3.4, 3.2.1, 6.1.2.1. 6.2.1.1 and 6.2.2).

8.1.2 Problems with Ch. 4 sec. 1 item 1 of ML for the determination of YRVE referring to the concept NAVE in the entire Ch. 13 of IL

The reference to NAVE in the entire Ch. 13 of IL for the determination of YRVE according to ML cause a problem where judicial persons are concerned and whether for instance a certain company (Sw., *aktiebolag*) can belong to the VAT system. Since all incomes are taxed in the income tax schedule NAVE for a judicial person according to Ch. 13 sec. 2 of IL, can the company in question belong to the VAT system, despite its activity doesn't comprise more than what can be expected of a private investor. It's even so that the SAC in connection with questions on group contributions has stated that already a newly formed inactive company can be considered carrying out NAVE (countinuing until the company cease to exist). Competition distortion will arise due to that it will be up to the company if it wants to exercise right of deduction for input tax on the investment in the activity, provided that a taxable transaction is planned with it, and first if the company choose to exercise deduction can the state claim that output tax is accounted for if the taxable transaction also will be made.

For the judicial persons will emerge a special case with risk for wrongful selection of tax subjects in cases with real estates, since such persons' possession of real estate always constitute business-real estate (Sw., *näringsfastighet*). Thus is also deemed that a real estate held for private use automatically constitutes NAVE, just because it's held by a judicial person and thereby only can be considered having the character of business-real estate. The limitation which is suggested in this book of the reference in Ch. 4 sec. 1 item 1 of ML to only concern the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL, should therefore be combined with that it in Ch. 4 sec. 1 item 1 will be expressed that YRVE doesn't exist only on the basis that the VE consist of possession of a real estate constituting NAVE (see section 6.2.8.1).

Otherwise similar problems emerge regardless whether it's a question of a physical or judicial person when the reference in Ch. 4 sec. 1 item 1 of ML to the whole Ch. 13 of IL comprise also other sections in Ch. 13 of IL than Ch. 13 sec. 1 first paragraph second sentence of IL and the subjective prerequisites for NAVE. Sometimes it's a question of an activity according to those sections which leads to the person in question cannot be deemed belonging to the VAT system due to that it is an object exempted from

taxation according to Ch. 3 of ML. That means however that the question on who shall belong to the VAT system is decided arbitrary depending on the tax object in the individual case. The question if the person in question is devoting the investment more administration effort than what can be expected of a private investor and thereby will be distinguished from the consumers is totally disregarded by the reference to sections in Ch. 13 of IL where NAVE is stipulated without connection to the subjective prerequisites for NAVE. Of the other sections in Ch. 13 of IL is it only Ch. 13 sec. 10 of IL, concerning dividend from community to one-man business with business-real estate which is part owning real estate in the community, that doesn't seem to cause distortion of the selection for VAT purposes of entrepreneurs. That changes however not the overall judgement that the reference in Ch. 4 sec. 1 item 1 of ML to the entire Ch. 13 of IL should be altered, so that the determination of YRVE will only be made with reference to the subjective prerequisites for NAVE in Ch. 13 sec. 1 first paragraph second sentence of IL (see section 6.2.8.2).

8.1.3 The two cases where ML for the determination of YRVE at temporary transactions refers to other sections in IL than of Ch. 13 don't cause any problems

The two cases in question are Ch. 4 sec. 3 first paragraph items 1 and 2 of ML, and letting of 'felling right' (Sw., *'avverkningsrätt'*) or sale of 'products of the forest' (Sw., '*skogsprodukter*') when the consideration according to Ch. 45 sec. 8 of IL is treated as one-time-consideration for letting for all future and sale of products from 'private real estate' (Sw., '*privatbostadsfastighet*') and from real estates by 'private residential enterprises' (Sw., '*privatbostadsföretag*') according to Ch. 2 sections 13 and 17 of IL.

The rules on temporary transactions can be considered EU law conform with respect to the facultative rule Article 4(3) of the Sixth Directive allowing the concept taxable person to comprise also such cases, although the legislator hasn't referred to that directive rule. By the "Hotel Scandic Gåsabäck"-case can the ECJ also be perceived to have clarified that one-time-considerations don't disqualify an activity as E-VE according to the main rule in Article 4(1) of the Sixth Directive. Since Ch. 4 sec. 1 item 1 of ML to the part the reference in Ch. 13 of IL concern sec. 1 first paragraph second sentence can – with regard of the current national income tax case-law – be considered conform with the concept taxable person in Article 4(1) of the Sixth Directive, can thereby the two items Ch. 4 sec. 3 first paragraph item 1 of ML and Ch. 4 sec. 3 first paragraph item 2 of ML

respectively however be more or less obsolete. A competition neutral selection of entrepreneurs is in practice achieved already according to the main rule Ch. 4 sec. 1 item 1 of ML.

If the real estate in question is devoted more administration efforts commercially than what can be expected from a private investor, there's no need for an extension by supports of Ch. 4 sec. 3 first paragraph items 1 and 2 of ML of the concept YRVE in relation to the main rule for that selection. Instead should it, at the same time as the limitation suggested in this book of the reference in question to only concern Ch. 13 sec. 1 first paragraph second sentence of IL is carried out, be added in Ch. 4 sec. 1 item 1 of ML that YRVE exist also in such a case where it in Ch. 13 sec. 1 second paragraph is stated that 'private dwellings' (Sw., '*privatbostäder*') cannot be included in NAVE. If these alterations aren't made, can the two items in question remain, since they can be deemed to be supported by Article 4(3) of the Sixth Directive, but then the limit amount for application of Ch. 4 sec. 3 first paragraph item 2 of ML should be abolished, since such amount limits aren't accepted by the Sixth Directive unless it's a question of rules on exemption from taxation for small undertakings or standardized taxation of farmers according to Article 24 and Article 25 of the Sixth Directive – which haven't been implemented in the ML. With the same reservation for the limit amount concerning item 2 should Ch. 4 sec. 3 first paragraph items 1 and 2 of ML remain also for the case that the 'continuing basis prerequisite' (Sw., '*fortlöpandekriteriet*') in Article 4(2) of the Sixth Directive for determination of E-VE according to the main rule in Article 4(1) of the Sixth Directive, despite the "Hotel Scandic Gåsabäck"-case, could be deemed being a problem concerning one-time-considerations on the topic E-VE (see section 6.2.5).

There's by the way one more facultative rule on who can be considered as taxable person in Article 4 of the Sixth Directive, namely item 4 of the article, and it's been used by Sweden. It's about the possibility of registration of 'VAT groups' (Sw., '*mervärdesskattegrupper*') according to Article 4(4), and Sweden implemented it on the 1st of July 1998, by the introducing rules in a new Ch. 6a of ML on certain 'entrepreneurs' (Sw., '*näringsidkare*') having the opportunity to apply for registration as a VAT group. The rules mean exemption from the main principle that VAT cannot be group accounted, and in one of the cases the ML connect to the rules on 'certain agent agreements' (Sw., '*kommissionärsförhållanden*') according to Ch. 36 of IL, but it doesn't mean anything for the trial here of the concept YRVE, since the unit that the group forms for VAT purposes concerning accounting of input and output tax must have such VE. The

VAT group is therefore also comprised by the main question in this book on the connection from ML to Ch. 13 of IL and the concept NAVE for the determination of YRVE (see section 3.1.2).

8.1.4 Tax free incomes according to IL and incomes which fall beside the income tax schedules

The interests, subsidies and payments from insurances which are listed in Ch. 8 of IL as tax free don't constitute transactions where VAT is concerned, since they aren't corresponding to any order of goods or services. They are causing neither taxable transaction nor transactions exempted from taxation, and can thus not lead to the receiver becoming comprised by the rules of the VAT.

Certain incomes can fall completely beside the income tax schedules capital, earned income and NAVE. It can depend on the subjective prerequisites for NAVE not being fulfilled and that neither earned income as a 'gathering income tax schedule' (Sw., '*restinkomstslag*') is applicable. In pursuance of a legally binding advanced ruling on VAT of the 21st of December 2005 is such an income not included in YRVE. If the receiver is a judicial person, it becomes a 'miscellaneous income' (Sw., '*övrig intäkt*') in NAVE. Since judicial persons all incomes are referred to the income tax schedule NAVE, may e.g. the company in the advanced ruling itself choose if it wants to belong to the VAT system for such incomes. Regardless whether the suggestion in this book to limit the reference in Ch. 4 sec. 1 item 1 of ML to Ch. 13 sec. 1 first paragraph second sentence of IL is carried out, cannot the SKV force the company to account for and pay output tax for the income. Without that measure can however a judicial person – unlike a physical person – choose to belong to the VAT system, by the reference today to the whole of Ch. 13 of IL formally making that YRVE can comprise the described sort of incomes. This isn't conform with the concept taxable person according to Article 4(1) of the Sixth Directive, and therefore should – to avoid competition distortion depending on the choice of corporate form – the reference in question in Ch. 4 sec. 1 item 1 of ML be limited to concern only the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL also for this reason (see section 6.2.9)

8.1.5 The SUPPLEMENTARY RULE Ch. 4 Sec. 1 item 2 of ML on YRVE under forms comparable with NAVE

Formally Ch. 4 sec. 1 item 2 of ML extends the concept NAVE to comprise cases beyond what's meant by NAVE according to Ch. 13 of IL. Regardless whether the limitation suggested here of the main rule in Ch. 4 sec. 1 item 1 of ML to only comprise the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL will be carried out, the SUPPLEMENTARY RULE Ch. 4 sec. 1 item 2 of ML should be abolished from the ML. It's been established here that the main rule's reference to the entire Ch. 13 of ML cause problems with the selection of persons who are tax subjects and can belong to the VAT system, and formally the SUPPLEMENTARY RULE means that an increase of that problem. After the *RÅ 1996 Not 168* is furthermore thus current law such as there's no need for the SUPPLEMENTARY RULE as compensation for any income tax law profit prerequisite concerning Ch. 13 sec. 1 first paragraph second sentence of IL. The SUPPLEMENTARY RULE can be abolished from the ML, and that would also mean a note that the national evolution of the law mustn't go back to arguing for a profit prerequisite for NAVE (see section 6.2.4).

8.1.6 Limitation of YRVE for non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*) by reference to IL's rules on qualified tax exemption

Ch. 4 sec. 8 of ML refers to the rules in Ch. 7 of IL on qualified exemption from taxation for 'public utility'-non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*), and stipulates exemption from YRVE according to ML in such cases. National practice gives support for that the income tax could come closer to the ML formally where the determination of who's an entrepreneur is concerned, and thus a common tax frame be upheld between VAT and income tax in that respect, since the decisions on income tax law seem to have come to be influenced by the VAT where the determination whether the presuppositions for such a qualified exemption from taxation are fulfilled is concerned (see section 6.2.6.1). Whereas the technique itself in the ML to determine the exemptions from value added taxation in cases with non-profit-making-organizations with respect of the tax subject and certain association forms isn't EU law conform. E.g. this means a risk for competition distortion by religious activities carried out in the form of a foundation falling beside the exemption in Ch. 4 sec. 8 of ML. Therefore should the ML become altered on this point and Ch. 4 sec. 8 of ML be abolished from the ML and Ch. 3 of ML instead be completed with rules on exemption from taxation referring to the tax object. I.e., that the

ML will be adjusted in relation to Article 13(A) of the Sixth Directive, where exemption from taxation for certain transactions of goods or services is stipulated for non-profit-making-organizations (see section 6.2.6.2).

8.1.7 Problems in cases where the description of the tax object contains tax law or civil law concepts of business activity

Thus, it's not a problem with the ML referring to the concept NAVE in the IL for the determination of YRVE, if only the concept is given a meaning corresponding with the content of the concept taxable person according to the Sixth Directive. The VAT is unlike the income tax governed generally by the EU law and the ML's concepts shall be given an autonomous European meaning (see sections 1.1, 3.2.1 and 5.1.2). The question on who can belong to the VAT system causes with respect of current practice no problems where the selection concern the character of the subject, where the concept YRVE constitute so to speak the VAT's 'inner engine' (Sw., '*inre motor*'). The reference to the IL for that determination needs thus just to be limited to only concern the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL.

That determination concerns the question on who *can* belong to the VAT system. Then is the question decided whether the person in question shall belong to the VAT system with respect of the tax object. If he by his acquisitions giving him the character of taxable person intend to create taxable transactions, will he become liable to account for and pay output tax when once such a transaction is actually made. In Ch. 3 of ML there are two cases from the field of real estate, where the determination of the tax object, due to the rule thereof in both cases also contain a business activity concept, can cause problems for the decision whether the person who can be considered having the character of tax subject for VAT purposes *shall* belong to the VAT system. These problems can reflect on the judgement of the tax subject where matters of evidence are concerned so that a materially correct judgement thereby isn't made with respect of the concept YRVE in the individual case. The two cases are the determination in Ch. 3 sec. 3 first paragraph items 4 and 5 of ML of taxable transaction of letting of rooms in hotels and letting of places for parking vehicles respectively, where the concept 'hotel business activity' (Sw., "*hotellrörelse*") is a business activity concept from the civil law and the concept 'parking place-activity' (Sw., "*parkeringsverksamhet*") is based on the income tax law concept business activity (see section 6.2.7).

8.1.8 Certain so called special rules on tax liability according to ML aren't influencing the question whether YRVE exist, but they can as special rules on accounting in the ML in themselves cause Requirement to maintain accounting records

In three cases is formally stipulated tax liability for transactions within the country 'beside' (Sw., "*vid sidan av*") the main rule in Ch. 1 sec. 1 first paragraph item 1 of ML. That's according to Ch. 1 sec. 2 last paragraph of ML: Ch. 6, Ch. 9 and Ch. 9c of ML. The two latter are about voluntary tax liability for certain letting out of real estate such as business premises and about the treatment of goods in certain warehousing arrangements for VAT purposes respectively. Voluntary tax liability is not of any particular interest here, since that institute isn't limited to comprise owners of real estate which have YRVE, but also concern private persons. The rules on certain warehousing arrangements concern only the tax object in connection with the trade of goods with other countries, and are neither of any interest for the question on YRVE. Whereas the special rules on tax liability according to Ch. 6 of ML have required an analysis (see section 6.1.1.1).

