EC law conformity between certain concepts in the ML (i.e. the Swedish value added tax act) and the national Swedish income tax law

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LIST OF CONTENTS

ABBREVIATIONS

A, *allmänna råd* (general advice) [in SKV A]
Aa, verdicts in the notice section of RÅ (until 1985) concerning cases on tax, customs or other fees and on collection, etc.
ABL, *aktiebolagslagen (2005:551)*, the Companies Act
anm., *anmärkning* (notification)
Art., Article/Articles
bet., *betänkande* (Committee reports)
BFL, *bokföringslagen (1999:1078)*, the Book-keeping Act
BFN, *Bokföringsnämnden*, Swedish Accounting Standards Board
C, curia (about the ECJ)
CE, *Communauté Européenne* (EC in French)
Ch., chapter
COM, the EU-commission (the EC-commission), also the Commission
Dan., Danish
Dir., *kommittédirektiv* (comittee directive)
Div., division
dnr, *diarienummer*, day-book number
Dr., Doctor
Dt, *direkt skatt taxering*, direct tax assessment
Du., Dutch
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 Luxemburg)
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
E-VE, *ekonomisk verksamhet* (compare: economic activity)
F, (in F-tax), entrepreneur
FB, *förhandsbesked*, advanced ruling
First Directive, the first EC directive on VAT (67/227/EEC)
Fr., French
GAAP, Generally accepted accounting principles
GBFL, the old BFL
Ger., German
GML, the old ML
GTS, Goods and Services Tax
HST, Harmonized Sales Tax
i.e., id est, that is
IL, *inkomstskattelagen (1999:1229)*, the income tax act
Im, *indirekt skatt mervärdesskatt*, indirect tax VAT
instr., instructions (Sw., *anvisningar* - abbreviated *anv.*)
KL, *kommunalskattelagen (1928:370)*, the municipality tax act (replaced by IL)
kr, SEK
Ltd, limited (compare: AB)

Memo, memorandum
ML, *mervärdesskattelagen (1994:200)*, the value added tax act
Moms, abbreviation of mervärdesskatt (compare: VAT)
Mr., mister
Mrs., missis
Ms., Miss
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
par., paragraph (Sw., *stycke*)
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
sec., section
SEK, Swedish kronor
sen., sentence
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
sen., sentence (Sw., *meningen*)
SOU, *statens offentliga utredningar*, Governmental investigations
Span., Spanish
SRN, *skatterättsnämnden*, the Tax Law Council
Sw., Swedish
TL, *taxeringslagen (1990:324)*, the Tax assessment act
TVA, *taxe sur la valeur ajoutée* (VAT in French)
UN, the United Nations
USA, the United States of America
UStG, *Umsatzsteuergesetz* (the VAT act in German)
VAT, value added tax
VAT Directive, the VAT Directive (2006/112/EC)
VE, *verksamhet* (compare: activity), inter alia the VE-part of YRVE
VMB, *vinstmarginalbeskattning* (margin taxation)
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 AND PURPOSE

This thesis is, as the title suggests, about EC law conformity with certain concepts in the Swedish value added tax act – *mervärdesskattelagen (1994:200)*, abbreviated ML – connecting to the national Swedish income tax law.

The purpose is first of all to make an analysis of whether the formal connection in the ML to the concept *näringsverksamhet* (Eng., business activity) in the Swedish income tax act [*inkomstskattelagen (1999:1229)*, IL] for the determination of yrkesmässig verksamhet and thereby the tax subject's character is EC law conform. Only for the sake of simplifying the reading, let's abbreviate *yrkesmässig verksamhet* (Eng., economic activity) with **YRVE** and especially point out when to separate the two words. YRVE is the most fundamental concept, since it determines the tax subject, i.e. who *can* belong to the VAT system. The determination of YRVE in the main rule in Ch. 4 sec. 1 item 1 of ML is made with reference to the concept *näringsverksamhet* (here abbreviated **NAVE**) in Ch. 13 of the IL. The main issue in this work is whether this is conform with the EC law concept taxable person. One of the necessary prerequisites for the emergence of tax liability according to the main rule of Ch. 1 sec. 1 first paragraph item 1 of ML, i.e. for the liability to pay output value added tax (VAT), is precisely that the subject can be deemed having an YRVE.

There's no formal EC law obstacle against the ML referring to other legislation for the determination of concepts. 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.[1] Therefore the question is whether the Swedish use of the concept YRVE is EC law conform. 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.[2] However, it's not an axiom that a common tax frame between VAT and income tax shall be maintained. Are the connections from ML to

[1] See the ECJ case 107/76 (Hoffman-La Roche).
[2] 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.

IL, e.g. concerning YRVE, not EC law conform, should they be revoked. Decisive for these connections being able to continue is whether the case law is EC law conform.

The concept *verksamhet* (i.e. the **VE**-part of YRVE) is also found in the main rule of determining the emergence of the right to deduct input tax on acquisitions and import in Ch. 8 sec. 3 first par. of the ML. A connection in the preparatory work to the ML to the income tax law will also be mentioned. The right of deduction and the claim against the state founded by it distinguish the VAT from other taxes, e.g. income tax. An interesting issue dealt with here is therefore the so called deduction prohibition for input tax on expenses for entertainment and similar, where the scope of the prohibition is determined by a reference in Ch. 8 sec. 9 first par. item 2 of the ML to the delimitation of the right to deduct such expense at the income tax assessment according to Ch. 16 sec. 2 of the IL.

The other fundamental concept for determining the emergence of tax liability in Ch. 1 sec. 1 first par. item 1 of ML is taxable supply of goods or services, which thus concern the tax object (an article of goods or a service). Ch. 3 of ML deals with questions on taxable supply and supplies exempted from taxation, and there isn't any formal connection to the income tax law. However can such connections exist at the application of the law due to such a practice in older Swedish VAT law without it being clarified that they've become obsolete. If this means a second trial of the question of who's taxable person, and which then is made beside the trial of YRVE, the application of the law isn't EC law conform. Such a connection may be found regarding the concept *parkeringsverksamhet* (Eng., parking business activity) in Ch. 3 sec. 3 first par. item 5 of ML, and is therefore mentioned here.

The main question and the other questions mentioned above are in the sections under 1.3 below set in relation to a selection of EC law and other questions. The purpose is to give an overview of aspects which have or have not to do with the questions treated here. This selection gives the delimitation of this work.

1.2 METHOD

The analysis here follows a jurisprudential dogmatic method. Sweden's accession to the European Union (EU) on the 1st of January 1995 meant there's a new environment for interpretation of the VAT with EC law

forming part of current law.[3] Then the Swedish Parliament (Sw., *Sveriges Riksdag*), by virtue of the national constitution (Sw., *regeringsformen* – abbreviated RF), transferred in principle its competence on VAT law to the EU institutions. In the field of income tax the Swedish Parliament retained in principle its competence. Therefore, the choice of subject is not very controversial with regard of a scientific ideal of neutrality.[4] Each applier of the law, scientist or layman should ask himself: are the existing connections from the ML to the Swedish income tax law EC law conform? The law sources in the field of VAT have been expanded with first of all EC directives and the ECJ's preliminary rulings. The traditional Swedish law sources with acts and preparatory works etc. remain, but form now part of a new environment for interpretation in the field of VAT, by the EC law being part of current law.

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*) – 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.[5] Thus. the same applies if for instance a rule of the VAT Directive isn't implemented in ML. The VAT Directive has a so called direct effect. Contrary a Governmental obligation towards the individual cannot be effected against the individual's will if it's not covered by the letter of the

[3] 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.

[4] See *Neutralitet i juridisk forskning* (Eng., Neutrality in legal science), pp. 8-11, by Christian Dahlman.

[5] See the third par. of Art. 234 EC (formerly 177). The articles of the EC Treaty were renumbered by the Amsterdam Treaty in 1997. Inter alia due to some references here are made to the preparatory work to the Swedish act deciding the Swedish membership of the EU, the so called EU act, *Prop. 1994/95;19*, the older article numbers are mentioned in parentheses.

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.[6]

The new environment for interpretation gives a more complex situation for the applier of the law where solving problems in the field of VAT are concerned. However, it doesn't alter the demand for neutrality in relation to the question on EC law conformity with the connections from the ML to the income tax law when making the analysis of it here. However, the problem here is the law source material to analyse. The problem in question seems namely to be a unique Swedish one. The normative guideline for the question of who can belong to the VAT system and how that system can be deemed acknowledging that person rights and imposing him obligations are competition neutrality. In principle consumers shall not choose deliverer of an article of goods or supplier of a service due to differences in such questions between various entrepreneurs. That's the moral and justice that the VAT system with regard of current law including inter alia competition neutrality provides entrepreneurs and consumers.[7] Inasmuch can the competition neutrality principle also be said functioning as a legal political basis for this thesis, where the author of this work is joining the equivalent perception by Eleonor Alhager.[8]

Thus, it's a case getting a perception in a descriptive sense of current law and the basic VAT principles, to be able to try whether the connections from the ML to the income tax law are EC law conform. It's mentioned later in this presentation, but deserves thus to be pointed out already in this context that the competition neutrality as one of these principles and basic norm puts the personal viewpoints in the background when making the analysis in this work.[9] The evaluating concept of law can be deemed lying in the competition neutrality principle as a basic norm when describing

[6] See Ch. 8 sec. 3 of RF and also Ch. 2 sec. 10 second par. 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.

[7] See *Neutralitet i juridisk forskning* (Eng., Neutrality in legal science), p. 23, by Christian Dahlman and *Rätt och rättfärdigande* (Eng., Law and justification), p. 98, by Christina Dahlman.

[8] See *Mervärdesskatt vid omstruktureringar* (Eng., VAT at restructuring measures), p. 29, by Eleonor Alhager.

[9] Compare: *Neutralitet i juridisk forskning* (Eng., Neutrality in legal science), p. 82, by Christian Dahlman.

current law in the field of VAT.[10] For he who's accepting market economy and that a taxation and collection system for financing the public welfare shall be based on inter alia the consumption tax VAT, it should not be any controversial matter either with regard of a scientific ideal of neutrality or in a legal political sense. Regardless whether the descriptive parts of the presentation are based on EU sources, the ML and the preparatory work, the SAC's verdicts or doctrine, they must be presented with respect of the basic VAT principles with above all the competition neutrality principle. It's lying within the whole idea of the VAT, and can therefore be said having been of guidance already before Sweden's EU accession.

The ECJ mainly use a teleological interpretation method when applying the EC law on the whole. Since the ECJ at the trial of VAT issues regards the basic VAT principles also when not explicitly saying so in its verdicts, can such a teleological method as Jan Kellgren calls 'aim based law interpretation' (Sw., '*målstyrd lagtolkning*') be considered basic here.[11] Although not every time stated clearly, it's always lying in the analysis here that the basic prerequisite for the trial of the questions raised in this work should be competition neutrality. The aim is above all that the application of the VAT rules shall lead to a competition neutral distinction of who can belong to the VAT system (the entrepreneur) and who's a consumer. If the connections from the ML to the Swedish income tax law lead to that process of selection and other questions on obligations and rights functioning inefficiently, they aren't EC law conform, since the ECJ with its teleological interpretation method refers to a principle of efficiency meaning that the solution most efficient for Community law should be chosen. This is mentioned more below in the chapter The new environment for interpretation and questions for the analysis in this work.

The focus here is on the EU law compliance of the concept YRVE in ML being defined by reference to the concept NAVE in Ch. 13 of IL. However, the task here isn't about creating the kind of general rules by the thumb often wanted for methods to solve tax issues.[12] This presentation shall not become a "brick" that so to speak blurs the vision making the analysis

[10] Compare: *Neutralitet i juridisk forskning* (Eng., Neutrality in legal science), pp. 18 and 19, by Christian Dahlman.
[11] See *Mål och metoder vid tolkning av skattelag* (Eng., Aims and methods at interpretation of tax law), p. 203, by Jan Kellgren.
[12] See *Skattenytt* (Eng., the Tax news) 1998 p. 539, the article *Skatterättsliga metodfrågor* (Eng., Tax law method questions), pp. 535-540, by Aleksander Peczenik.

difficult to grasp and hard to overview.[13] 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,[14] are here expressed by both NAVE in the IL and **E-VE** (abbreviation for *ekonomisk verksamhet* in the Swedish language version of the VAT directive – compare economic activity in the English language version) in the VAT Directive (2006/112/EC) having a common denominator in the civil accounting law, where the separation of the entrepreneur's economy from his private one by the concept Requirement to maintain accounting records (Sw., *bokföringsskyldighet*) is concerned. 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, where the connection in question from ML to IL doesn't meet any obstacle as far as the delimitation of the income tax schedule (Sw., *inkomstslaget*) NAVE from other income tax schedules – i.e. of the entrepreneurs from the private persons for income tax purposes – can be based on the same basic evidence, namely if the person in question is required to maintain accounting records. Thus, it's possible in practice 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 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 and for the analysis of the other connections from the ML to the income tax law.

[13] 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).
[14] 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).

1.3 OVERVIEW ON EC LAW AND OTHER ASPECTS ON THE QUESTIONS OF THIS WORK

1.3.1 The VAT and the income tax in relation to EC law

Thus, Sweden's membership of the UE has concerning Swedish rules on VAT meant that EC law nowadays is a part of current law. By virtue of the Maastricht treaty of 1992 the EU was established in 1993. The EU27 countries decided on the 19th of October 2007 to replace the EU constitution with a Reform Treaty to the European Parliament elections in 2009. Thereby will in principle the so called Rome treaty of 1958 continue to be in force. The Rome treaty is also called the EC Treaty, i.e. Treaty Establishing the European Community, since by the Maastricht treaty of 1992 European Economical Communities (EEC) was changed to European Community (EC). By Art. 93 (formerly 99) of the EC Treaty – abbreviated Art. 93 EC – follows the request on "harmonisation" of indirect taxes, mainly including VAT and Excise Duties,[15] meaning 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.

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.[16] So called cumulative multiple-step-taxes were supposed to be exchanged with a common VAT system.[17]

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 mervärdeskatt*, GML].[18] Already then under the influence of the EU law on VAT,[19] 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.

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[15] 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) 11th edition), p. 4, by Sven-Olof Lodin and others.
[16] See Art. 1 of the First Directive. See also *Prop. 1994/95:57* p. 73.
[17] See the fourth and eighth par. of the preamble (introduction) of the First Directive.
[18] See *Prop. 1968:100* pp. 1 and 31.
[19] See *Prop. 1968:100* pp. 25 and 51.

Due to 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 been 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. Then the Swedish Parliament (Sw., *Sveriges Riksdag*), by virtue of the national constitution (RF), (Sw., *regeringsformen*), transferred its competence on VAT law to the EU institutions when Sweden acceded to the EU.[20] 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.[21] The same rules since the First and Sixth Directives were replaced on the 1st of January 2007 by the so called VAT Directive (2006/112/EC). By the first sen. in the third par. of the preamble of the VAT Directive it's stated that it shall not in principle mean any material changes that it replaced the First and the Sixth Directives. In the version of the Sixth Directive issued in the Swedish language "*skattskyldig person*" was used concerning the tax subject, i.e. concerning who can belong to the VAT system, and "*beskattningsbar person*" concerning the liability to pay VAT, whereas the VAT Directive consistently only use "*beskattningsbar person*". *Skattskyldig person* [Art. 4(1) of the Sixth Directive] and *beskattningsbar person* [Art. 9(1) first par. of the VAT Directive] respectively has been used and is used to describe the tax subject; thus not meaning any material change – instead it's perhaps a matter of a better translation of "taxable person" from the versions of the directives issued in the English language. Already the language version in English of the Sixth Directive also served as a model to the one in the Swedish language. In the following of this presentation *beskattningsbar person* will be used first of all. E.g. the lingual alteration in the version of the VAT Directive in the Swedish language in relation to the Sixth

[20] See Ch. 10 sec. 5 of *regeringsformen*, RF.

[21] 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 treaties 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 stipulated, 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].

Directive doesn't in any decisive way change the analysis of the questions in this work; such alterations may instead give it a certain effect of contrast.

A small number of changes have been made through the VAT Directive according to the second sen. in the third par. of the preamble of the VAT Directive, but they don't concern the questions in this work and there won't be any complete review of those here. However, a novelty mentioned here is the new Article (80) on revaluation of a sale for a consideration lower or higher than the open market value between closely connected persons, which will be made together with the mentioning of the rules on withdrawal taxation in the ML in relation to EC law. The new directive rule is facultative and supposed to work against tax evasion or avoidance. By *SFS 2007:1376* the new article has been implemented in ML on the 1st of January 2008. The new rule on revaluation of under or over priced transfers doesn't contain any such connection to the income tax law which mainly shall be treated here.

In the field of income tax the Swedish Parliament hasn't transferred its competence generally to the EU institutions. Art. 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. The income tax isn't governed materially by the EC law in the general way that applies for the VAT. However, shall he who has the character of entrepreneur in both cases have a book-keeping, and the rules in Swedish Book-keeping Act [*bokföringslagen (1999:1078)*, BFL], concerning it is governed by the EC law and inter alia 'the fourth company law directive' (78/660/EEC) – Sw., '*fjärde bolagsrättsliga direktivet*'. Community law on VAT lacks rules on accounting. However, there are rules in the ML on certain VAT law requests of the content of invoices based on the so called invoicing directive (2001/115/EC). The main question of this work is about the determination of who is a tax subject, i.e. of who's an entrepreneur. Concerning evidence there are, as mentioned, a common denominator for VAT and income tax regarding that question, namely the Requirement to maintain accounting records according to the BFL. This aspect is mentioned in this work.

In the context may be mentioned the VAT investigation's consideration *Mervärdesskatt i ett EG-rättsligt perspektiv (SOU 2002:74)* [Eng., VAT in an EC law perspective]. In the consideration, which hasn't yet led to any bill (Sw., *proposition – abbreviated Prop.*), it's suggested that the EC law concept "*beskattningsbar person*" (taxable person) should be introduced in

the ML instead of YRVE. The limitation of the scope of the VAT would thereby be independent in relation to the IL compared to the current connection to the concept NAVE there.[22] However, the investigation makes first of all proposals regarding the accounting rules of the VAT, and it's important to note that the investigation makes a reservation for not having made any material overview of the rules on rights and obligations in the ML which are connected to the capacity of *beskattningsbar person* (taxable person). That would mean a need for a complete material overview of the ML, which couldn't be fitted into the investigation's assignment.[23] Therefore, the investigation doesn't make any analysis of the connection from Ch. 4 sec. 1 item 1 of the ML to Ch. 13 of the IL. The material analysis of the EC law conformity with the material rules of the ML is instead made for instance here. The investigation has suggested that the ML's accounting rules should be disconnected from the current determination of the accounting for output and input tax by references to the main rules thereof in Ch. 13 sec. 6 and Ch. 13 sec. 16 of the ML to the concept Generally accepted accounting principles (Sw., *god redovisningssed*), GAAP, according to the BFL.[24] However, there's no analysis in this work of the accounting rules in particular. Therefore questions on a changed evidence and procedural situation of the investigation's proposal from above all the control perspective and the procedural perspective for determining the tax subject will be left out. Here the analysis is about the material issues, i.e. what in principle isn't dealt with in *SOU 2002:74*. However, the importance of the connections to the civil accounting law for forming norms regarding VAT and income tax is mentioned concerning the question of the ML's continuing connection to the civil law concept GAAP. The question whether connections in the application of law between the determination of the tax object and the income tax law, and which can mean a second trial of the question of the tax subject for the purpose of VAT, contains also a tax procedure, evidence problem, but apart from that will only the material questions of taxation be dealt with here.

The concept VE, which appear as the VE-part of YRVE and also in Ch. 8 sec. 3 first par. of the ML concerning the emergence of the right of deduction, is such a basic concept where the investigation SOU 2002:74 actually makes a material suggestion without it only being a consequence of terminological proposals or of suggestions concerning the accounting rules. The investigation talks about a transition from an ”activity-thinking”

[22] See *SOU 2002:74* Part 1 p. 16.
[23] See SOU 2002:74 Part 1 pp. 17 and 186.
[24] See *SOU 2002:74* Part 1 p. 20.

(Sw., "verksamhetstänkande") to a "transaction-thinking" (Sw., "transaktionstänkande") and means that an exclusion from the ML of the concept VE for the determination of the emergence of the right of deduction would only be 'a clarification of current law' (Sw., "*ett förtydligande av gällande rätt*"), and thereby the investigation is referring to the Supreme Administrative Court's (SAC – abbreviated RÅ in Swedish) verdict RÅ 1999 not. 282.[25] Thus, although this work doesn't constitute a review of the investigation, there's a special reason to mention it's view on current law concerning the concept VE of the ML here.

In context it's 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.[26] 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.[27] 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.[28]

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[25] See *SOU 2002:74* Part 1 p. 197 and also pp. 17, 152 and 194-200 therein.

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

[27] (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]

[28] 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 diskrimineringsförbud och dess skattekonsekvenser: den svenska erfarenheten* (Eng., The European Community's prohibition of discrimination and its tax consequences: 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

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,[29] there's nothing in VAT law contradicting such a trial of EU law compliance. It follows of Art. 93 EC (formerly 99), of the second par. of the preamble in the First Directive and of the third par. of the preamble in the Sixth Directive and of the fourth par. of the preamble in the VAT 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 par. of the preamble in the Sixth Directive that also a person making temporary transactions within an EU Member State can be deemed a *skattskyldig person* (Eng., taxable person).[30] Thus, ML's rules shall be written with respect of the EC Treaty principles on free movement of goods in Art. 23 EC (formerly 9), of services in Art. 49 EC (formerly 59), of persons in Art. 39 EC (formerly 48) and of capital in Art. 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 the law of the Member States,[31] is

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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. 296 and 297, 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.

[29] 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 interest payments 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)].

[30] The same is stipulated concerning *beskattningsbar person* (Eng., taxable person) in the thirteenth par. of the preamble in the VAT Directive.

[31] 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

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

In the context 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 wouldn't have been affected by the EU constitution issued in June 2004, if it would've been ratified by the EU27 Member States. The principle on primacy of the EU law over the law of the Member States would have been "codified" by the EU constitution.[32] 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 would have existed 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 Art. 93 EC and 94 EC would have only been replaced by articles of equal wordings in the EU constitution.[33]

In the EU constitution the expression regulation would have been replaced by European law and directive, e.g. as in the VAT Directive, would have been 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.[34] The EU constitution would in this sense have made it

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issuing laws where the national legislative bodies have not transferred a general competence to the EU institutions according to Art. 93 EC (formerly 99), and the task at hand is rather about "approximation of laws" according to Art. 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 work.

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

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

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

possible for 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 four freedoms and right of establishment.[35] 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 establishing for VAT purposes in Sweden and thereby joining the Swedish VAT register. As a result of the EU accession 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 par. 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*),[36] which rules on placing the supply decide if a foreign entrepreneur shall belong to the Swedish VAT system and register here.

Now the aim is to reform the EC Treaty, instead of replacing it with the EU constitution. It doesn't either affect the VAT law. Here is only noted that the Reform Treaty leaves the idea of "codifying" the primacy of EU law, but in the draft of July 2007 was it stated: "The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle".

1.3.2 Concepts in the ML comprised by and left out of the analysis

Thus, the analysis here of the main question concerns whether the content given by the existing reference in Ch. 4 sec. 1 item 1 of ML to the concept NAVE in Ch. 13 of IL is EC law conform. That question is treated in this work with respect inter alia of an expansion made on the 1st of January 2001 by *SFS 1999:1283* inasmuch Ch. 4 sec. 1 item 1 of ML is referring to all of Ch. 13 of IL instead of only to the subjective prerequisites for NAVE in Ch. 13 sec. 1 first par. second sen. of IL. Previously Ch. 4 sec. 1 item 1

[35] Although, the EU Commission aims to leave a law proposal in 2008 on an optional common consolidated *base* for the corporate tax [see Krister Andersson, *Svensk skattetidning* (Eng., Swedish tax journal) 2007 p. 393].
[36] See the wordings of Ch. 5 sec. 7 and Ch. 5 sec. 8 of ML according to *SFS 2001:971* (*Prop. 2001/02:28*).

of the ML was referring only to the subjective prerequisites in sec. 21 first sen. of 'the municipality tax act' [Sw., '*kommunalskattelagen (1928:370)*', KL], which was the equivalent to the existing Ch. 13 sec. 1 first par. second sen. of IL, for the determination of YRVE. The expansion in 2001 was made without any motivation.[37] The IL was by the way introduced on the 1st of January 2000, with effect for the first time at the assessment year of 2002, and replacing inter alia the KL and 'the state income tax act' [Sw., '*lagen (1947:576) om statlig inkomstskatt*', SIL]. The expansion of the determination of YRVE seems to be unintentional. The preparatory work to the ML, which was introduced on the 1st of July 1994 and already then with regard of the EC law in the field of VAT, also speaks for a reference only to the subjective prerequisites of NAVE for that determination.[38] However, the analysis here must be made with regard of the wording of the ML, and then it must concern the EC law conformity with a determination of the tax subject for VAT purposes based both on this narrow determination and the formally wider one which the reference to the concept NAVE in the whole of Ch. 13 of IL means.

In the context can also be mentioned that according to the preparatory work would the application which ruled be retained in wait for the result of an investigation meaning an overview of the concepts in the ML concerning tax liability (*skattskyldighet*) and YRVE (*Dir. 1999:10*).[39] That led to the VAT investigation's consideration *Mervärdesskatt i ett EG-rättsligt perspektiv (SOU 2002:74)* [Eng., VAT in an EC law perspective]. However, the investigation didn't make any other proposal materially than the abolition of the concept VE from the ML, which thus is the question to be analysed here.

The concept VE should be analysed due to it not only being a part of YRVE, but also in the determination of the emergence of the right of

[37] A motivation to the change in Ch. 4 sec. 1 item 1 of the ML doesn't exist in the preparatory work to the IL, *bet. 1999/2000:SkU2* [*Inkomstskattelagen* – the Income tax act] and *Prop. 1999/2000:2* (*Inkomstskattelagen* – the Income tax act].