That analysis has however resulted in that the rules in Ch. 6 of ML first of all may be perceived as accounting rules to ensure a final accounting of VAT on transactions which are made without the person receiving the incomes having started any YRVE. The rules are about tax liability for a bankrupt's estate or that an intermediary also shall be deemed tax liable for the mandator's transaction. Common is however that the persons comprised by the rules aren't creating any YRVE which didn't exist before by another person, just because they become tax liable for transactions which are generated by such a VE. A question of particular interest for the question on retaining the connection from ML to the civil law where the accounting of VAT is concerned is that the special rules on tax liability according to Ch. 6 could in themselves be deemed causing a liability to keep books of account, i.e. without Requirement to maintain accounting records first arising according to the rules of BFL. Otherwise may be mentioned that two rules in Ch. 6 are considered necessary to determine the tax subject. That's sec. 6 which stipulates that if a 'Government business unit' (Sw., '*statligt verk*') is making a taxable transaction it is the unit within the subject that is the state which is tax liable according to ML. Furthermore is stipulated in sec. 1 that value added taxation is made on company level in partnerships (Sw., *handelsbolag*, including *kommanditbolag*) and so called European Economic Interest Groups (Sw., *europeisk ekonomisk intressegruppering*, EEIG). However it may be deemed more of a

clarification after the ML, unlike the GML, doesn't connect generally to the income taxation's world of concepts, where taxation of such subjects is made on partner level (see sections 6.1.1.2 and 6.1.1.3).

8.2 THE VE-CONCEPT IN ML AND THE ACCOUNTING RULES' AS EVIDENCE FOR QUESTIONS WHETHER VE HAS EMERGED AND EXPIRED RESPECTIVELY AND ON THE LEAVE OF APPEAL INSTITUTE IN THE FIELD OF VAT

8.2.1 The VE-concept, necessary prerequisite objectively to confirm 'the purpose of making money' (Sw., '*förvärvssyftet*')

The analysis in chapter 3 shows that a VE-concept is necessary in the ML, to have some objective concept corresponding to E-VE to confirm the purpose of making money.

The sections under 4.1 show that the Swedish concept VE, used in the ML inter alia as part of the concept YRVE, can be retained in the ML and that it, apart from what the investigation *SOU 2002:74* is suggesting, is compatible with the ECJ's practice. Above all the "Breitsohl"-case, which the investigation actually isn't treating in connection with its commentary of *RÅ 1999 Not 282*, is of interest for that issue. To remove the concept VE is by the way one of few proposals from that investigation which concern material rules taxation rules on VAT. The investigation *SOU 2002:74* is instead focusing on the VAT's accounting rules and terminology questions.

If it wasn't possible to retain the concept VE in the ML, would the trail of the connection to IL for the determination of YRVE be radically changed, since the concept VE is part of that concept.

Since there isn't any EU directive on when someone is entrepreneur for income tax purposes (see section 4.2.1.3), can a comparison with the secondary law on income tax thus instead be made concerning the Merger Directive on the topic of when a VE cease to exist (see section 4.2.2.2). That and corresponding rules in IL aren't of more guidance than the secondary law on income tax at least cannot be perceived being in conflict with Article 5(8) of the Sixth Directive and the corresponding rule in the ML, Ch. 3 sec. 25, concerning transfer of VE. The question whether a person that once has been deemed able to belong to the VAT system ceased to have a VE will be of procedural importance. If the person in question has transferred all assets and debts and doesn't intend to acquire new to support himself, can the person be considered to have ceased having a VE. Thereby

the national income tax law corresponds with the VAT, where the judgements whether the person in question shall no longer be taxed for NAVE and be able to belong to the VAT system respectively are concerned (see section 4.2.2.3).

8.2.2 Civil law rules on Requirement to maintain accounting records and accounting according to generally accepted accounting principles (GAAP) have evidence value with respect of 'questions on the procedure of taxation' (Sw., '*förfarandemässiga frågor*') and 'procedural questions' (Sw., '*processuella frågor*') for the judgement whether YRVE has emerged and expired respectively

8.2.2.1 The analysis previously in the presentation

Of chapter 5 follows that even if the civil law accounting rules don't have any prejudicial effect for the question whether YRVE has emerged according to ML, can they have evidence value for the question with respect of the procedure of taxation and procedural, i.e. for the tax case procedure. In the same way as for the question whether a VE has ceased to exist is that judgement made objectively with respect of the assets and debts around the supposed activity in question. Thereby it is the civil law Requirement to maintain accounting records with its prerequisites on VE which is of economic nature and of professional character, which are compatible with the prerequisites for taxable person in the Sixth Directive (see sections 3.2.3.2 and 3.2.3.5), which may be deemed being an evidence of highest interpretation value.

It would lead to a great uncertainty the for legal rights of the individual in these respects to remove the connection from ML to civil law and the concept GAAP as the investigation *SOU 2002:74* is proposing. The Sixth Directive is lacking accounting rules and that would invite to thoughts about some kind of tax law GAAP in the field of VAT – which tendencies the tax authority has showed at least previously (see section 5.2.1). Although a 'common tax frame' (Sw., "*gemensam beskattningsram*") wouldn't have been possible to uphold between VAT and income tax, where the distinguishing of the entrepreneurs from the consumers is concerned, should that ambition rule for the accounting issues.

Instead of the evolution to expected with standardized taxation for certain sectors and simplifications like abolishing the audit duty for small enterprises (see section 5.2.4.4), should the value of 'a properly done book-keeping' (Sw., '*ordnad bokföring*') in precisely matters of procedure of

taxation and of the tax case procedural be especially noted. It means great uncertainty for the legal rights of the individual if essentially the same matter, e.g. the question whether an acquisition for the purpose of supporting oneself with an activity has been made, would be given different judgements in these respects, just because the building of norms would go in different directions in accounting questions for the VAT and the income tax respectively. Let alone as the civil law accounting issues are comprised by EU directive and the so called connected area can have a common denominator thereby for VAT and income tax.

8.2.2.2 More arguments for the analysis previously in the presentation of the importance of the civil law accounting rules for the taxation issue

In the latter respect can be noted from the criminal court procedure that the situation today can be so extreme that a person is convicted for 'book-keeping crime' (Sw., '*bokföringsbrott*'), despite that he has a 'properly done book-keeping' acknowledged as such by the prosecutor. To the arguments in chapter 5 about a continued cohesive view on the accounting questions with connection to the civil law concept GAAP and the Requirement to maintain accounting records can therefore the following description of cases from practice be added.

- In a criminal court procedure, where the author of this book was public defense counsel for a part-owner of a company within the building business, it was an issue of that company's involvement in a so called tangle (Sw., *härva*) with alleged purchase of 'false invoices' (Sw., '*falska fakturor*'). The part-owner and the other owner of the company were convicted for 'coarse tax fraud' (Sw., '*grovt skattebrott*') and book-keeping crime by the court of appeal (Sw., *hovrätten*) to one year of imprisonment each.[425] The company was commissioned by ordering companies which in their turn were subcontractors to bigger 'well-reputed' (Sw., "*välrenommerade*") mandators, which was the prosecutor's judgement with reference to the RSV's (nowadays the SKV's head office) website. The company, which itself hired a subcontractor, would however according to the prosecutor not have had to rely on that subcontractor-company's possession of certificate issued by the tax authority on 'registration for corporation taxation' (Sw., '*F-skatteregistrering*') – here, to simplify, abbreviated F-tax. On a direct question during the proceedings in the court of appeal the prosecutor

[425] See the court of appeal's (*Svea hovrätt*) verdict of the 20th of December 2001-12-20, case No. B 5292-01 and others.

acknowledged however that the company's own book-keeping was exemplary. The question was relevant since it wasn't questioned that the work had been done and there wasn't any deviation in the reconciliation of the company's monthly accounting of withholding tax and employer's contribution (for national social security purposes) with the company's yearly statement for control indicating that so called black money to workers would have existed and that accounting matched also the payrolls issued of the company to the trade union (named *Byggettan*). That control was missing in the protocol of the preliminary investigation from the prosecutor, despite that it from book-keeping material audited by tax authority's auditor who was called as witness on the prosecutor's request followed that it was possible to make. Consider that the prosecutor's burden of evidence is on the level 'beyond reasonable doubt' (Sw., "*bortom varje rimligt tvivel*"), and that the court of appeal neither for the objective prerequisites nor for the question of intent evaluate the importance of the defense having to do that work and force the prosecutor by the question stated to cease to make insinuations on explanations after the event.

- The prosecutor's only argument was that the company and the other slightly more than fifty companies which had hired the subcontractor in question had 'pulled in the same direction' (Sw., "*dragit åt samma håll*"). The prosecutor's argument wasn't accepted by the Stockholm district court (Sw., *Stockholms tingsrätt*), which acquitted the two owners of the company in question. The Stockholm district court allowed the author of this book to present the tax rules in the case concerning the topic of tax fraud, whereas the court of appeal didn't allow this. Neither the ML nor the SBL were allowed to be mentioned there. Then it's neither surprising that the court of appeal in its verdict hasn't regarded that the tax authority's auditor, who testified on the prosecutor's request, couldn't be proven not sticking to facts as in the district court due precisely to that procedural error on the court of appeal's side. In the district court the tax authority's auditor stated as reason for responsibility for withholding tax and employer's contribution and refused right to deduct input tax that the F-tax couldn't be deemed being in force thereby if the subcontractor didn't have a 'properly done book-keeping'.

- If one regard the tax rules is it above all dubious with the conviction when it of the preparatory work to 'the act on tax fraud' [Sw., *skattebrottslagen (1971:69)*, SkBrL], its wording from the 1st of July 1996, with reference to the preparatory work to the introduction of the F-

tax-institute in 1993, follows that a mandatory shall be able to rely on information in the invoice from the hired person on his tax certificate.[426] Thus, the F-tax-institute means, contrary to what the tax authority's auditor stated in his testimony, that the mandator shall not have to go behind the F-tax-information and control whether the hired person has a 'properly done book-keeping' and is fulfilling his tax accounting. Instead it follows from the preparatory work to the introduction of the F-tax-institute in 1993 that as an 'effective remedy against the company not fulfilling its obligations' (Sw., "*effektivt ingripande ... mot det bolag som missköter sina skyldigheter*") shall 'deregistration from F-tax' (Sw., "*avregistrering från F-skatt*") be made by the SKV.[427] In the case in question had the authority made an F-tax-audit concerning the subcontractor in question, but didn't apply that measure in connection thereof, despite the subcontractor not fulfilling the tax accounting. Deregistration was made far later at a new investigation. Had the tax authority acted according to the presuppositions for the system with F-tax, would the mandator company instead only have had half of the problems which concerned whether it could rely on the F-tax-information from the subcontractor. This is very conspicuous, since the company in question knowingly was the only one having a 'properly done book-keeping' to show in the tangle where some fifty companies were supposed to have 'pulled in the same direction'. Knowingly was by the way the company and its two owners the only in the whole so called building business tangle which paid all the claims caused by those to the criminal proceedings attached tax proceedings.

- Even more unreasonable is the verdict against the two with respect of them starting their company about one year after the start of the criminal proceedings. The two shall thus have had the intention to 'pull in the same direction' as those participating in such a cloud of companies, but at the same time being the only therein to have had the ambition to have a 'properly done book-keeping'.

- The book-keeping crime has only been able to impute on the two by the prosecutor as a consequence of alleged tax fraud and that has not even been allowed to be mentioned in the court of appeal.

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[426] See *Prop. 1995/96:170* p. 121, where, with reference to *Prop. 1991/92:112*, the following is stated: 'Is a F-tax-certificate invoked shall it in principle rule' (Sw., "*Åberopas en F-skattesedel skall den ... i princip gälla*").
[427] See *Prop. 1991/92:112* p. 92.

- The Supreme Court (Sw., *Högsta domstolen*) didn't find reason to grant leave of appeal, and the punishments against the two representatives of the company in question had already been served when the tax case was decided to the disadvantage of the company on the same loose foundation as by the court of appeal.[428] The two didn't have the strength after that treatment to even appeal to the SAC in the tax cases for the company and themselves.

- Thus, it's a great responsibility for inter alia the academic world to note in essays and research the phenomenon with an entrepreneur being convicted by today's legal system for book-keeping crime, despite a 'properly done book-keeping' being an undisputed fact in the proceedings. It's easy to start talking about special courts, but those won't hardly cure the flaws if not the value as a whole for the entrepreneur of having the ambition to have a 'properly done book-keeping' is give a proper analysis. I.e., an analysis of what procedural value it should have for the entrepreneur.

- The research can e.g. begin with a review of a selection of departments by various county administrative courts (Sw., *länsrätter*), administrative courts of appeal (Sw., *kammarrätter*), district courts (Sw., *tingsrätter*) and courts of appeal (Sw., *hovrätter*) concerning how often they decide to the advantage of the entrepreneur or of the state and the prosecutor. The following questions can be asked. Is there beside a book-keeping approved by the external auditors anything else but opinions from the tax authority's auditor and in the protocol of the preliminary investigation from the prosecutor to support prosecution and conviction? Is the memo from the tax authority's auditors included in that protocol compatible with the described deed, if the tax rules would be given an adequate analysis? Could the district court have decided in pursuance of sec. 15 of SkBrL to declare the criminal proceedings pending for the purpose of awaiting the outcome of the tax proceedings? Could this at least have been decided with respect of the tax surcharge issue? Thereby is it of a particular interest that the concept 'incorrect information' (Sw., '*oriktig uppgift*') shall be given the same meaning in the tax fraud issue as in the tax surcharge issue.[429] The SAC established in the four so

[428] See the Stockholm administrative court of appeal's verdicts of the 24th of August 2004 (case No.:s 4886—4890-03 and 778-04; Div. 03).
[429] See *Förvaltningsprocess* (Eng., Administrative procedure), 1st edition, p. 242, by Bertil Wennergren, *Prop. 1995/96:170* p. 91, *Skattenytt* (Eng., the Tax news) 2000 p. 415, the article *Om muntlig förhandling i taxeringsmål* (Eng., Of oral proceedings in tax cases), pp. 405-417, by Börje Leidhammar, *SOU 2001:25* p. 351 and *Prop. 2002/03:106* p. 116.

called allocation to a particular period-verdicts of the 25th of March 1999, where *RÅ 1999 Ref 16*, was one of them, that the documentation wasn't the matter, but the business transaction. The SAC thus removed the tax surcharge levied only because a correction of documentation had been necessary with respect of the requests on content of invoice in Ch. 11 of ML after the accounting period (see section 5.2.1). That it has a value in itself to keep together the evidence- and procedure questions between VAT and income tax should appear as clear in that perspective. Whether an acquisition of a building service has been made, decide the question on 'incorrect information' – not that the one issuing the invoice doesn't have a 'properly done book-keeping'.