[38] See Prop. 1993/94:99 [*Ny mervärdesskattelag* – new VAT act] p. 169, where it's stated that YRVE is determined by the income tax acts' [*inkomstskattelagarnas* (note on page 169 of the bill (Sw., *proposition – abbreviated Prop.*) that the genitive-s in '*inkomstskattelagarnas*' is missing in the text) rules on "*subjektiv skattskyldighet*" (subjective tax liability) and on the pages 164 and 165 of the bill it's stated that what's decisive for a *verksamhet* ('activity' – i.e. the VE-part of YRVE) being *yrkesmässig* ('professional' – i.e. the YR-part of YRVE) is if the prerequisites for *näringsverksamhet* (NAVE) according to sec. 21 of the KL – "*varaktighet*, *självständighet*, *bakomliggande vinstsyfte m.m.*" ('duration, independence, purpose of making profit etc.') are fulfilled.

[39] See *Prop. 1999/2000:2* Part 2 p. 760.

deduction in Ch. 8 sec. 3 first par. of ML. The right of deduction and the and the claim against the state as it forms for the tax subject thus distinguish the VAT from other taxes, e.g. the income tax. Both NAVE in the IL and E-VE in Art. 9(1) first par. of the VAT Directive [Art. 4(1) of the Sixth Directive] can be said having a common denominator in the BFL's rule on the emergence of the Requirement to maintain accounting records. It's about separating the entrepreneur's economy from his private one, i.e. basically about distinguishing the entrepreneur from the consumer. Therefore, from a perspective of evidence, the question about the concept VE is thus of interest here, since it's the closest equivalent to the directive law's E-VE. In that perspective will the connection in the preparatory work to the ML to the income tax law concerning the concept VE be analysed.

The VAT is protected by Art. 401 of the VAT Directive [previously Art. 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,[40] and the main 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. That question has never been tried, but since Sweden's EU accession the SAC has tried whether the excise duty on advertisement is in conflict with the principle that each Member State may have only one VAT system. The SAC established that the Swedish 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*").[41] Here it's of interest not only to try the connection from the ML to the IL concerning the determination of the tax subject, but also whether the connection from Ch. 8 sec. 9 first par. item 2 of ML to Ch. 16 sec. 2 of IL, for the determination of the scope of the prohibition of deduction for input tax on expenses for entertainment and similar, gives such an extensive application that it isn't EC law conform with respect of the basic thought of a principally general right of deduction for he who shall belong to the VAT system.

[40] See the ECJ case 295/84 (Wilmot).
[41] 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.

The right of deduction and its emergence are central for the VAT, and the main question is about YRVE. Therefore the question about the concept VE will be set in relation to the right of deduction, by the analysis here also concerning whether the ML's structure is EC law conform for the determination of the emergence of the right of deduction. Above all the structural, systematical analysis thereby is about that the ML in Ch. 8 sec. 3 first par. of ML uses the concept tax liable (*skattskyldig*) in the meaning liable to account for and pay output tax for the determination of the emergence of the right to deduct input tax on acquisitions to the VE. That's not conform with respect of the Community law which thereby uses the concept taxable person (*beskattningsbar person*), which has it's closest equivalent in the concept YRVE in the ML.

Here may also be mentioned problems that may arise concerning application of the main rule on taxation of an entrepreneur's intra-Community acquisitions according to Ch.2a sec. 3 first par. item 3 of ML, due just to that 'tax liable' (Sw., "*skattskyldig*") in the recently mentioned meaning being used in that rule with regard of the vendor in the other EU country involved. If that country, contrary to Sweden, divert from the EC law and in its national VAT legislation makes an exemption from taxation for the article of goods in question, it can be questioned based on the constitutional principle on legality for taxation whether taxation can be imposed upon the entrepreneur (purchaser) in Sweden for the acquisition against his will.[42] Thus, the problem in question is about the object for taxation and doesn't connect to the IL, why the issue won't be dealt with in particular here. If it instead was about judging whether a person from another country than Sweden – EU country or third state – shall belong to

[42] 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). 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 work took part in the work with writing the Bar Association's reply to the Treasury.

the Swedish VAT system due to a taxable transaction of an article of goods or a service within the country (Sweden), the trial of the subject question must, as well as for domestic persons, be made based on the concept YRVE in the ML.

Besides the main rule in C. 4 sec. 1 item 1 of ML with the reference to the concept NAVE in Ch. 13 of IL, there's a supplementary rule on YRVE in Ch. 4 sec. 1 item 2 of ML, without that connection. Instead it's stipulated in **the SUPPLEMENTARY RULE** that YRVE exist for an activity which is 'made under forms comparable with NAVE' (Sw., "*bedrivs i former som är jämförliga med en till sådan näringsverksamhet hänförlig rörelse*"), i.e. for so called businesslike activities (Sw., "*rörelseliknande former*). In that case it's provided that the annual turn over of such businesslike activities exceed SEK 30,000 for YRVE to be deemed to exist. For the sake of determining YRVE there are also a couple of references to IL concerning certain temporary transactions.[43] Those rules are also treated in this work.

YRVE is one of the basic concepts in the main rule on the emergence of tax liability in Ch. 1 sec. 1 first par. item 1 of the ML. The other basic concept is taxable transaction of goods or services, which thus is about the tax object (the article of goods or the service). The concept YRVE also exist in Ch. 1 sec. 6 of the ML, to distinguish the services from the goods. Goods are material things, including real estate, heat, cool and electrical power and everything else that 'can' (Sw., "*kan*") be supplied in an YRVE is a service. A transaction of goods or services is taxable if exemption isn't stipulated in Ch. 3 of the ML.[44] This means that if the tax subject once is determined with respect of YRVE can in principle any supplies at all made by the person in question be deemed tax objects according to the ML. The tax object's determination in the ML is in that sense complying with the EC law, and there are of course reasons to try in another context the EC law conformity with concepts used for the determination of taxable transaction or exemption from taxable transaction.

Of interest here is instead, as mentioned, if there are connections to the income tax law in with regard of the determination of the tax object which can influence the determination of the tax subject. In connection with some of the rules in Ch. 3 sec. 3 first par. of ML on exemption from the exemption from taxation in the field of real estate according to Ch. 3 sec. 2 of ML the concepts hotel business activity, harbour business activity and

[43] See Ch. 4 sec. 3 first par. items 1 and 2 of ML.
[44] See Ch. 3 sec. 1 first par. of ML.

parking business occur. The latter differs from the other two inasmuch there's a connection in older Swedish VAT law to the income tax concept business activity which can be of importance for the application of the law after Sweden's EU accession concerning the concept parking-VE (*parkeringsverksamhet*) in Ch. 3 sec. 3 first par. item 5 of ML, since it hasn't been clarified that the connection would be obsolete. It wouldn't be EC law conform if that means that the subject issue so to speak will have a second trial in connection with the establishment of the character of the object. Therefore that question will be treated here.

It can be mentioned in this context that the concept real estate (Sw., *fastighet*) in the ML isn't EC law conform, since it's more restricted than the EC law's immovable property (Sw., *fast egendom*). However, that question is about the determination of the tax object and without any connection to an income tax law concept of business activity (Sw., *rörelse*). Rules on real estate are mentioned in certain contexts of this work, but for the reason mentioned the concept real estate's EC law conformity isn't dealt with especially.

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.[45] 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 a tax liable in his building business activity according to IL (Sw., *byggnadsrörelse*) supply or acquire building services to his real estate.[46]

- The so called prohibition of deduction of input tax (Sw., *ingående moms*) on expenses for the purpose of entertainment and similar

[45] 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.

[46] See Ch. 2 sec. 7 first par. of ML. By *SFS 2007:1376* this rule on withdrawal taxation comprise since the 1st of January 2008 also real estate which isn't stock of real estate and premises rented or held with tenant-owner's right by the building contractor. Withdrawal as for private use of a passenger car in a VE has also a connection to the IL (via the SBL), but it concerns according to Ch. 7 sec. 4 of ML only the taxable amount (i.e. the amount to levy tax upon) and may be considered peripheral here, since that connection doesn't concern questions about the supply itself or the tax subject.

(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.[47]

The rules mentioned on withdrawal taxation for building business activities exist by virtue of the EU act as a Swedish exception from the VAT Directive and applies to the new production of buildings and sites for building.[48] The prohibition of deduction is in force by virtue of the second par. of Art. 176 of the VAT Directive [previously the second par. of Art. 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 VAT 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 purpose of this work is first of all to give an 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 VAT 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 VAT Directive. Instead there'll be, as mentioned, an analysis of the prohibition of deduction of input tax on expenses for the purpose of entertainment and similar, since the right to deduct input tax is central to distinguish the VAT from e.g. the income tax and a connection exist to the IL particularly for that particular case of prohibition of deduction in the ML.

Formally, as mentioned, 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 par. 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 main question raised here is instead if the application of the law may have caused or risk causing a Swedish VAT practice in conflict with the VAT concepts given by EU law concerning who's a taxable person according to Art. 9(1) first par. of the VAT Directive [and previously according to Art. 4(1) of the Sixth Directive], and thereby comprised by the scope of the VAT. The

[47] See Ch. 8 sec. 9 first par. item 2 of ML.
[48] 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.

VAT 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.[49]

However, an analysis is motivated of the non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*), since they may be excluded from YRVE, whereby a reference is made to the IL's concepts.[50] This is of a certain interest to judge the main question on EC law conformity with the application of the expression YRVE in Ch. 4 sec. 1 item 1 of ML, but basis of the analysis is the judgement of the situation for the entrepreneur. 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*].

1.3.3 International comparison

The analysis here is based on the EC law, but it can be of interest in connection with the delimitation of the material for comparison to mention not only the 27 EU Member States, which thus all must have a VAT system, but first also something about some other countries.

On the 6th of February 2008 there were 204 countries on earth, according to Countries of the World on Internet.[51] The number may vary due to the question of definition, but since 2066 are at least 192 countries members of the United Nations.[52] Since the number of countries with VAT in their economies are nearly 50,[53] one can say that one fourth of the countries on earth – amongst them the EU27-countrues – have a VAT system.

[49] See Ch. 4 sec. 6 and Ch. 4 sec. 7 of ML.
[50] See Ch. 4 sec. 8 of ML.
[51] See www.infoplease.com.
[52] See www.un.org.
[53] See www.worldwide-tax.com (The Complete WorldWide Tax & Finance Site).

USA, Canada and Japan

Thus, the VAT shall in principle apply in general for the enterprises' deliveries of goods and supplies of services, where they equally in principle shall have the possibility to lift off the VAT on their acquisitions and imports for the production of such deliveries and supplies. If they don't have the right of deduction or it is to limited, it's really a matter of a sales tax like the Swedish one preceding the GML in the 1960's (Sw., *varuskatt*) or excise duty (Sw., *punktskatt*) or a general tax on goods and services (Goods and services tax, GST), which may otherwise resemble VAT but is not a real VAT. Only real VAT systems form a material for comparison here, and therefore e.g. the USA and Canada, which have sales tax and GST are out.

USA seems to be constantly investigating whether they shall introduce "VAT". If they do, the intention seems to be to have a real VAT with a general right of deduction in principle for the enterprises.[54] Canada has for three of its provinces a harmonized sales tax (HST) which shall be applied on the same taxable amount as for the general GST.[55] That's an obstacle for a real VAT in the same way as the USA must rid itself from sales tax on the state level to be able to introduce VAT on the federal level.

Japan has a "Consumption Tax" named VAT. It's taken by itself a general tax on goods and services, but with a general prohibition of deduction concerning the tax for the next enterprise in the chain of ennobling the product in question – like what's the case with a so called margin taxation (Sw., *vinstmarginalbeskattning*, abbreviated VMB). The EC law's VMB is special schemes in relation to the general rules of the VAT system, and provided only for taxable dealers of second-hand goods, works of art, collectors' items and antiques and certain travel agents.[56] However, VMB allows VAT deduction on overhead costs. Since Japan's Consumption Tax doesn't allow the enterprise a general right of deduction in principle to claim from the state the VAT paid, it can be said to resemble more the taxes on gross sales (Sw., '*bruttoomsättningsskatter*'), like sales tax or excise

[54] See p. 197 in Simple, Fair, and Pro-Growth: Proposals to Fix America's Tax System. Report of the President's Advisory Panel on Federal Tax Reform. November 2005.
[55] See the Canadian government's website: www.cra-arc.gc.ca.
[56] See Ch. 9a and 9b of the ML which correspond to Art. 311-343 of the VAT Directive (Art. 26 a of the Sixth Directive) and Art. 306-310 of the VAT Directive (Art. 26 of the Sixth Directive). By the way the concepts YRVE and taxable person apply for the determination of the tax subject also for enterprises comprised by the rules on margin taxation.

duty. A real VAT shall lead to the consumer only having to carry the burden of VAT of the total value added on the final product, why the right of such a claim for each enterprise in the chain of ennobling until the is fundamental and distinguish the VAT from the taxes on gross sales.[57] Although Japan cannot be considered having a real VAT, it may be noted that the tax subject concerning their ”VAT” doesn't seem to be determined by reference to the income tax law.[58]

Norway, Iceland and Liechtenstein and Switzerland and Turkey

Amongst the countries that aren't members of the EU, but have VAT in their economies, are the EEA-countries of interest and also Turkey, which may be next in line to become an EU Member State, and Switzerland, which may be considered an economy close to the EU.[59]

The EEA-countries don't have the Swedish law technical solution with a connection to the income tax law for the determination for VAT purposes of the tax subject. In the Norwegian VAT act, *lov om merverdiafgift*, it's stated in §§ 10 and 27 only that the ”*næringsdrivende*” (Eng., the one carrying out business) that ”*driver omsetning*” (Eng., makes supplies) which is ”*avgiftspliktig*” (Eng., taxable), shall register to VAT.[60] Norway was by the way one of the countries included in the inquiry mentioned below in this section, and which was made a long with this work to foreign tax administrations. They were asked if they had the Swedish law technical solution in question in their VAT acts for determining the tax subject. The answer from *Sentralskattekontoret for utenlandssaker* (Eng., the central tax office for foreign matters) was that such a connection doesn't exist in the Norwegian VAT act, which thus also can be established from a study of the act. In the English translation of the Icelandic VAT act, *Lög um virðisaukaskatt*, it's stipulated in Art. 3, which concerns the determination of ”*Skattskyldir*” (Eng., tax liable), that ”all businesses” which mean trade of goods and services are comprised.[61] In Art. 21.1 of Liechtenstein's VAT

[57] 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*”.

[58] See the Japanese Ministry of Finance's website concerning Consumption Tax (VAT): www.mof.go.jp.

[59] Since 1995 the remaining EEA-countries are Iceland, Liechtenstein and Norway.

[60] See Lov om merverdiafgift of the 19th of June 1969 No. 66.

[61] See Lög um virðisaukaskatt 1988 No. 50 and English translation of the act, on Iceland's Ministry of Finance website – http://eng.fjarmalaraduneyti.is.

act, *Mehrwertsteuergesetz*, it's stipulated that the concept "*Steuerpflichtig*" (Eng., taxable person) comprise the one independently carrying out business 'also when profit fails' ("*auch wenn die Gewinnabsicht fehlt*").[62]

Neither Switzerland nor Turkey have the Swedish law technical solution in question for determining the tax subject for VAT purposes. In a commentary to the Turkish VAT act it's said that "taxable person" is he who "in the course of a trade or profession" makes taxable supplies.[63] In the Swiss ministry of finance's commentary to Art. 21 of the VAT act, *Mehrwertsteuergesetz*, the same prerequisites are stipulated for who's a taxable person ("Steuerpflichtig") as in the VAT act of Liechtenstein, where the lack of a request of profit is especially noted.[64]

By the way it may be noted that the five countries recently mentioned seem more or less complying with Art. 9(1) first par. of the VAT Directive, and the determination there of taxable person. Above all that's the case with Liechtenstein and Switzerland, who are making that determination regardless of 'a purpose of profit' ("*Gewinnabsicht*").

The EU Member States

The presentation now continues with only the EU Member States, which thus nowadays are 27 countries, EU27. All of them will be mentioned. Since EC case law so far has comprised first of all the EU15-countries, they will be treated first and thereafter the countries joining the EU on the 1st of May 2004 and on the 1st of January 2007. Since certain EU Member States theoretically could have the Swedish law technical solution with connection the determination of the tax subject for VAT purposes to the income tax law, they are treated first, namely Finland, Ireland and the Netherlands. Thereto belongs also Hungary who became an EU Member State on the 1st of May 2004. To that group would also Norway belong, if Norway was an EU Member State. Thereafter the countries which traditionally have influenced the Swedish VAT legislation are treated: Denmark and Germany and also Great Britain, by – as mentioned – the versions of the EC directives on VAT in the Swedish language having had the English language versions as models. France follows thereafter with regard of

[62] See the VAT act of the 16th of June 2000 [Gesetz vom 16. Juni 2000 über die Mehrwertsteuer (Mehrwertsteuergesetz, MWSTG)]. It's to be found on the website of Liechtensteinisches Landesgsetzblatt: www.gesetze.li.
[63] See European Tax Handbook 2008, p. 814, the chapter on Turkey, by Prof. Dr B. Yaltõ.
[64] See the website of the Swiss ministry of finance, Eidgenössisches Finanzdepartement EFD Government of Switzerland, www.efd.admin.ch.

France being first on earth with introducing a VAT system. Then follow in two groups the other EU15-countries and the other eleven EU-countries, with the nine joining the EU together with Hungary on the 1st of May 2004 and Bulgaria and Romania which became EU Member States on the 1st of January 2007.

The matter of determining the tax subject is about distinguishing the entrepreneur from the consumer, why an employee normally can't be considered having the character of taxable person for VAT purposes. Of interest is then the distinction of other 'purpose of making money-activity' (Sw., '*förvärvsverksamhet*') from capital gain (Sw., *kapitalinkomster*) for income tax purposes. What VAT can connect to thereby is the income of work (Sw., *arbetsinkomster*) with regard of the concept E-VE as a necessary prerequisite for someone to be considered having the character of taxable person. In that perspective, and with regard to this work mentioning the emergence of such a VE, are countries with income tax systems similar to the Swedish one, where the division of income of work and capital gain in one-man businesses (Sw., *enskilda firmor*) or close enterprises (Sw., *fåmansföretag*) is concerned, of interest here. The Swedish law technical solution in question, to distinguish a person from the consumers and determine that he's a tax subject who can belong to the VAT system, could, as mentioned, theoretically have been used by the EU- Member States Finland, Ireland, the Netherlands and Hungary and also by Norway. These five countries have on the whole the same income tax system as the Swedish one, to division income of work and capital gain in close enterprises, or rules leading to similar consequences.[65] Therefore the review of the EU Member States begin with Finland, Ireland, the Netherlands and Hungary.

Before continuing the presentation, it may be mentioned that Finland, Ireland, the Netherlands and Hungary and also, as mentioned, Norway were included in a written inquiry made a long with this work in the beginning of 2003. The tax authorities in those countries and the other EU15-countries at the time were asked – in English – if they had the Swedish law technical solution in question in their VAT legislations for determining the tax

[65] 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 at the time.

subject.[66] The tax authorities in Finland, the Netherlands, Hungary and Norway and in Denmark, Greece, Italy, Luxemburg, Spain, Great Britain and Austria answered the inquiry.[67] The answer was in all these cases the same as the one from the Norwegian tax authority, namely that their VAT legislations don't contain the Swedish law technical solution wit a connection to the income tax law for the determination of the tax subject. Ireland referred to its VAT guide on the tax authority's website there.[68] The question now is if it as the review so far and the inquiry implies, namely that the law technical solution in question is a unique Swedish one, is confirmed by foreign sources. Therefore the review now will concern above all foreign VAT acts, public law sources and doctrine.

Finland, which is particularly interesting, since Finland became an EU Member State at the same time as Sweden in 1995 and has an official version of the VAT legislation also in Swedish (which is official language along with Finnish), states in the 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 par.).[69] 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 par.). The Finnish VAT act also use the term business activity (Sw., *rörelse*), but lacks a connection to a division between on the one hand NAVE [Sw. (Finland), *rörelse*] and on the other hand capital gain according to the income tax act.

[66] The Austrian tax authority wanted the question in German, and it was made also in German.

[67] The Greek tax authority's answer was translated into Swedish with the aid of the Greek embassy in Stockholm (via phone on the 15th of September 2003).

[68] See LIST OF REFERENCES (under 1 LITERATURE – Interviews/inquiry …) the persons at tax authorities in EU Member States, in Norway and in Hungary (nowadays an EU Member State) which has been helpful by answering the inquiry done for this work which was made in January 2003. See also Appendix 4 of *SOU 2002:74* Part 2, were an inquiry by the investigation SOU 2002:74 is shown, but which didn't contain the question whether the connection in question to the income tax law exist in other EU Member States' VAT legislations. The investigation mostly state that some of them follow the Community law's taxable person for determining the tax subject and that some of them thereby connect to "business" in the civil law meaning of that concept. That inquiry comprised only the EU15-countries of which France, Ireland and Portugal didn't answer and the investigation didn't translate its answer from Greece.

[69] 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.

The concept "businesslike" may resemble the Swedish concept business activity 'made under forms which are only comparable with NAVE' according to the SUPPLEMENTARY RULE in Ch. 4 sec. 1 item 2 of ML. That concept – like the Finnish "businesslike" – is neither determined with regard of the income tax law. Thus, Finland may become interesting for comparison concerning the main question of this work first 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 someone has YRVE. With regard of the Swedish case law since the advanced ruling *RÅ 1996 not. 168*,[70] which will be mentioned more later on in this presentation, can the SUPPLEMENTARY RULE instead be considered obsolete for the purpose of determining the tax subject. That seems to be what Finland may have in common with Sweden concerning this context – not the Swedish law technical solution with a connection to the income tax law for the determination of the tax subject for VAT purposes. Thus, the Finnish tax authority's answer on the inquiry made along with this work is confirmed.

Another similarity with the Swedish ML is otherwise that the Finnish VAT act (sec. 4) connects to the Finnish income tax act [Sw. (Finland), *inkomstskattelagen (1535/92)*], where 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 of a business activity for the organization, which is comparable with the Swedish model to – in accordance with Ch. 4 sec. 8 of ML – exempt from YRVE non-profit-making organizations (and registered religious congregations) which are limited taxable, when the income from the activity constitutes such an income of NAVE for which the organization (or the congregation) isn't tax liable according to the IL. A – in relation to the main question here – side matter, but which thus also will be mentioned somewhat in this work, is whether the ML can divert, by the limitation of the scope of the VAT with regard of the tax subject in Ch. 4 sec. 8 of the ML, from the directive law's object oriented delimitation with exemption from taxation for certain supplies made by "non-profit-making"-organizations).[71]

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[70] 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.

[71] See Art. 13A.1. l, m and o of the Sixth Directive [Art. 131-134 of the VAT Directive].

Ireland answered, as mentioned, the inquiry by referring to the Guide to Value Added Tax on the tax authority's website.[72] In chapter 2 of the guide it's stated that "taxable person" is "one who otherwise than as an employee" supplies taxable goods and services "in the course or furtherance of business". In a commentary to the Irish VAT rules it's stated that "taxable person" means "[e]ach person who in the course of a trade or profession makes taxable supplies".[73] These statements indicate that Ireland doesn't have the Swedish law technical solution for determining the tax subject for VAT purposes.

The Netherlands states in Art. 7.1 of their VAT act that "*ondernemer*" (taxable person) is 'all carrying out activity independently' (Du., "*ieder die een bedrijf zelfstandig uitoefent*").[74] In a commentary to the Dutch VAT rules it's expressed that "[t]axable persons are, in general, all entrepreneurs".[75] This confirms the answer from the tax authority in the Netherlands on the inquiry, i.e. that the Swedish law technical solution in question for determining the tax subject for VAT purposes doesn't exist there.

Hungary states according to a commentary to the Hungarian VAT rules that "taxable persons" mean all physical and juridical persons carrying out "businesses". However do they involve a prerequisite of "profit".[76] Thus, that's not conform with the determination of taxable person according to Art. 9(1) first par. of the VAT Directive. The answer from the Hungarian tax authority on the inquiry, i.e. that they are lacking the Swedish law technical solution in question, can thereby be deemed confirmed, but there are thus indications that Hungary still have some job to do on the topic of EC law conformity in the field of VAT. That was by the way pointed out by the EU-commission before Hungary's EU-accession on the 1st of May 2004.[77]

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

[72] See the Irish tax authority's website: www.revenue.ie.
[73] See European Tax Handbook 2008, p. 376, the chapter on Ireland, by Ms. B. Obuoforibo.
[74] See Wet op de omzetbelasting 1968.
[75] See European Tax Handbook 2008, p. 579, the chapter on the Netherlands, by Dr R. Offermanns.
[76] See European Tax Handbook 2008, p. 340, the chapter on Hungary, by Mr. G. Antal.
[77] See Activities of the European Union, on the website http://europa.eu.

other Nordic countries, has traditionally been a role model for the Swedish legislation on VAT.[78] Thus, the Danish act would perhaps have been primary for comparison here, if Denmark had had the Swedish law technical solution in question for determining the tax subject for VAT purposes. However, a connection between VAT and income tax 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 calculating the tax.[79] The Danish VAT act, Ch. 2 sec. 3 first par., reflects instead almost exactly Art. 9(1) first par. of the VAT 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*").[80] Thereby is the answer on the inquiry from the Danish tax authority confirmed.

Great Britain can thus, due to that EU Member State being alone as one with English as official language at the time of Sweden's EU-accession, be said to have influenced the versions of the VAT directives in the Swedish language by the Sixth Directive in the English language being a model for the Swedish language version of the same directive.[81] For instance do Swedes working with VAT issues sometimes even use – at least in spoken Swedish – "taxable person", to emphasize that they mean beskattningsbar person in the VAT sense. However, a review of the British VAT act shows that neither Great Britain has the Swedish law technical solution with a connection to the income tax law for determining the meaning of "taxable person" (Sw., "*beskattningsbar person*"). In sections 3(1-3) of the Value Added Tax Act of Great Britain it's stated that "a taxable person" shall belong to the VAT register for "taxable supplies" according to Schedules 1-3 in the act and the question whether it's "a business carried on by a taxable person" is given a vast interpretation, since it's stated in section 94 that with "business" is meant in the act "any trade, profession or vocation".[82]

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[78] 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.