- Another example on when the legal system contribute to undermine the incentives to regard the frames for the entrepreneurial conditions set by tax rules and book-keeping rules is the following, where the author of this book was lawyer for the complainant company. The case was an ordinary evidence case in the tax courts and a criminal trial was never topical. In a tax audit the tax authority's auditors claimed that double deduction existed between two companies which carried out a common project. The case was caused by different name aberrations in invoices from deliverers with reference to the partner company and a project name the two companies were using for their common project. The company's external auditors were allowed to review the two companies' book-keeping, and it proved to be no double deduction at hand. In a decision thereafter the tax authority claimed that the name errors in themselves were basis for refusing VAT deduction. Materially was it undisputed that the company in question also for such invoices had taxed the VAT deductions by accounting for output tax on the supplies in the project.

- The proceedings went on for two and a half years until oral motions in the administrative court of appeal, where the tax authority's solicitor tried to bring up the question on double taxation again. After the complainant company pointing out that it would mean a change of claim and that the proceedings must be interrupted for review of the evidence in such parts again, this was withdrawn by the tax authority. However did the administrative court of appeal go on the formalistic line in its verdict of the 3rd of November 1998.[430] The administrative court of

[430] See the Stockholm adminsitrative court of appeal case No. 6461-6462-1996, Div. 7. The verdict appealed, no leave of appeal (the SAC's case No. 7895-7896-1998). See commentary of that case, and of the SAC's four so called allocation to a particular period-verdicts of the 25th of March 1999, in *Skattenytt* (Eng., the Tax news) 1999 pp. 258-268,

appeal considered that the formal name errors in the invoices still 'constituted a risk for deduction becoming made in both companies' (Sw., "*utgör en fara för att avdrag kan ske för samma mervärdesskatt i båda bolagen*"). The SAC did remarkably not grant the company's appeal leave of appeal.[431]

- The administrative court of appeal's standpoint means such a request of legal evidence that regardless what can be considered established concerning the basic VAT principles on right of deduction and taxation of deductions by POTB would the fact alone that the documentation from the deliverer didn't completely fulfill the requests on content of invoice according to Ch. 11 sec. 5 of ML (nowadays Ch. 11 sec. 8 of ML) lead to loss of the right to deduct input tax. That such a verdict has been issued confirms that the importance to note questions on what the matter is and the importance of the book-keeping as evidence thereby and, for avoidance of some sort of GAAP for taxation beside the civil law concept, the need of it being explicitly stipulated in Ch. 8 sec. 5 of ML and not only in the preparatory work that the reference to Ch. 11 of ML and the rules on content of invoice is just an evidence rule (see section 5.2.1).

The review in this book should be sufficient as a counterweight to the proposals on simplifications such as abolishing the auditing duty for small enterprises. Materially can it also be questioned if such simplifications as the decision to introduce so called reverse charge in the building sector on the 1st of July 2007 (see section 3.3.2.4), would have been called for if the value that should lie in the entrepreneur having a 'properly done book-keeping' had been fully acknowledged by the legal system today.

That power to a certain extent has become right is shown by the, in the recently described case from the building sector, bigger 'well-reputed' mandators weren't called as either defendants or witnesses. They are a few big companies which the last years almost without exception have been involved in unallowed so called asphalt-cartels. They govern the larger building projects in the country and decide who's going to be let in on the working sites. They shall in their end of a chain of entrepreneurs not be expected to master the four simple ways of calculation, when it comes to judging if the prices on the work is set at market value. Instead of making

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the article *Avgör inköpsfakturas utseende alltid rätten till avdrag för moms?* (Eng., Does the layout of purchaseinvoice always decide the right of deduction of VAT?) – by Björn Forssén.

[431] See the SAC's decision of the 17th of July 2000 (case No. 7895-7896-1998).

signals that a higher level on the investigations is requested, has the legal system given in for 'the spirit of Saltsjöbaden' (Sw., "*saltsjöbadsandan*' (i.e. the spirit of a meeting at which lasting agreement was reached in 1938 on the labour-market – here in the sense that the big players on the emloyerside dominate together with the trade unions). Law politically can it not be considered contributing to do justice between new entrepreneurs and those established that Montesquieu's distribution of power-doctrine is set aside, by special rules being introduced for small enterprises, instead of the evidence in form of a 'properly done book-keeping' is given a true value at the free evaluation of evidence.

If 'the spirit of Saltsjöbaden' and its spokesmen shall rule as well the legal system as the legislator, is it from a democratic point of view called for a two-chamber system, where one chamber would have a corporate- and organization representation. First then could the problem described with corporatism influencing the legal system and the legislative work in the field of corporate taxation be put under a democratic review. How has the lobbying influenced where the presenting of all these simplification suggestions is concerned? That it's hardly a procedure preceded by any analysis based on the small enterprises' situation as a whole in the legal system is thus a topic which should interest the academic world. If a prosecutor with at least formally high requests on evidence from the legal system can persuade the court of appeal (*Svea hovrätt*, i.e. the one of the county courts of appeal in Sweden which is situated in Stockholm), like in the described case from the building sector, that a company is 1.5 times bigger than what the book-keeping acknowledged by the prosecutor as exemplary is showing, is something fundamentally wrong. Why would it be possible in that forum but not at a bank in a normal loan situation? Also that argument, which the defense after all was allowed to make in *Svea hovrätt*, was of little avail.

Yet another example on the legal system – knowingly or unknowingly – being used with corporatism as an end unless the courts show integrity and carefulness with the signals which not only court decisions, but also 'court findings' (Sw., '*domskäl*') are sending out, is a case on withdrawal taxation in the field of VAT, where the author of this books assisted the complaining company. The company had success in the administrative court of appeal after an almost 7 year long tax case. The errand was about the ML's rules on withdrawal taxation after the EU-accession in 1995 and the tax authority's decision that the fact alone that the company was calculating a deficit for the first financial year which comprised the 1st of March to the 31st of December 1995 would cause withdrawal taxation of VAT. The tax

authority used all imaginable arguments for the company, which was owned by municipal dwelling companies and mediated tenancy rights for them, being comprised of such a liability just on the basis mentioned.[432] The Stockholm administrative court of appeal ruled in favour of the company on the 3rd of May 2002, but stated as basis for its verdict that the situation could be deemed acceptable with the motivation that the deficit was 'adjusted to conditions on the market' (Sw., '*marknadsmässigt betingat*') according to Ch. 2 sec. 5 first paragraph item 1 and Ch. 7 sec. 3 item 2b of ML.[433] The question whether the company itself could decide in what period of time the project was supposed to become profitable was thus not tried and the RSV didn't appeal the verdict of the administrative court of appeal (why the verdict has gained legal force, i.e. became legally binding).

That question has instead been answered by the ECJ's verdict on the 20th of January 2005 in the "Hotel Scandic Gåsabäck"-case, if the interpretation given here that the under pricing doesn't cause withdrawal taxation of VAT can be deemed meaning that the taxation of deducted VAT may take as long time as you like (see sections 3.3.2.3, 3.3.2.4, 4.2.1.3, 6.2.5 and 6.2.9). That question is thus not tried by the ECJ in the case mentioned, but it presents itself immediately with respect of the value added not being defined in the ML or the Sixth Directive and the purpose with the rules on withdrawal only being the state taking back a previous VAT deduction. In a couple of articles about the case ending in the administrative court of appeal in 2002 and which were published in 1996, i.e. long before that verdict, the author of this book argued that it would be a 'commando-economy' (Sw., "*kommandoekonomi*") if the state would determine how long time a project shall have to prove itself economically.[434] There are still cases on their way up through the instances on that topic, and it doesn't

[432] Inter alia it had to pointed out by the company during the proceedings that the tax authority's argument, meaning that withdrawal taxation of it was called for since the companies owning the company lacked right to deduct input tax, was in conflict with the main principle that taxation of groups of companies as mentioned doesn't apply for VAT, but every subject is treated separately.

[433] The Stockholm administrative court of appeal's case No. 6431-6435-2000, Div. 7.

[434] See *Skattenytt* (Eng., the Tax news) 1996 pp. 535-536, the article *Moms – några frågor avseende "gamla" och "nya" regler* (Eng., VAT – some questions concerning 'old' and 'new' rules), pp. 533-541, by Björn Forssén, *Ny Juridik* (Eng., New Law) 4/1996 pp. 87-89 and the article *Tio frågor om moms* (Eng., Ten questions on VAT), pp. 74-103, by Björn Forssén. See also *Momshandboken Enligt 1998 års regler* (Eng., The VAT handbook. According to the rules of 1998), p. 48, by Björn Forssén and *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 59, by Björn Forssén.

seem to be anything impressing the SKV that the ECJ's standpoint in the "Hotel Scandic Gåsabäck"-case could be given the interpretation that it is the entrepreneur who decides on his own with legal consequence also for the VAT where the question how long time a project so to speak may get to prove itself profitable is concerned.[435] The situation would of course have been more secure for the entrepreneurs with regard of the legal rights of the individual if the administrative court of appeal in its verdict in 2002 had been clearer in its court findings on the topic in question.

In the context it's of interest that the SAC in the previously in the presentation mentioned advanced ruling on VAT, RÅ 1999 Not 282 (see sections 2.4, 4.1.1, 4.1.2 and 8.2.1), removed the SRN's ruling because of the EU law aspects not being illuminated in the way they should have been and weight was placed thereby to the actual circumstances supposed to be related to the EU law. In RÅ 2001 Not 28, which also concerned advanced ruling on VAT, the SAC removed and referred back the case to the SRN for the same reasons. The SAC thereby pointed out the inappropriate in first at the SAC treating the EU law aspects. In the "Abbey National"-case can the ECJ be perceived to urge the national courts to distinguish the evidence cases from those containing legal issues (see section 3.2.3.4). That's thus very important for the adequate cases reaching the highest instance and eventually move on to the ECJ for preliminary ruling for guidance for the application of law in the field of VAT. The court findings in the Stockholm administrative court of appeal's verdict of the 3rd of November 1998 is not an expression for current law, but they are sending the wrong signals to those applying the law, and it becomes more and more usual that verdicts by administrative courts of appeal – even verdicts by county administrative courts – are invoked in proceedings concerning VAT as if they were an expression of current law. The administrative court of appeal gives in that case the formal rules on content of invoice an importance which disqualifies other evidence that tax evasion has not existed materially.

The court findings thereby giving signals contrary to another legally binding decision from another division by the Stockholm administrative court of appeal of the 28th of May 2002.[436] The administrative court of appeal removed there a tax surcharge and stated as court findings for

[435] See also, concerning that it has been noted during later time that the SKV is seeking ways to go around the "Hotel Scandic Gåsabäck"-case, *Svensk skattetidning* (Eng., Swedish tax journal) 2006 pp. 741-746, the article *Moms på koncernbidrag och andra vinstdispositioner* (Eng., VAT on group contributions and other appropriations of profits), by Ulf Hedström.
[436] The Stockholm administrative court of appeal's case No. 8568-2000, Div. 2.

incorrect information not to be deemed to have been issued, that 'it is not sufficient that the tax liable cannot prove the claim of deduction. Against the company's denying can the tax authority not be considered having proved that the questioned invoice is lacking foundation on facts or concerns costs which aren't referable to the company's VE' (Sw., "*[d]et är inte tillräckligt att den skattskyldige inte kan styrka sitt avdragsyrkande. Mot bolagets bestridande kan skattemyndigheten inte anses ha visat att den ifrågasatta fakturan saknar verklighetsunderlag eller avser kostnader som inte är hänförliga till bolagets verksamhet*"). That's in line with the SAC in the four allocation to a particular period-verdicts of the 25th of March 1999 may be perceived to have established that the business transaction is the matter and that the documentation doesn't have anything else but evidence value. It's thus also of importance for the judgement of questions on tax fraud, where the same concept incorrect information also shall be tried. Since such an important question, as if formal errors in the documentation itself can be deemed leading to such a risk that not even one by the tax authority approved investigation that the from the beginning of the investigation in the case which the Stockholm administrative court of appeal decided on the 3rd of November 1998 alleged double deduction had not existed materially shall be deemed having a value in the tax case procedure on that topic, not led to the SAC granting leave of appeal, calls in particular upon clarity in the court findings.

In the criminal court case described here from the building sector the tax authority's auditor called on the prosecutor's request testified that a lack of order with book-keeping by the hired subcontractor disqualified evidence like that person's information in invoices on possession of F-tax and levied VAT, where the responsibility for withholding tax and employer's contribution and the right to deduct input tax by the mandator was concerned. The Stockholm district court went on the company, where one of the two owners as mentioned had the author of this book as defender, stating that it should be allowed to rely on established systems, all the more as itself had a 'properly done book-keeping'. The F-tax should thus have been called back from the subcontractor by the tax authority. Before that the matter of the law of the case meant that the mandatory could rely on information thereof in the invoices. Furthermore applies according to *RÅ 1984 1:67* that a mandator doesn't have 'any more comprehensive obligation of investigation whether tax liability applies for the one levying the tax' (Sw., "*någon mera omfattande utredningsskyldighet i frågan om skattskyldighet föreligger för den som debiterat skatten*") – see section 2.3.4. Established systems ruled in the Stockholm district court, but in the court of appeal (*Svea hovrätt*) they weren't even allowed to be mentioned.

What is it that says that the owner of the company in the case that led to the Stockholm administrative court of appeal's verdict of the 3rd of November 1998 couldn't have been convicted by *Svea hovrätt*, if that matter had interested a prosecutor? What guarantees are there in today's legal system for the material rules and the thorough analysis of the two partner companies would even have been allowed to be mentioned in *Svea hovrätt*, if that errand had ended up there too? For the time being there's a lot speaking for a prosecutor being able to have gained a hearing in a criminal court case with the administrative court of appeal's reasoning in the court findings in that case that the wording and layout itself of the documentation of a business transaction would constitute incorrect information about the actual matter. In the same way as in the case from the building sector would then book-keeping crime very well have been possible to impute to the owner of the company in the case decided by the Stockholm administrative court of appeal on the 3rd of November 1998 indirectly by a false application of formal rules and material rules respectively on VAT, where thus a 'properly done book-keeping' would be lacking evidence value. As long as the latter flaw in the court procedure isn't corrected the more urgent is it that it will be clarified in Ch. 8 sec. 5 of ML that the rule is just an evidence rule, e.g. by the word 'only' (Sw., "*endast*") with reference to the rules on content of invoice in Ch. 11 of ML being abolished from the section. That the section only contains an evidence rule and that the rules on content of invoice aren't any exclusive proofs forming some sort of legal evidence especially in the field of VAT should follow by the text in the section in the act and not by the preparatory work to ML (see section 5.2.1). That would work against a verdict on book-keeping crime being based on a wrongful evaluation legally of the rules on requests on content of invoice according to Ch. 11 of ML.