[79] 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.

[80] See Lov om merværdiafgift, LBK No. 804 of the 16th of August 2000.

[81] Malta has, with Maltese and English as official languages, entered as another EU Member State with English as official language on the 1st of May 2004.

[82] See Great Britain's Value Added Tax Act 1994.

Thus, "taxable person" as a definition of the tax subject for VAT purposes is independent in relation to the income tax legislation. Thereby is also the answer on the inquiry along with this work from Great Britain's tax authority confirmed.

Germany and its Bundesamt für Finanzen didn't answer the question in the inquiry, but here's established that also the German VAT act ("*Umsatzsteuergesetz*", abbreviated UStG) lacks the Swedish law technical solution with a connection to the income tax law for the determination of the tax subject.[83] In a commentary to the German VAT act it's also clarified, concerning the question who's a 'taxable person' (Ger., "*Unternehmer*"), that 'a purpose of making profit' [Ger., "*Eine Gewinnerzielungsabsicht*" (Sw., *vinstsyfte*], as for the income tax law-concept 'entrepreneur' (Ger., "*Gewerbetreibenden*"), isn't required for a person being considered having the character of taxable person.[84] "*Unternehmer*" is used in the German income tax legislation, but it's another concept than in UStG, and the German determination of the tax subject for VAT purposes is thus independent in relation to the income tax law.[85]

France and its tax authority didn't answer the inquiry. However, the Tax Act, *Code général des impôts*, shows that the French VAT legislation also lacks the Swedish law technical solution in question for determining the tax subject for VAT purposes. Of Art. 256 follows that value added tax (Fr., "*taxe sur la valeur ajoutée*" – abbreviated TVA) shall be paid by an "*assujetti*" (taxable person) that for consideration delivers goods and supplies services. In Art. 256 A is stated that with "assujetties" is meant persons 'which independently are carrying out' (Fr., "*qui effectuent de manière indépendante*") 'economic activities' ("*activités économiques*"), and that that judgement is 'free in relation to the legal status otherwise of those persons and in relation to other taxes and their influence' (Fr., "*quels que soient le statut juridique de ces personnes, leur situation au regard des autres impôts et la forme ou la nature de leur intervention*"). Then it's stipulated that with 'independently … carrying out' is not meant inter alia employees and others activated by an employer and that with 'economic activities' "*activités économiques*" is in the first place meant all activity

[83] See § 2(1) Umsatzsteuergesetz 1980.
[84] See the commentary to the German VAT act *Umsatzsteuergesetz*, p. 2, 4 § 2, by Karl Ringleb and others.
[85] See *SOU 2002:74* Part 2 (Appendix 4), p. 240, where that's actually noted also by the investigation.

with the supply of goods or services by a producer.[86]Although both VAT and income tax are exist in the same act, is the French VAT law, at least in the sense here, free from the income tax law. It may also be considered supported by a commentary to the French VAT rules, where it's stated that with "taxable persons" are meant "[a]ll entreprenuers", i-e. entrepreneurs in general.[87]

France was by the way, as mentioned, first on earth with the introduction of the VAT system, which was on the on the 10th of April 1954. It first comprised bigger enterprises, but was later expanded to comprise all business sectors. The idea of VAT was presented for the first time in 1919 by Wilhelm von Siemens.[88] To name the VAT an idea as well as a tax will be proven justified by the review of the basic VAT principles. It's even close at hand to call the VAT an "invention" (Sw., "*uppfinning*"). That does Leif Mutén in an article, where he expresses that Wilhelm von Siemens and also Maurice Lauré, who was active when the French VAT reform was introduced, were the 'inventors' (Sw., "uppfinnare") of the VAT.[89]

Also concerning the remaining EU15-countries indications are lacking on them having the Swedish law technical solution in question for determining the tax subject for VAT purposes.

> Concerning the cases where the foreign tax authorities answered the inquiry with them lacking any connection to the income tax law for that determination, has this been confirmed by studying the VAT rules for three of them, *Luxemburg*, *Spain* and *Austria*. The concepts "*assujetti*", "*empresario o profesional*" and "*Unternehmer*" correspond for the three countries to 'taxable person' in Art. 9(1) first par. of the VAT Directive. Austria and Luxemburg respectively states in its VAT act and Tax Act that "*Unternehmer*" and "*assujetti*" respectively is determined without regard of 'a purpose of making profit', as long as it's a matter of someone who 'independently is carrying out a professional activity' (Ger., "*gewerbliche oder berufliche Tätigkeit selbständig ausübt*"), which is the same wording as in the German VAT act, and independently is carrying out operations of importance for an 'economic activity' (Fr., "*activité économique*"). Spain gives in its VAT act for the concept "empresario o profesional" (Eng., entrepreneur or professional), which shall be considered equal to the directive rule's taxable person, examples of various 'economic activities' (Span., "*Actividades Económicas*") which it comprises. The difference is just that the implementation of

[86] See Code général des impôts (Version à venir au 1 janvier 2008).
[87] See European Tax Handbook 2008, p. 245, the chapter on France, by Ms. S. Baranger.
[88] 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.
[89] 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.

taxable person thereby gets support also in the directive rule's second par. In the same way as concerning "*assujetti*" and "*Unternehmer*" there's not 'a purpose of making profit' stipulated for someone to be considered having the character of "*empresario o profesional*". It shall be a matter of persons which 'carry out activities as taxable persons' (Span., "*realicen las actividades empresariales o profesionales*") and which activities are stated in the rule in question of the Spanish VAT act. In common is also the absence of a connection to the income tax law in the present respect in the three countries' VAT rules.[90] The tax authorities in *Greece* and *Italy* respectively thus also answered the inquiry the same way. Confirmation of the lacking of the Swedish law technical solution there can be deemed to be found in commentaries of their VAT rules, where it's said that with "taxable persons" is meant "every individual or legal entity or enterprise … engaged in an independent economic activity" and "[i]ndividuals and companies … if they carry on a business or profession or an artistic activity".[91]

The tax authorities in *Belgium* and *Portugal* respectively didn't answer the inquiry. That Belgium also is lacking a connection in its VAT act to the income tax law for the determination of "*assujetti*" can be considered following from it without expressing such a connection following the determination of taxable person in Art. 9(1) first par. of the VAT Directive, and stipulating that with "*assujetti*" is meant he who's independently carrying out an 'economic activity' [Fr., "activité économique" (Sw., E-VE)] with or without 'a purpose of making profit' (Fr., "avec ou sans esprit de lucre").[92] Support for the conclusion can also be deemed to be found in a commentary of the Belgian VAT rules, where it's stated that with "taxable persons" is meant "[p]ersons engaged in economic activities", where it's also stated that they can be named "entreprenuers", i.e. entrepreneurs in general.[93] The Portuguese ministry of finance has a manual on the Internet, and thereof follows that with "taxable persons" is meant "[a]ll individual and legal persons" which on a continuous basis and independently are carrying out "an activity of producer, trader or supplier of services".[94] Any connection, as with the Swedish law technical solution in question, is apparently not made here either to the income tax law for the determination of the tax subject for VAT purposes. This could be deemed to be supported of a commentary of the Portuguese VAT legislation, where it's stated that with "taxable persons" is meant "individual or corporate entrepreneurs and self-employed professionals" which are making taxable supplies of goods and services.[95]

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[90] See Section 3 Art. 4 1. of Code fiscal (Loi du 18 décembre 1992 modifiant et complétant la loi du 12 février 1979 concernant la taxe sur la valeuer ajoutée), Articulo 5 of Ley 37/1992, de 28 de diciembre, del Impuesto sobre el Valor Añadido and § 2 of Umsatzsteuergesetz, UStG, 1994.

[91] See European Tax Handbook 2008, p. 307, the chapter on Greece, by Dr G.S. Mavraganis and European Tax Handbook 2008, p. 413, the chapter on Italy, by Ms. G. Chiesa.

[92] See Art. 4 § 1 of Code de la Tax sur la Valeur Ajoutée, version 2008.

[93] See European Tax Handbook 2008, p. 105, the chapter on Belgium, by Dr R. Offermanns.

[94] See the Portuguese ministry of finance's website, www.dgci.min-financas.pt.

[95] See European Tax Handbook 2008, p. 636, the chapter on Portugal, by Ms. P. Dias de Almeida.

Concerning the other eleven EU-countries has neither anything been found indicating that anyone of them would have the Swedish law technical solution for determining the tax subject for VAT purposes.

> By translations of the VAT acts into English in the following countries it can be established that they are complying with Art. 9(1) first and second par:s of the VAT Directive for the determination of the tax subject (”taxable person”), and seem to be lacking connection to the income tax law: Bulgaria, Estonia, Latvia, Lithuania, Romania and Slovakia.[96] The same seems to be following by commentaries in English of the VAT rules in the following countries respectively on their governments’ websites, Cyprus, Malta, Poland and Slovenia, and, concerning the Czech Republic, on OECD’:s website.[97] Nor are there any indications of the existence of the Swedish law technical solution in question for determining the tax subject for VAT purposes according to a review of certain commentaries to the eleven countries’ VAT legislations.[98]

Regardless whether theoretically possible or not, the review here shows that neither other EU Member States than Sweden or other investigated countries with VAT in their economies seem to nave any connection from the national VAT legislation to their domestic income tax legislation, where the distinction of the tax subject from the consumer for VAT purposes is concerned. Thus, Sweden seems – at least where comparable countries are concerned – to be unique with its connection in the ML to the IL for determining the tax subject, and therefore the analysis may be made on the basis of a material consisting of the Swedish law sources and doctrine

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[96] See concerning Bulgaria, Art. 3(1) of Value Added Tax Act, promulgated on the 4th of August 2006; concerning Estonia, § 3(1) of Value Added Tax Act of the 10th of December 2003; concerning Latvia, Section 1.6 and Section 1.7 of Value Added Tax Act, updated per the 16th of June 2005; concerning Lithuania, Art. 2.2 and Art. 2.6 of Republic of Lithuania Law on Value Added Tax of the 5th of March 2002; concerning Romania, Art. 127.1 of Fiscal Code of Romania (Law No. 571/2003); and concerning Slovakia, § 3(1) of Act No. 222/2004 Coll. On Value Added Tax.

[97] See concerning Cyprus, VAT Services – Information For Business; concerning Malta, VAT Department Malta the 1st of February 2008, p. 3; concerning Poland, Tax Administration and Tax System in Poland, section 4.2.1, in Tax Information Bulletin 2004 from Ministerstwo Finansów; concerning Slovenia, p. 23 in Taxation in Slovenia March 2007 from Republic of Slovenia Ministry of Finance; and concerning the Czech Republic, pp. 17 and 55 in The Tax System in the Czech Republic. Economics Department Working Papers No. 245 (the 25th of May 2000), by Chiara Bronchi and Andrew Burns.

[98] See European Tax Handbook 2008: p. 123, the chapter on Bulgaria , by Mr. K. Lozev; p. 204, the chapter on Estonia, by Mr. M. Herm; p. 444, the chapter on Latvia, by Mr. Z. Kronbergs; p. 476, the chapter on Lithuania, by Mr. R. Degesys; p. 655, the chapter on Romania, by Mr. R. Badea; and p. 695, the chapter on Slovakia, by Dr. T. Mkrtchyan; and p. 148, the chapter on Cyprus, by Mr. A. Taliotis; p. 525, the chapter on Malta, by Mr. A. Zarb and Mr. P. Portelli; p. 614, the chapter on Poland, by Ms. M. van Doorn-Olejnicka; p. 709, the chapter on Slovenia, by Ms. J. Dolšak; and p. 166, the chapter on the Czech Republic, by Dr. T. Mkrtchyan.

compared to in the first place the EC law sources in form of the VAT Directive, but thus also the previous First and Sixth Directives, and the ECJ's verdicts.

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.[99] The EU-commission's 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 VAT Directive and other 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.

1.3.4 Something about social security contributions (Sw., *sociala avgifter*), excise duties (Sw., *punktskatter*) and customs (Sw. *tull*)

Of interest is that the Swedish legislation on social security contribution, excise duties and customs like the VAT are governed by the EC law.[100] Therefore, for the delimitation may something be mentioned briefly whether there are connections in the Swedish legislations thereof to the national Swedish income tax law.

- Concerning social security contributions in form of so called self-employed person's social security contributions (Sw., *egenavgifter*),

[99] See *Prop. 1994/95:19* Part 1 p. 528.
[100] 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*].

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.[101] That complies with the EC regulations 1408/71 and 574/72 on social security comprising both entrepreneurs and employees.[102]

- Note concerning excise duties that for tax on energy the tax subject 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 SUPPLEMENTARY RULE on YRVE which is 'made under forms comparable with NAVE' (Sw., "*bedrivs i former som är jämförliga med en till sådan näringsverksamhet hänförlig rörelse*").[103] For tax on advertisement the concept YRVE is partly also determined by a reference to the concept NAVE in Ch. 13 of IL,[104] whereas with YRVE concerning e.g. 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*").[105]

- Concerning customs the 'debtor' (Sw., "*gäldenären*") can be anyone reporting to 'the Customs' (Sw., "*Tullverket*") goods imported from a third country (i.e. from a place outside the EU), i.e.

[101] See Ch. 3 sec:s 3, 4, 5, 6, 8 and 11 of SAL.
[102] See Art. 1a and Appendix 1 of the EC regulation 1408/71.
[103] 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 2008 (Sw., *SKV:s Handledning för punktskatter* 2008), p. 226.
[104] See the first par. of the instr. to sec. 9 of the act on tax on advertisement and marketing [Sw., *första stycket anv. till 9 § lag (1972:266) om skatt på annonser och reklam*] and the SKV manual on excise duties 2008, p. 414.
[105] 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 2008, p. 62.

'reporting goods for transition to free transfer' (Sw., "*anmäler varan till övergång till fri omsättning*") within the customs union which is the EU.[106] The same applies for who's liable to pay VAT on import of the goods.[107] Thus, the liabilities to pay customs and VAT on import of goods don't apply only to entrepreneurs, but also to a private person reporting imported goods to the Customs.

Concerning customs and VAT on importation there's no reference to IL for determining the debtor. The SAL is neither of interest here. The problems there don't concern if, but whom of the mandator or the one doing the actual work shall pay social security contributions on work. Whereas the excise duty acts' connections to the IL's concept NAVE can be of interest for the topic of EC law conformity 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.[108] 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 analyse 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 Art. 33 of the Sixth Directive [nowadays Art. 401 of the VAT 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 Art. 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 makes a division of 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 work, where the subjective prerequisites for NAVE

[106] 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)*].
[107] See Ch. 1 sec. 2 first par. item 6 and second par. and Ch. 1 sec. 1 first par. item 3 of ML.
[108] See *Prop. 1994/95:54* pp. 81 and 82.

in Ch 13 sec.1 first par. second sen. 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 (Sw., *beskattningsbar person*) in the VAT Directive (and previously *skattskyldig person* in the Sixth Directive) on the topic of who can belong to the VAT system, whereas the question about the characteristics of the tax object 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 the scope of taxation so that otherwise formally taxable transactions remain untaxed.[109] Stefan Olsson notes that a definition of YRVE is lacking in most of the Swedish acts on excise duties, but he doesn't analyse 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.[110]

Thus, reason may exist to also try the EU law conformity of the Swedish legislation on excise duties with respect of the determination of the tax subject. However there will not be any review of the questions mentioned here, since this work on the topic of EC law conformity inter alia treats the connection from the ML to the IL for the determination of the tax subject in relation to the VAT Directive.

1.4 DISPOSITION

Sometimes is mentioned what's a value added, when an article of goods or a service shall be considered finally consumed and about VAT principles for various decisions. However has knowingly no effort been made so far to

[109] 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).

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

find a “tool” for the trial of a question like the present main question concerning the ML’s connection to the income tax law for determination of YRVE, i.e. of the tax subject. Thus, there are in the following a review first made of the basic VAT principles and how they – together with ECJ case law – can contribute to inter alia the analysis of whether the content of the concept YRVE in the ML, by the connection to the concept NAVE in Ch. 13 of IL, is EC law conform. That review cannot be said forming the only, ideal tool for the purpose, but gives based on the basic principles so to speak the nodes, i.e. guidelines and frames, for the continuing analysis of inter alia the question whether the determination in the ML of the tax subject is EC law conform. The disposition of the continuing review will thus be the following. Den genomgången kan inte sägas bilda det enda, ideala verktyget för ändamålet, men ger utifrån grundprinciperna så att säga noderna, dvs. riktlinjer och ramar, för den fortsatta analysen av bl.a. frågan om bestämningen i ML av skattesubjektet är EG-rättskonform. Dispositionen av den fortsatta framställningen blir därför följande:

- The review of the basic VAT principles and the method questions is made in chapter 2, which will be concluded with section 2.4. There’s an overview given of how the analysis of the main question of this work shall be done.

- In chapter 3 a review is made of who’s a taxable person and the concept E-VE according to the EC law. Together with the review in chapter 2 of the basic VAT principles it forms the necessary guidelines and frames for the trial of the questions in this work.

- Chapter 4 contains a trial whether the Swedish concept VE in the ML is EC law conform and when a VE cease to exist where VAT and income tax are concerned. There’s also briefly mentioned the importance of connections to the civil accounting law for the forming of norms for VAT and income tax, concerning the question of continued connection from the ML to the civil law concept GAAP.

- In the sections under 5.1 is mentioned the structure for and delimitation of the continued EC law analysis in chapter 5 of the main question whether the determination of YRVE in the ML is EC law conform where the formal connection to the concept NAVE in Ch. 13 of the IL is concerned.

- In chapter 6 is the question mentioned on the EC law conformity with the reference to Ch. 16 sec. 2 of the IL in Ch. 8 sec. 9 first par. item 2 of the ML for the determination of the scope of the so called deduction prohibition for input tax on expenses for entertainment and similar.

- Chapter 7 contains a summary with concluding viewpoints.

This work considers legislation etc. per the 1st of January 2008.

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

2.1 THE COLLECTION OF VAT

At each analysis of the VAT system should it be regarded that the VAT rules are strongly characterized by the way of how the tax is collected. 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*").[111] 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),[112] 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, as mentioned, distinguish itself from taxes on gross sales (Sw., '*bruttoomsättningsskatter*') 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, 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 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.[113]

The thought of the VAT system as a system for tax collection might possibly be perceived strengthened by the expression "*skatteuttaget*" [Eng.,

[111] See *Prop. 1989/90:111* p. 294.
[112] See British Tax Review 1998 p. 591, the article Restitution of Overpaid VAT (pp. 582-591), by Graham Virgo.
[113] See second par. of the preamble of the Sixth Directive and *Prop. 1994/95:57* pp. 73 and 93.

"procedure for charging the tax"] being changed to "*uppbörden*" [Eng., "procedure for collecting VAT"], when the important rule in Art. 27(1) of the Sixth Directive on Member States having to obtain permission from the EU to introduce rules for the purpose of stopping certain forms of tax evasion or avoidance was replaced on the 1st of January 2007 by Art. 395(1) of the VAT Directive.

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*").[114]

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 on earth the entrepreneur is established. Also when the entrepreneur's supply e.g. in the

[114] See *EG-skatterätt* (Eng., EC tax law), p. 197, 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.

EU Member State Sweden is only temporary and a single one, it shall be subject to VAT here one of those ways or the other.[115] To achieve that tax liability occur according to the main rule in Ch. 1 sec. 1 first par. item 1 of ML for all taxable transactions of goods or services within the country (Sweden), regardless where on earth 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 VAT Directive's 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 of 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*").[116] Thereto the EC regulation on tax administrative co-operation on VAT also applies between the tax authorities in the EU Member States.[117]

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

[115] See fifth par. of the preamble of the Sixth Directive and *Prop. 1994/95:57* pp. 155 and 175.
[116] See Art. 220 and 221(2) of the VAT Directive [previously Art. 22(3a) first and fourth par:s of the Sixth Directive]. See also the so called invoicing directive on VAT (2001/115/EC) [Sw., *faktureringsdirektivet (2001/115/EG)*] which was implemented in Art. 22(3) of the Sixth Directive [Art. 217-248 of the VAT Directive] and on the 1st of January 2004 in Ch. 11 of ML (*Prop. 2003/04:26*).
[117] 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.[118] 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”.[119]

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 Art. 12(4) of the Sixth Directive [nowadays Art. 99(1) of the VAT Directive] admitting reduced tax rates beside the general one.[120] Robert Påhlsson has in a comment of that thesis questioned that view as being a definition of neutrality.[121] 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*”).[122] 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*

[118] 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).
[119] 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”.
[120] See *Mervärdesskatt vid omstruktureringar* (Eng., VAT at restructuring measures), pp. 72 and 73, by Eleonor Alhager.
[121] 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.
[122] 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.

inre marknadens upprättande och funktion"),[123] 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.[124]

It would be beside the aim of this work to attempt to make a full law theoretical analysis of the EU law neutrality concept. In this work 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 principle, where the goal is neutrality on consumption within the EU admitting diversions there from 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 [nowadays the VAT Directive], 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

[123] See fourth par. of the preamble of the EC circulation directive on excise duties (92/12/EEC).
[124] 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.[125] 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.[126] The neutrality distortion of reduced VAT rates shall be limited – as stipulated in Art. 99(2) of the VAT Directive – by each such rate being determined so that applying it allows 'in the normal case' (Sw., "*i normalfallet*") deduction of the whole VAT deductible according to Art. 167-171 and 173, 176 and 177 of the VAT Directive [previously Art. 17 of the Sixth Directive]. The rules of the VAT 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*'),[127] 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.[128] 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 work, it

[125] See eleventh par. of the preamble of the Sixth Directive.
[126] See Art. 97(1) and 99(1) of the VAT Directive [previously Art. 12(3a) first and third par. of the Sixth Directive]. It's by the way only Great Britain, Ireland and Sweden which transitionally furthermore may have a so called zero-rate on certain goods and services by virtue of their treaties on accession to the EU. See e.g. section 30 and Schedule 8 in Great Britain's Value Added Tax Act 1994 concerning goods and services which are "zero-rated".
[127] See the EC Directive 91/680/EC which will be found in Art. 402-404 of the VAT Directive [previously Art. 28a-28n of the Sixth Directive].
[128] See *Prop. 1994/95:57* pp. 78 och 79.

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 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.[129] 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).[130] 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 [nowadays the VAT Directive], 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"),[131] it was deemed to be in conflict with EU law to refuse

[129] See in ML: Ch. 1 sec. 13a and Ch. 2a sec. 3 first par. item 1 compared to the second par.

[130] 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 Art. 26a of it [nowadays Art. 311-343 of the VAT Directive] and implemented in Ch. 9a of ML, the so called 'rules on margin taxation' (Sw., *vinstmarginalbeskattningsreglerna*).

[131] 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)

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 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 Art. 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 Art. 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.[132] 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,[133] it strengthens, in conjunction with the Mother-

[132] 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.

[133] 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

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.[134] 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., '*en princip om att avdragsrätten skall vara beroende av att beskattningsrätten också tillkommer samma stat för motsvarande inkomst'*).[135] 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

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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. 163 and 164, by Ståhl, Kristina och Persson Österman, Roger, where the same is expressed 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).

[134] 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

[135] See *EG-skatterätt* (Eng., EC tax law), pp. 149, 150 and 153, by Ståhl, Kristina and Persson Österman, Roger, where the second edition also can refer to "Bosal Holding".

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.

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.[136] The principle on reciprocity is also stipulated for the VAT, by Art. 1(2) and Art. 167 of the VAT Directive [previously Art. 2 of the First Directive and Art. 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 Art. 9(1) first par. of the VAT 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 Art. 43 EC (formerly 52).[137] 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

[136] 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.
[137] 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).

the other country involved is however not of interest here, since the analysis now will be about the internal neutrality.

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 Art. 9(1) first par. of the VAT 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 par. of the preamble of the VAT Directive [previously the fifth par. 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.[138] An entrepreneur who's a taxable person and as such comprised by the rules of the VAT 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

[138] 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.

sectors, the less will the assumed benefits of the situation be for the VAT free entrepreneur as well as for the consumer.

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.[139] 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.[140]

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 VAT 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*

[139] See *SFS 1990:576*; *bet. 1989/90:SkU31*; *Prop. 1989/90:111*; *SOU 1989:35*.
[140] See *Prop. 1968:100* p. 36.

undantag från denna rätt utgör ett undantag från regeln vilket endast kan godtas om det åtföljs av en mycket precis motivering").[141]

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].[142] 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*").[143] '*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.[144]

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 diminution of value on investments 'set up as assets' (Sw., '*aktiverade*') from 'the

[141] See COM (1998)377 final [Sw., *KOM (1998)377 slutlig*].
[142] Such a change took place when the VAT Directive replaced the Sixth Directive on the 1st of January 2007, but the investigation's suggestion to enter *beskattningsbar person* into the ML instead of *skattskyldig* and YRVE hasn't yet led to any bill of law.
[143] See *SOU 2002:74* Part 1 p. 163.
[144] 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.

income items' (Sw., '*intäktsposterna*').[145] 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.[146] Thus, the costs in the income 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.[147] 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.[148] The ideal is that input tax and output tax respectively will never be cost and income item respectively by the entrepreneur.[149]

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 Art. 9(1) first par. of the VAT Directive and the concept taxable person.

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[145] See Ch. 14 sec. 2 second par. first sen. and sec. 21 first par. and Ch. 16 sec. 1 IL.
[146] See Ch 14 sec. 22 third par. and Ch. 40 sec. 2 IL.
[147] See Ch. 1 sec.. 8 second par. and Ch. 8 sec. 2 ML and Ch. 8 sec. 3 first par. ML, which shall equal Art. 168 of the VAT Directive [previously Art. 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.
[148] See Ch. 11 sec:s 10 and 14 and Ch 18 sec. 2 first par. item 1 SBL.
[149] See Ch. 16 kap. sec. 16 first par. respectively Ch. 15 sec. 6 first par. first sen. IL.

Thus, the task here is to 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 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 VAT 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, since that question isn't mentioned by the Reform Treaty. Otherwise the aim is that the VAT shall be applied competition neutral. It follows already by the seventh par. of the preamble of the VAT Directive [previously the eighth par. of the preamble of the First Directive] that "even if rates and exemptions are not fully harmonized" (Sw., "*även om skattesatserna och undantagen inte är helt harmoniserade*") 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 Art. 1(2) of the VAT 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*").[150] The 'inner engine' (Sw., '*inre motor*') of the VAT can be described as a 'hermeneutic circle' (Sw., '*hermeneutisk cirkel*'), with the

[150] 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.

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 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 Art. 1(2) of the VAT Directive [previously Art. 2 of the First Directive], which in fact describes the basic principles of the common system of VAT.

An analysis of Art. 1(2) of the VAT 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 par. of Art. 1(2) of the VAT Directive reads:

"The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged" (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 par. can – together with the second par. – be construed expressing the POTB-principle.

The second par. of Art. 1(2) of the VAT Directive reads:

"On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deducting of the amount of VAT borne directly by the various cost components" (Sw., "*På varje transaktion skall mervärdesskatt, beräknad på varornas eller tjänsternas pris enligt den skattesats som är tillämplig på sådana varor eller tjänster, vara utkrävbar efter avdrag av det mervärdesskattebelopp som burits direkt av de olika kostnadskomponenter som utgör priset*.")

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

> In the Swedish language version of the second par. has, compared to the reading in the First Directive, the end been changed from "… *kostnadskomponenterna*" [Eng., the cost components] to "… *kostnadskomponenter som utgör priset*" [Eng., cost components which are the price]. That may lead to the misunderstanding that an addition of a profit wouldn't be included in the price, which normally constitutes the amount on which the VAT is calculated. Whereas at a supply free of charge that amount is formed only and at the highest by the costs of the supply, where it's a matter of a so called withdrawal taxation. If the alteration of the Swedish language version can be deemed necessary at all, the par. should have been ended "… kostnadskomponenter som *ingår i* priset" [Eng., cost components which are *included in* the price]. With that remark it's looked away from in this presentation, when reasoning about the principles which can be considered expressed by the directive rule in question, that the end of the second par. in the Swedish language version has undergone the alteration mentioned.

The third par. of Art. 1(2) of the VAT Directive reads:

"The common system of VAT 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 par. can – together with the first par. – 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 was also a fourth par. of Art. 2 of the First Directive, but it's been obsolete since 1993. It stipulated exemption from the third par. 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 the directive rule, which were transferred from Art. 2 of the First Directive to Art. 1(2) of the VAT 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.[151] However, the competition neutrality-principle isn't protected by EC 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 was presumed generally already according to the second par. of the preamble of the First Directive. Therefore, it's of interest to compare the principles of Art. 1(2) of the VAT 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).[152] 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.[153] 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 VAT Directive concerning exemptions from taxation are allowed, the aim when applying the VAT rules shall be competition neutrality.

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[151] 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).

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

[153] 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.

The reciprocity principle's strong position in the field of VAT is also expressed in Art. 167 of the VAT Directive [previously Art. 17(1) of the Sixth Directive], which stipulates that "[a] right of deduction shall arise at the time the deductible tax becomes chargeable" (Sw., "*[a]vdragsrätten skall inträda vid den tidpunkt då den avdragsgilla skatten blir utkrävbar*"). 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.[154] 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 are no longer valid as motives for Swedish diversions from the VAT 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 VAT 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

[154] 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.

(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.[155] The prohibition against retroactive tax legislation in the Swedish constitution,[156] 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

[155] 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*".
[156] See Ch. 2 kap. sec. 10 second par. of RF.

concerning the time before the EU-accession.[157] 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 VAT 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 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 Art. 1(2) of the VAT 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.[158] That was also the case with the preambles of the First and the Sixth Directives. 'Those applying the law' (Sw., '*rättstillämparna*') often missed that the ECJ refers not only to the Sixth Directive, but also to the First Directive. They often missed 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 Art. 2 of the First Directive. Above all should the POTB-principle be more emphasized by those applying the law, and it can hopefully be an improvement now that

[157] 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 work 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).

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

the First and Sixth Directives have been put together to the VAT Directive and the basic principles of Art. 2 of the First Directive are found in Art. 1(2) of the VAT Directive. Has a deducted VAT been taxed by the entrepreneur accounting for and paying output tax on his transactions? The importance of these circumstances should not be underestimated in any way. The question whether an evasion has occurred where VAT is concerned is important where trying questions on 'tax surcharge' (Sw., '*skattetillägg*') and 'tax fraud' (Sw., '*skattebrott*') in the field of VAT are concerned. Is that analysis missing e.g. in a prosecutor's crime description on the theme VAT fraud or in the court's verdict, the defendant may have been convicted and maybe already served the penalty, before the procedures on the tax issue itself has even been decided upon by The county administrative court. By the rules of the First Directive being put together on the 1st of January 2007 in the VAT Directive with the rules of the Sixth Directive, which more often have been noted expressly in the ECJ-verdicts, a higher awareness can hopefully be achieved concerning the basic VAT principles.

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 Art. 2 of the First Directive (and also to Art. 2 of the Sixth Directive), and thus inter alia to the POTB-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 Art. 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 Art. 17 of the Sixth Directive "relied on Art. 2 of the First Directive".[159] 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 Art. 2 of the First Directive [nowadays Art. 1(2) of the VAT 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.

[159] See British Tax Review 1998 p. 569, the article A Tide in the Affairs of Men … (pp. 563-572), by Michael Conlon.

An example of preliminary ruling where the ECJ not explicitly refer to Art. 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 Art. 2 of the First Directive being reflected by the case, although the ECJ goes directly into the Sixth Directive and apply Art. 2(1), 17(2) and 20(2) of the Sixth Directive [nowadays Art. 2(1) a and c, 168 and 187 of the VAT 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*").[160] However, the question is central for this work. *SOU 2002:74* makes a compromise 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 Art. 1(2) of the VAT 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 here only when it fills a structural, systematical purpose for the material analysis.

2.3.4 Literal interpretation, systematical interpretation and teleological interpretation

It's sometimes said that 'all interpretation begins with the text' (Sw., "*all tolkning börjar med texten*").[161] In the field of VAT that's first and foremost something that concerns the VAT 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 VAT Directive. The rules of the VAT 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

[160] See *SOU 2002:74* Part 1 p. 64.
[161] See *EG-skatterätt* (Eng., EC tax law), p. 42, by Ståhl, Kristina and Persson Österman, Roger.

principles on competition neutrality, reciprocity and POTB. For interpretation problems concerning the wording of a rule in the VAT 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.[162] 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.[163] 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 VAT 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 VAT Directive which shall guide in decisions concerning the corresponding rule in the ML.

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*").[164] 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 VAT Directive, can neither the same presumption be made as for a literal interpretation of a single rule in the VAT Directive. A 'judicial leap' (Sw., '*juridiskt språng*') at a systematical interpretation must be covered by the same aim.

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[162] See the ECJ case 283/81 (CILFIT).

[163] 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.

[164] See *Inför europeiseringen av svensk rätt* (Eng., Before the Europeanization of 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.

If not a literal interpretation – with or without a comparison of different language versions of the actual rule in the VAT 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.[165]

The importance of the principle of efficiency is confirmed inter alia by the in principle 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.[166] 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

[165] See *Prop. 1994/95:19* Part 1 p. 484.
[166] See *EG-skatterätt* (Eng., EC tax law), p. 52, by Ståhl, Kristina and Persson Österman, Roger.

excise duty would be levied in the destination country Great Britain 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 Great Britain 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.[167] 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 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 Great Britain.[168]

[167] See *EG-skatterätt* (Eng., EC tax law), p. 54, by Ståhl, Kristina and Persson Österman, Roger.

[168] 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

- 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*").[169] The goal here is that the VAT rules shall lead to a competition neutral distinction of who can belong 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.[170] 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

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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.

[169] See *Mål och metoder vid tolkning av skattelag* (Eng., Aims and methods at interpretation of tax law), p. 203, by Jan Kellgren.

[170] See *Prop. 1994/95:19* Part 1 pp. 486 and 487 and comments there of the ECJ case 6/64 (Costa).

alia' (Sw., "*bl.a.*") to the SAC case *RÅ 1984 1:67*.[171] 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 par. item 1 of ML. Nowadays an entrepreneur, regardless where on earth 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. Tax liability also applies to temporary, single transactions here, and the mandator in the case of 1984 should have more reason today to rely on the charge of Swedish input tax in the invoice concerning a correct purchase and that the supplier could be presumed tax liable for the corresponding supply. By the joint ECJ-cases C-439/04 and C-440/40 (Kittel and Recolta Recycling) follow that the right of deduction of input tax can be exercised in good faith about the counterpart's tax fraud. Thus, that corresponds with Swedish VAT law from the time before Sweden's EU-accession in 1995 and thereafter. Of interest is instead if rules from the time before the EU-accession which remain unchanged in the ML to their content can create problems for the determination of YRVE. That will be mentioned later in this presentation.

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.

[171] 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*.

The rule in Art. 9(1) first par. of the VAT 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 there from, 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 Art. 15(3) of the Sixth Directive [nowadays Art. 146(1d) of the VAT 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 VAT 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.[172] 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 [nowadays the VAT 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 VAT Directive-rule having direct effect, the court shall not apply the actual rule of the ML in the case. An example is Art. 168 of the VAT Directive [previously Art. 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*".[173]

The VAT 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).[174] However, ML is still Swedish legislation. Thereof follows that a duty for the individual to account for and pay output tax according to the VAT 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

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

[173] 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.

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

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.[175]

2.4 QUESTIONS FOR THE ANALYSIS OF THE MAIN QUESTION

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 VAT 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 Art. 9(1) first par. of the VAT 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.

A literal interpretation is of interest here only concerning to *whom* taxable person refer. It can already here be determined from Art. 9(1) first par. of the VAT 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. The international comparison in the introduction chapter of this work implies a request of activity exceeding the possession of property which in itself generates income, for an "economic activity" to be considered existing in the present sense. In Great Britain's VAT act is, as mentioned, "business"

[175] 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.

used, but in the English language version of the directive rule is “economic activity”. It can be said corresponding to ”*activité économique*” in the French language version of the directive rule, and, as mentioned, the Belgian VAT act and the French and Luxemburg tax acts contain the expression “*activités économiques*”, or the singular form of the same expression. A request of activity can also be said lying in that Great Britain’s VAT act, as mentioned, contains the expression “business carried on”. The same can be said applying to Denmark, the Netherlands and Spain which, as mentioned, in their VAT acts use the expressions “*driver ... økonomisk virksomhed*”, “*bedrijf ... uitoefent*” and “*realicen ... actividades*”. Thus, regardless whether there’s any difference between VE and activity, the perception by the implementation of the directive rule seems to be that it’s a question of something supposed to be exercised. In the same way can a perception of a request for activity be traced also by the German and Austrian VAT acts not containing “*Wirksamkeit*” in the present respect, but, as mentioned, the expression “*Tätigkeit ... ausübt*”. Also a Finnish perception of an activity request can perhaps be found, by, as mentioned, the VAT act there containing ‘business activity’ (Sw., “*rörelse*”) and ‘*businesslike*” (Sw., ’*rörelsemässig*’) when describing the tax subject. The question may be completed with an analysis of the ECJ’s case law says about the activity request and the degree thereof for an economic activity according to Art. 9(1) first and second par:s of the VAT Directive to be considered established.

Another question is *when* a person is a taxable person and as such entitled to deduction according to Art. 168 of the VAT Directive [previously Art. 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? Art. 9(1) first par. 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 Art. 9(1) first par. of the VAT 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 Art. 9(1) first par. of the VAT 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 VAT 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*') and VE which leads to tax liability in he ML work when it comes to determining who can and shall 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 VAT 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 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 the chapter Other issues, since it has to do with the conceptual world of the VAT and its structure without any connection to the IL.

Directly after the analysis of the concept taxable person there'll be another analysis, 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. That's about 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 the ML. That's one of the few proposals made by the investigation in a material sense. Although the investigation has its focus on the accounting issues, it's of interest here to examine whether the investigation has support for its proposal to remove the concept VE from the 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 [nowadays the VAT 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 [nowadays the VAT Directive's] rules supposed to be more 'transaction orientated' (Sw., "*transaktionsinriktade*") than those of the ML.[176] 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 the VE-concept in the ML doesn't have any direct corresponding concept in the VAT Directive, it has its similarity in the VAT 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

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

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 EC 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., E-VE) and NAVE respectively cease to exist.

A long with the analysis of the concept VE is also mentioned the importance of connections to the civil accounting law for the forming of norms for VAT and income tax. It will be done in relation to the question of the ML continuing to connect to the civil law concept GAAP. Thereby it's questioned whether there is 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. Therefore, the continuing analysis of the main question if the ML's connection to Ch. 13 of the IL is EC law conform for the determination of the tax subject will then be made without any particular regard of whether such a value could be considered existing.

3. TAXABLE PERSON: WHO, HOW AND WHEN?

3.1 TAXABLE PERSON, WHO?

3.1.1 The main rule

In Art. 9 of the VAT Directive it's stated who is considered to have the character of a taxable person. In Art. 9(1) first par., 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 VAT 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.[177] 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 Art. 9(1) first par. of the VAT Directive.

The elimination of non-profit-making organizations from the VAT system is made in the VAT Directive with reference to the tax object, i.e. the supply of goods or services. In Art. 131-134 of the VAT Directive [previously Art. 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*').

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

Finland and Sweden respectively are the only here examined EU Member States who don't follow the VAT Directive in this respect, but instead 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 Art. 131-134 of the VAT Directive [previously Art. 13A of the Sixth Directive] or specifically due to its character as such a subject according to Art. 13 of the VAT Directive [previously Art. 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

Art. 131-134 of the VAT 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., "*befaras vålla snedvridning av konkurrensen till skada för kommersiella företag som måste betala mervärdesskatt*", and that such a limitation of the exemption of public bodies is stipulated in Art. 13 of the VAT Directive.

3.1.2 Facultative rules on who's a taxable person

In Art. 12 of the VAT Directive [previously Art. 4(3) of the Sixth Directive], which is a facultative rule in the VAT 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 which constitute stock in such a business activity. 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 VAT Directive, i.e. when determining the tax subject. Furthermore, there's support to that relation in Art. 12 of the VAT 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 work.

Art. 12 of the VAT Directive or the predecessor Art. 4(3) of the Sixth Directive have 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 work.

Sweden used on the 1 of July 1998 the facultative rule in Art. 4(4) second par. of the Sixth Directive [nowadays Art. 11 of the VAT Directive] on the opportunity to register VAT groups, and the rules were implemented in a

new chapter (6a) in the ML.[178] Such a registration means exemption for the group members from the otherwise applying general principle that VAT isn't accounted in group. 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.[179] 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.[180] 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 work, 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 Art. 13 of the VAT Directive [previously Art. 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.[181] By *SFS 2007:1376* was by the way a second par. introduced in Ch. 4 sec. 7 of ML on the 1st of January 2008 meaning

[178] See *SFS 1998:346*; *Prop. 1997/98:134* and *Prop. 1997/98:148*.
[179] See *Prop. 1997/98:148* p. 26.
[180] See Ch. 6a sec. 2 first par. item 3 of ML.
[181] See Ch. 4 sec:s 6 and 7 of ML.

that a public body's transaction isn't comprised the exemption from YRVE for the exercise of authority, if it cause significant competition distortion.

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 it's comprised by the general rules of the ML on YRVE.[182] Such an activity is also comprised by the main question of this work, i.e. whether the connection from ML to IL is EU law conform for 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 Art. 13 of the VAT 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 work.

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 par. 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 Art. 4(5) first par. second sen. of the Sixth Directive [nowadays Art. 13 of the VAT 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 the directive rule, 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 par. 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*".[183]

[182] See *SKV:s Handledning för mervärdesskatt* 2005 (Eng., The SKV's manual for value added tax 2005), pp. 157 and 158 and *SKV:s Handledning för mervärdesskatt* 2008 (Eng., The SKV's manual for value added tax 2008) Part 1 p. 175.
[183] 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*.

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

3.2.1 Entrepreneur, not employee

Thus, the main rule on taxable person, Art. 9(1) first par. of the VAT Directive is of interest in this work, and the prerequisites ”independently” (Sw., ”*självständigt*”) and E-VE (Sw., ”*ekonomisk verksamhet*”) in that rule are amplified in Art. 9(1) second par. and 10 of the VAT Directive [previously Art. 4(2) and 4(4) first par. of the Sixth Directive].

In Art. 10 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 delimitation of the independence prerequisite against employment relations is clear in principle. 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 par. second sen. 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.[184]

The National Tax Board (RSV) has in a writ of the 6th of April 2000,[185] 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*

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

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 liability' (Sw., '*skattskyldighet*') according to Ch. 1 sec. 1 first par. 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 Art. 14a of the EC regulation on social security and taxable person according to Art. 9(1) first par. of the VAT 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*").[186] 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.

[186] 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).

3.2.2 E-VE

For the determination of E-VE there are first listed in Art. 9(1) second par. of the VAT Directive a number of active professional categories: (”[a]ny activity of producers, traders or persons supplying services including mining and agricultural activities and activities of the professions” (Sw., ”*varje verksamhet som bedrivs av en producent, en handlare eller en tjänsteleverantör, inbegripet gruvdrift och jordbruksverksamhet samt verksamheter inom fria och därmed likställda yrken*”). Furthermore it’s stipulated there that as economic activity shall also be considered ”[t]he exploitation of tangible or intangible property for the purpose of obtaining income there from on a continuing basis” (Sw., ”*[u]tnyttjande av materiella eller immateriella tillgångar i syfte att fortlöpande vinna intäkter därav*”) [previously Art. 4(2) of the Sixth Directive contained about the same wordings].

A taxable person according to Art. 9(1) first par. of the VAT Directive [previously Art. 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 the E-VE is some kind of activity which is supposed to generate a continuous income. That conclusion may, as mentioned, be considered confirmed by the English and French language versions of the directives containing the expressions “economic activity” and “*activité économique*” and the Belgian, French and Luxemburg legislations in the field containing the expressions “*activités économiques*”, or the singular form “*activité économique*” and by Great Britain’s VAT act containing the expression “business carried on”; the Danish VAT act, “*driver ... økonomisk virksomhed*”; the Dutch VAT act, “*bedrijf ... uitoefent*”; the Spanish VAT act, “*realicen ... actividades*”; the German and Austrian VAT acts, “*Tätigkeit ... ausübt*”; and the Finnish VAT act containing the expressions ‘business activity’ (Sw., “*rörelse*”) and ‘*businesslike*” (Sw., ’*rörelsemässig*’). Activity could be considered more precise for the context, 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 Art. 9(1) first par. of the VAT 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.

It follows from Art. 2(1) a and c of the VAT Directive [previously Art. 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.[187] 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

[187] 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)].

entrepreneur and shall separate his private economy from the one of his enterprise. The E-VE shall be able to identify objectively, so that it shall be 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 VAT 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*').[188]

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' (KL) and 'the state income tax act' (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.[189] 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

[188] See *Prop. 1998/99:130* Part 1 p. 229.
[189] See *Prop. 1999/2000:2* Part 3 pp. 396 and 397.

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*"),[190] 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., '*företagsskatterättslig*') rule.[191] 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*").[192] 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*".[193] However, it's obvious that the evidence

[190] See *Prop. 1999/2000:2* Part 2 pp. 177 and 178.
[191] 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 par. item 7 of BFL.
[192] See *SOU 1996:157* p. 331 and *Prop. 1999/2000:2* Part 2 p. 167.
[193] 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) 11th edition, p. 259, 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

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 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.[194] Thereby is made clear compared to GBFL the condition that the entrepreneur must clearly separate his private economy from the one of the enterprise.[195] 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.[196] 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.[197] Due to the new patterns of commerce created foremost on account of the IT-evolution the connection in sec. 8 second par. 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

concerning the connection between accounting and taxation in the connected area – some thoughts), by Claes Norberg.

[194] See Ch. 1 sec. 2 first par. item 7 of BFL.

[195] See *SOU 1996:157* p. 463.

[196] See *SOU 1996:157* p. 464.

[197] See Ch. 4 sec. 1 first par. items 1 and 2 and Ch. 5 sec. 2 of BFL.

business transaction shall be noted in the book-keeping, by the introduction of the BFL.[198]

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.[199] 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 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*').[200] The concept GAAP, which is developed under the responsibility of the Swedish Accounting Standards Board [Sw., *bokföringsnämnden*, abbreviated BFN) according to sec. 8 first par. 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 maintained 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 maintained 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*

[198] See *SOU 1996:157* p. 276etc. and 291 and also *Prop. 1975:104* p. 168.
[199] 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.
[200] See *Prop. 1975:104* p. 179.

som materiellt hänseende är så beskaffad att resultatet återspeglar det verkliga skeendet ekonomiskt sett i rörelsen").[201] 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 maintained 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 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*").[202] The prerequisites for Requirement to maintain accounting records aren't incompatible with the prerequisites for taxable person according to Art. 9(1) first par. of the VAT 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.

[201] See *Prop. 1999/2000:2* Part 2 p. 179.
[202] See *Prop. 1998/99:130* Part 1 p. 381.

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 [nowadays the VAT Directive] can in itself be claimed to be a totally objective concept.[203] 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 Art. 9(1) first par. of the VAT 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 Art. 9(1) first par. of the VAT 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 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 Art. 2 of the First Directive to [nowadays Art. 1(2) of the VAT Directive] describe the scope of the right of deduction of input tax according to Art. 17 of the Sixth Directive [nowadays Art. 167-171 and 173, 176 and 177 of the VAT 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 Art. 4(1) of the Sixth Directive [nowadays Art. 9(1) first par. of the VAT Directive]. The basic principles according to Art. 2 of the First Directive [nowadays Art. 1(2) of the VAT Directive] for the common VAT

[203] See *EG-skatterätt* (Eng., EC tax law), p. 198, by Ståhl, Kristina and Persson Österman, Roger.

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 VAT 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 Art. 168 of the VAT Directive need to be analyzed. The principle on reciprocity is stated in Art. 167, 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 Art. 168 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 (Art. 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 [nowadays the VAT Directive].[204]

It’s a procedural problem that the ECJ’s and the Advocate General’s emphasizing of the basic VAT principles in Art. 2 of the First Directive [nowadays Art. 1(2) of the VAT 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

[204] 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.

courts often omitting the basic principles following by especially Art. 2 of the First Directive [nowadays Art. 1(2) of the VAT 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 suggests according to item 11 of the ECJ case C-99/00 (Lyckeskog) precisely that the system, in conflict with the ECJ's practice,[205] risk leading to a non-EU conform domestic practice, if only the highest instance of the courts is obliged to obtain preliminary rulings from the ECJ in pursuance of the third par. of Art. 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 Art. 2 of the First Directive [nowadays Article 1(2) of the VAT Directive], which inter alia describes the POTB-principle, and Art. 17 of the Sixth Directive [nowadays Art. 167-171 and 173, 176 and 177 of the VAT 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 to make taxable transactions, for the acquisition to be deductible. In the "Abbey National"-case, where the POTB-principle of Art. 2 of the First Directive was 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

[205] See the ECJ case "Hoffman-La Roche".

the topic of evidence is if deductions are passed on and thereby taxed in pursuance of Art. 2 of the First Directive [nowadays Art. 1(2) of the VAT 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, emphasized that the latter mentioned principle aspect follows by Art. 2 of the First Directive.[206] The author of this work 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

[206] See the SAC case *RÅ 2003 ref. 36*. See also the advanced ruling *RÅ 2004 ref. 60* and the VAT cases *RÅ 2006 ref. 19 I and II*, which cases express the same principle for right of deduction for acquisitions constituting general costs in the VE as the case of 2003: they shall be proven aiming to lead to taxable transactions. In the case of 2006 the SAC express that although a direct and immediate connection is missing between acquisitions and taxable transactions, the costs for the acquisitions can ‘constitute such general costs in the VE that have a direct and immediate connection to the tax liable’s whole VE’ (Sw., “*utgöra sådana allmänna kostnader i verksamheten som har ett direkt och omedelbart samband med den skattskyldiges hela verksamhet*”. Such general costs can ‘be considered a part of the cost components of an enterprise’s production, and … therefore establish right of deduction’ (Sw., “*anses utgöra en del av kostnadskomponenterna för ett företags production, och … därför medföra avdragsrätt*”).

the principles on POTB and taxation in the end of the deductions in form of output tax in Art. 2 of the First Directive [nowadays Art. 1(2) of the VAT Directive].[207] 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.[208] 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.[209]

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[207] 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.

[208] Common for the cases of 2003, 2004 and 2006 is that they, to support that right of deduction for acquisitions constituting a part of general costs presupposes that it can be proven that they shall lead to taxable transactions, refer to the "Cibo"-case.

[209] 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 deduction 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.

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 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 VAT 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 Art. 9(1) first par. of the VAT Directive has such a character also when the person in question intend to make transactions exempted from VAT, 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 VAT Directive, 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 Art. 9(1) first par. of the VAT 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.[210] 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.[211]

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 Art. 9(1) first par. of the VAT 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.[212] 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,[213] and it's taxable according to Ch. 3 sec. 1 first par. 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.[214]

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[210] In the "Harnas & Helm"-case the ECJ refer to a similar decision in the ECJ case C-60/90 (Polysar).
[211] See commentary of the ECJ case C-155/94 (Wellcome Trust) in *SOU 2002:74* Part 1 p. 82.
[212] See *Prop. 1989/90:110* Part 1 p. 402.
[213] See Ch. 1 sec. 3 of ML.
[214] 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.