The tax authority's auditor in the crime case proceedings described here from the building sector never testified in the district court in any material respect. He 'thought' (Sw., "*tyckte*"), besides the described opinions about the legal consequences of possession of F-tax in relation to the order of the book-keeping by the subcontractor, that the invoices in question to the company were far too 'brief' (Sw., "*knapphändiga*"), why they therefore would be deemed as false. With that logic would thus incorrect information which – together with intent – lead to tax crime consist of an error in the documentation itself of the business transaction. The tax authority's auditor answered on the question from the defense that he had no perception about the relation between the mandator company mentioned here and the hired subcontractor materially. An anomaly in the context is that the prosecutor in the interrogations with the workers from the mandator company without

any success tried to make them answer that they had had contact with the mandator company's two owners, before they had contact with the two owners of the subcontractor company. That would of course have been to the mandator company's disadvantage on the topic false invoices, but if the prosecutor would have had success in that sense materially would the prosecutor's description of the deed about the owners of the subcontractor company committing book-keeping crime have been ineffective from the beginning. Of the SAC case *RÅ 1991 Ref 6* follows namely that a criminal activity, i.e. an activity 'totally based on crime' (Sw., "*helt och hållet bygger på brott*"), cannot lead to Requirement to maintain accounting records, since incomes thereof aren't taxable. Whereas it follows by the same case that incomes of a criminal activity as part of a legal activity can be taxable.[437] Since the material tax issues and their importance for as well the tax fraud question as the question on book-keeping crime weren't allowed to be treated in the court of appeal (*Svea hovrätt*), has the verdict there against the two owners of the mandator company just been based on a "guilt by association"-argumentation and a wrongful application of material and formal rules on taxation. In the occidental legal system should a prosecutor not have the possibility to be successful in that way with a suit on the topic book-keeping crime, despite the prosecutor acknowledging that the book-keeping by the defendants' company is exemplary – not even at *Svea hovrätt*. The two were convicted for tax fraud and book-keeping crime there, just because the prosecutor kept repeating over and over that everyone in the so called building tangle had 'pulled in the same direction' (Sw., "*dragit åt samma håll*").

RÅ 1984 1:67 and *RÅ 1988 ref 74* respectively show that the exterior signs for the judgement whether a hired person has YRVE are such that they don't cause the mandator to question the hired person's status as tax subject, shall the mandator be able to acquire the right to deduct input tax in the invoice that person in 'good faith' (Sw., "*god tro*"), whereas it of course isn't possible to acquire such a right if it is a question of an error about the law concerning levied VAT where the tax object is exempted from taxation.[438] Noted thereby that the two cases are considered ruling also for time after Sweden's EU-accession, since they are referred to in *RÅ 2001 Not 99* and *RÅ 2004 Ref 65* (see section 2.3.4). In case of error about the law would by the way acquisition of input tax in good faith be possible, if

[437] See *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 9th edition, p. 67, by Sven-Olof Lodin and others, where *RÅ 1991 Ref 6* is commented too.
[438] See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 75, by Björn Forssén.

Sweden implement Article 21(1d) of the Sixth Directive into ML meaning that he who levies output tax becomes tax liable, even if the object is exempted from taxation (see section 7.1).

That the ECJ in the ”Abbey National”-case points out that the question on basic VAT principles are fulfilled for right of deduction in the individual case shall be tried in the first place of the national courts themselves, should be perceived as urgent request not to make the evidence questions to matters of the law. Before proposals of simplification like standardized taxation and abolished auditing duty for small enterprise uncritically are accepted, should a thorough review of how the legal system works be made where the guarantee of the reliance in established systems is concerned. F-tax and special rules on content of invoice according to ML should be seen as the exterior to the book-keeping as the proof a priori. The review here could at least be considered establishing that such a thorough review is called for, before measures are mad which can lead to a morass systematically.

It’s not any axiom that there shall exist a ’common tax frame’ (Sw., ”*gemensam beskattningsram*”) between income tax and VAT where the determination of who’s entrepreneur is concerned (see section 3.2.3.2). However may the review here show that it in evidence questions has a great value taken by itself that the same proofs as far as possible are given the same evaluation in the proceedings for VAT and income tax respectively, and that it thereby is appropriate with a common building of norms in accounting questions. The connection to civil law in that field which as mentioned is governed by EU directives is underpinning that standpoint. If then any adjustment should be made materially between VAT and income tax, where the determination of the tax subject is concerned, can it, with respect of the existing national practice in the field of income tax concerning the subjective prerequisites for NAVE being compatible with who’s referred to by the Sixth Directive’s taxable person and the fact that the SAC is following the primary law also in segments within the income taxation where the Swedish Parliament hasn’t transferred competence to EU’s institutions, as well be made by the IL being adjusted to ML as vice versa (see sections 5.1.2, 5.2.1, 5.2.4.2, 6.2.6.1, 8.1.6 and 8.2.2.1).

8.2.3 If not the legal system gives a properly done book-keeping any evidence value, should the leave of appeal-institute be reviewed rather than materially and accounting special rules being introduced for certain sectors and small enterprises

The Stockholm administrative court of appeal's verdict of the 3rd of November 1998 and the rejected leave of appeal, according to the review in the recent section, show also that if not a better order with separating material and formal rules comes about by the administrative courts, should the leave of appeal-institute be reconsidered at least for them, i.e. for the SAC (see section 3.2.3.4).

Here can also be added that that suggestion is equally as valid concerning the public courts. In section 7.1 are the problems mentioned with questions on tax sovereignty and the principle of legality for taxation for the VAT question concerning the main rule for so called intra-Community acquisitions containing the concept 'tax liable' (Sw., "*skattskyldig*") instead of taxable person or any other concept closer to that concept of the Sixth Directive for determining the tax subject, i.e. who can belong to the VAT system.

In a crime case procedure the county court of appeal *Svea Hovrätt* sentenced, case No. B 1378/96,[439] the defendant for tax fraud, despite the circumstances being precisely those described in section 7.1 with exemption from taxation for so called fine gold in Luxembourg when Sweden followed the Sixth Directive and didn't stipulate exemption in the ML, but the usage of the expression 'tax liable' (Sw., "*skattskyldig*") in the rule in question, with respect of the *lex scripta*-request in the constitutionally established principle of legality for taxation, means that the person in question couldn't be considered liable to account for and pay calculated output tax as for an intra-Community acquisition. The Supreme Court (Sw., *Högsta domstolen*) has in a decision to reject 'an application to be granted a new trial' (Sw., '*resningsansökan*') stated that the Supreme

[439] The case is one of several mentioned in *Ny Juridik* (Eng., New Law) 4/2000, pp. 69-83, in the article *Momsfritt i EU – moms i Sverige?* (Eng., VAT free in EU – VAT in Sweden?), by Björn Forssén, in *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), pp. 408-445 (Appendix 3 - *Bilaga 3*), by Björn Forssén, in *Svensk skattetidning* (Eng., Swedish tax journal) 2005 pp. 118-133, the article *EG-förordning om tillämpning av sjätte momsdirektivet* (Eng., EC-regulation on application of the Sixth Directive), by Björn Forssén, in *Ny Juridik* (Eng., New Law) 1/2005 pp. 66-85, the article *EG-förordning om tillämpning av sjätte momsdirektivet* (Eng., EC-regulation on application of the Sixth Directive), by Björn Forssén and at a lecture held at the Swedish jurist meeting (*Svensk juriststämma*) on the 14th of November 2001, *Moms och omsättningsbegreppet. Karusellen hos skatte- och ekobrottsmyndigheten* (Eng., VAT and the transaction-concept. The roundabout at the tax authority and National Crimes Bureau), by Björn Forssén. The Swedish Bar Association also brought up the case in its reply of the 22nd of December 2004 to the Treasury, which the author of this book took part in writing, on the proposal of an EC regulation with certain instructions on application of certain rules in the Sixth Directive.

Court didn't find 'reason to obtain a preliminary ruling from the ECJ' (Sw., "*anledning inhämta förhandsavgörande från EG-domstolen*"),[440] which thus also may be deemed confirming the need of a review of the 'to be or not to be' of the leave of appeal-institute in the field of VAT. If the legal system won't give a 'properly done book-keeping' any evidence value, should the leave of appeal-institute rather be reviewed than materially and accounting special rules being introduced for certain sectors and small enterprises.

Possibly can the situation become better by the sec. 15 of SkBrL being completed with a strengthening of the incentive to await the outcome of the tax case, before the crime case proceeding continue, where the question on tax fraud and book-keeping crimes are concerned, where the bottom line question is concerning the VAT or another discipline which also undoubtedly is governed by the ECJ's field of competence, such as excise duties, customs or social security contributions.

The alternative to the legal system pulling itself together concerning the evidence questions seems otherwise be that Sweden makes a request according to Article 27 of the Sixth Directive for permission from the EU to introduce special rules for the purpose of stopping tax evasion or avoidance, like what thus is now decided for the first time by the *SFS 2006:1031* on reverse charge for building services between entrepreneurs. Where fine gold transactions are concerned such an order was introduced in 2000, but that was as mentioned according to an EU directive and caused by problems also between EU Member States where Sweden wasn't involved (see sections 3.3.2.4 and 8.2.2.2). The similarity with the procedural situation recently described for cases with chains of entrepreneurs cheating was that the participants in the top of those chains in Sweden were a few big companies. They weren't either called as witnesses or defendants in the cases on VAT fraud at the trade with fine gold, despite they should be expected to be well fitted to judge e.g. market value of prices. That has also been pointed out by the author of this book in commentaries of e.g. the *Svea hovrätt*'s case No. B 1378/96 which is referred to here.

The difference is however that the problems with so called building tangles aren't about chain transactions which lead to transactions in several links of the chain concerning one or a few transports. The VAT control has been undisputedly low especially in Sweden (see section 5.2.4.3), and the chain

[440] The Supreme Court's case No. Ö 257-99.

transactions within the trade of fine gold was a problem on EU level and solved properly also by directives for the whole union, but the efforts which are now decided within the building sector in the field is thus national special rules. Therefore it's called for with the research efforts suggested here, to get a grip on the question whether the Swedish legal system and the problems with distinguishing between material and formal VAT rules there have contributed to those problems. If it would be known that the one putting effort into keeping good order gets the right kind of recognition for it in the legal system and isn't lumped together with those cheating, should it stimulate in the right direction. The necessity of introducing special rules materially can thereby decrease. It mustn't become so that the argument usually made before Sweden's EU-accession for introducing or keeping rules deviating in relation to the general VAT rules, namely the finances of the State, is replaced with Sweden invoking Article 27 of the Sixth Directive to introduce national special rules in relation to the Sixth Directive. That's not to the benefit of the request of security of the legal rights of the individual in the rules on taxation being foreseeable. Therefore should thus the research efforts suggested here be realized, regardless that the rules decided on reverse charge in the building sector are introduced on the 1st of July 2007 by virtue of Article 27. If the legal system can be improved on the points brought up here, can additionally such national special rules in relation to the Sixth Directive be avoided. The development has ever since GML been an approximation to the EC's directive law in the field (see sections 1.1, 1.2 and 2.3.2), and all tendencies to disregard the VAT's general rules should be avoided. There are special rules supported by the Sixth Directive, and thereby is noted first of all voluntary tax liability for letting of business premises, but those are rules which so to speak lets in also private persons owning real estate into the VAT system to create competition neutrality between entrepreneurs renting their premises and those having business premises of their own. It's thus the facultative rules of the Sixth Directive which so to speak are considered necessary to create possibilities to harmony amongst those comprised by the Sixth Directive's mandatory rules, and where the need of deviation from general rules thus is expressed (see section 5.2.2).

In the context can it be remembered of that the ECJ in the ”Halifax and others”-cases and the doctrine on the rights of the VAT system only possible to be limited in cases of ”abusive practice” – see section 5.2.1 – and that the ECJ is noting that it doesn't intend to give its doctrine other legal consequence than a liability to pay back input tax as a consequence of such practice being established. Other ”penalty” must be tried in relation to the special legal foundations thereof. 'The act against tax evasion' [Sw.,

”*lagen (1995:575) mot skatteflykt*”] comprises income tax – and tax on wealth – but not VAT. The ECJ can however in the ”Halifax and others”-cases be considered stipulating own rules similar to those in The act against tax evasion’. The ECJ has however in another case, which also has been decided lately, established that a taxable person cannot be denied his right to deduct input tax on acquisitions made for the purpose of by himself making taxable transactions, just because – him unknowingly – someone else in the chain of deliverers in which these transactions is included has made a transaction of a fraudulent character.[441] With these decisions from the ECJ had possibly the outcome become another at least in some link of the crime case procedures on VAT and chain transactions or so called roundabout-trade which as mentioned the author of this book has commented on different occasions. It should not have been possible to convict an entrepreneur for tax fraud without the big companies which should have had at least equal insights in market value of the prices also sitting on the defendants’ bench. Without the few big companies which have existed in the end of ”the chains” would the cheating with VAT on fine gold probably not have had any ”market”. That message may the ECJ be deemed to have sent to the law applying instances. On the Swedish side may unfortunately be established that the light comes from outside, i.e. from the EU. The similarity with the last years asphalt-cartels amongst the big companies within the building sector is striking, but the difference is that in the field of VAT is there no unbiased Competition authority (Sw., *Konkurrensverk*), see section 3.3.2.1, but where crime case procedures on VAT are concerned the pulling together demands that the legal system pulls itself together on the items mentioned here and not let the state via the SKV, its ‘crime investigation unit’ (Sw. ‘*skattebrottsenhet*’) and ’the office of the public prosecutor’ [Sw., ’*åklagarämbetet*’ – i.e. the Swedish National Crimes Bureau (Sw., *ekobrottsmyndigheten*)] conduct ’witness-/defendant-shopping’ (Sw., ”*vittnes-/tilltalad-shopping*”) amongst the entrepreneurs. The lack described here of integrity in the legal system concerning the evaluation of a ‘properly done book-keeping’ in the individual case and lack of respect for built-up systems, such as the VAT system and the F-tax-institute respectively, make that such activities continue and in the true ’spirit of Saltsjöbaden’ making power to right.

8.2.4 Civil law rules whether business transaction has emerged has evidence value for both the question if YRVE has emerged and the question if a transaction has been made

[441] See joint ECJ cases C-354/03, C-355/03 and C-484/03 (Optigen Ltd and others).

The civil law rules on Requirement to maintain accounting records and GAAP have evidence value for the judgement of the tax subject's character (see the sections under 8.2.2). Whether YRVE has emerged and the subject can be considered having the character of entrepreneur is also a question influenced for matters of evidence by the civil law rules on when a business transaction has occurred. Also the BFL's concept business transaction is an important corporate tax law-rule. No business transaction, nothing to account (see section 3.2.3.2). The difference is that the concept business transaction also has evidential effect where the determination whether a subject, which has been established or by the business transaction in question can be established to have YRVE, by the actual business transaction also can be deemed making a transaction for VAT purposes is concerned. A subject which has YRVE can belong to the VAT system and if the subject is making a taxable transaction within the country, and the customer shall not be subject to reverse charge instead, shall the subject belong to the VAT system (see sections 1.1, 1.2, 2.1 and 2.4).

The business transaction is thus of importance where VAT is concerned for the judgement of as well the tax subject as the tax object, and the civil law has thereby evidential effect for the material tax law. This strengthens the importance of distinguishing in the tax case procedure the evidence cases from the matters of the law, and not making the evidence questions to matters of the law (see sections 3.2.3.4 and 8.2.2.2). It's important that a case which basically is about judging whether a person devotes an asset more administration measures than what can be expected from a private investor isn't given another character than the one of an evidence case in the tax case procedure.

If the proofs in form of documented business transactions show that the issue isn't just about a holding company or possession of an asset which in itself generates proceeds in the form of interest etc, can an E-VE be considered existing and the person in question deemed to have YRVE (see section 6.2.8.1).

In the same way the business transaction or business transactions indicate that a transaction can be deemed to exist.

If there isn't any particular matter of the law about interface problems on the topic taxation contra exemption from taxation according to Ch. 3 of ML, should the question about the person's in question belonging to the VAT system be able to try as an evidence case as well in the subject issue as the object issue. That a 'common tax frame' is possible to maintain for

matters of evidence between VAT and income tax also in the object question, disregarding the recently mentioned VAT specific interface problems, is confirmed by national practice. Of e.g. the SAC cases *RÅ 1988 ref 106* (VAT) and *RÅ 1989 Ref 62 I* and *II* (income tax) follow that the judgement of whether a sale and leaseback-deal has led to a transaction is decided of the intention of the parties and the real meaning it gives to the transactions in question. Agreements and books of account constituting the book-keeping are the proofs which in practice are available to objectively underpin the judgement of that intention.[442] Then is it of course so that the accounting law neither in the object issue has any prejudicial effect, but in the field of VAT must national law stand back for the EU law in matters of the law, i.e. when a material question of principle emerges and the question no longer is about evaluating available evidence in form of book-keeping etc. The civil law and not just the BFL's concepts, but also purchase law concepts which first of all are expressed in agreements constitute however available indications for judging the matter of the law. That seems also Stefan Olsson to go on, when he comments that 'Forssén illustrates' (Sw., "*Forssén illustrerar*") the rules in ML on placing the transaction with the concepts 'transport purchase' (Sw., "*transportköp*") and 'pick up purchase' (Sw., "*hämtningsköp*"), and settles for that it is 'a rather good description' (Sw., "*en ganska bra beskrivning*").[443]

8.3 'ACTIVITY-THINKING' AND 'TRANSACTION-THINKING' COMPLETED WITH 'ASSET-THINKING'

The concept VE should thus remain in ML, since otherwise an objective prerequisite would be missing corresponding to E-VE, which according to the ECJ's practice is necessary, to, together with the intention to create taxable transactions, confirm that a person has the character of taxable person and thus can belong to the VAT system. The only necessary to clarify in the ML is that the emergence of the right of deduction in the VE isn't depending on a taxable transaction first actually having occurred. That clarification is, contrary to what the investigation SOU 2002:74 has assumed without any material analysis of consequences, not anything

[442] See *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), pp. 34-36, by Björn Forssén, where references are made to additional cases from the SAC on that topic.
[443] See *Skattenytt* (Eng., the Tax news) 2006 p. 192, the article *Internet och alkoholskatt* (Eng., the Internet and the alcoholic products' taxation), pp. 183-193, by Stefan Olsson, where reference is made to *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 338, by Björn Forssén.

preventing that the concept VE remains in the ML (see sections 4.1.1 and 8.2.1).

Instead of replacing an 'activity-thinking' with a 'transaction-thinking', as the investigation SOU 2002:74 is suggesting, should these two aspects be completed with an 'asset-thinking'. He whose acquisitions of assets establish an E-VE cannot belong to the VAT system, if they shall be used in an activity with creating from taxation exempted transactions of goods or services, despite the person in question having the character of taxable person. If on the other side the assets change character to current assets, will he become tax liable for transaction of them and shall then belong to the VAT system as if fixed- and current assets were acquired from the beginning for creating taxable transactions. The person in question will go from having a VAT free VE to having a mixed activity. The only difference between fixed assets which were used in the totally VAT free VE and which changed character to current assets and acquisitions which from the beginning have the character of current assets, is that deduction for input tax only can be made by adjustment for those assets changing character, if they constituted so called Capital goods (see section 5.1.1).

The importance of a common connected area between corporate taxation and the civil law rules on accounting for VAT and income tax, where 'the question of allocation to a particular period' (Sw., '*periodiseringsfrågan*') and evidence issues at the procedure of taxation and in the tax case procedure are concerned, should be deemed well stated at this stage of this presentation. It's even more confirmed by the civil law rules on accounting materially getting an almost prejudicial effect where VAT is concerned for the question on classification in the cases now mentioned about the change of character of assets. The Sixth Directive only has one rule, Article 13(B.c), which concern the topic and then only for the goods, where exemption from taxation is stipulated for sale of goods which are "used" (Sw., "*används*") in a VAT free "activity" (Sw., "*verksamhet*", VE).[444] Otherwise there are no classification criteria in the directive, why Ch. 3 sec. 24 of ML, which on the same topic treat 'current assets' (Sw., "*omsättningstillgångar*") and other 'assets' (Sw., "*tillgångar*") than those, i.e. 'fixed assets', may be considered basing these concepts for goods or services on the civil. This is complying with the content of the concepts in the civil law rules of accounting also being governed by EC-directives.

[444] Compare the preparatory work to ML and the expression 'used or consumed in the VE' (Sw., "*användas eller förbrukas i verksamheten*"), concerning the general right of deduction for acquisitions (or import) of goods or services according to Ch. 8 sec. 3 first paragraph of ML (*Prop. 1993/94:99* p. 209).

Whereas the Sixth Directive for the subject issue has its own concept taxable person, but there may the civil law rules on Requirement to maintain accounting records be considered having strong influence where matters of evidence are concerned. Since the connected are between income tax and the law on accounting is possible to uphold for 'the question of allocation to a particular period' strengthens what's now argued about the VAT and the classification question where the assets are concerned thus the judgement here that also the ML's accounting rules should connect to the civil law concept GAAP, concerning the main rules for accounting of input and output tax (see sections 3.2.3.2, 5.1.1, 5.1.2, 5.2.1, 6.1.1.2, 6.1.1.3, 6.2.7 and 8.2.2.1).

8.4 THE RIGHT OF DEDUCTION, THE STRUCTURE OF THE ML AND PROHIBITION OF DEDUCTION WITH CONNECTION TO THE IL

The analysis of the ECJ's practice shows that if only the intention is to create taxable transactions with the acquisitions making the person in question having the character of taxable person, emerges right to deduct input tax on the acquisitions constituting the E-VE even if taxable transactions actually haven't existed in the VE yet (see section 3.3.2.1). The expression 'VE leading to tax liability' (Sw., "*verksamhet som medför skattskyldighet*") in the rule on the general right of deduction, Ch. 8 sec. 3 first paragraph of ML, can however, together with the special rule in Ch. 10 sec. 9 of ML on reimbursement before taxable transaction has occurred, at a systematical interpretation give the impression that that such a request exists so to speak in the structure of the ML. Therefore should partly Ch. 10 sec. 9 of ML be abolished from the ML, partly be clarified in Ch. 8 sec. 3 first paragraph of ML that the emergence of the right of deduction isn't depending on a taxable transaction actually existing first. The latter leads to a change of tense in the section, so that it will follow thereof that right of deduction emerges for acquisitions in VE which 'can come to' (Sw., "*kan komma att*") cause tax liability, or that it in a new paragraph in the sections will be stipulated that the emergence of the right of deduction 'isn't depending on' (Sw., "*inte är beroende av*") tax liability first having emerged (see sections 4.1.1 and 8.3).

The right of deduction is of central importance for distinguishing the VAT from other taxation. A 'competing VAT' mustn't exist beside the real one; only one VAT system shall exist in the EU Member State Sweden. Decisive for whether another tax has signs resembling the VAT to such a degree that it is unallowed is that it is established by a so called Wilmot-test

that the other tax also give rise to a claim on input tax against the state. There's not any such problem existing with the IL, where deficit in NAVE not founds any claim against the state, but is just 'carried forward' (Sw., "*rullas*") to the next 'fiscal year' (Sw., '*beskattningsår*') and is deducted from the incomes there (see sections 1.2, 2.2.2, 2.3.2, 6.2.3.1 and 7.2).

Since the right of deduction constitutes such a decisive criterion for what shall be understood with VAT, is it however of interest here to examine one of the so called prohibitions of deduction in the ML. That concerns Ch. 8 sec. 9 first paragraph item 2 of ML, where such a prohibition is connected to what's considered constituting non-deductible entertainment and similar according to Ch. 16 sec. 2 of IL. Due to the IL's rules thereof being more standardized and don't seem to give the same dynamic evolution of the law as for the VAT, where the right of deduction for personnel care moves in one for the entrepreneurs 'more liberal' direction, should the connection from Ch. 8 sec. 9 first paragraph item 2 of ML to Ch. 16 sec. 2 of IL be revoked. The risk is otherwise that national practice comes into conflict with the ECJ's practice. It means that even if the prohibitions of deduction existing in the national VAT acts at the EU-accession may be kept according to Article 17(6) second paragraph of the Sixth Directive until the Council decides otherwise, may the application of prohibition of deduction not be made so standardized that it in the individual case won't be possible to prove that it's a question of an expense in the business activity and that tax evasion or avoidance don't emerge (see section 6.3).

8.5 REGISTRATION, CONTROL AND TAX COLLECTION

In the sections below 5.2 are mentioned besides the accounting rules also questions on VAT-registration and VAT-control. The registration has no legal consequence for questions on the emergence of the right of deduction and tax liability, besides in cases of so called voluntary tax liability. Otherwise the registration measure has where the mandatory VAT rules are concerned, which first of all are of interest here, only the function of the tax administrative control apparatus being switched on and when deregister being switched off (see section 5.2.2). The VAT control is however possible from the SKV to conduct regardless whether the reviewed subject is VAT registered or not (see section 5.2.4.1). In that respect are there, for additional confirmation of it having a value in itself with both VAT and income tax connection for accounting questions to the civil law rules thereof, advantages concerning security of the legal rights of the individual with such a consensus also for control purposes (see section 5.2.4.2). An

increased registration control should also give the tendency that the number of unnecessary tax cases decrease (see section 5.2.4.3).

In the latter respect can, on the topic of democracy in the tax system (see section 8.2.2.2), it be added that all control don't need to be done by economists and solicitors. When reviewing a 'general notice for registration of taxes and contributions' (Sw., '*skatte- och avgiftsanmälan*'), and controlling whether a certain uncomplicated activity exist on the stated address (see section 5.2.4.3), can it of course be performed as well by an 'assistant' (Sw., '*assistent*') as by an 'official in charge of the matter' (Sw., '*handläggare*') at the SKV. The local connection is lost when the review in the new nation-wide covering SKV seems to be about it being conducted by officials or auditors placed almost anywhere in the country in relation to the tax liable's place of establishment. The employees' organizations shall of course just like the employers' organizations be permitted to have opinions about the tax system. The approximately 9,400 yearly employees by the SKV should first of all at the registration control be used as suggested here without barriers between the assistant- and official-side. The evolution since the reorganization "*SOL90*" in the beginning of the nineties seems instead has been the officials at the SKV having taken over also the tasks traditionally conducted by the assistants. Although the registration control as mentioned wasn't treated in the preparatory work at the introduction of the new SKV in 2004, is it not too late for the employees' organizations at the SKV to discuss the allocation of resources in the way described here. A thus improved registration control would most probably lead partly to that certain 'objects to review' (Sw., "*granskningsobjekt*") never occurs, partly to the selection for auditing by the tax auditors thereby can become more focused on cases with VAT fraud which cannot be solved at the registration control. It would most likely lead to an increased need of suggesting rules deviating from the general VAT rules, such as those now decided about reverse charge within the building sector, and it would benefit the security of the legal rights of the individual in the field.

It's important to remember that the Vat system is a tax collection system, and nothing else. The ambition from as well the Swedish side as e.g. from the British side is that the entrepreneur shall have in the field in question the function of a tax collector for the state (see sections 2.1 and 7.2). The importance of materially correct and precise signals sent out by the SKV and the courts respectively, when they in their decisions under the headlines motives for the decision and court findings respectively express who can or cannot or shall belong to the VAT system, can in that perspective not become emphasized enough.

In this respect can it for pedagogical reasons be of interest to examine also whether a claim for input tax can be enforced with support of the legal system, even if the actual rule in ML describes something else than VAT compared to the basic VAT principles. A limit must exist thereby. Otherwise could an error in writing in the ML found right also for consumers to get out a claim for "VAT" from the state (see section 7.2).

In section 7.2. is that question treated by comparison of older law in the field of VAT with current law containing the EU law, concerning cases of overcompensation at acquisitions of real estate comprised by decision on voluntary tax liability from companies in bankruptcy.

Here can be added another interesting case which isn't directly comparable, since it's about VAT deduction on the person's filing the return own expenses to the deliverer of the article of goods or service for which corresponding tax liability emerged, but it's still about a overcompensation from the VAT system founded on the actual wording of a rule in the ML.[445] It's about the SAC's decision to give the finance company *Nordbanken Finans AB* right of reimbursement for input tax on acquisitions in the VE with the motivation that an error in writing of Ch. 10 sec. 11 second paragraph of ML gave finance and insurance enterprises such a right, although the customer wasn't established outside the EU, before the section was altered on the 1st of November 1995 and the right of reimbursement was explicitly limited to such cases. That such a right would exist within the two sectors for VAT free supplies to private persons in Sweden was clearly in conflict with Articles 13(B.) and 17(3c) of the Sixth Directive. It was however only the Stockholm county administrative court which at all mentioned the latter rule. The Stockholm administrative court of appeal didn't at all go in on the Sixth Directive, but stayed at a literal interpretation of the rule in question in the ML. The SAC joined the lower instances and gave *Nordbanken Finans AB* right of reimbursement – without mentioning the Sixth Directive.