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 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 Art. 9(1) first par. of the VAT 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 Art. 9(1) first par. of the VAT 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 VAT 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 Art. 9(1) first par. of the VAT 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 VAT 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.[215] Equally as little as there's a definition of any value added is

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

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. 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 Art. 9(1) first par. of the VAT 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 VAT Directive, is of course made based on the independent concepts of the VAT 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 VAT 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 [nowadays the VAT 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 Art. 9(1) first par. of the VAT 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. At that trial the civil law concept Requirement to maintain accounting records has above all an evidence value. 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 for income tax and VAT.

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. A question is also when the right of deduction emerge in an economic activity giving the person in question the character of taxable person. There is the importance of taxable transaction of interest for that judgement. 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 whether the reference to Ch. 13 of IL for the determination of who's got YRVE according to the ML is conform with E-VE and taxable person in Art. 9(1) first par. of the VAT 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 Art. 168 of the VAT Directive is about, with respect of the idea of taxation of the deductions in the POTB-principle in Art. 1(2) of the

VAT 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 Art. 9(1) first par. of the VAT 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 Art. 1(2) of the VAT Directive and the rules in question of the VAT Directive.

3.3.1.2 Different alternatives of interpretation

Thus, the scope of the right of deduction according to Art. 168 of the VAT Directive connects to the concept taxable person in Art. 9(1) first par. of the VAT 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 Art. 2(1) a and c of the VAT Directive [previously Art. 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.[216] 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 Art. 168 of the VAT Directive [previously Art. 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 Art. 21(1a) of the Sixth Directive was already *beskattningsbar person* [Eng., taxable person] used and it was stated there that he is liable to pay output tax to the authorities, *when* he carry out a taxable delivery of goods or a taxable supply of services [Art. 193 and 194 of the VAT Directive]. Then it was stipulated in Art. 10(1a) of the Sixth Directive that tax liability has occurred, i.e. the chargeable event has occurred [Art. 62(1) of the VAT Directive]. Is that circumstance a presupposition for the occurrence of the right of deduction? The investigation *SOU 2002:74* did, concerning inter alia the expression *skattskyldig person* [Eng., taxable person], certain comparisons with other language versions than the Swedish, e.g. the English, but made thus a reservation for not being able to thereby make any material analysis within the frames of its assignment. Also for that reason is it of value that such an analysis is made here.

It wasn'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 Art. 17(1) of the Sixth Directive have given 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 was 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

[216] In Art. 2(1d) of the VAT Directive [previously Art. 2(2) of the Sixth Directive] is stated that VAT shall be paid for importation of goods.

to the taxable person in question. The idea of taxation of deductions in the POTB-principle according to Art. 2 of the First Directive in conjunction with Art. 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 Art. 2 of the First Directive), have 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. The same viewpoints can be made by an interpretation of the corresponding directive rules of the VAT Directive, since they've been transferred there without any material change intended.

What spoke against such an interpretation already previously is a literal interpretation and comparison between the Swedish and English respectively directive text. In the Swedish language version of the Sixth Directive was *skattskyldig person* used in Art. 2(1), 4(1) and 17(2), but *beskattningsbar person* is used in Art. 21(1a). Whereas in the English language version "taxable person" is used consistently in all of these directive rules. That *beskattningsbar person* wasn't used in Art. 17(2) of the Sixth Directive could be perceived as the Sixth Directive not presupposing any chargeable event of its own according to Art. 10(1a), before the right of deduction emerged for the *skattskyldiga personens* [Eng., taxable person's] acquisition. If *skattskyldig person* was another concept and it was used in Art. 4(1) to describe the character of the tax subject and as well in Art. 17(2) to determine the right of deduction, the right of deduction could be considered emerging without a taxable transaction first being made by him. On the other hand it was thus possible to defend the opposite interpretation with regard of a systematic interpretation based on the basic principles of reciprocity and POTB according to Art. 2 of the First Directive, if a completing literal interpretation didn't fulfill the objective of the interpretation here, a competition neutral VAT. However, neither such a teleological interpretation is free of problems. Since the described literal interpretation is no longer actual after *skattskyldig person* of the Sixth Directive has been replaced consistently by *beskattningsbar person* in the VAT Directive, it's of interest with a continuing analysis of the question at hand on the topic of competition neutrality.

If taxable transactions aren't provided, before the emergence of right of deduction, the one with much capital can build up a bigger supply in his enterprise and get better 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 vast 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 VAT 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 instead have a tendency to be fulfilled more efficiently by a taxable 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. Otherwise, he'd be depending on generating incomes rather immediately after the first investment expenses, to be able to pay for 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's practice.

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.[217] 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 Art. 4 of the Sixth Directive [nowadays Art. 9(1) first par. of the VAT 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 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 Art. 5(8) of the Sixth Directive [nowadays Art. 19 of the VAT Directive]. The deductions were yet referring to transactions which the unregistered company – a German so called *Vorgründungsgesellschaft* – had made in

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

the purpose of making possible taxable transactions which were planned to be carried out by the finally formed capital association.[218]

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*”).[219]

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 [nowadays the VAT Directive] in that respect, and this means that the occurrence of the right of deduction cannot be depending on taxable transactions first being 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 Art. 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*

[218] See item 41 in the ”Faxworld”-case.
[219] 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.

näringsidkaren") of the economical "burden" (Sw., "*belastning*") on the assets consisting of input tax paid on the acquisitions of them.[220]

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.[221] Thereby the affected entrepreneur can assume the position of party in the first instance court by the ECJ at his own initiative.[222] 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 there from 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 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.

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

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 Art. 17 of the Sixth Directive [nowadays Art. 167-171 and 173, 176 and 177 of the VAT 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.[223]

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 the extent of the initial deduction to which the taxable person is entitled under Art. 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*

[223] 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.

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 Art. 16 and 26 of the VAT Directive [previously Art. 5(6) and 6(2) 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 Art. 184-192 of the VAT Directive [previously Art. 20 of the Sixth Directive].[224]

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 maintained 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.[225] 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 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

[224] 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.

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

questioned whether any E-VE according to Art. 9(1) first par. of the VAT 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 Art. 9(1) first par. of the VAT 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 VAT Directive or the ML. Art. 9(1) first par. 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 Art. 4 of the Sixth Directive [nowadays Art. 9(1) first par. of the VAT 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”.[226] 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 Art. 9(1) first par. of the VAT 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 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*’)

[226] 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”.

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.[227]

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 stipulated 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.[228] However, the ECJ disqualified the ML in that respect in a verdict on the 20th of January 2005; the ML was 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.[229] In the latter respect follows by the ECJ's judgement that ML's rules on withdrawal taxation were in conflict with the corresponding rules in Art. 16 and 26 of the VAT Directive [previously Art. 5(6) and 6(2) 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*'). Therefore the rules had to be altered so that the ML only stipulates withdrawal for supplies free of charge and not for under pricing. In the context it can be noted that a new directive rule has been introduced by the VAT Directive, namely Art. 80, which is about revaluation of an under- or overpriced transfer between closely connected persons and where at least one party doesn't have a full right of deduction of input tax in his activity. However, the new article is about the revaluation of a transfer to be at the open market value and not about withdrawal. Therefore the new directive rule didn't change the need to alter the ML's rules on withdrawal taxation in accordance with what followed by the "Hotel Scandic Gåsabäck"-case, which was made later on the 1st of January 2008 by *SFS 2007:1376*. Of interest can also be that the new directive rule, which was implemented in the ML on the 1st of January 2008 to prevent tax evasion or avoidance (which also was made by *SFS 2007:1376*), didn't request an Art.

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

27-permit from the EU, i.e. what after the VAT Directive having replaced the Sixth Directive on the 1st of January 2007 should be called an Art. 395-permit.[230]

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?

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 Art. 4(1) of the Sixth Directive [nowadays Art. 9(1) first par. of the VAT 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.[231] More remains to be done on the topic of EU law conformity with the ML's rules on withdrawal taxation, although they were altered on the 1st of January 2008 in accordance with the case. 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

[230] See *Svensk skattetidning* (Eng., Swedish tax journal) 2007 p. 204, the article *Omvänd skattskyldighet inom byggsektorn – skapar den flera momsproblem än den loser?* [Eng., 'Reverse charge within the building sector – causing more VAT problems than it solves?'] – by Björn Forssén (pp. 195-206).
[231] See the SAC case *RÅ 2005 ref. 20*.

her commentary of the ECJ case Eleonor Alhager leaves it open to continue such a debate,[232] but in the latter respect is there no connection to concepts in the IL of interest for the topic of this work. 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 work, 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 VAT 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 must be taxed in a certain pace, for the POTB-principle according to Art. 2 of the First Directive [nowadays Art. 1(2) of the VAT 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".

[232] 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.

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 Art. 27 of the Sixth Directive for permission to introduce rules for the purpose of stopping certain forms of tax evasion or avoidance [Art. 395 of the VAT Directive].[233] 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 Art. 27.[234] Of interest for the context can be that for the building sector was according to the acts *SFS 2006:1031* and *SFS 2006:1293* a so called 'reverse charge' (Sw., '*omvänd skattskyldighet*') introduced also for transactions between entrepreneurs within the country on the 1st of July 2007. Here is also of interest that the motives for these rules 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 are however based on Art. 27 of the Sixth Directive,[235] 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 work.

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.[236] Although it's not expressed directly by the ECJ can the court thereby be deemed having taken into consideration Art. 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

[233] See items 21, 25 and 26 in the "Hotel Scandic Gåsabäck"-case.
[234] See *Prop. 1998/99:69* p. 15.
[235] See *Prop. 2005/06:130* pp. 1, 13, 24, 25, 28-30, 32, 45 and 47.
[236] See item 23 in the ECJ case C-412/03.

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 Art. 2 of the First Directive compared to Art. 33 of the Sixth Directive [nowadays Art. 1(2) and 401 of the VAT 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 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.[237] 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.[238] 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

[237] See *Prop. 1994/95:57* p. 117 and *Prop. 2002/03:5* p. 52.
[238] See *Prop. 1994/95:57* p. 118 and *Prop. 2002/03:5* p. 53.

considerations. Therefore can it very well now be considered clarified that en E-VE in the meaning of Art. 9(1) first par. of the VAT 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.[239]

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. 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 VAT Directive [previously 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.[240] 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

[239] See *SOU 2002:74* Part 1 pp. 94 and 95.

[240] 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.

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 Art. 12(1) of the VAT 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 Art. 9(1) first par. of the VAT Directive which shall be deemed implemented in the ML. The closest corresponding rule in the ML is Ch. 4 sec. 1 and the concept 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 VAT Directive [previously 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 VAT 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 work is whether the connection thereby to NAVE in Ch. 13 of IL is conform with taxable person in the VAT Directive. Another thing is it that the ML accept that he who has that character can belong to the VAT system regardless of where on earth 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.[241] That's EU law conform. Whereas it's not that the emergence of the right of deduction for acquisitions to the activity would be depending on taxable transactions first occurring in it. However, that's a problem depending on the structure of the ML itself which 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

[241] See Ch. 1 sec. 1 first par. 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 par. 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 VAT 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 VAT 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, it doesn't prevent a person from being a taxable person if transactions exempted from taxation are planned, instead of taxable transactions, 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 VAT Directive [previously 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 par. of ML). Thereby must the description of the emergence of the right of deduction in Ch. 8 sec. 3 first par. 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 VAT 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 with taxable person in the VAT Directive [previously 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 [nowadays the VAT 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 VAT 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,[242] but not the "Breitsohl"-case. That also goes for the SKV's manual on VAT 2008 (Sw., *SKV:s Handledning för mervärdesskatt* 2007).[243] 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., "*[a]vdragsrätten 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 Art. 17(2), 17(5) and 19 of the Sixth Directive [nowadays Art. 168, 173, 174 and 175 of the VAT Directive] with the national VAT act specially stipulating that a taxable person, who only carries out taxable transactions,

[242] See *RSV:s Handledning för mervärdesskatt* 2003 (Eng., The RSV's manual for value added tax 2003), pp. 99-105 and 379-380.
[243] See *SKV:s Handledning för mervärdesskatt* 2008 (Eng., The SKV's manual for value added tax 2008) Part 1, pp. 415 and 496-499.

would only get a limited right to deduct input tax on acquisitions of goods or services, just because they are 'subsidised' (Sw., "*subventionerade*").[244]

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.[245] 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

[244] 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 receiving public subsidies, introduced into the ML as Ch. 8 sec. 13a in 1997, cannot apply to activities fully deductible, only to mixed activities. By *SFS 2007:1376* Ch. 8 sec. 13a of ML was by the way abolished from the ML on the 1st of January 2008.
[245] See *Prop. 2002/03:5* p. 109.

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 par. of ML, where it's a question of the concept expressing an activity prerequisite corresponding to E-VE of the VAT Directive [previously the Sixth Directive], so that 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 par. of ML, and been entitled to deduct input tax also in that part.[246]

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',[247] 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

[246] 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., *SKV:s Handledning för mervärdesskatt* 2008 (Eng., The SKV's manual for value added tax 2008) Part 1, pp. 137, 138, 496 and 497 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.

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

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 work 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.

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*.[248] However, it's sufficient here to establish that *RÅ 1999 not. 282* is complying with the Sixth Directive [nowadays the VAT 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 Art. 9(1) first par. of the VAT 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.

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

It's been established that the concept VE in the ML is complying with the EC law, and necessary for the ML having a concept corresponding to E-VE in Art. 9(1) first par. of the VAT Directive for the determination of who's a taxable person and can belong to the VAT system. Before the analysis continues with the question when a VE cease to exist, may something also be said for additional confirmation that an 'activity-thinking' shouldn't be put in opposition to a 'transaction-thinking', but both viewpoints should exist, namely as to rather combine both the viewpoints with an 'asset-thinking' with respect of certain questions on VAT.

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

[248] 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.

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 which changed 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.[249] 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.

The analysis here is about 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 occurring by adjustment, despite tax liability – as a consequence of the change of character – emerging for the sale of them. Although the analysis here thus is about material questions concerning the determination of the tax subject, it can be noted that in such a perspective it can be motivated to combine an 'activity-thinking' and a 'transaction-thinking' with an 'asset-thinking'.

[249] 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".

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 VAT 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 VAT Directive for the judgement of inter alia when in time YRVE can be deemed to exist.

By Art. 4(2) of the Sixth Directive could 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 determining if the person in question has the character of taxable person, means that E-VE is an objective concept on the subject level. *Skattskyldig person* [Eng., taxable person] had "all activities" (Sw., "*alla verksamheter*"), i.e. all VE, in an E-VE. In the Swedish language version of Art. 9(1) first par. of the VAT Directive this has become more clear, by therein stating that a *beskattningsbar person* [Eng., taxable person] is carrying out "*en*" [Eng., 'a'] E-VE (which also is mentioned later on in the presentation). If the person in question has made acquisitions for transactions exempted from VAT, can he be taxable person, but must 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 VAT Directive,[250] but the concept VE is joined with E-VE in the VAT Directive, by an 'activity-thinking' has to be part of the trial

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

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:s by the taxable person. He must have liquidated all VE:s 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”.[251] 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 Art. 136 a and b of the VAT Directive [previously Art. 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*”) according to Art. 132, 135, 371, 375, 376, 377, 378(2), 379(2) and 380-390 [previously Art. 13, except 13(B.c), and Art. 28(3b) of the Sixth Directive]. 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 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 it is 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

[251] See previous reference to: 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”.

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*").[252] Now is thereby the ML conform with the VAT 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.[253] Of interest here is transfer of enterprises and mergers and similar, since they concern the subject's own taxation.

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.[254]

[252] See *Prop. 1993/94:99* p. 156.
[253] See *Prop. 1998/99:15* p. 102.
[254] See *Prop. 1998/99:15* p. 233.

By 'the Companies Act' [Sw., '*aktiebolagslagen (2005:551)*', ABL] of 2006 is now divisions (fissions) possible also according to civil law.[255] 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.[256] 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.[257] The prerequisites 'all assets' rules also for transfer of VE according to the IL.[258] By an amendment to the Merger Directive has one more possibility to restructure without immediate taxation been possible to introduce into the IL on the 1st of January 2007, namely partial fission, if the transferring enterprise has at least a branch of a VE left.[259] A branch of a VE is according to the rules on postponement a part of a VE suited to be separated into an independent VE.[260] 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 principle 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*".[261] According to the income tax rules from 1998 can withdrawal taxation be omitted in certain cases of under pricing transfer of a single asset, which raised the question on a corresponding alteration of Ch. 3 sec. 25 of ML (but that's never been made).[262]

Problems were considered existing with 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

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[255] See Ch 24 of ABL and *SOU 2001:1* pp. 271-274.
[256] 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) 11th edition, p. 462, by Lodin, Sven-Olof, Lindencrona, Gustaf, Melz, Peter and Silfverberg, Christer.
[257] See Ch. 37 sec:s 3 and 5 of IL and Ch. 23 kap. sec. 1 first par. and Ch. 24 sec. 1 second par. item 1 of ABL.
[258] See Ch. 38 sec. 2 item 1 of IL.
[259] See *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 11th edition, p. 465, by Lodin, Sven-Olof, Lindencrona, Gustaf, Melz, Peter and Silfverberg, Christer concerning Ch. 38 a sec. 2 of IL..
[260] See *Prop. 1998/99:15* p. 137.
[261] See the SAC case *RÅ 2001 not. 99*, which concerned the interpretation of Ch. 3 sec. 25 of ML after Sweden's EU-accession.
[262] See *Prop. 1998/99:15* p. 173.

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.[263] 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.[264] 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.

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

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

4.2.2.1 Lack of accounting rules in the VAT 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.[265] 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 VAT Directive is as mentioned lacking accounting rules, but Art. 19 [previously Art. 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.

Art. 19 of the VAT 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.[266] However, now is for the procedural

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

[266] 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

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 [nowadays the VAT Directive] already at Sweden's EU-accession in 1995.[267] 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 VAT 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 Art. 5(8) of the Sixth Directive [nowadays Art. 19 of the VAT 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 Art. 19 of the VAT 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.[268]

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

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

[267] See the SAC case *RÅ 2001 not. 99* concerning Ch. 3 sec. 25 of ML in relation to Art. 5(8) of the Sixth Directive [nowadays Art. 19 of the VAT 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.

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

the secondary law on income tax at least partly is in line with the VAT law and the VAT Directive's Art. 19.[269]

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 and 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.[270] 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, Art. 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.[271] 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 VAT 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

[269] 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 – Beskattningen vid gränsöverskridande omstruktureringar inom EG, m.m.*), p. 18, by Björn Forssén.

[270] 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).

[271] 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.

organizationally constitute a by itself functioning unit.[272] 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 Art. 5(8) of the Sixth Directive [nowadays Art. 19 of the VAT Directive], where 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.[273] 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*").[274]

Regardless of the legislative technical difference between the rule in the ML and the rule in the VAT 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 Art. 19 of the VAT Directive.

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

[273] The SAC case *RÅ 2001 not. 99* not mentioned in the standard work 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.

[274] See the SAC case *RÅ 2006 ref. 57*.

4.2.2.3 Comparison of the VAT 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 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.[275] 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 Art. 19 of the VAT Directive [previously Art. 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.[276]

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 VAT 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 Art. 173 of the VAT Directive [previously Art. 17(5) of the

[275] See *Prop. 1989/90:110* Part 1 p. 705.
[276] See *Prop. 1989/90:110* Part 1 p. 660 and the "Hotel Scandic Gåsabäck"-case.

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 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. The VAT Directive lacks special accounting rules; there's instead the pace of the accounting coinciding with the tax liability according to Art. 193, 194, 206, 250(1) and 252(1) [previously Art. 21(1a), 22(4a) first and second sen. and 22(4b) of the Sixth Directive]. However, it's 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. Although, 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 conform, and that will be analyzed here.

4.3 CONNECTIONS TO THE CIVIL ACCOUNTING LAW AND QUSTIONS ON FORMING OF NORMS AND EVICENCE FOR VAT AND INCOME TAX

Although the analysis here shall not deal with questions on accounting, tax procedure or procedural issues, it can be of interest to somewhat mention influences from the building of norms within the civil accounting law for the determination of the tax subject.

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.[277] 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 principle 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.[278] 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 in the actual case shall judge what's GAAP – which in practice means that the BFN's general advice are decisive for that question.[279]

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*").[280] 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.[281] 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*

[277] 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.
[278] 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.
[279] 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.
[280] See *Företagens inkomstskatt* (Eng., The enterprises' income tax), pp. 36 and 37, by Robert Påhlsson.
[281] See *Företagens inkomstskatt* (Eng., The enterprises' income tax), p. 37, by Robert Påhlsson.

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.[282]

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 GAAP to separate the entrepreneur's private economy from the enterprise's and, where issues of evidence are concerned, the entrepreneur from the consumers than the civil law one cannot be made out without a certain uncertainty about the 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 VAT 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*").[283] In that sense it can have a value to – opposite to what the investigation *SOU 2002:74* suggests – retain

[282] 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.

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

the so called connected area also for the VAT, i.e. the connection from the accounting rules in the field of VAT to the civil law concept GAAP. 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. That's what the analysis here is all about, but it can thus be noted that it could have a value in itself for the sake of legal certainty for the individual to be able to foresee as far as possible his tax character on the basis of available evidence for both VAT and income tax at the same time.

A development of a certain GAAP for taxes would probably lead to uncertainty about the legal rights of the individual where evidence in the tax procedure and in the court procedure are concerned, and the disconnection suggested by *SOU 2002:74* just for VAT rules on accounting in relation to the civil law concept GAAP could open for such a development. 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*").[284] Concerning the importance of the concept determinations 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 'principle 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*

[284] 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.

utstuderad").[285] Jan Kellgren refers in his book *Redovisning och beskattning* (Eng., Accounting and taxation) also to the first edition of the book which is now edited into this thesis, when he concludes – concerning that the books of account are only 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*"].[286] 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. Then the analysis here may continue with the question whether it's possible to maintain a common tax frame between VAT and income tax materially concerning the distinction between entrepreneurs and consumers, and the answer to that question shall be based upon the EC law governing the interpretation of the ML.

Here may also be mentioned that it's of course neither so that the accounting law has any prejudicial effect for the object issue, but in the field of VAT must national law stand back for the EU law in issues of 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 issue of 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'

[285] 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.
[286] 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.

(Sw., ”*hämtningsköp*”), and settles for that it is ’a rather good description’ (Sw., ”*en ganska bra beskrivning*”).[287]

[287] 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.

5. ANALYSIS OF YRVE IN THE ML IN RELATION TO NAVE IN CH. 13 OF IL

5.1 STRUCTURING AND LIMITING THE CONTINUING ANALYSIS

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

The analysis here is first of all about the necessary prerequisite fro tax liability in Ch. 1 sec. 1 first par. 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 on 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. Before that shall just something be mentioned about the existence of 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 par. item 1 of ML.[288] 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.[289] These three cases are thus formally about tax liability 'beside the' (Sw., "*vid sidan av*") main rule Ch. 1 sec. 1 first par. item 1 of ML. Therefore they aren't of interest for the trial which will be made here of the concept YRVE, and the following may be noted for that conclusion.

Ch. 6 of ML may – at least in some parts – be perceived as accounting rules, although the headline of the chapter is 'Special cases of tax liability' (Sw., "*Skattskyldighet i särskilda fall*"). However, the rules in question don't concern the main question here on YRVE, Ch. 6 sec. 1 of ML only contains a clarification that the ML accepts partnerships (Sw., *handelsbolag*) and so called European Economic Interest Groups (Sw., *europeisk ekonomisk intressegruppering*, EEIG) as tax subjects. It doesn't matter that these aren't taxed themselves according to the IL. YRVE is a necessary prerequisite also for a partnership or EEIG belonging to the VAT system. Ch. 6 sec. 2 of ML is only about partners in an unregistered partnership (Sw., *enkelt bolag*) or in a partner-owned shipping enterprise (Sw., *partrederi*) by virtue of Ch. 6 sec. 2 of ML appointing a 'one-man liable' for accounting the VAT amongst them, and the rule can be compared with when entrepreneurs (Sw., *näringsidkare*) apply for group registration to VAT according to Ch. 6a of ML and for the same reason appoint amongst them a head of the group. Ch.

[288] See Ch. 1 sec. 2 first par. item 1 of ML.
[289] See Ch. 1 sec. 2 § last par. of ML.

6 sections 3 and 4 of ML only constitute the legal bases for a bankrupt's estate (Sw., *konkursboet*) or the estate of a deceased person (Sw., *dödsbo*) belonging to the VAT system as 'tax liable' (Sw., "*skattskyldig*"), if the liquidation of the VE by a person in bankruptcy (Sw., *gäldenär*) or deceased (Sw., *avliden*) who's been tax liable according to the ML leads to taxable transactions. These rules may rather be perceived as special accounting rules, since they mean that any special trial shall not be made in such a case concerning whether the bankrupt's estate or the estate of the deceased person has YRVE.[290] Ch. 6 sec. 6 of ML 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. That's not of interest here, since the section is about public bodies (Sw., '*offentliga verksamheter*') and this work is focused on the question of separating for VAT purposes the enterprises (entrepreneurs) from the consumers. Ch. 6 sec. 7 of ML is neither of interest here, since it's about that an intermediary's trading of an article of goods or a service under certain circumstances can lead to the article of goods or the service being deemed as a supply by the intermediary as well as by his mandator. Ch. 6 sec. 8 of ML states that Ch. 6 sec. 7 of ML also applies to producers' enterprises formed by producers to sell their products at auctions. The question whether an intermediary has YRVE and can belong to the VAT system at all shall however be decided with respect of CH. 4 sec. 1 of ML as well as for others. Ch. 6 sec. 7 of ML doesn't stipulate any special treatment of that issue, but Ch. 6 sections 7 and 8 of ML are only special rules concerning the object question.

Ch. 9 of ML concerning voluntary tax liability for certain letting of immovable property has been mentioned previously in the presentation in the context of adjustment of deduction of input tax for so called Capital goods. Here may only be noted that voluntary tax liability according to Ch. 9 of ML exists based on a facultative rule, Art. 137(1d) of the VAT Directive [previously Art. 13(C.a) of the Sixth Directive], beside the VAT Directive's and the ML's rules on mandatory tax liability. Since the voluntary tax liability isn't limited to lessors with YRVE, but also can comprise private persons, are the rules in question not of interest for this work with the main question on distinction of who can belong to the VAT system into entrepreneurs and consumers.