What's missing in the SAC's decision in the case is the question whether the right of reimbursement which the error in writing thus is supposed to have founded formally is deviating to such a degree from the basic VAT principles, such as they are expressed in Article 2 of the First Directive and are reflected by Article 17 of the Sixth Directive on the right of deduction (see section 2.3.3.1), that it materially no longer can be deemed to be a

[445] See the SAC case *RÅ 1999 Not 245*.

question of reimbursement of VAT and that such a overcompensation of "VAT" cannot be considered possible to get out from the VAT system. The SAC should have obtained a preliminary ruling from the ECJ, which doesn't seem to be too late, since it of an article by Juan Flores in the DN (i.e. *Dagens Nyheter* – the Daily News) of the 5th of May 2006 follows that additional cases are on their way there concerning the insurance companies VAT expenses for the 10 months after Sweden's EU-accession on the 1st of January 1995 which already had passed before the actual section was altered. The question is thus then not whether the VAT directives have direct effect (see section 2.3.5), but if the VAT as idea by its basic principles sets a limit for what can be considered a description of real VAT, regardless if so to speak the word "VAT" is used in a certain way in the ML or not.

The conclusion here is that current case-law within the field of income tax doesn't cause a problem in relation to the ECJ's practice concerning who's meant by the concept taxable person in the Sixth Directive, if Ch. 4 sec. 1 item 1 of ML for the determination of YRVE is limited to refer to the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL. However is the SAC giving unclear signals if references to the income tax are made uncritically at decisions of VAT issues. Examples of that are *RÅ 2001 Not 69* and *RÅ 2001 Not 70*, where the SAC concerning right of deduction of input tax for costs for issuing new shares established the advanced ruling of the SRN to refuse right of deduction without mentioning that the SRN referred to two income tax cases, whereof one of them, *RÅ 1917 Fi. 64*, was from the time when VAT didn't even exist as an idea. The first VAT system was introduced in France in 1955,[446] and the idea VAT was presented for the first time in 1919 by Wilhelm von Siemens.[447] Especially dubious is the cases of 2001 in the meaning that the question on deduction in ML isn't just decided by the subject issue, but also by the object issue which thus is VAT specific – without connection to the IL.

Although the national practice today may be deemed giving a materially correct result, when the value added tax subject is determined by the formal connection from Ch. 4 sec. 1 item 1 of ML to the national income tax law-

[446] See Liber Amicorum Sven-Olof Lodin, the chapter The EU VAT System – Time for a Change? by Gunnar Rabe (section 3), p. 226, by Andersson, Krister, Melz, Peter and Silfverberg, Christer.
[447] See Liber Amicorum Sven-Olof Lodin, the chapter The EU VAT System – Time for a Change? by Gunnar Rabe (section 3), p. 225, by Andersson, Krister, Melz, Peter and Silfverberg, Christer.

concept NAVE, if the reference is limited to concern only the subjective prerequisites for NAVE according to Ch. 13 sec. 1 first paragraph second sentence of IL, is it important to remember that that viewpoint is only built on a tradition from the time before Sweden's EU-accession in 1995 with determining the professionalism concept (compare YR in the concept YRVE) for the indirect taxes by a reference to the direct taxes (see section 1.3). The force of tradition is as everyone knows strong, and it's important that those applying the law consistently respect that the VAT already from the beginning was an 'invention' (idea) with a world of concepts aiming to give a competition- and consumption neutral taxation of consumption. It's basically about distinguishing those who can or shall belong to the VAT system from the consumers, regardless whether a judgement of a certain VAT problem concerns the subject- or the object issue or both of these aspects. Both the principles which also exist within the income tax, like the principle on reciprocity, and the other completely VAT specific basic principles for the VAT as idea, like the POTB-principle, are since Sweden's EU-accession protected both in the primary and secondary law of the EU law (see section 2.3.3.1). The sometimes seemingly arbitrary references to the income tax, when the SAC treats VAT questions, are giving a wrongful tendency in the meaning that the attitude can lead to a domestic practice deviating from the EC directives on VAT, which isn't allowed (see sections 1.1, 3.2.1, 5.1.2 and 8.1.7).

The author of this book has been criticized by an editor of a tax periodical – had a telling-off if you like – when the term 'invention' has been used about the VAT in drafts of articles. It's therefore most satisfactory and hopefully a signal well received by those applying the law and academics that Leif Mutén, who by the way also is editor for a tax periodical, express that Wilhelm von Siemens together with Maurice Lauré, who was active already when the French VAT reform was launched, were the 'inventors' (Sw., "*uppfinnare*") of the VAT.[448]

The expectation is also that this book contributes to lift the special need of the basic VAT principles functioning together with another invention, the book-keeping, and that it has an important role for the selection process with determining who's an entrepreneur for VAT purposes in the perspectives of procedure of taxation and matters of evidence, even if the formal connection from ML to IL thereby proved not possible to uphold due to the evolution of the law. Tax collection of income tax in the field of

[448] See *Skattenytt* (Eng., the Tax news) 2006 p. 494, the article *Export av skattesystem. Skattepolitiska transformationsprocesser i tredje världen* (Eng., Export of tax systems. Tax political transformational processes in the third world), pp. 487-497, by Leif Mutén.

corporate taxation can, unlike the VAT, be made with greater respect of the finances of the State, since the functionality which ties together the VAT with the civil law accounting rules doesn't have to be regarded in the same way there. Income tax isn't an idea with specific basic principles as those expressed for the VAT in Article 2 of the First Directive. The tax law's largely economical character leads to e.g. a need of neutrality being stipulated as a basic assumption on reality also for the income tax (see section 2.3.3.1), but not like with the VAT with a competition neutrality which also shall give consumption neutrality with respect of the taxation. The income tax is a tax on production, and the question whether the EU law allows distortions there is thus far about the primary law and the academic discourse whether the ECJ can disqualify national income tax legislation which is in conflict with the principle of the right of (freedom to) establishment in another Member State for a national of an EU Member State and the four freedoms of the EC Treaty will probably continue (see section 1.1). Although a secondary law regulation isn't made by the EU of the selection for income tax purposes of entrepreneurs, is it however nothing stopping with the current national practice that the IL would move closer to the VAT thereby (see sections 6.2.6.1, 8.1.6 and 8.2.2.2).

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- Konsulten 6/2005 s. 12, the article *Revisionsplikten har överlevt sig själv* (Eng., The auditing duty has survived itself)

Från Riksdag & Departement (R&D)

- R&D 4/2000 p. 10, article by Per-Anders Sjögren (*om att EU-länderna inte gör tillräckligt för att stoppa momsfusk och att Sverige är sämst på momskontroll* – Eng., on the EU-countries not doing enough to stop the VAT fraud and that Sweden is worst at VAT control)
- R&D 28/2001 p. 21, article by Staffan Thulin [*om utbrett momsfusk i Skåne inom livsmedelshandeln och vid privatinförsel av bilar* – Eng., on extensive VAT fraud in Skåne (county in the south of Sweden) within the food industry and at private import of cars]

Interviews/inquiry in connection with the work with this book etc

- Interview with Burmeister, Jari on the 8th of January 2003 – p. 26
- Conversation with von Oehlreich, Niclas on the 12th of March 2003 – p. 199
- Interview with Paulander, Henrik on the 9th of September 2003 – p. 20
- Interview with Nilsson, Leif on the 2nd of October 2003 – p. 28
- Interview with Tunudd, Madeleine on the 14th of January 2004 – p. 164

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- Correspondence with *Sentralskattekontoret for utenlandssaker* [Eng., the central tax office for foreign entrepreneurs], Lasse markhus – Norway [January 2003]
- Correspondence with Hungarian Tax and Financial Control Administration, dr. Gábor Bessenyei – Hungary [January 2003]

Correspondence with foreign tax authorities was part of an inquiry made in January 2003 in connection with the work with this book and directed to Norway and Hungary (which at the time wasn't an EU Member State) and to all the EU15-countries, and which was answered by most of them. The following persons at tax authorities within the EU have, like the two mentioned colleagues in Norway and Hungary respectively, answered via mail, fax and/or telephone on the inquiry which was made in connection with the work with this book: Jens Peder Thomsen, Denmark; Sari Sorjonen and Eeva Niemimaa, Finland; Roumellioti [Γ. Ρουμελλιώτη], Greece; Marco Iuvinale, Italy; Mr. Speffes, Luxembourg; Antonio Blanco Dalmau, Spain; Margaret Laurenson, Great Britain; Elisabeth Plank, Austria. Also Holland responded on the inquiry. That did not the German Bundesamt für Finanzen, which via Gerhard Häfner notified that they as a routine procedure refer to tax advisors ('steuerberatenden'). Ireland referred to its guide on the tax

authority's website there. Information on VAT rules has also been obtained from the treasuries' websites in Belgium and Portugal. [The French Treasury has a website].

www.treasury.fgov.be – Belgian Treasury's website
www.finances.gouv.fr – French Treasury's website
www.revenue.ie – Irish tax authority's website
www.dgci.min-financas.pt – Portuguese Treasury's website

2 ACTS AND PUBLIC PRINT

Acts

Sweden

Aktiebolagslagen (2005:551), Eng., the Companies Act
Lag (1994:1564) om alkoholskatt, Eng., the act on tax on alcoholic products
Lag (1962:381) om allmän försäkring, Eng., the act on public insurance
Lag (1994:1500) med anledning av Sveriges anslutning till Europeiska unionen (kallas också anslutningslagen eller EU-lagen), Eng., the act on Sweden's accession to the European Union (also called the accession-act or the EU act)
Lag (1998:1603) om beskattningen vid fusioner, fissioner och verksamhetsöverlåtelser, Eng., the act on taxation at mergers, divisions (fissions) and transfer of enterprises
Bokföringslagen (1976:125) – gamla, Eng., the Book-keeping Act – the old act
Bokföringslagen (1999:1078), Eng., the Book-keeping Act
Lag (1987:667) om ekonomiska föreningar, Eng., the Act on economic associations
Förvaltningslagen (1986:223), Eng., the Administration Act
Förvaltningsprocesslagen (1971:291), Eng., The Administrative Procedure Act
Lag (1980:1102) om handelsbolag och enkla bolag, Eng., the act on partnerships
Lag (1966:742) om hotell- och pensionatsrörelse, Eng., the act on hotel- and pensions-activity
Lag (1999:1230) om ikraftträdande av inkomstskattelagen, Eng., the law on introduction of the income tax act
Inkomstskattelagen (1999:1229), Eng., the income tax act
Förordningen (1990:1293) med instruktion för skatteförvaltningen (*ersatt av förordningen SFS 2003:1106*), Eng., the regulation with instructions for the tax authorities (replaced by the regulation *SFS 2003:1106*
Förordning (2003:1106) med instruktion för Skatteverket (*ersatt förordningen SFS 1990:1293*), Eng., the regulation with instructions for Skatteverket (replaced the regulation *SFS 1990:1293*)
Kommunalskattelagen (1928:370), Eng., the municipality tax act
Konkurrenslagen (1993:20), Eng., the Competition Act
Lag (1968:430) om mervärdeskatt, Eng., the act on value added tax (1968)
Mervärdesskatteförordningen (1994:223), Eng., the VAT-regulation act
Mervärdesskattelagen (1994:200), Eng., the value added tax act (1994)
Plan- och bygglag (1987:10), Eng., the planning and building act
Regeringsformen (1974:152), Eng., the national constitution
SFS 1990:576 – Reformerad mervärdesskatt m.m. (Eng., reformed value added tax, etc)
SFS 1991:119 (*om återbetalning av mervärdesskatt till utländska företagare*) [Eng., on refund of value added tax to foreign entrepreneurs]

SFS 1994:1798 [*om ändringar i mervärdesskattelagen (1994:200) i samband med Sveriges EU-inträde*] [Eng., on alterations in the value added tax act in connection with Sweden's EU-accession]
SFS 1998:346 (*om s.k. gruppregistrering till mervärdesskatt*) [Eng., on so called group registration for value added tax]
SFS 1999:640 (*om s.k. investeringsguld och moms*) [Eng., on so called investment gold and VAT]
SFS 2000:500 – Mervärdesskatt vid överlåtelse och nyttjande av fastigheter m.m. [Eng., Value added tax at transfer and use of real estate etc]
SFS 2000:1358 (*3 kap. 3 § andra stycket ML, ändring*) [Eng., Ch. 3 sec. 3 second paragraph of ML, alteration]
SFS 2001:971 – Utländska företagares mervärdesskatt i Sverige [Eng., Foreign entrepreneurs' value added tax in Sweden]
SFS 2002:391 – lag om ändring i skattebetalningslagen [Eng., the act on alteration in the Swedish act on tax payment]
SFS 2002:1004 – Vissa mervärdesskattefrågor m.m. [Eng., Certain value added tax issues, etc]
SFS 2003:642 – lag med anledning av inrättande av Skatteverket [Eng., act concerning the introduction of *Skatteverket* (i.e. the nation-wide covering tax authority)]
SFS 2003:1107 – Förordning om tillämpning av rådets förordning (EG) nr 1798/2003 av den 7 oktober 2003 om administrativt samarbete om mervärdesskatt och om upphävande av förordning (EEG) nr 218/92 [Eng., the EC council regulation (EC) No. 1798/2003 of the 7th of October 2003 on tax administrative co-operation on VAT and on abolishing the regulation (EEC) No. 218/92]
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Lag (1994:1776) om skatt på energi [Eng., the act on tax on energy]
Skattebetalningslagen (1997:483), Eng., the Swedish act on tax payment
Skattebrottslagen (1971:69), Eng., the act on tax fraud
Lagen (1995:575) mot skatteflykt, Eng., The act against tax evasion
Socialavgiftslagen (2000:980), Eng., the Swedish social security contributions act
Lagen (1947:576) om statlig inkomstskatt, Eng., the state income tax act
Taxeringslagen (1990:324), Eng., the Tax Assessment Act
Tillkännagivande (1994:1501) av fördrag och andra instrument med anledning av Sveriges anslutning till Europeiska unionen, Eng., the act announcing treatys and other instruments for the purpose of Sweden's accession to the European Union
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Foreign VAT acts etc

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Lov om merverdiavgift av 19.juni 1969 nr. 66 (reformerad genom lov 21.desember 2001 nr. 103) [Eng., the value added tax act of the 19th of June 1969 (reformed by the act of the 21st of December 2001) – Norway]

Public print

Utskottsbetänkanden [Eng., Committee reports (*Skatteutskottet*, SkU, Eng., the tax committee)]

bet. 1989/90:SkU31 – Reformerad mervärdeskatt m.m. [Eng., reformed value added tax, etc]
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Prop. 1973:163 – *Kungl. Maj:ts proposition med förslag till ändring i förordningen (1968:430) om mervärdesskatt, m.m.* [Eng., the Govermment's bill with the proposal of alteration in the regulation on value added tax]
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Prop. 1978/79:141 – om redovisning av mervärdeskatt, m.m. [Eng., on accounting of value added tax, etc]
Prop. 1989/90:74 – Ny taxeringslag m.m. [Eng., New Tax assessment act]
Prop. 1989/90:110 Part 1 – *Reformerad inkomst- och företagsbeskattning* [Eng., Reformed income- and enterprise taxation]
Prop. 1989/90:111 – Reformerad mervärdeskatt m.m. (Eng., reformed value added tax, etc)
Prop. 1990/91:72 (om återbetalning av mervärdesskatt till utländska företagare) [Eng., on refund of value added tax to foreign entrepreneurs]
Prop. 1991/92:112 – F-skattebevis, m.m. [Eng., the certificate on registration for corporation taxation, etc]
Prop. 1993/94:50 – Fortsatt reformering av företagsbeskattningen [Eng., Continued reform of corporate taxation]
Prop. 1993/94:99 – Ny mervärdesskattelag [Eng., New value added tax act]

Prop. 1994/95:19 Part 1 – *Sveriges medlemskap i Europeiska unionen* [Eng., Sweden's membership of the European Union]
Prop. 1994/95:36 (om Sveriges anslutning till Europeiska unionen) [Eng., on Sweden's accession to the European Union]
Prop. 1994/95:54 – Ny lag om skatt på energi, m.m. [Eng., New act on tax on energy, etc]
Prop. 1994/95:56 – Nya lagar om tobaksskatt och alkoholskatt, m.m. [Eng., New acts on tax on tobacco and tax on alcoholic products, etc]
Prop. 1994/95:57 – Mervärdesskatten och EG [Eng., The value added tax and the EC]
Prop. 1995/96:10 Part 1 – *Års- och koncernredovisning Lagförslag Allmänna utgångspunkter* [Eng., Annual- and group accounting Bill Common references]
Prop. 1995/96:10 Part 2 – *Års- och koncernredovisning Företag i allmänhet* [Eng., Annual and group accounting Enterprises in general]
Prop. 1995/96:170 – Översyn av skattebrottslagen [Eng., Overview of the act on tax fraud]
Prop. 1996/97:100 Part 1 – *Ett nytt system för skattebetalningar, m.m.* [Eng., A new system for tax payments, etc]
Prop. 1997/98:134 (om gruppregistrering till mervärdesskatt) [Eng., on group registration for value added tax]
Prop. 1997/98:148 (om gruppregistrering till mervärdesskatt) [Eng., on group registration for value added tax]
Prop. 1998/99:15 – Omstruktureringar och beskattning [Eng., Restructuring measures and taxation]
Prop. 1998/99:32 – EU-bedrägerier och korruption [Eng., EU-frauds and corruption]
Prop. 1998/99:38 – Staten och trossamfunden [Eng., The state and the religious congregations]
Prop. 1998/99:69 (om s.k. investeringsguld och moms) [Eng., on so called investment gold and VAT]
Prop. 1998/99:130 Part 1 – *Ny bokföringslag m.m. (förslaget till 1999 års bokföringslag,* BFL*)* [New Book-keeping Act, etc (bill to the Book-keeping Act of 1999)]
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Prop. 1999/2000:82 – Mervärdesskatt vid överlåtelse och nyttjande av fastigheter [Eng., Value added tax at transfer and use of real estate etc]
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Prop. 2001/02:127 – Punktskatternas infogning i skattekontosystemet, m.m. [Eng., The excise duties' insertion into the tax account system]
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Prop. 2002/03:77 – Mervärdesskatteregler för elektronisk handel samt för radio- och TV-sändningar [Eng., Value added tax rules for electronical trade and for radio- and TV broadcasting]
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SOU 1964:25 – (utredningen som ledde till införande av lag om mervärdeskatt 1969) [Eng., the investigation which led to the introduction of the valua added tax act in 1969]
SOU 1975:1 – Demokrati på arbetsplatsen (Om arbetstagarbegreppet) [Eng., Democracy at work (on the employee concept)]
SOU 1989:35 Part 1 – *Reformerad mervärdeskatt m.m.* [Eng., Reformed value added tax, etc]
SOU 1994:88 – Mervärdesskatten och EG [Eng., the value added tax and the EC]
SOU 1994:100 – Beskattningen vid gränsöverskridande omstruktureringar inom EG, m.m. [Eng., Taxation at border crossing restructuring measures within the EC, etc]
SOU 1996:157 – Översyn av redovisningslagstiftningen (Slutbetänkande av redovisningskommittén) [Eng., Overview of the accounting legislation (Final report of the accounting committee)]
SOU 1999:28 – Förenklingsutredningens betänkande Kontantmetod för småföretagare [Eng., The simplification investigation's report Cash basis-method for small entrepreneurs]
SOU 1999:47 – Mervärdesskatt Frivillig skattskyldighet (Betänkande av utredningen om mervärdesskatt vid fastighetsuthyrning) [Eng., Value added tax Voluntary tax liability (Report of the investigation on value added tax at letting of real estate)]
SOU 1999:94 – Förmåner och ökade levnadskostnader [Eng., Benefits and increased costs of living]
SOU 1999:133 – Kommunkontosystemet och rättvisan [Eng., The municipal account system and justice]
SOU 2001:1 – Ny aktiebolagslag [Eng., New Companies Act]
SOU 2001:25 – Skattetillägg m.m. [Eng., Tax sur charge, etc]
SOU 2002:35 – Ny handelsbolagsbeskattning (Slutbetänkande av Förenklingsutredningen) [Eng., New taxation of partnerships (Final report of The simplification investigation)]
SOU 2002:47 – Våra skatter? Betänkande från Skattebasutredningen (med bilagorna Volym A och Volym B) [Eng., Our taxes? Report from the Tax base investigation (with appendixes Voulume A and Volume B)]
SOU 2002:74 – Mervärdesskatt i ett EG-rättsligt perspektiv. Betänkande av Mervärdesskatteutredningen (Del 1 och Del 2) [Eng., Value added tax in an EC law perspective. Report of The value added tax investigation (Part 1 and Part 2)]

Ds 2002:15 – Det nya Riksskatteverket [Eng., The new National Board of Taxation]

Dir. 2002:106 – Kommittédirektiv, Redovisning enligt internationella redovisningsstandarder [Eng., Committee instructions, Accounting according to international accounting standards]
Fi 2003/3465 – Nya faktureringsregler när det gäller mervärdesskatt [Eng., New invoicing rules where value added tax is concerned]
Fi 2004/5143 – Finansdepartementets remiss 2004-11-04 ang EG-kommissionens förslag till rådet KOM(2004)641 slutlig [Eng., The Treasury's referring for consideration of the 4th of November 2004 concerning the EC-commission's proposal to the Council COM(2004)641 final]

Messages etc from the RSV/SKV

[The SKV (*Skatteverket*) was formed on the 1st of January 2004 and is a nation-wide covering tax authority which includes the former National Board of Taxation (*Riksskatteverket*, RSV) and the former 10 regional tax authorities – at references to writs etc is by *Skatteverket* (SKV) meant its head office, i.e. formerly the RSV]

Writs

11.07.1991, *dnr 14360-91/D19* – pp. 243 and 245
03.02.1998, *dnr 875-98/900* – p. 243
17.08.1998, *dnr 7115-98/900* – p. 243
03.02.1999, *dnr 851-99/100* – pp. 243 and 245
12.03.1999, *dnr 271-99/120* – pp. 243 and 245
12.04.1999, *dnr 3254-99/120* – p. 232
09.12.1999, *dnr 11530-99/100* – p. 139 [replaced by 16.03.2004]
06.04.2000, *dnr 3997-00/100* – p. 74
05.05.2000, *dnr 5056-00/110* – p. 117
28.02.2001, *dnr 2758-01/120* – p. 117
02.03.2001, *dnr 2962-01/100* – p. 168
03.07.2002, *dnr 4860-02/120* – p. 223
18.06.2003, *dnr 10324-02/150* – p. 158
16.03.2004, *dnr 130-256490-04/113* – p. 140 [replaced 09.12.1999]
22.09.2004, *dnr 130-557045-04/113* – p, 216
28.09.2004, *dnr 130 553888-04/111* – p. 153
01.11.2004, *dnr 130 624085-04/111* – p. 216
03.11.2004, *dnr 130 553890-04/111* – p. 73
22.12.2004, *dnr 130 735843-04/111* – p. 216
03.03.2005, *dnr 130 344-04/1152* – p. 169

Common advice/messages/recommendations/reports

RSV Im 1984:2 – p. 125
RSV Im 1993:4 – p. 215
RSV S 1996:7 – p. 156
RSV S 1997:2 – pp. 243 and 244
RSV S 1998:40 – pp. 243 and 244
RSV 2001:18 – pp. 156 and 215
RSV:s Rapport (Eng., the RSV's report) *1993:8* – p. 145
RSV:s Rapport (Eng., the RSV's report) *1994:3* – p. 145
RSV:s Rapport (Eng., the RSV's report) *2000:8* – p. 161
RSV:s Rapport (Eng., the RSV's report) *2000:12* – p. 164
RSV:s Rapport (Eng., the RSV's report) *2002:3* – p. 164
SKV A 2004:5 – p. 244
SKV M 2004:4 – p. 244
SKV A 2005:4 – p. 156

The Swedish Accounting Standards Board's [Sw., bokföringsnämnden, abbreviated BFN) statements and general advice

BFN U 90:2 (Om tidpunkt för bokföring) [Eng., on the occurrence of the Requirement to maintain accounting records] – p. 177 [replaced by *BFNAR 2001:2*]
BFNAR 2001:2 (Om löpande bokföring) [Eng., on the continuing book-keeping] – p. 178 [replaced *BFN U 90:2*]

The Swedish National Audit Office (Sw., *Riksrevisionsverket* - nowadays *Riksrevisionen*)

Auditreport of the 10th of June 2003, *dnr 23 2000-1504* – p. 158

The Swedish Bar Association

[The replies below on the Treasury's referring for consideration are to be found under Artiklar (Eng., articles) on the website www.forssen.info. Here is noted below within [ ] with **BF=A** or **BF=O** if the author of this book (Björn Forssén) has taken part as author or opponent at the work with the Bar Association's reply; the Bar Association points out for the work with its replies a group consisting of a chairman, an author (A) and an opponent (O) – all lawyers]

The Swedish Bar association's reply to the Treasury of the 20th of August 2003, "*Nya faktureringsregler när det gäller mervärdesskatt*" [Eng., 'New invoicing rules concerning value added tax'] (*Fi2003/3465*), *dnr R-2003/0656* [**BF=A**] – p. 165
The Swedish Bar Association's reply to the Treasury of the 22nd of December 2004, concerning the EC-commissions proposal to the Council (Sw., "*ang EG-kommissionens förslag till rådet*") COM(2004)641 final (*Fi2004/5143*), *dnr R-2004/1266* [**BF=O**] – p. 216, 250 and 285

3 EU-SOURCES AND OECD

Amsterdamfördraget 1997 (artiklarna i Romfördraget – EG-fördraget – omnumrerades) {Eng., The Amsterdam Treaty (the articles in the Rome treaty – the EC Treaty – were renumbered)]
EG-fördraget [Romfördraget från 1958, det grundläggande fördraget om upprättande av Europeiska ekonomiska gemenskaperna (EEG), EEG bytte namn till Europeiska gemenskaperna (EG) genom Maastrichtfördraget 1992] [Eng., the EC Treaty (the Rome treaty of 1958, the basic treaty on establishment of the European Economical Communities, EEC, the EEC change name to the European Community, EC, by the Maastricht treaty of 1992]
EG-kommissionens förslag till EG:s råd den 17 juni 1998, KOM (1998)377 slutlig [Eng., the EC-Commission's proposal to the EC Council of the 17th of June 1998, COM (1998)377 final]
EG-kommissionens "Förslag till rådets förordning om fastställande av tillämpningsföreskrifter för direktiv 77/388/EEG rörande det gemensamma systemet för mervärdesskatt", lämnat den 11 oktober 2004 till EU:s råd, KOM(2004)641 slutlig [Eng., the EC-Commission's 'Proposal to the Council on establishment of application instructions for directive 77/388/EEC concerning the common system for value added tax', given on the 11th of October 2004]
EG-kommissionens sjuttonde årsrapport om kontroll av tillämpningen av gemenskapsrätten (1999), KOM(2000)92 slutlig [Eng., the EC-Commission's 17th yearly report on control of application of the Community law (1999), COM(2000)92 final]
EG:s cirkulationsdirektiv för punktskatter (92/12/EEG) [Eng., the EC circulation directive on excise duties (92/12/EEC)]

EG:s direktiv om handel med begagnade varor, m.m. (94/5/EG) [Eng., the EC directive on Special arrangements applicable to second-hand goods, etc (94/5/EC)]
EG:s direktiv om indirekta skatter på kapitalanskaffning (69/335/EEG) [Eng., the EC directive on indirect taxation on the raising of capital (69/335/EEC)]
EG:s direktiv 98/80/EG (om undantag från skatteplikt för investeringsguld) [Eng., the EC directive 98/80/EC (on exemption from taxation for investment gold)]
EG:s direktiv 2000/65/EG (om att underlätta för företagare som blir mervärdesskatteskyldiga i andra EG-länder och om att stimulera det skatteadministrativa samarbetet mellan medlemsländerna) [Eng., the EC directive 2000/65/EC (on facilitation for entrepreneurs which become value added tax-liable in other EC-countries and on stimulation of the tax administrative co-operation between Member States)]
EG:s direktiv om övergångsordningen för varuhandeln mellan EG-länderna (91/680/EEG) [Eng., the EC directive on the transitional arrangements for the trade between the EC Member States (91/680/EEC)]
EG:s fjärde bolagsrättsliga direktiv (78/660/EEG) – rådets direktiv av den 25 juli 1978 om årsbokslut i vissa bolagsformer [Eng., the fourth company law directive' (78/660/EEC) – the Council's directive of the 25th of July 1978 on Annual Accounts in certain company forms]
EG:s förordning 1408/71 om sociala avgifter [Eng., the EC regulation 1408/71 on social security]
EG-förordningen 574/72 om tillämpningen av förordningen 1408/71 [Eng., the EC regulation 574/72 on application of the regulation 1408/71]
EG:s första mervärdesskattedirektiv (67/227/EEG) – om harmonisering av medlemsstaternas lagstiftning om omsättningsskatter, ersatt 1/1 -07 av 2006/112/EG [Eng., the EC's first value added tax directive (67/227/EEC) – on harmonization of the Member States' legislation on turnover taxes] Here abbreviated the First Directive (replaced 01.01.2007 by 2006/112/EC)
EG:s fusionsdirektiv (90/434/EEG) [Eng., the EC's Merger Directive (90/434/EEC)]
EG:s moder-dotterbolagsdirektiv (90/435/EEG) [Eng., the EC's Mother-daughter-company Directive (90/435/EEC)]
EG:s sjätte mervärdesskattedirektiv (77/388/EEG) – RÅDETS SJÄTTE DIREKTIV av den 17 maj 1977 om harmonisering av medlemsstaternas lagstiftning rörande omsättningsskatter – Gemensamt system för mervärdesskatt: enhetlig beräkningsgrund, ersatt 1/1 -07 av 2006/112/EG [Eng., the EC's Sixth Council Directive (77/388/EEC) – THE COUNCIL'S SIXTH DIRECTIVE of 17th of May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (replaced 01.01.2007 by 2006/112/EC)]
EG:s trettonde rådsdirektiv av den 17 november 1986 angående återbetalning av mervärdesskatt till näringsidkare från tredje land (86/560/EEG) [Eng., the EC's thirteenth council directive of the 17th of November 1986 concerning refund of VAT to entrepreneurs from third countries (86/560/EEC)]
EG:s tullkodex – Rådets förordning (EEG) nr 2913/92 [Eng., the Community Customs Code – the EC Council Regulation (EEC) No. 2913/92]
EG:s åttonde rådsdirektiv av den 6 december 1979 angående återbetalning av mervärdesskatt till utländska företagare från annat EG-land än Sverige (79/1072/EEG) [Eng., the EC's eighth council directive of the 6th of December 1979 concerning refund of VAT to foreign entrepreneurs from another EU-country than Sweden (79/1072/EEC)]
EU-grundlag, Utkast till fördrag om upprättande av en konstitution för Europa (den 18 juli 2003, CONV 850/03) och antagen EU-grundlag på toppmötet i Bryssel 17-18 juni 2004 som undertecknades den 29 oktober 2004, men har ännu inte ratificerats av alla EU-länderna (varför EG-fördraget alltjämt gäller) [Eng., the EU constitution, Draft of a treaty