Ch. 9c of ML concerns the treatment for VAT purposes of goods in certain warehousing arrangements. The rules in question concern the tax object linked to 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 tax warehouses, etc. Thus, the subject question isn't affected. The rules in Ch. 9c of ML is a part of the "transitional arrangements for the taxation of trade between Member States" (Sw., '*övergångsordningen för varuhandeln mellan EU-länderna*') and questions about them are thus about the external neutrality for the VAT.[291]

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[290] 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. See *Mervärdesbeskattning vid obestånd* (Eng., Value added taxation at bankruptcy), pp. 115etc., by Jesper Öberg.

[291] See Art. 154-163 of the VAT Directive [previously Art. 28(c.) of the Sixth Directive and Art. 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 Art. 402-404 of the VAT Directive [previously Art. 28(a)-28(n) of the Sixth Directive].

5.1.2 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

5.1.2.1 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 par. item 1 of ML, where thus the concept YRVE 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 on earth. 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 [nowadays the VAT 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 par. 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 VAT Directive.[292] 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 VAT Directive [previously the Sixth Directive] is only used in certain rules to determine the place of the supply.[293] 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

[292] See *Prop. 2001/02:28* p. 62.
[293] See *Prop. 2001/02:28* p. 44.

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 (nowadays the SKV's head office) 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 conform with taxable person according to the VAT 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 par. 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 work it won't be mentioned more. In Ch. 4 sec. 3 first par. 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 par. 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 par. 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 Art. 131-134 of the VAT Directive [previously Art. 13(A) of the Sixth Directive] with respect of the tax object.

5.1.2.2 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 Art. 13 of the VAT Directive [previously Art. 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.[294] Therefore there's no reason to in this work to take up public body-activities and the interface between 'exercise of authority' (Sw., '*myndighetsutövning*') and taxable person.

[294] 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.

5.2 YRVE

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

5.2.1.1 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 Art. 9(1) first par. of the VAT Directive. YRVE is one of the necessary prerequisites for tax liability according to the main rule in Ch. 1 sec. 1 first par. 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 par. 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 par. 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 VAT 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 VAT 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 VAT 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*) .

5.2.1.2 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 par. 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.

5.2.2 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 par. 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*"),[295] 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*").[296] Sec. 21 of KL correspond to Ch. 13 sec. 1 first par. second sen. 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

[295] 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.
[296] See *Prop. 1993/94:99* pp. 164 and 165.

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.[297] 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 par. second sen. of the chapter. Is the formal connection from 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 par. second sen.

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 VAT 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 concideration by 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

[297] See *SOU 2002:74* Part 1 p. 79 with reference to *Prop. 1999/2000:2* Part 2 pp. 759-760.

foresee, 'inter alia concerning the delimitation to the tax free area' (Sw., "*bl.a. när det gäller avgränsningen mot det skattefria området*").[298] 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.

5.2.3 YRVE, the reference to Ch. 13 of IL and the subjective prerequisites for NAVE in sec. 1 first par. second sen. of the chapter

5.2.3.1 The prerequisite of profit

In pursuance of the preparatory work to the predecessor to Ch.13 sec. 1 first par. second sen. 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*).[299] 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.[300]

The purpose of profit-prerequisite isn't complying with the presuppositions for taxable person according to Art. 9(1) first par. of the VAT 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"). 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

[298] See *Prop. 1999/2000:2* Part 2 p. 161 and also p. 191, where it's noted that after the commentary of 'the Swedish 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.
[299] See *Prop. 1989/90:110* Part 1 p. 310 and also p. 649.
[300] See also *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 11th edition, pp. 239etc., by Sven-Olof Lodin and others.

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 determination of taxable person in the VAT Directive, follows directly by the concept of 'purpose of making money-activity' (Sw., '*förvärvsverksamhet*') being used in the rule Ch. 13 sec. 1 first par. second sen. of IL.[301]

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.[302]

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.[303] 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.[304]

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[301] See the SKV's manual on taxation of income (Sw., *SKV:s Handledning för beskattning av inkomst*) at the tax assessment 2008 Part 2, pp. 52 and 53.
[302] See *Prop. 1989/90:110* Part 1 p. 312.
[303] See the SKV's manual on taxation of income (Sw., *SKV:s Handledning för beskattning av inkomst*) at the tax assessment 2008 Part 2, p. 53.
[304] See *Prop. 1999/2000:2* Part 2 p. 160.

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 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*").[305] 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 par. second sen. 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*").[306]

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

[305] See *EG-skatterätt* (Eng., EC tax law), p. 198, by Ståhl, Kristina and Persson Österman, Roger.

[306] 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.

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 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*").[307]

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*").[308]

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 abolition 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 Art. 9(1) first par. of the VAT 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

[307] See the SAC case *RÅ 2004 ref. 62*.

[308] See *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 11th edition, pp. 241 and 242, 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 work.

makes the actual connection from ML to IL for the determination of the tax subject EU law conform materially at least in that respect.

5.2.3.2 The independence-prerequisite

An independence-prerequisite (Sw., *självständighetsrekvisitet*) corresponding to the one in Art. 10 of the VAT Directive [previously Art. 4(4) first par. of the Sixth Directive] is found in Ch. 13 sec. 1 first par. second sen. of IL. It's as already has been established here EU law conform 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.

5.2.3.3 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 par. second sen. 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 par. 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 VAT 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 Art. 9(1) first par. of the VAT 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 VAT 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 par. second sen. of IL, which fulfill the function of objectively describing the emergence of an activity comprised by the VAT 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*").[309] 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.[310] 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 instr. 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 par. second sen. of IL.[311] That income source was abolished doesn't mean any material

[309] See Ch. 14 sec. 12 first sen. of IL.
[310] 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) 11th edition, pp. 35 and 398, by Sven-Olof Lodin and others.
[311] See also *Prop. 1999/2000:2* Part 2 pp. 184, 190 and 191.

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 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.[312]

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.[313] However, that reservation from the legislator can, which will mentioned later in the presentation, be insufficient, for avoiding non EU conform interpretation results meaning that the ML would allow a tax subject having more than one VE for VAT purposes also after Sweden's accession to the EU in 1995. Therefore the question may be raised whether a clarification in the ML is necessary, to make a notice that the trial of the concept VE in the ML shall be independent in relation to the income tax concept VE and income source from the time before 1994.

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 VAT 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

[312] See *Prop. 1999/2000:2* Part 2 p. 185 and *Prop. 1993/94:50* p. 222.
[313] See *Prop. 1993/94:99* pp. 163 and 165.

results for the value added taxation.[314] 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 'purpose of making money-prerequisite' in Ch. 13 sec. 1 first par. second sen. of IL which express 'the purpose of making money'. Although the clarification in the ML just mentioned would be considered necessary, which will be brought up again later in the presentation, it's to establish here that no material change is intended by the abolition of the concept income source from the income tax legislation. The income tax law legislation doesn't define the concept income, instead 'the scope of income taxation is stipulated by the income tax schedules' [Sw., "*inkomstbeskattningens omfattning anges I stället genom ... inkomstslagen*"].[315] Of interest here is that the basis for income taxation ever since the KL of 1928 has been and, with regard of the abolition of the concept income source by inter alia the KL being replaced by the IL not intending to mean any material change, still is the so called source theory. It means that taxation should only apply to income constituting a durable source of income, where only regularly recurrent income is considered income – not value fluctuations and profits on the source of income itself.[316] Thus, already according to the source theory there's an income tax law prerequisite of duration. The question in the present respect is now only whether the degree of activity given the duration prerequisite by the SAC's current practice concerning income of NAVE can be considered in compliance with the ECJ's view on when an investment constitutes E-VE.

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 VAT Directive where the determination of the tax subject is concerned.

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[314] See *Prop. 1993/94:99* p. 165.
[315] See *SOU 1989:33* Part II p. 20.
[316] See *SOU 1989:33* Part I p. 54.

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).[317] 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.[318]

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 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.[319] This can

[317] See the SAC case *RÅ 1988 not. 276*.
[318] See the SAC case *RÅ 1981 1:4*.
[319] 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 and the SKV's manual on

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 par. second sen. of IL and E-VE in Art. 9(1) first par. of the VAT Directive.

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 par. second sen. of IL is the reference from Ch. 4 sec. 1 item 1 of ML for that determination conform with Art. 9(1) first par. of the VAT 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.

5.2.4 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 par. second sen. 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 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 Art. 281-294 of the VAT Directive [previously Art. 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

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taxation of income (Sw., *SKV:s Handledning för beskattning av inkomst*) at the tax assessment 2008 Part 3, p. 615.

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 VAT Directive, be obsolete for that reason.

The SUPPLEMENTARY RULE was introduced during a time when the connection to the income tax law for the determination of the tax subject meant that the expressed 'purpose of profit'-prerequisite for NAVE of the time gave rise to problems with the delimitation against hobby activities. The SUPPLEMENTARY RULE was supposed to make the control easier of certain professional categories with big investment expenses not being put beside the VAT system and the possibility to lift off input tax on acquisitions. The SUPPLEMENTARY RULE was introduced for technical control reasons and not for technical tax reasons.[320] 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).[321]

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

[320] See *Prop. 1973:163* p. 60.
[321] 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, *SKV:s Handledning för mervärdesskatt* 2008 (Eng., The SKV's manual for value added tax 2008) Part 1 (section 8.3.2), pp. 158etc., *Prop. 1973:163* pp. 31 and 62 and *EG-skatterätt* (Eng., EC tax law), pp. 200 and 201, by Ståhl, Kristina and Persson Österman, Roger.

perspective.[322] 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.[323] 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. 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,[324] 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 sec. 1 first par. second sen. 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*).[325]

In the case (RÅ 1996 not. 168) 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. According to the presenter (Sw., *föredraganden*) in the SRN has it at the judgement 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

[322] See *Prop. 1989/90:110* Part 1 pp. 312 and 313.
[323] See *Prop. 1989/90:74* pp. 363 and 364.
[324] 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.
[325] See also the SAC case *RÅ 2001 not. 15*.

the ’profit-prerequisite’ in such cases (which by the way coincide with Sweden’s EU-accession in 1995).[326] 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 VAT Directive. It isn’t in conflict with the VAT Directive, since it thus could be considered supported Art. 281-294 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 work, 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 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 VAT 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.

[326] A long with this work due confirmation was obtained at a conversation on the 12th of March 2003 with the presenter in the SRN, Niclas von Oelreich, of that perception from a conversation in 1996 about the advanced ruling in question.

5.2.5 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 par. 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 par. 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 Art. 9(1) first par. of the VAT Directive as mentioned in Art. 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 there from 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 Art. 9(1) second par. second sen. of the VAT Directive [previously Art. 4(2) second sen. of the Sixth Directive] yet could be considered creating a problem for that question, can the two cases of

temporary transactions be deemed having support in Art. 12 of the VAT Directive [previously Art. 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 Art. 12 of the VAT Directive [previously Art. 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.[327] 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.[328]

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.[329]

Ch. 4 sec. 1 item 1 of ML can thus to the part the reference to Ch. 13 of IL concern sec. 1 first par. second sen. – with respect of current national income tax law-practice – be considered conform with the concept taxable person in Art. 9(1) first par. of the VAT Directive. By the "Hotel Scandic

[327] See *Prop. 1994/95:57* p. 175.
[328] See *Prop. 1993/94:99* p. 168.
[329] See Ch. 13 sec. 1 second par. second sen. of IL. By the way the income taxation concerning the real estate was delimited for private residential enterprises on the 1st of January 2007 (*SFS 2006:1344*).

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 Art. 9(1) first par. of the VAT Directive, can thereby the two items Ch. 4 sec. 3 first par. item 1 of ML and Ch. 4 sec. 3 first par. 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 par. 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 work of the reference in Ch. 4 sec. 1 item 1 of ML to concern only Ch. 13 sec. 1 first par. second sen. 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 par. 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 par. of IL 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 work.

If not the two changes recently mentioned are realized, can taken by itself Ch. 4 sec. 3 first par. items 1 and 2 of ML remain, since the items in question thus can be deemed having support in Art. 12 of the VAT Directive. The two items should also be left unchanged for the case that the continuing basis-criterion in Art. 9(1) second par. second sen. of the VAT 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 par. of the sec., for application of Ch. 4 sec. 3 first par. item 2 of ML, still be abolished. Such limit amounts aren't accepted in the VAT 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 Art. 281-294 and 295-305 of the VAT Directive [previously Art. 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 par. 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.[330]

5.2.6 Exemptions from YRVE, non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*)

5.2.6.1 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 par:s of IL and registered religious congregations for which tax liability don't apply according to Ch. 7 sec. 14 of IL.[331] By the way is, according to Ch. 4 sec. 8 second par. 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.[332]

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.[333]

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[330] See *SOU 2002:74* Part 1 pp. 91, 93 and 130-134 and *SOU 2002:74* Part 2 p. 21.
[331] See Ch. 4 sec. 8 first par. of ML.
[332] 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 par. of ML.
[333] 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 registered religious congregations and the tax system), pp. 690-699, by Dan Hanqvist and 'the SKV manual on foundations, non-profit associations and cooperatives etc. 2008' (Sw., '*SKV:s Handledning för stiftelser, ideella föreningar och samfälligheter m.fl. 2008*'), pp. 245 and 246.

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. Reference to the case was as mentioned made by the courts 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 [nowadays the VAT 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 par. second sen. 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 par. 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.[334]

Although if it also exist formal aspects with respect of the equivalent in Art. 131-134 of the VAT Directive [previously Art. 13(A) of the Sixth Directive] as mentioned describes the scope of the exemption from value added taxation in the field of non-profit-making-organizations as an

[334] See the SAC case *RÅ 2005 ref. 37*.

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.[335]

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 par. second sen. 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 Art. 9(1) first par. of the VAT 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 par. of IL is fulfilled, works on subject level according to the SAC, and although if the ECJ's competence for the income tax law problems in question is unclear, 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 a 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 mainly qualified for tax exemption according to the IL rules in question.[336]

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[335] See also *SOU 2002:74* Part 1 pp. 258-263.

[336] 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.

The question now is whether it's conform with the VAT 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 Art. 131-134 of the VAT Directive [previously Art. 13(A) of the Sixth Directive], which as mentioned concern certain activities for which exemption from taxation shall apply for non-profit-making-organizations.

5.2.6.2 The relation between Ch. 4 sec. 8 of ML and Art. 131-134 of the VAT 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 Art. 131-134 of the VAT Directive [previously Art. 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 Art. 131-134 of the VAT 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 (Sw., *idrottsföreningens*) traditional bingo evenings and lotteries to music

concerts.[337] 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 VAT 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 Art. 131-134 of the VAT 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 partnership (*RÅ 1993 ref. 100*) and the right to use for marketing purposes

[337] See also *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 31, by Björn Forssén.

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 there from 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.[338]

In two advanced rulings has the SAC made statements on playing rights in a golf association.[339] 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.[340] 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*

[338] See the SAC case *RÅ 2005 not. 96*.
[339] See the SAC cases *RÅ 2005 ref.4* I and II.
[340] 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.[341]

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 VAT 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 Art. 131-134 of the VAT 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 Art. 131-134 of the VAT

[341] 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 VAT 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 par:s and sec. 14 of IL.

The religious congregations which aren't registered are usually organized as non-profit-associations,[342] 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*'),[343] 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 VAT Directive and the limitation of taxation is determined with respect of the tax object. Such a formal conformity between the ML and the VAT 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.[344]

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

[342] See *Prop. 1998/99:38* p. 210.
[343] See *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 11th edition, p. 496, by Sven-Olof Lodin and others.
[344] 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.

question are comprised by YRVE according to the main rule in Ch. 4 sec. 1 item 1 of ML.

That the ML formally is only conform with the VAT 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,[345] and can thereby according to ML be value added taxed for transactions of goods and services for which Art. 131-134 of the VAT Directive are 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 Art. 131-134 of the VAT 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 par. second sen. 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.

[345] 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*').[346] 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*"),[347] 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 [nowadays the VAT 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 work would be unnecessary if it only was a question of mechanically listing which concepts in the ML connect to other legislation.

5.2.7 YRVE, how the determination of the tax object can influence the determination of the tax subject[348]

Previously in the presentation it's been suggested that a historical interpretation principle doesn't have any significant importance for the main question on the EU law conformity with the reference in ML to IL for the determination of the tax subject, but that problems for the determination of YRVE can arise if a rule in the ML has been given its content by older Swedish VAT law without having undergone any change at Sweden's EU-accession in 1995.

The concept VE is basic in the concept YRVE, since it's decisive for anyone being considered having such a purpose of making money with an activity that it doesn't only constitute a VE corresponding to the EU law concept E-VE, but also that the person in question thereby is independent and can be considered fulfilling the prerequisites for taxable person. The application problems brought up on the theme influences from older Swedish VAT law is that there's a connection in the preparatory work to

[346] See *SOU 2002:74* Part 1 p. 18.
[347] See *SOU 2002:74* Part 1 p. 257.
[348] See *Svensk skattetidning* (Eng., Swedish tax journal) 2007 pp. 538-557, the article *Momsens verksamhetsbegrepp i dåtid, nutid och framtid* [Eng., 'The VAT's concept VE then, now and in the future'], by Björn Forssén.

the ML to the income tax law concept VE and income source from the time before the 1st of January 1994 for the determination of the concept VE in YRVE in Ch. 4 sec. 1 item 1 of ML. However, that problem should be manageable at the application of current law, since the legislator marked that the older concept VE and income source in the KL from the time before the 1st of January 1994 only could be of a certain guidance for the ML's concept VE. Such a connection may according to the preparatory work mentioned not give an undesired result at the value added taxation.[349] Thus, the trial of the meaning of the concept VE has been provided to be executed with respect of the special conditions for the VAT and the determination of YRVE should thus be possible to handle where its content is concerned. This because it's been clarified in Swedish income tax law practice since *RÅ 1998 ref. 10* 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, which can said proven to be in compliance with the ECJ's practice concerning taxable person.

Instead it's more problematic if the determination of YRVE cannot be considered done so to speak once and for all, but being influenced by the character of the subject mentioned also in a rule on determination of the tax object. That's the case with the concept *parkeringsverksamhet* in the rule on taxable transactions for the letting of parking premises and sites in such a VE (note VE as the part *verksamhet* in *parkeringsverksamhet* here) according to Ch. 3 sec. 3 first par. item 5 of ML [*parkeringsverksamhet* will be abbreviated parking-VE here]. The concept parking-VE was namely determined in the preparatory work to changes in the GML on the 1st of January 1991, when such activities became subject to VAT, by a reference to the income tax law concept parking business activity of the time.[350] Parking-VE was thereafter transferred without any material change to the ML and was neither changed at the EU-accession. In the preparatory work to the changes in the ML at the EU-accession is only stated that Ch. 3 sec. 3 first par. item 5 of ML was considered EU law conform. Any trial of the concept parking-VE regarding the connection to parking business activity of the income tax was never made in the preparatory work.[351] The SAC miss this at the trial of an application for an advanced ruling in *RÅ 2007 ref. 13* and establish the majority's in the SRN ruling that a company's letting of premises and sites for storing boats is comprised by the rule on taxation

[349] See *Prop. 1993/94:99* p. 165.
[350] See *Prop. 1989/90:111* pp. 89 and 197.
[351] See *SOU 1994:88* pp. 110 and 114.

in Ch. 3 sec. 3 first par. item 5 of ML. The majority in the SRN just noted that the legislator considered the rule EU law conform without making the trial mentioned.

The problem with *RÅ 2007 ref. 13* for the present context is that neither the SRN nor the SAC go into the question about how the historical connection to the income tax law concept business activity affects the determination of the tax subject. The trial stays by the rule about the tax object, Ch. 3 sec. 3 first par. item 5 of ML, being in compliance with the ECJ in the case C-428/02 (Fonden Marselisborg Lystbådehavn) finding that the corresponding directive rule comprise letting of all means of transportation, i.e. not only cars, but also boats.[352] The minority in the SRN considered the principle of legality still meaning that taxation against the applicant's will couldn't be enforced, since the Swedish preparatory work and Swedish linguistic usage according to them meant that the purpose was that tax liability would comprise 'parking of motor vehicles in a special part of VE' [Sw., "*parkering av motorfordon i en särskild verksamhetsgren*"], and not letting of parking premises and sites for boats. That problem with the rule in question isn't of interest here, but here is the problem with it connecting to the income tax law's concept business activity mentioned and thus that a rule on the tax object can influence the determination of the tax subject. Although, in the context it can be mentioned that Ch. 3 sec. 3 first par. item 5 of ML is one of several rules in Ch. 3 sec. first par. which constitute exemptions from the exemption from taxation in the field of real estate according to Ch. 3 sec. 2 of ML, and that special problems exist in that field due to the concept real estate [Sw., *fastighet*] not being EU law conform in relation to the EU law's immovable property [Sw., *fast egendom*]. That question concerning the determination of the tax object is neither handled here, since it too lacks connection to the income tax law concept business activity or NAVE. The question about the influence from the rule in question at the determination of the tax subject has never had any proper analysis, but it was notified already from the beginning that the concept business activity in connection with the rule could cause problems. Before the introduction of the rule on taxation for letting of parking premises and sites in parking-VE in item 8 second par. d of the instr. to sec. 8 of GML the 1st of January 1991 the RSV wrote a memo titled 'Parking-VE from a value added tax point of view' [Sw., *Parkeringsverksamhet ur*

[352] See Art. 13B(b2) of the Sixth Directive, which has been replaced by Art. 135(2b) of the VAT Directive.

mervärdesskattesynpunkt].[353] It didn't bring up the problem in question with a distinction of the trial of the tax subject and the trial of the tax object. However, The real estate owners' association [Sw., *Fastighetsägareförbundet*] could in an article, where the RSV's memo is mentioned, state as its interpretation from contacts under hand with the RSV that although the income tax law concept business activity was replaced then by NAVE would it 'still decide the question whether tax liability exist or not' [Sw., "*alltjämt avgöra frågan om mervärdesskatteplikt föreligger eller ej*"].[354]

In the advanced ruling *RÅ 2003 ref. 80* was a tenant-owners' association external letting of parking premises considered comprised by the rule on taxable transaction in Ch. 3 sec. 3 first par. item 5 of ML, but neither was it there noted that the expressions in the preparatory work about the rule's EU law conformity were made without any analysis of the connection in question to the income tax' parking business activity. The majority of the SRN in *RÅ 2003 ref. 80* can be said confirming this, when they stated that the trial of the rule in question in the preparatory work was made with regard of the ECJ case 173/88 (Henriksen). That case was only about whether the directive rule which correspond to the actual rule in the ML provides that let parking spots are included in the same real estate complex as the flats and that the lettings are to the tenant-owner by the one and same landlord. The SKV does in its writs on parking-VE neither mention the legality of taxation principle nor the question about the connection to the income tax law concept business activity, but refers only to *RÅ 2003 ref. 80* and the "Henriksen"-case.[355] The majority of the SRN in *RÅ 2003 ref. 80* is on the other hand going into how the historical connection to the income tax law concept business activity at the determination of parking-VE

[353] See RSV's memo Parkeringsverksamhet ur mervärdesskattesynpunkt [Eng., Parking-VE from a value added tax point of view] of the 3rd of December 1990 (dnr D29-1487-90).

[354] See *Fastighetstidningen* [Eng., The real estate journal] No. 1 1991, p. 25, the article *Upplåtelse av p-plats ur momssynpunkt* [Eng., Letting of parking spot from a VAT point of view], by the association solicitors Leif Holmqvist and Christer Högbeck, *Fastighetsägareförbundet* [Eng., The real estate owners' association].

[355] 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*. Whereas the Swedish Bar Association, in connection with a reply on the 22nd of December 2004 (dnr R-2004/111) to the Treasury on a proposal of an EC regulation with certain instructions on application of certain rules in the Sixth Directive, has at least brought up inter alia the word *parkeringsverksamhet* (parking-VE) in Ch. 3 sec. 3 first par. item 5 of ML and the *lex scripta*-condition following by the legality of taxation principle. The author of this work took part in the work with writing the Bar Association's reply.

influences the determination of the tax subject. The majority of the SRN mention that the decisive question to determine whether the tenant-owners' association can belong to the VAT system is if the lettings constitute YRVE according to Ch. 4 of ML. However goes The SAC pass that question and establish the majority's of the SRN decision, and refer only to the rule on the tax object, Ch. 3 sec. 3 first par. item 5 of ML.

RÅ 2003 ref. 80 and *RÅ 2007 ref. 13* show there's a need of law clarification concerning the ML's concept VE with respect of historical connections to the national income tax law.

The necessity of the law clarification mentioned is proven also in another way. The minority of the SRN in RÅ 2003 ref. 80 considered that the external letting of parking spots is comprised by the tenant-owners' association's administration of the residential houses and thereby cannot be considered contained in 'a special income source concerning business activity' (Sw., "*en särskild förvärvskälla avseende rörelse*"). The majority of the SRN considered instead that the external letting in question could be deemed 'a from the administration of the residential houses separated YRVE' [Sw., "*en från fastighetsförvaltningen avskiljd yrkesmässig verksamhet*"]. They come to different conclusions in the question on value added taxation, but at least the majority of the SRN in RÅ 2003 ref. 80 is obviously thinking that a subject can have more than one VE. That's not in compliance with the EU law, which means that a taxable person has one E-VE. A taxable person has one single E-VE although it may be mixed and meant to lead to both exempted and taxable transactions. It's by his planning of the purpose of with the acquisitions that he himself decides when the VAT system and the rules on deduction shall apply.[356] It's the one and same E-VE which can be fully or partly deductible or not entitle to a right of deduction at all. That becomes more clear in Art. 9(1) first and second par:s of the VAT Directive, where it's stated that a taxable person is running "*en*" [Eng., 'a'] E-VE and that with such is meant "*varje*" [Eng., "each"] VE of a certain kind, to obtain income there from a continuing basis. In Art. 4(1) and 4(2) of the Sixth Directive were stated that a taxable person was running "*någon*" [Eng., 'some'] form of E-VE and that thereby was meant "alla" [Eng., 'all'] VE:s of a certain kind. In the same clarifying way works also the alteration that the concept "*rörelsegren*" [Eng., 'part of business activity'] in Art. 17(5) a and b of the Sixth Directive has been replaced by the for mixed activity more obvious "*verksamhetsgren*" [Eng., 'part of VE'] in Art. 173(2) a and 2b of the VAT Directive.

[356] See items 33 and 35 in the "Breitsohl"-case.

That the SRN and the SAC in RÅ 2003 ref. 80 seem to be thinking about a subject being able to have more than one VE for VAT purposes is – in a historical perspective – understandable. Until the ML replaced the GML on the 1st of July 1994 the Swedish VAT law provided that a subject could have several VE:s. That follows by the rule on distribution of the right of deduction of input tax on acquisitions in mixed activities, second par. third sen. of the instr. to sec. 17 of GML. There it was spoken about such a distribution inter alia when an acquisition concerns 'only partly VE causing tax liability or a VE which only partly cause tax liability' [Sw., "*... endast delvis verksamhet som medför skattskyldighet eller verksamhet som endast delvis medför skattskyldighet*". The latter part of the expression concerned a mixed activity, which is in compliance with the EU law, but the first part was about an acquisition being used in at least two VE:s by the same subject, where one of them were tax liable and the other exempted from taxation. At least since Sweden's EU-accession in 1995 the same subject isn't registered for several VE:s, and in consequence there's only the addition 01 in the VAT registration number. It should have been clarified at Sweden's EU-accession that the tax subject for VAT purposes nowadays only can have one E-VE. When the rule in question on parking-VE was introduced in 1991 the legislation allowed that several VE:s were registered for the same subject. The real estate owners' association interpreted then the RSV's standpoint to be that VAT liability for received fees applied 'if a real estate would have filed for and been taxed for his letting as one from the rest of the administration of the residential houses separated business activity' [Sw., "*[o]m fastighetsägare skulle ha deklarerat och skattat för sin uthyrning som en från fastighetsförvaltningen i övrigt separate rörelse*"].[357] That the perception of a possibility to register more than one VE for the same subject still remains is shown by the minority of the SRN in *RÅ 2003 ref. 80* talking about 'a special income source concerning business activity' (Sw., "*en särskild förvärvskälla avseende rörelse*") with regard of the tenant-owners' association's external letting of parking premises.[358]

[357] See *Fastighetstidningen* [Eng., The real estate journal] No. 1 1991, p. 25, the article *Upplåtelse av p-plats ur momssynpunkt* [Eng., Letting of parking spot from a VAT point of view], by the association solicitors Leif Holmqvist and Christer Högbeck, *Fastighetsägareförbundet* [Eng., The real estate owners' association].

[358] In the context can on the theme of a historical interpretation be mentioned that one of the Justices of the SAC [Sw., *Regeringsråd*] once also signed the mentioned memo from the RSV before the introduction of the rule in question in 1991.

Since the preparatory work to the ML makes a reference to the KL's VE and income source concept of the time before the 1st of January 1994 concerning the VE-part of YRVE, should a clarification be made meaning that this connection to the income tax law is obsolete. *RÅ 2003 ref. 80* shows that the reservation in the preparatory work to the ML for undesired results at the value added taxation isn't sufficient, for the national practice fully respecting that EU law applies in the field since Sweden's EU-accession in 1995 and that the implementation of EU law in the ML shall mean that a subject can only have one VE with regard of the concept YRVE. The clarification mentioned would make a better insurance of whether the trial of the concept VE in YRVE is fulfilled presupposes to comprise one VE, regardless if several activities by the subject lacks natural connection.

The minority of the SRN in *RÅ 2003 ref. 80* treats the rule on the tax object correctly, but doesn't express clearly enough that the reasoning about 'a special income source concerning business activity' (Sw., "*en särskild förvärvskälla avseende rörelse*") should apply to a VE with a VAT free part of VE consisting of the external letting. The minority of the SRN in *RÅ 2007 ref. 13*, which partly is the same as the minority of the SRN in *RÅ 2003 ref. 80*, lies formally closer to the EU law, by speaking of a 'special part of VE' [Sw., "*särskild verksamhetsgren*"] with regard of the rule on the tax object. A VE can for VAT purposes have a taxable and an exempted part of VE, but the same subject cannot according to the EU law have two VE:s with the same or different character concerning the tax object.

The historical interpretation problem according to RÅ 2003 ref. 80 and RÅ 2007 ref. 13 with the concept parking-VE in Ch. 3 sec. 3 first par. item 5 of ML and the connection to concept business activity in the income tax law shows that a mix up of the rule on the tax subject with a rule on the tax object can give a non EU law conform choice regarding who shall belong to the VAT system. The problem is that the business activity concept of the income tax law is about the subject's status, and that trial shall be finished by the trial of the concept YRVE in Ch. 4 sec. 1 of ML. It shall not come back also as a part of the trial of the object's status. Thus, a second material trial of the tax subject issue via the trial of the question of the tax object leads also to obvious evidence problems in the taxation procedure and the tax court procedure. The EU law means that rules on the tax object with prerequisites which are about the subject's status only exist concerning

certain cases of transactions by non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and similar.[359]

In the context it can be mentioned that there are rules on the tax object in Ch. 3 sec. 3 first par. of ML which contain concepts of business activity, but which aren't causing the described problem, since in these cases there's not a question of connections to the income tax law concept business activity. They are Ch. 3 sec. 3 first par. items 4 and 6 of ML, where taxable transactions are stipulated for inter alia letting of rooms in a hotel business and inter alia letting for ships of harbours. Hotel business was comprised of VÀT liability already before 1991, and the concept – which was transferred unchanged to the ML – was based according to the preparatory work to the GML on the act from 1966 on hotel- and pensions-activity [Sw., *lagen från 1966 om hotell- och pensionatsrörelse*].[360] The rule on tax liability for letting for ships of harbours was introduced in GML in 1991, and it replaced the regulation from 1968 on liability to pay VAT for harbour- and airport activities concerning letting for ships and aircrafts [Sw., *förordningen (1968:616) om skattskyldighet till mervärdesskatt för hamn- och flygplatsverksamhet beträffande upplåtelse för fartyg och luftfartyg*]. By the rule – which also was transferred unchanged to the ML – the tax liability was extended to comprise 'not only trade harbours but also other harbour business activity' [Sw., "*inte bara handelshamn utan även annan hamnrörelse*"]. That business activity concept was however aiming to note that the tax liability comprises also letting of harbour equipment and other things which aren't included as a part of the letting of the real estate.[361] Thus, both hotel business activity and harbour business activity differ from parking business activity in the sense that those concepts don't connect to the income tax law concept business activity. The determination of such activities is made foremost with regard of objective circumstances like the

[359] Previously in the presentation has also been mentioned the EU law conformity with the limitation of the value added taxation of 'public-utility'-non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*) being made with reference to the tax subject by the rule on exemption from YRVE in Ch. 4 sec. 8 of ML, instead of by any rule on the object in Ch. 3 of ML. That would have been the formally correct in relation to Art. 13A of the Sixth Directive [Art. 132(1) of the VAT Directive]. However, that's not of interest here, since *RÅ 2003 ref. 80* and *RÅ 2007 ref. 13* aren't about such organizations and congregations, but about a tenant-owners' association, which is a kind of economic association, and a company. Thus, in both cases the question were only about the application of the main rule on YRVE in Ch. 4 sec. 1 item 1 of ML.

[360] See *Prop. 1968:100* p. 67, *Prop. 1989/90:111* pp. 107 and 197 and *Prop. 1994/94:99* p. 149.

[361] See *Prop. 1989/90:111* pp. 89, 197 and 198.

number rooms or guests, concerning hotels, and investment in quay spaces and harbour equipment, concerning harbours. The determination of the tax object in both these cases doesn't contain anything about the subject's character which in practice could affect the determination of YRVE.

Another problem would be if it was claimed concerning VE:s that request permits there's some kind of 'fourth prerequisite' [Sw., "*fjärde rekvisit*"] for business activity or NAVE.[362] A hotel business activity provides permit from the police authority, and that's, via the connection in the preparatory work to the GML to the act mentioned of 1966, of importance for the determination of the tax object because the rule on taxation in the GML has been transferred unchanged to the ML. However, the permit question doesn't affect the determination of the tax subject. There's no 'fourth prerequisite' besides duration and independence and the in older practice regarded profit-prerequisite for the determination of NAVE. This may be considered following from the SAC, where the lower instances verdicts were removed and the SAC established the SKV's standpoint. The case was about a taxi business which requested permit, and the SAC considered that it had been tax liable according to the IL, despite it lacked the requested permit. The SAC expressed that the fact that a certain NAVE isn't legal due to the requested permit for running it legally is missing cannot 'in itself have as a consequence that the income of the activity isn't tax liable' (Sw., "*inte i sig få till konsekvens att inkomsten av verksamheten inte är skattepliktig*", although 'the entrepreneur thereby commits a criminal offence' (Sw., "*näringsidkaren ... därigenom gör sig skyldig till en brottslig handling*".[363] Thus, questions on permits can only have significance for the determination of the tax object according to ML, like with a police permit for hotel business activity, not concerning the determination of the tax subject. Whether the permit prerequisite for determining tax liability according to the ML for letting of rooms in hotels is EC law conform is another question than the one treated here.

Here can also be mentioned that the rules on hotel business activity and harbours are mentioned in *RÅ 2003 ref. 80* and *RÅ 2007 ref. 13*, but only as a counterpart in the object question to the concept parking-VE in Ch. 3 sec. 3 first par. item 5 of ML. Therefore the two cases don't say anything about that concept's connection to the income tax law concept business activity and importance to the subject question, and it's the concept VE in

[362] Se även *Momshandboken Enligt 1998 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 42, by Björn Forssén and *Momshandboken Enligt 2001 års regler* (Eng., The VAT handbook. According to the rules of 2001), p. 53, by Björn Forssén.
[363] See *RÅ 2005 ref. 14*.

connection with the determination of the tax subject which is of interest here.

5.2.8 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

5.2.8.1 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 par. 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 par. second sen. 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 par.second sen. 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 VAT Directive [previously 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 par. 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.[364] 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 of 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*").[365] The activity based classification is in compliance with the activity request which is lying in E-VE according to the VAT 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 par. 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 par. second sen. 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 Art. 9(1) first par. of the VAT Directive can hardly be considered fulfilled in the described situation. In this work is as mentioned 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 par. second sen. 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

[364] See Ch. 2 sec. 14 of IL, *Prop. 1989/90:110* Part 1 p. 501 and *RÅ 1994 not. 302*.(whereto by the way a reference is made in the list of cases in *RÅ 2003 ref. 80*)

[365] 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.

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 issues of 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.[366] 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

[366] 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.

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 an advanced ruling on VAT, where a reference is made to inter alia RÅ 2005 ref. 19, it's noted that the fact that a partner supplies services to the partnership in which he's a part owner doesn't taken by itself rule out the emergence of tax liability, but that the request for consideration usually cannot be considered fulfilled if the payment to him only consist of the right to take part in a future profit from the partnership's activity.[367]

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-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

[367] See *RÅ 2007 ref. 6*.

and his wife. The person in question was considered a taxable person, 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. (In the advanced ruling *RÅ 1995 not. 224* the transaction prerequisite within a group of companies was tried, but limited to GML).

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 Art. 9(1) first par. of the VAT 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 par. item 1 of ML, since shares aren't tax objects for VAT purposes. Thus, no right to deduct input tax according to Ch. 8 sec. 3 first par. of ML exist in 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 par. 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 be a direct ownership of a real estate, has the company in question not only YRVE formally. It may then 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 Art. 9(1) first par. of the VAT 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.[368] 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 company is formed.[369] 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.

[368] 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.

[369] 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.

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 Art. 2(1) of the Sixth Directive [nowadays Art. 2(1) a and c of the VAT 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 Art. 135(1b) of the VAT Directive [previously Art. 13(B.d1) of the Sixth Directive] is the right to deduct input tax on the acquisitions in the VE limited.[370] Of interest here is that the SRN's and the SAC's viewpoint 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

[370] According to the ECJ case C-437/06 (Securenta) the right of deduction by the way never comprises expenditure assignable to "non-economic activities" outside the scope of the VAT system.

between the companies becoming comprised by the VAT's rules, 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 par. second sen. 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 work 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.[371] 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 the conditions for taxable person being deemed having YRVE formally, regardless whether they are physical or judicial persons.

[371] See the SAC case *RÅ 2006 ref. 58*.

5.2.8.2 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 Art. 9(1) first par. of the VAT 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 par. 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 VAT 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 VAT 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.[372] This freedom of choice has been hard to combine with Art. 11(A.3a) of the Sixth Directive [Art. 79 a and b of the VAT 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 according to Art. 90 of the VAT

[372] See *Prop. 1993/94:99* p. 240 and Ch. 7 sec. 6 first par. and Ch. 13 sec:s 24, 25 and 26 of ML.

Directive [previously Art. 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.[373] 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 VAT 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 par. 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 par. of the sec. 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 the case of the sale

[373] See *Prop. 2002/03:5* p. 73.

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 par. 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 VAT 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.[374] 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.

[374] 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.[375] 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 par. 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.[376]

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 par. second sen. 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 VAT Directive.

5.2.9 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 prerequisites for NAVE in Ch. 13 sec. 1 first par. second sen. of IL, but

[375] See Ch. 1 sec. 3 first par. second sen. 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.

[376] 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 was mentioned for the question on YRVE.

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,[377] 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',[378] 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.[379] 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 requested that the services also normally are supplied externally, which

[377] See Ch. 1 sec. 3 first par. second sen. 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.
[378] 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.
[379] See Ch. 22 sec. 7 first par. 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*").

prerequisite wasn't deemed having any support by the Sixth Directive [nowadays the VAT Directive].[380] 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.[381] 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.[382]

Apart from these reflections on the theme transaction remains to judge if incomes that fully fall outside the three income schedules, by the connection from Ch. 4 sec. 1 item 1 of ML to the income schedule NAVE in the IL, cause a limitation of the value added taxation in conflict with the VAT Directive. Would it be possible for the incomes to be incomes in YRVE, if it wasn't for the connection to NAVE in the IL? Thereby is an older case, *RÅ 1964 ref. 16*, which isn't commented in the doctrine,[383] 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.[384]

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[380] See *Prop. 1994/95:57* p. 117. See also *Svensk moms i EU* (Eng., Swedish VAT in the EU), p. 24, by Björn Forssén.

[381] See *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 11th edition, p. 250, by Sven-Olof Lodin and others and *Prop. 1989/90:110* Part 1 p. 660.

[382] See *Prop. 1989/90:110* Part 1 p. 660.

[383] See e.g. *Inkomstskatt – en läro- och handbok i skatterätt* (Eng., Income tax – an educational- and handbook in tax law) 11th edition, p. 699, 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.

[384] 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) 11th edition, pp. 68 and 69, 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 par. 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 par. item 1 of ML.

The SRN has in a legally binding advanced ruling of the 21st of December 2005 on VAT considered that a 'consideration for standstill' (Sw., '*ståndsersättning*') 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 par. of IL or thereby comparable business activity' (Sw., "*någon av bolaget bedriven näringsverksamhet enligt 13 kap. första stycket IL eller därmed jämförlig rörelse*").[385]

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

[385] The author of this work assisted the applicants in the advanced ruling in question.

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 par. 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 Art. 4 of the Sixth Directive [nowadays Art. 9(1) first par. of the VAT 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 par. second sen. 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 Art. 9(1) first par. of the VAT 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 par. second sen. 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 Art. 4 of the Sixth Directive [nowadays Art. 9(1) first par. of the VAT 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 Art. 4(1) of the Sixth Directive [nowadays Art. 9(1) first par. of the VAT 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 par. 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 work to limit the reference in Ch. 4 sec. 1 item 1 of ML to Ch. 13 sec. 1 first par. second sen. 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 par. second sen. 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 Art. 9(1) first par. of the VAT Directive, but when ML is giving a wider space for deduction than the VAT 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 par. second sen. of IL.

6. THE DEDUCTION PROHIBITION IN THE ML FOR EXPENSES FOR ENTERTAINMENT AND SIMILAR AND THE CONNECTION TO THE IL

Questions on the right of deduction have previously been mentioned in the presentation, but then in a more systematical, structural sense. It's first of all been an issue about the relation between tax liability and the right of deduction and the meaning thereby of the expression 'VE causing tax liability' (Sw., "*verksamhet som medför skattskyldighet*") in Ch. 8 sec. 3 first par. of the ML, which is about the general right of deduction for input tax, and the existence of a rule on registration under the provision of special reasons in Ch. 10 sec. 9 of ML, before the occurrence of income. A clarification should, as mentioned, be made so that the ML cannot be construed providing that taxable transactions must have occurred by a taxable person with the purpose of making such transactions in his economic activity, before the right of deduction emerge. Such a request is in conflict with the EC law expressed by the ECJ's practice. Otherwise it's been established that the ML is conform with the VAT Directive when it comes to t´he concept VE. It's necessary in YRVE so that the ML may contain a concept corresponding to the directive's 'economic activity' (Sw., E-VE), for the sake of confirming that a purpose of making money exist and that the person in question can be deemed having the character of taxable person and thereby be able to belong to the VAT system. Therefore, it remains here on the topic of right of deduction – considering the choice of subject – only to examine whether the connection existing in Ch. 8 sec. 9 first par. item 2 of ML to Ch. 16 sec. 2 of IL for determining the scope of the so called deduction prohibition for expenses for entertainment and similar (Sw., *representation och liknande ändamål*) is EC law conform.

Deduction prohibitions are, as mentioned, possible for Sweden to retain for the time being after the EU-accession in 1995 according to Art. 17(6) second par. of the Sixth Directive [nowadays Art. 176 second par. of the VAT 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. Previously in the presentation it's been mentioned that the EU-commission in connection with its – not introduced – proposal of the 17th of June 1998 to introduce special rules on prohibition of deduction also pointed out that "the right to deduct is a basic feature of the value added tax system" (Sw., "*avdragsrätten utgör en grundläggande del av mervärdesskattesystemet*"), and that it means that "any exclusion from this

right is an exception to the rule, which is unacceptable unless it is specifically justified" (Sw., "*varje undantag från denna rätt utgör ett undantag från regeln vilket endast kan godtas om det åtföljs av en mycket precis motivering*"). Of interest is therefore whether the connection to IL is EU law conform in 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,[386] 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.[387]

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 Art. 27(1) of the Sixth Directive [nowadays Art. 395(1) of the VAT Directive] for avoidance of tax evasion and tax loss, exemption from the general right of deduction in Art. 17 of the Sixth Directive [nowadays Art. 167-171 and 173, 176 and 177 of the VAT Directive] was introduced concerning the tax liable's acquisitions for entertainment of goods and services. Divergence from the rules in the Sixth Directive [nowadays the VAT 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 which, according to the so called principle of proportionality in Art. 5 EC (formerly 3b third par.), stands in proportion to the aim to prevent tax evasion and avoidance, and influence then the aim and principles of the Sixth Directive [nowadays the VAT Directive] in a far too large extension.

[386] See Ch. 8 sec:s 9, 10, 15 and 16 of ML.

[387] See e.g. *RÅ 2003 ref. 100*, where reference – in case I – 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.

The ECJ's interpretation of Art. 27 [Art. 395 of the VAT Directive] was made in the case in comparison to precisely Art. 17(6) second par. of the Sixth Directive [Art. 176 second par. of the VAT 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 therefore that the income tax law principles concerning the limitation of the scope of deductible internal and external entertainment according to Ch. 16 sec. 2 of IL doesn't seem to be EC law conform, when considering the current Swedish practice in the field. For the sake of the VAT must a trial of the scope of the deduction prohibition be allowed to be made on the topic whether the costs which formally can be referred to thereby can be considered having emerged in the business activity (Sw., *rörelsen*) and still shall entitle to deduction. Thereby 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 according to the recommendations and general advice which have been given by the RS`V and the SKV's head office respectively.

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 par. 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 VAT Directive. Although the authorities and courts shall disregard such a domestic practice in conflict with the VAT 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 par. first sen. of IL) about the costs (expenses) supposed to be for generating and keeping revenues (incomes).[388] 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

[388] See *Prop. 1998/99:32* p. 80.

deduction. According to item 28 of the ”Lennartz”-case the ECJ thus considered that Art. 17 of the Sixth Directive [Art. 167-171 and 173, 176 and 177 of the VAT 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.[389] 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.

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 work in an article.[390] In that article is by comparison another article by the author of this work mentioned,[391] to illustrate that any

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[389] See also *EG-skatterätt* (Eng., EC tax law), p. 219, by Ståhl, Kristina and Persson Österman, Roger, where they with respect 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*”).

[390] 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 income 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.

[391] 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

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 been "modernized" 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 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*'). In these cases is the delimitation between private costs and expenses in the business activity so sophisticated that the reference to the national Swedish income tax law practice with rather standardized criterion cannot be considered EC law conform for the judgement whether the expenses are comprised by the deduction prohibition in question. Thus, the connection from Ch. 8 sec. 9 first par. item 2 of ML to Ch. 16 sec. 2 of IL should be revoked, so that also a

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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.

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 par. 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 Art. 17 of the Sixth Directive [nowadays Art. 167-171 and 173, 176 and 177 of the VAT Directive].[392]

[392] 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 par. item 2 of ML (see *SOU 2002:74* Part 2 pp. 68 and 69).

7. SUMMARY AND FINAL VIEWPOINTS

7.1 GENERALLY

This work concerns the EC law conformity with certain concepts in the ML being determined by reference to the national Swedish income tax law. The main question is about the tax subject, i.e. he who unlike the consumer can belong to the VAT system, being formally determined by a reference made to the concept NAVE in Ch. 13 of the IL for the concept YRVE in Ch. 4 sec. 1 item 1 of ML. The main question may be considered answered by the analysis in this work with the division of persons in on the one hand entrepreneurs which can belong to the VAT system and on the other hand consumers being EC law conform also with that formal reference. However provided that it's limited to the subjective prerequisites for NAVE in Ch. 13 sec. 1 first par. second sen. of IL and that national Swedish income tax law practice thereby remains at not adding a 'profit prerequisite' to the others. The right of deduction and the claim against the state on input tax to be regained or credited against output tax distinguish the VAT from other taxes, e.g. income tax and excise duties. Therefore has also the connection from Ch. 8 sec. 9 first par. item 2 of ML to Ch. 16 sec. 2 of IL for the determination of the scope of the so called deduction prohibition for expenses for entertainment and similar been treated.

Due to the right of deduction's central importance as distinguishing for the VAT has questions on structural, systematical character also been mentioned. The concept VE in YRVE also exist in the rule on the emergence of the right of deduction in Ch. 8 sec. 3 of ML. Thus, the concept VE is very important, and it's been questioned by the investigation *SOU 2002:74* – which has not yet led to any bill – if it has any place at all in the ML, but rights and obligations according to the VAT system instead should be connected to the transaction. The analysis here has shown that the concept VE is necessary, for the ML having a corresponding concept to E-VE (economic activity), which is one of the necessary prerequisites for the determination of taxable person, i.e. the tax subject, according to Art. 9(1) first par. of the VAT Directive. An 'activity-thinking' should be retained for the application of the ML together with a 'transaction-thinking', and the two viewpoints should be combined with an 'asset-thinking' (see section 4.1.3) Other structural, systematical aspects is that the concept 'tax liable' (Sw., "*skattskyldig*") in the ML, i.e. the liability to account for and pay output tax, is used for determining the emergence of

the right of deduction in Ch. 8 sec. 3 first par. of ML, which isn't complying with the ECJ's interpretation of the directive law in the field. That can lead to the non EC conform perception that the emergence of the right of deduction is providing that taxable transactions first actually exist, instead of that it is sufficient that he who through his acquisitions has YRVE intends to create taxable transactions with them (see section 3.3.2.1 and also section 3.3.2.4). Therefore should two measures be taken. Ch. 10 sec. 9 of ML about reimbursement due to special reasons before taxable transactions have occurred should be abolished from the ML as obsolete. It should be clarified concerning the expression 'VE leading to tax liability' (Sw., "*verksamhet som medför skattskyldighet*") in Ch. 8 sec. 3 first par. of ML that right of deduction emerges for acquisitions in VE which 'may come to' (Sw., "*kan komma att*") lead to tax liability, or that it will be noted in a new second par. of the rule that the emergence of the right of deduction 'isn't depending on' (Sw., "*inte är beroende av*") tax liability first occurring (see section 4.1.1).

These structural, systematical questions are important descriptively for putting into context the main question on the connection to the IL for the determination of YRVE in the ML and the question on the connection to the IL for the determination of the deduction prohibition for entertainment and similar in the ML.

The analysis here of the main question and the question on the deduction prohibition is made from the material perspective. There's no analysis in particular made of the accounting rules in this work. Therefore questions on a changed evidence and procedural situation are left out concerning the suggestion made by the investigation *SOU 2002:74* of disconnecting the accounting rules of the ML from the civil law concept GAAP. However it's noted that it may have a value in itself for the sake of the legal rights of individual from a perspective of forming norms to keep the so called connected area also for the VAT. I.e., regardless whether the analysis here of the material questions – which *SOU 2002:74* didn't address – would have proven that it wasn't possible with respect of the EC law with a common tax frame for the VAT and the income tax where the main question here on the determination of the tax subject is concerned (see section 4.3).

The main question on the connection from the ML to the IL for the determination of the tax subject seems to be a unique Swedish problem. The trial here is made with respect of the EC law, and it's been established that the phenomenon doesn't exist in the other present EU27-countries. It

does neither seem to exist in other countries with VAT in their economies – at least not in examined countries comparable with Sweden (see section 1.3.3). It can by the way, although the analysis here only concern the ML, be of a certain interest – for future research – that concerning the excise duties and the determination there of YRVE also exist references in the legislations thereon to the concept NAVE in Ch. 13 of the IL (see section 1.3.4). A whole lot remains to be examined in the field of VAT, e.g. the questions which aren't dealt with specifically here: accounting questions, questions on evidence and questions on taxation procedure and court procedure. The same applies for the connection with the criminal trial and VAT issues concerning the concept incorrect information. Also amongst the material questions there are still a whole lot remaining on the topic of EC law conformity about the rules of the ML, and this work gives at the least the following threads to follow up.