on establishing a constitution for Europe (the 18th of July 2003, CONV 850/03) and approved EU constitution at the summit in Brussels 17-18 June 2004 which was signed on the 29th of October 2004, but has not yet been ratified by all the EU Member States (why the EC Treaty still applies)]
EUROPAPARLAMENTETS OCH RÅDETS FÖRORDNING (EG) nr 1606/2002 av den 19 juli 2002 om tillämpning av internationella redovisningsstandarder [Eng., the European Parliament's and the Council's Regulation (EC) No. 1606/2002 of the 19th of July 2002 on application of international accounting standards]
Faktureringsdirektivet (2001/115/EG) [Eng., the invoicing directive (2001/115/EC)]
Maastrichtfördraget 1992 (traktatfäste Den europeiska unionen av år 1993, EU) [Eng., the Maastricht treaty of 1992 (established by treaty the European Union of 1993, EU)]
OECD:s modellavtal för undvikande av dubbelbeskattning av inkomst och förmögenhet (1977) – sedan 1992 lösbladspublikationen "OECD Model Tax Convention on Income and on Capital" [Eng., the OECD model treaty for avoiding of double taxation of income and wealth (1977) – since 1992 the loose-leaf system publication OECD Model Tax Convention on Income and on Capital]
Romfördraget 1958 (EG-fördraget) [Eng., the Rome treaty of 1958 (the EC Treaty)]
Rådets direktiv 2001/115/EG om ändring av direktiv 77/388/EEG i syfte att förenkla, modernisera och harmonisera kraven på fakturering när det gäller mervärdesskatt ("faktureringsdirektivet") [Eng., the Council's directive 2001/115/EG on alteration of directive 77/388/EEC for the purpose of simplifying, modernizing and harmonizing the requests on invoicing where value added tax is concerned ('the invoicing directive')]
Rådets direktiv 2003/48/EG – (om beskattning av inkomster från sparande i form av räntebetalningar för privatpersoner) [Eng., The directive on taxation of income from savings in the form of interestpayments for private persons (2003/48/EC), the so called Interest directive]
Rådets direktiv 2003/49/EG ('Ränta/royaltydirektivet') [Eng., The directive on a common system for taxation of interests and royalties paid between closely linked companies in different EU Member States (2003/49/EC), 'Interest/royalty/directive']
Rådets direktiv 2006/112/EG av den 28 november 2006 om ett gemensamt system för mervärdesskatt (ersatte den 1 januari 2007 bl.a. första och sjätte direktiven) [Eng., the Council Directive 2006/112/EC of the 28th of November 2006 on the common system of value added tax (replaced on the 1st of January 2007 inter alia the First and Sixth Directives)]
Rådets förordning (EG) nr 1798/2003 av den 7 oktober 2003 om administrativt samarbete om mervärdesskatt och om upphävande av förordning (EEG) nr 218/92 [Eng., the EC council regulation (EC) No. 1798/2003 of the 7th of October 2003 on tax administrative co-operation on VAT and on abolishing the regulation (EEC) No. 218/92]

4 LEGAL CASES

The European Court of Justice's (ECJ) verdicts

*(see the EU's website: **www.europa.eu.int** – curia **or www.curia.eu.int**)*

Actual EU Member State follows by the case designation, when it's a matter of the Commission claiming breach of the EC Treaty. When it's a matter of a national court etc obtaining preliminary ruling, the Member State's in question landcode is stated after the case designation – therefore are the EU Member States' land codes noted in the next paragraph.

The EU Member States were sometimes called ’EU15’ during the time they were precisely 15. By the expansions 01.05.2004 and 01.01.2007 the EU consists of 27 countries (EU27). However the landcodes for EU15 are stated first here, since the list of legal cases still only consists of the ECJ’s decisions of cases from countries which already belonged to EU15. The landcodes are stated in parentheses before the respective country: (AT) Austria, (BE) Belgium, (DE) Germany, (DK) Denmark, (EL) Greece, (ES) Spain, (FI) Finland, (FR) France, (GB) Great Britain, (IE) Ireland, (IT) Italy, (LU) Luxembourg, (NL) the Netherlands, (PT) Portugal och (SE) Sweden. The landcodes for the 10 + 2 new Member States are: (CY) Cyprus, (EE) Estonia, (LV) Latvia, (LT) Lithuania, (MT) Malta, (PL) Poland, (SK) Slovakia, (SI) Slovenia, (CZ) the Czech Republic and (HU) Hungary and (BG) Bulgaria and (RO) Romania.

Between brackets [ ] is stated the material topic/-s which first and foremost are mentioned in the verdict by the usage of the following abbreviations: **Cr**, criminal case; **We**, wealth tax; **Do**, questions on domicile for tax purposes, place of branches, freedom of establishment etc; **I**, income tax; **CapI**, indirect tax on the raising of capital; **V**, value added tax; **E**, excise duties; **Soc**, social insurance and social contributions; **Sop**, social politics (labour legislation etc); **Cu**, Customs law; and **Tm**, trade mark law. Otherwise is stated **Re**: which means the case concerns the relation between national rules and the EU law without any material topic in particular stated.

Verdicts and ongoing cases and the SRN's etc advanced rulings

[Tax or contribution etc mentioned in the cases below are stated within brackets [ ]: **Soc**=social contributions issue; **I**=income tax issue; **V**=value added tax issue; **E**=excise duties issue; and **TC**=tax collection issue.]

Supreme Administrative Court's (SAC) verdicts

[the SAC abbreviated RÅ in Swedish]

RÅ 1917 Fi. 64 [I] – p. 296
RÅ 1964 ref 16 [I] – pp. 234, 235 and 236
RÅ 1969 ref 19 [I] – p. 190
RÅ 1973 Fi. 85 [I] – p. 190
RÅ 1974 A 2068 [I] – p. 190
RÅ 1978 1:51 [V] – p. 87
RÅ 1981 1:4 [I] – p. 196
RÅ 1981 1:17 [I] – p. 190
RÅ 1983 1:40 [I] – pp. 75 and 190
RÅ 1984 1:67 [V] – pp. 61, 257, 282 and 283
RÅ 1984 1:101 [TC] – pp. 75 and 190
RÅ 1985 Aa 203 [V] – p. 77
RÅ 1987 ref 115 [V] – p. 145
RÅ 1987 ref 153 [I] – pp. 206 and 207
RÅ 1987 ref 163 [Soc] – pp. 75, 154 and 174
RÅ 1988 Not 276 [I] – p. 196
RÅ 1988 Not 642 [V] – p. 77
RÅ 1988 ref 74 [V] – pp. 61 and 283
RÅ 1988 ref 106 [V] – p. 290
RÅ 1988 ref 143 [V] – p. 148
RÅ 1989 Ref 62 I and *II* [I] – p. 290
RÅ 1989 Ref 86 [V] – pp. 118 and 223
RÅ 1991 Not 82 [V] – p. 77
RÅ 1991 Ref 6 [I] – p. 283
RÅ 1992 Not 209 [V] – p. 77
RÅ 1992 Not 210 [V] – p. 77
RÅ 1992 Ref 62 [V] – pp. 77 and 174
RÅ 1993 Ref 13 [V] – p. 77
RÅ 1993 Ref 78 [V] – pp. 255, 256 and 258
RÅ 1993 Ref 100 [I] – p. 208
RÅ 1994 Not 13 [V] – p. 77
RÅ 1994 Not 302 [V] – p. 221
RÅ 1995 Not 224 [V] – p. 224
RÅ 1996 Not 168 [V] – pp. 28, 70, 198, 211 and 267
RÅ 1996 Not 192 [V] – p. 174
RÅ 1997 Not 82 [V] – p. 174
RÅ 1997 Ref 16 [V] – pp. 191, 204 and 239
RÅ 1998 Not 111 [V] – p. 77
RÅ 1998 Ref 10 [I] – pp. 191, 198, 204 and 212
RÅ 1998 Ref 40 [V] – p. 243
RÅ 1999 Not 46 [V] – p. 77
RÅ 1999 Not 176 [V] – p. 243
RÅ 1999 Not 245 [V] – p. 295
RÅ 1999 Not 282 [V] – pp. 67, 113, 116, 117, 118, 119, 120, 270 and 280
RÅ 1999 Ref 8 [E] – p. 24
RÅ 1999 Ref 16 [V] – pp. 139 and 276
RÅ 1999 Ref 33 [V] – p. 119
RÅ 1999 Ref 37 [V] – p. 243
RÅ 1999 Ref 50 [I] – p. 207
RÅ 2000 Not 59 [E] – p. 24
RÅ 2000 Not 189 [I] – pp. 75 and 190
RÅ 2000 Ref 5 [V] – pp. 62 and 63
RÅ 2000 Ref 17 [I], preliminary ruling obtained from the ECJ: C-200/98 – pp. 18 and 40
RÅ 2000 Ref 38 [I] – p. 18
RÅ 2000 Ref 47 (I and *II)* [I] – pp. 18 and 40
RÅ 2000 Ref 53 [I] – p. 208
RÅ 2001 Not 15 [V] – pp. 28 and 199
RÅ 2001 Not 28 [V] – p. 280
RÅ 2001 Not 69 [V] – p. 296
RÅ 2001 Not 70 [V] – p. 296
RÅ 2001 Not 97 [V] – pp. 54, 126 and 128
RÅ 2001 Not 98 [V] – pp. 54 and 126
RÅ 2001 Not 99 [V] – pp. 54, 61, 123, 126, 128, 257 and 284
RÅ 2001 Ref 60 (the SAC's verdict of the 16th of November 2001, case No. 6655-2000) [I] – pp. 75 and 222
RÅ 2002 Not 26 (the SAC's verdict of the 27th of February 2002, case No. 8365-1998) [V] – p. 145
RÅ 2002 Not 210 (the SAC's verdict of the 20th of December 2002, case No. 7009-1999) [I], preliminary ruling obtained from the ECJ: C-436/00 – pp. 18 and 41
RÅ 2002 Ref 9 [V] – p. 174

Verdicts from the administrative courts of appeal

["Not appealed", appeal has been withdrawn or appealed but no leave of appeal has been granted=the verdict is legally binding]

- The Stockholm administrative court's of appeal (legally binding) verdict of the 3rd of November 1998 (case No. 6461—6462-1996, Div. 7). The SAC refused granting leave of appeal on the 17th of July 2000 (case No. 7895—7896-1998). [V] – pp. 277, 280, 281, 282 and 285
- The Stockholm administrative court's of appeal verdict of the 3rd of May 2002 (case No. 6431-6435-2000, Div. 7). Not appealed. [V] – p. 279
- The Stockholm administrative court's of appeal verdict of the 28th of May 2002 (case No. 8568-2000, Div. 2). Not appealed. [V] – p. 281
- The Stockholm administrative court's of appeal verdict of the 24th of August 2004 (case No. 4886—4890-03 and 778-04; Div. 03). Not appealed [(inter alia) V] – p. 275

The Tax Law Council's [Sw., Skatterättsnämndens (SRN)] etc advanced rulings [the SRN replaced on the 1st of July 1991 the RSV's (the National Tax Board's) council for legal matters which in its turn had replaced the National Tax Council [Sw., Riksskattenämnden (RSN)]

["Not appealed"=the ruling is legally binding]

- *RSV/FB Im 1978:1* (*=RÅ 1978 1:51*) [V] – p. 87 (legally binding by the SAC's verdict *RÅ 1978 1:51*)
- *RSV/FB Dt 1985:33*. Not appealed [I] – p. 222
- *SRN* 28.01.1998. Appealed and decided (altered by the SAC in *RÅ 1999 Ref 50*) [I] – p. 207
- *SRN* 10.07.1998. two cases, appealed and decided (both established by the SAC in *RÅ 1999 Ref 37* and *RÅ 1999 Not 176*) [V] – p. 243
- *SRN* 14.02.2001. Appealed and decided (established by the SAC in *RÅ 2003 Ref 36* – the SAC's verdict of the 6th of June 2003, case No.1438-2001) [V] – p. 86
- *SRN* 16.05.2005. Not appealed [V] – p. 224
- *SRN* 23.06.2005. Appealed, but removed at the SAC on the 7th of November 2005 due to recall by the appealing party (legally binding) [V] – p. 223
- *SRN* 21.12.2005. Not appealed [V] – pp. 236, 237, 239 and 266
- *SRN* 12.01.2007. Appealed by the SKV [V] – p. 224

The Stockholm court of appeal (Sw., Svea hovrätt)

- Case No. B 1378/96 (the Supreme Court's rejection of the petition for a new trial, case No. Ö 257-99) [V] – pp. 285 and 287
- Case No. B 5292-01 and others (the Supreme Court's decision of the 13th of May 2002 to refuse granting leave of appeal, case No. B-447-02, and the Supreme Court's decision of the 13th of May 2002 to refuse granting leave of appeal in errand on consideration to public defense counsel, case No. Ö 448-02) [(inter alia) V] – p. 272

SUBJECT INDEX