On the topic of external neutrality can the fact that the VAT Directive is lacking a corresponding concept to the ML's foreign entrepreneur (Sw., *utländsk företagare*) be of interest to examine (see section 5.1.2.1 and also section 1.3.1).[393] E.g. can in that context be further examined the concept 'tax liable' (Sw., "*skattskyldig*") in connection with the rules on intra-Community acquisition in the ML. It has thus been brought up by the author of this work on various occasions and when taking part in the work with the Swedish Bar Association's reply of the 22nd of December 2004 to the Treasury (see section 1.3.2). Here can also be mentioned that *SFS 2007:1376*, which has been mentioned in sections 1.3.1, 3.1.3 and 3.3.2.3, also meant an implementation into the ML on the 1st of January 2008 of Art. 203 of the VAT Directive [Art. 21(1d) of the Sixth Directive]. That means that he who wrongly charges VAT in an invoice e.g. for a supply exempted from taxation still becomes liable to account for VAT according to the ML. In *RÅ 2005 ref. 81* the SAC had established that tax liability couldn't arise in such a situation. However, the implementation in question hasn't been made so that the wrongly charged VAT also is named VAT like in the directive rule, but in a separate rule (sec. 2e) of the ML is stated, with reference to Ch. 1 sec. 1 third par., that the liability to pay shall apply to the 'amount' (Sw., "*beloppet*") which has been labeled 'value added tax' (Sw., "*mervärdesskatt*") and it shall according to Ch. 1 sec. 1 third par. of ML apply 'although the amount doesn't constitute value added tax according to this act' [Sw., "*även om beloppet inte utgör mervärdesskatt enligt denna lag*"]. It can lead to the new rule being deemed going beyond the frames for measures of taxation against the will of the individual set by the principle of legality for taxation. That's a problem in itself which can be examined. Here's only noted that the new rule in question based on Art. 203 of the VAT Directive doesn't comprise the problem with 'tax liable' (Sw., "*skattskyldig*") being used about the vendor of the article of goods in the other EC-

[393] See also sections 6.1.1.1 and 7.1 in *EG-rättslig analys av hänvisningen till inkomstskattens näringsverksamhetsbegrepp för bestämning av begreppet yrkesmässig verksamhet i mervärdesskattelagen* (Eng., 'EU-law analysis of the reference in the Swedish VAT act to the concept business activity in the Swedish income tax act for the purpose of determining the concept taxable person in the Swedisk VAT act'), by Björn Forssén, where inter alia the Eighth Directive (Sw., *åttonde direktivet*) is mentioned.

country involved in the rule about the main case of tax liability for intra-Community acquisitions in Ch. 2a sec. 3 first par. item 3 of ML. The new Ch. 1 sec. 2e of ML concerns liability to account for output tax for he who issues an invoice with a wrongly charged Swedish VAT. Ch. 2a sec. 3 first par. item 3 of ML is about the taxation of the purchaser in Sweden and an intra-Community acquisition cannot at the same time be a supply within the country, according to Ch. 1 sec. 1 first par. item 2 of ML. Therefore should it not be possible that a 'wrongly stating' (Sw., "*felaktigt angivande*") of calculated Swedish output tax for intra-Community acquisition could be deemed comprised by the new rule even in case of so called 'self-billing' (Sw., "*självfakturering*"), since such a procedure only can comprise supplies within the country according to Ch. 11 sec. 4 of ML. *SOU 2002:74* has by the way not even noted that the problem with the concept 'tax liable' (Sw., "*skattskyldig*") in Ch. 2a sec. 3 first par. item 3 of ML exist.

Above all in connection with an examination of the accounting rules could it be of interest to further mention the rules in Ch. 6 of ML on tax liability in certain cases (see section 5.1.1). Thus, it's been mentioned here from a perspective of forming norms the value of keeping the connected area also for the VAT. In that context could it also be of interest with questions on the tax law's influence on the civil accounting law. Such a question is whether the special rules on tax liability in Ch. 6 of ML can be deemed leading to liability to maintain accounting records in themselves, i.e. without Requirement to maintain accounting records according to the BFL first occurring. Any closer examination of the special cases of tax liability in Ch. 6 of ML has knowingly never been done. Here can for the relation between the tax law and the accounting law be noted, concerning certain subjects comprised by the rules in Ch. 6 of ML on tax liability in certain cases, that partnerships and a deceased person's estate as legal persons are comprised by the rules on Requirement to maintain accounting records according to Ch. 2 sec. 1 of BFL, whereas a bankrupt's estate is exempted from Requirement to maintain accounting records according to Ch. 2 sec. 5 item 2 of BFL. It can be questioned at least for the purpose of VAT if not a bankrupt's estate should be required according to the BFL to maintain accounting records for supplies and – at least when supplies then occurs – also for acquisitions after the bankruptcy decision with regard of the civil law's GAAP, by the reference to that concept from the main rules on accounting of output and input tax in Ch. 13 sections 6 and 16 of ML. These questions aren't limited only to the perspective of forming norms which has been brought up here, and should be treated before the suggestion by *SOU 2002:74* to disconnect the accounting rules in the ML from the civil law concept GAAP is realized. The investigation *SOU 2002:74* does not at all make any analysis of the rules in Ch. 6 of ML, but only suggest that they should be moved to a new chapter (1a) on taxable person (Sw., *beskattningsbar person*) and that they in consequence with the suggested change of terminology instead shall be stipulated to comprise 'Taxable persons in certain cases' (Sw., "*Beskattningsbara personer i vissa fall*").[394]

That the concept real estate (Sw., *fastighetsbegreppet*) in ML doesn't correspond with the VAT Directive's immovable property is also something which can be examined especially (see sections 1.3.2 and 5.2.7).

[394] See *SOU 2002:74* Part 1 pp. 69-70 and *SOU 2002:74* Part 2 pp. 22-23.

The ML's rule on 'public utility'-non-profit-making organizations (Sw., *allmännyttiga ideella föreningar*) and registered religious congregations (Sw., *registrerade trossamfund*) has been mentioned here in relation to the main question on distinguishing the entrepreneurs from the consumers, and that rule is also worth a special attention (see sections 5.2.6.1, 5.2.6.2 and 7.2.6).

The ML's rules on withdrawal are of interest, despite that the ML was adjusted on the 1st of January 2008, so that withdrawal only emerges for supplies free of charge (see sections 1.3.1, 3.3.2.3 and 3.3.2.4). The ECJ didn't mention the special rules on withdrawal in the ML in the "Hotel Scandic Gåsabäck"-case, i.e. inter alia those concerning certain building-VE in Ch. 2 sections 7 and 8 of ML. Although the special rules mentioned within the building sector are supported by the treaty on Sweden's accession to the EU (see section 1.3.2), can question arise in the same way as concerning deduction prohibition supported by Art. 176 second par. of the VAT Directive (see chapter 6), namely whether such a special rule is complying with the application of the basic VAT principles on taxation of a deduction (see sections 2.3.3.1 and 2.3.3.3). The deduction limitations in the ML for passenger cars (and motor cycles) have already been criticized on the topic of EC law conformity (see chapter 6). In that context could also the special rule in ML – with a connection via SBL to IL – on standardized values to tax at withdrawal in the form of private use a passenger car in a VE be brought up on the topic of EC law conform application of the mentioned basic VAT principles (see section 1.3.2). Then above all with respect of the EC law being deemed meaning that the purpose of withdrawal in the field of VAT only leading to the state reclaiming a previous VAT deduction (see section 3.3.2.4). of particular interest in connection with an analysis of the withdrawal rules of the ML can the alternative to withdrawal be that was introduced on the 1st of January 2008 concerning revaluation of an under- or overpriced sale between closely connected people, and which – apart from the withdrawal rules – has the open market value as an aim (see sections 1.3.1, 3.3.2.3 and 3.3.2.4).

Here has the question on distinguishing the entrepreneurs from the consumers for VAT purposes been treated, and also whether the right of deduction can be limited for an entrepreneur by the connection to the ML concerning the VAT's request for EC law conformity. Of interest could also be to go further with structural questions concerning which limits the VAT system have where the question on compensating the entrepreneurs for their VAT expenses is concerned. Here has also been mentioned that the VAT rules are strongly characterized by the way of how the tax is collected (see section 2.1). A question without any connection to the IL is in that context where the limit goes for the individual's possibilities to make a claim supported by the ML for reimbursement of input tax from the state. Could there be cases where the ML should be adjusted for avoiding that the rules give the entrepreneur a right of deduction formally which isn't motivated materially? If there's no such limit, could it perhaps be questioned whether the distinction between entrepreneurs and consumers can be upheld at all and that also private persons could have the right to exercise such a claim against the state? The author of this work mention a similar question in an article on the rules on adjustment of input tax for Capital goods in the field of real estate in connection with bankruptcy, and then concerning whether the state can obligate a purchaser of real estate liability to adjust for the remainder of the correction time after the purchase of the real estate in bankruptcy, despite the parties have exercised the possibility which the ML's adjustment-rules for Capital goods give them to strike 'a deal that the vendor shall make the adjustment' (Sw., "*avtal om att överlåtaren skall jämka*"). From the 1st of January

2001 the older form of so called affidavit-VAT (Sw., "*intygsmoms*") has ceased to exist, which existed in the field of real estate parallel with the rules on adjustment which were revised on the 1st of January 2001. However, the question is if the option mentioned to make a deal leads to effects for the system with adjustment-VAT similar to those which were allowed concerning the affidavit-VAT, before that system was revised a long with the introduction of the ML on the 1st of July 1994, namely that a purchaser of a real estate from a bankrupt's estate just based on an affidavit could regain input tax in the real estate without the debtor or the receiver in bankruptcy having paid back to the state the input tax stated in the affidavit.[395] That question could be brought up in connection with a more general overview of questions on relations between the formal rules on right of deduction in ML and the intended material meaning of them.

7.2 THE MAIN QUESTION OF THIS WORK

7.2.1 The determination of YRVE in ML can be made with reference to the subjective prerequisites for NAVE in Ch. 13 sec. 1 first par. second sen. 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 Art. 13 of the VAT Directive [previously Art. 4(5) of the Sixth Directive] isn't of interest here (see sections 3.1.3 and 5.1.2.2). Here the trial of the main question in this work concerns the concept YRVE according to ML in relation to Art. 9(1) first par. of the VAT Directive [previously Art. 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

[395] 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. There's mentioned inter alia that the phenomenon with the affidavit-VAT was brought up in an article in *Svenska Dagbladet* (Eng., the Swedish Daily paper) on the 4th of March 1993 by Björn Dickson and that the question on double compensation from the state never was tried in *RÅ 1993 ref. 78*, which had been predicted in Björn Dickson's article. Jesper Öberg mentions by the way not at all the problem in question in *Mervärdesbeskattning vid obestånd* (Eng., Value added taxation at bankruptcy), and only mention *RÅ 1993 ref. 78* concerning the question whether obligation of 'bringing back' (Sw., '*återföring*') laid upon the debtor or the bankrupt's estate (see pp. 219-222 in the work mentioned).

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 Art. 9(1) first par. of the VAT Directive (see sections 3.1.1, 5.2.3.1 and 5.2.9).

- That connection is however only EU law conform in the respect mentioned to the part it concern Ch. 13 sec. 1 first par. second sen. 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 5.2.8.1 and 5.2.8.2).

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 work 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 par. second sen. of IL. This would mean that the order before 2001, when the reference in question concerned sec. 21 of KL, would be restored (see sections 1.3.2, 5.2.2 and 5.2.8.1).

Art. 10 of the VAT Directive [previously Art. 4(4) first par. 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 5.2.3.2).

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 Art. 9(1) first par. of the

VAT Directive and above all by comparison of the description of the tax subject in the VAT acts of the EU Member States Austria, Belgium, Denmark, Finland, France, Germany, Great Britain, Luxemburg, the Netherlands and Spain (see sections 1.3.3, 2.4 and 3.2.2). 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 5.2.3.3). The analysis in chapter 3 shows that a concept VE is necessary in the ML, to have some objective concept equivalent to E-VE to establish the purpose of making money (see chapter 3). To abolish the concept VE from the ML, like the investigation *SOU 2002:74* suggests, is therefore not possible, and the analysis here shows that the investigation's perception based on *RÅ 1999 not. 282* can questioned, since the later verdict in the "Breitsohl"-case shows that the concept is in compliance with the ECJ's case-law (see sections under 4.1). Instead the question is whether the determination of the ML's concept VE can be made with reference to the older income tax law concept VE and income source like what's done, with a certain reservation for undesired interpretation results for VAT purposes, in the preparatory work to ML (see section 7.2.7 and the conclusions there from the sections 5.2.3.3 and 5.2.7).

> In an article is by the way the author of this work mentioning collected foremost what's been said here about the concept VE in the following sections: 1.3.1, 2.3.3.1, 2.3.4, 2.3.5, 2.4, 3.2.2, 3.2.3.4, 3.3.2.1, 3.3.2.2, 3.3.2.3, 3.3.2.4, 4.1.1, 4.1.2, 4.1.3, 4.2.1.1, 4.3, 5.2.2, 5.2.3.1, 5.2.3.3, 5.2.4, 5.2.7, 5.2.8.1 and 7.1.[396]

[396] See *Svensk skattetidning* (Eng., Swedish tax journal) 2007 pp. 538-557, the article *Momsens verksamhetsbegrepp i dåtid, nutid och framtid* [Eng., 'The VAT's concept VE then, now and in the future'], by Björn Forssén.

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 1.3.3). Although VAT concepts, unlike the income tax law, are generally governed by the EU law according to the primary law, is the Swedish law technical solution not prohibited by the VAT Directive [previously the Sixth Directive]. A connection to Ch. 13 sec. 1 first par. second sen. 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 Art. 9(1) first par. of the VAT 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 section 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 Art. 1(2) of the VAT Directive [previously Art. 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 par. 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 1.3.1, 2.1, 2.3.4, 3.2.1, 5.1.2.1. 5.2.1.1 and 5.2.2).

7.2.2 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 (continuing 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. 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 here 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 par. second sen. 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 5.2.8.1).

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 par. second sen. 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 par. second sen. of IL (see section 5.2.8.2).

7.2.3 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 par. 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 Art. 12 of the VAT Directive [previously Art. 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 Art. 9(1) first par. of the VAT Directive [previously Art. 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 par. second sen. can – with regard of the current national income tax case-law – be considered conform with the concept taxable person in Art. 9(1) first par. of the VAT Directive, can thereby the two items Ch. 4 sec. 3

first par. item 1 of ML and Ch. 4 sec. 3 first par. 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 par. 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 work of the reference in question to only concern Ch. 13 sec. 1 first par. second sen. 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 par. 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 Art. 12 of the VAT Directive, but then the limit amount for application of Ch. 4 sec. 3 first par. item 2 of ML should be abolished, since such amount limits aren't accepted by the VAT Directive unless it's a question of rules on exemption from taxation for small undertakings or standardized taxation of farmers according to Art. 281-294 and 295-305 of the VAT Directive [previously Art. 24 and 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 par. items 1 and 2 of ML remain also for the case that the 'continuing basis prerequisite' (Sw., '*fortlöpandekriteriet*') in Art. 9(1) second par. of the VAT Directive [previously Art. 4(2) of the Sixth Directive] for determination of E-VE according to the main rule in Art. 9(1) first par. of the VAT Directive, despite the "Hotel Scandic Gåsabäck"-case, could be deemed being a problem concerning one-time-considerations on the topic E-VE (see section 5.2.5).

Since Ch. 4 sec. 3 first par. items 1 and 2 of ML can be considered EC law conform and remain in the ML, should Ch. 4 sec. 5 of ML be altered so that that rule comprise also these two cases of YRVE. Otherwise can the connection to the IL for the determination of YRVE be too restrictive for foreign entrepreneurs, by Ch. 4 sec. 5 only referring to Ch. 4 sec. 1 of ML (see section 5.1.2.1).

By the way there's one more facultative rule on who can be considered a taxable person – Art. 11 of the VAT Directive [previously Art. 4(4) of the Sixth Directive]. It's been used by Sweden, and is about possibility to register 'VAT groups' (Sw., '*mervärdesskattegrupper*'), and was

implemented by Sweden on the 1st of July 1998, by rules being introduced 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 constitute exemption from the main principle that VAT cannot be group accounted. In one case 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 accounting input and output tax must have such VE. The VAT group is therefore also comprised by the main question in this work on the connection from ML to the concept NAVE in Ch. 13 of IL for the determination of YRVE (see section 3.1.2).

7.2.4 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 work to limit the reference in Ch. 4 sec. 1 item 1 of ML to Ch. 13 sec. 1 first par. second sen. 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 Art. 9(1) first par. of the VAT 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 par. second sen. of IL also for this reason (see section 5.2.9)

7.2.5 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 par. second sen. 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 makes that problem bigger. After the *RÅ 1996 not. 168* is furthermore thus current law such that the SUPPLEMENTARY RULE isn't needed to compensate any income tax law profit prerequisite concerning Ch. 13 sec. 1 first par. second sen. of IL. The SUPPLEMENTARY RULE can be abolished from the ML. That that would also mean a note that national case-law mustn't go back to arguing for a profit prerequisite for NAVE (see section 5.2.4).

If the development of the law would have meant that support was sought in the SUPPLEMENTARY RULE rather than in the main rule, to determine YRVE, could by the way Finland have been of interest for comparison concerning the question on determining the tax subject for VAT purposes (see section 1.3.3).

7.2.6 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 case-law means that the income tax can become closer to the ML formally where the determination of who's an entrepreneur is concerned, and thus is a common tax frame

possible for VAT and income tax, 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 5.2.6.1). Whereas the technique itself in the ML to determine exemptions from 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 Ch. 4 sec. 8 be abolished from the ML and rules be introduced in Ch. 3 of ML on exemption from taxation referring to the tax object. Since the ML will be adjusted in relation to Art. 131-134 of the VAT Directive [previously Art. 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 5.2.6.2).

Here can also be mentioned that the rules in Ch. 7 of IL on qualified exemption from taxation shall be investigated no later than on the 30th of June 2009, and modernized and simplified (*Dir. 2007:97*). The investigation could also look into a problem with Ch. 4 sec. 8 of ML and football clubs. The SAC has in a verdict on the 21st of September 2007, *RÅ 2007 ref. 57*, considered that the clubs' purchases of players from abroad leads to value added taxation of acquisitions, since the concept entrepreneur (Sw., *näringsidkare*) is included in the rule on the place of the supply, Ch. 5 sec. 7 of ML (see section 7.1), and deemed to correspond to the directive law's taxable person, with precisely the motive that the Sixth Directive [the VAT Directive] lacks an equivalent to Ch. 4 sec. 8 of ML. A non EU law conform distortion of competition occur, since VAT for purchases of players between clubs in Sweden cannot be enforced against the principle of legality for taxation, due to the special Swedish limitation of YRVE in Ch. 4 sec. 8 of ML.

7.2.7 Problems when the determination of the tax object can influence the determination of the tax subject

One of the questions in this work is whether there are in the rules in Ch. 3 of ML on the determination of the tax object (an article of goods or a service) any connections to the income tax law influencing the determination of the tax subject which can cause the tax subject issue to undergo a second trial in connection with the determination of the object's character (see section 1.1, 1.3.1 and 5.2.7).

The analysis of the advanced rulings RÅ 2003 ref. 80 and RÅ 2007 ref. 13 concerning the rule on taxation of letting of parking premises and sites in parking-VE, Ch. 3 sec. 3 first par. item 5 of ML, has shown that the connection in older Swedish VAT law to the income tax law concept parking business activity for determining of parking-VE according to the

ML must cease, by a clarification of the law expressing that the connection is obsolete. Otherwise precisely the problem mentioned with a non EU law conform influence for the determination of the tax subject from the determination of the object's character when applying the ML will emerge, which the analysis of the two advanced rulings may be considered to have proven that the SRN and the SAC were under, when they didn't clearly enough keep apart the two legal issues at the trial of the circumstances. To make the handling of evidence and procedure easier concerning VAT issues the law clarification should be made (see section 5.2.7).

In connection with the law clarification mentioned should also be clarified that the concept VE of the ML does not any longer connect to any income tax law VE and income source concept. In the preparatory work to the ML is referred to the income tax concept VE and income source from the time before 1994 for determining VE in the concept YRVE with the reservation for such a determination of VE not leading to an undesired interpretation result for VAT purposes. However, the analysis of the two advanced rulings just mentioned shows that that reservation isn't sufficient to avoid that it in the application emerge the non EU law conform perception that a taxable person can have more than one VE for VAT purposes. A law clarification is therefore called for meaning that the ML cannot refer to the older income tax concept VE and income source for determining of VE in YRVE, which can be combined with a clarification that the connection mentioned to parking business activity for the determination of parking-VE is obsolete (see section 5.2.7). However, that doesn't prevent that the ML refers to the duration prerequisite which lies in the concept NAVE. A duration prerequisite lies already in the source theory in the field of income tax, which hasn't been changed by the abolition of the income source concept by the IL replacing inter alia the KL, and Swedish income tas case-law corresponds with the EU law prerequisite of duration concerning who can be deemed an entrepreneur (see sections 5.2.3.3 and 7.2.1).

7.3 THE DEDUCTION PROHIBITION IN THE ML FOR EXPENSES FOR ENTERTAINMENT AND SIMILAR AND THE CONNECTION TO THE IL

The EC law allows deduction prohibition in the field of VAT. However, the principle on the right of deduction in the form of a claim against the state is fundamental and distinguishing for VAT and means that the connection from Ch. 8 sec. 9 first par. item 2 of ML to Ch. 16 sec. 2 of IL for the determination of the scope of the deduction prohibition for entertainment and similar is reaching to far. Swedish case law which on the whole may be

perceived based upon the RSV's recommendations and the SKV head office's general advice on the topic contain an income tax law standard which means a distinction between what belongs and not belongs to 'social life' (Sw., "*sällskapslivet*"), whereas Swedish practice in the field of VAT may be perceived as more dynamic and fulfilling the purpose from an EC law perspective. The formal connection in question from the ML to the IL for the determination of the scope of the deduction prohibition in question should therefore be revoked. Otherwise it can lead to such diversions from the rules of the Sixth Directive [nowadays the VAT Directive] that the ECJ doesn't allow for the application of the rules on deduction prohibition, namely that a limitation of the right of deduction is based upon the objective character of an acquisition regardless of whether it in the actual case can be proven that it's about expenses which have occurred in the business activity (see chapter 6).

> Here the material questions have been treated and it's been noted that it may have a value in itself for the sake of the legal rights of individual from a perspective of forming norms to keep the so called connected area also for the VAT (see section 7.1). Beside the previously mentioned examples of VAT issues for further research can that question be of interest to examine further also where the right of deduction according to the ML and evidence are concerned. How does above all the material rule on an in principle general right of deduction for input tax on acquisitions or import in a VE leading to tax liability, Ch. 8 sec. 3 first par. of ML, relate to the evidence rule, Ch. 8 sec. 5 of ML, which means that the right of deduction may be exercised 'only' (Sw., "*endast*") by virtue of the rules on content of invoice in Ch. 11 of ML? Questions arising are whether a certain GAAP for taxes already has been developed and what that means for uncertainty about the legal rights of the individual where evidence in the tax procedure and in the court procedure are concerned. *SOU 2002:74* doesn't bring up these questions at all, when the investigation suggests a disconnection for the ML's accounting rules in relation to the BFL's concept GAAP, but not for the income tax (see also section 4.3). The author of this work brings up those questions and inter alia a couple of administrative court of appeal-verdicts in e.g. the previously mentioned work, which was one of the results of the work with this thesis, and those interested can read more there.[397]

[397] Se above all section 8.2.2.2 in *EG-rättslig analys av hänvisningen till inkomstskattens näringsverksamhetsbegrepp för bestämning av begreppet yrkesmässig verksamhet i mervärdesskattelagen* (Eng., 'EU-law analysis of the reference in the Swedish VAT act to the concept business activity in the Swedish income tax act for the purpose of determining the concept taxable person in the Swedisk VAT act'), by Björn Forssén.

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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]

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03.02.1998, *dnr 875-98/900* – p. 225
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RSV Im 1984:2 – p. 144
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Mutén, Leif
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- Interview with Burmeister, Jari on the 8th of January 2003 – p. 35
- Conversation with von Oelreich, Niclas on the 12th of March 2003 – p. 177
- Interview with Paulander, Henrik on the 9th of September 2003 – p. 23
- Interview with Nilsson, Leif on the 2nd of October 2003 – p. 37

The following persons have answered via mail, fax and/or telephone on the inquiry which was made to foreign tax authorities in connection with the work with this book: Elisabeth Plank, Austria; Jens Peder Thomsen, Denmark; Sari Sorjonen and Eeva Niemimaa, Finland; Margaret Laurenson, Great Britain; Mr. Roumellioti [Γ. Ρουμελλιώτη], Greece; dr. Gábor Bessenyei, Hungary; Marco Iuvinale, Italy; Mr. Speffes, Luxemburg; Lasse markhus, Norway; and Antonio Blanco Dalmau, Spain. Also Holland responded on the inquiry. Ireland referred to its guide on the tax authority's website there.

3 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) Luxemburg, (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 of the SAC 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]

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 issues of law 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*) – p. 105
- *RSV/FB Dt 1985:33*. Not appealed [I] – p. 201
- *SRN* 28.01.1998. Appealed and decided (altered by the SAC in *RÅ 1999 ref. 50*) [I] – p. 185
- *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. 225
- *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. 104
- *SRN* 16.05.2005. Not appealed [V] – p. 203
- *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. 202
- *SRN* 21.12.2005. Not appealed [V] – pp. 214, 215, 216, 218 and 239

SUBJECT INDEX