Composite transactions and semiotics regarding VAT

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This special version includes sections 6 Summary (Sammanfattning) and 7 Concluding viewpoints (Avslutande synpunkter) – omitted in the original in SvSkT to save space.]

1 Introduction

I mention, in inter alia my latest article in Svensk Skattetidning (abbreviated SvSkT), Swedish Tax Journal, that interest in effect consists of a typical value-added that would be subject to value-added taxation to or instance a bank, if not exemption from taxation for supply of bank- and financing services and trading of services was stipulated in Ch. 3 sec. 9 of *mervärdesskattelagen (1994:200)*, ML (the Swedish VAT act), in accordance with article 135(1)(b)-(f) of the EU's VAT Directive (2006/112/EC), the VAT Directive.[1] Interest is one example of a composite transaction, which can be divided into services consisting of the granting of credit and aministrative services. Thus, it is decisive for the determination of the value-added taxation to judge whether a consideration that for instance banks, financing institutes and other taxable persons receive gives rise to a transaction of goods or services for them according to Ch. 2 sec. 1 first para. no. 1 and third para. no. 1 of the ML compared with the articles 14(1) and 24(1) of the VAT Directive. Those rules constitute the main rules on transaction of goods ans services and deliveries of goods and supplies of services in the ML and the VAT Directive respectively.

Questions on VAT and composite transactions often concern Ch. 7 se. 7 of the ML, where a principle of division is stated as main rule for a division on a reasonable basis of the taxable amount, when differently composed transactions with respect of the theme taxable or exempt or concerning different tax rates exist. If a division is not possible, a principle of the principal is considered applying, where the dominating part of such composite transaction decides the question whether taxation or exemption shall apply and the question on applicable tax rate.[2] To save space, I do not mention in this article such typical questions on application, but focus on questions like the mentioned about on interest as an example of a composite transaction for VAT purposes. The question on the VAT treatment of a consideration should however not stay at the transaction perspective of the tax object, but for the research should the external limits of the VAT – i.e. of the scope of the VAT – be regarded also at the determination of the tax subject, i.e. concerning the for the VAT fundamental distinction that shall be made on the one hand of taxable persons according to Ch. 4 sec. 1 of the ML, which has the same wording as the main rule article 9(1) first para. of the VAT Directive, and on the other hand the consumers, which normally are private persons and shall carry the tax burden. In another context, I have written about a model for researchers and solicitors as a support for the treatment of the external limits of the VAT.[3] In this article, I make a deeper analysis of the

[1] See SvSkT 2019 (pp. 329-346), *Vouchrar och moms – regeltekniska aspekter och förslag till forskning* (Eng., Vouchers and VAT – law technical aspects and suggestions for research), below Forssén 2019a,, p. 344, where I refer to SOU 1989:35 (*Reformerad mervärdeskatt m.m.*), Eng., Reformed VAT etc., Part 1 p. 192.
[2] See the CJEU-case C-349/96 (CPP), item 32. CJEU, the Court of Justice of the EU.
[3] See The Periodical Balans Annex with advanced articles (*Balans fördjupning*) 3 2019 (pp. 19-26), *Mervärdesskattens yttre gränser – en modell för forskare och processförare vid jämförelse av mervärdesskattelagen med EU-rätten* (Eng., The VAT's external limits – a model for researchers and solicitors at comparison of the VAT Act with the EU law). (Below Forssén 2019b).

same theme with more examples and show how a deep analysis of concepts can be necessary to make to judge composite transactions and to determine the external limits of the VAT.

At the interpretation of the rules in the ML in relation to the rules in the VAT Directive, the scope of the VAT is most made partly of the determination of the tax subject, by the distinction of the taxable persons from the consumers (ordinary private persons), partly regarding the tax object, by the determination of on the one hand what is a taxable transaction of a service or goods and on the other hand what is a from taxation unqualified exemption of a service or goods. In this article, I reason about the VAT's external limits in relation to certain concepts, namely subsidies, interest and money. In connection with interest, I also bring up options, where not only the VAT Directive is concerned, but also the Council's regulation (EU) No 282/2011 laying down implementing measures for the VAT Directive (the Implementing Regulation). Nearest, I treat the tax object in relation to interest and options and money. Thereafter, I treat the tax subject in relation to what can be deemed constituting subsidies from the State and that considerations and agreements can lead to questions about number of transactions and about transactions of goods and services and transaction in the form of withdrawal at the same time. Furthermore, I mention semiotics as an element in models – tools – as support to judge complex VAT questions.

2 The tax object

2.1 Interest and options

If a taxable person who makes from taxation unqualified exempted transactions of services (or goods), and thus not having right of deduction or reimbursement of invoiced input tax on acquisitions to his activity still gets such a right, it is a matter of an illicit subsidy from the State of such taxable persons (entrepreneurs) according to article 107(1) of the Treaty on the Functioning of the EU (TFEU), since the competition is distorted. The CJEU has made that judgment in the case C-172/03 (Heiser), where the court considered that such an illicit subsidy from the State existed, when a physician according to Austrian VAT legislation could not be subject to taxation by adjustment of deductions of input tax for capital goods in the activity when the services that the physician supplied changed from being taxable to be unqualified exempted from taxation. Thereby, the TFEU sets up an external limit for the VAT's liabilities and rights. In that respect, I may mention the following regarding on the one hand what is a transaction of a service for VAT purposes and on the other hand what is pure interest.

In Forssén 2019a, I brought up, together with the law technical aspects and suggestions of research regarding vouchers for VAT purposes, the question on what constitutes a consideration where the earnings consist of a so-called. Thereby, I came back to my article in the SvSkT on bitcoins and VAT,[4] where I brought up that financial institutes profit by incomes of interest by the float, i.e. interest on the money placed on the market during the lapse of time emerging at the intermediation of payments made at banks etc. and which not yet have been entered on the bank customer's etc. (the receiver's) account. Moreover, I stated that the float can exist also by for example coupon enterprises, whereby I stated inter alia the following.

Luncheon coupons are according to the preparatory work to the special rules on vouchers in the ML an example of instruments that can be vouchers.[5] The coupon enterprise's earnings

[4] See SvSkT 2017 (pp. 95-106), *Bitcoins och mervärdesskatt*, Eng., Bitcoins and VAT (below Forssén 2017a).
[5] See prop. 2017/18:213 (*Mervärdesskatteregler för vouchrar*), Eng., VAT rules for vouchers, p. 15.

can then consist of the income of interest – the float – which arise by that enterprise having the money from he who has purchased coupons on his account until it pays for example a restaurant where a luncheon has been bought in exchange for a coupon. According to the preparatory work mentioned, the market for such restaurant vouchers has in itself decreased considerably the last decades, why the importance of the new rules on vouchers in the ML is less for a restaurant enterprise.[6] However, this does not change that it in principle can occur fixing of a border problems for example between what is consideration and what is such pure interest that shall not be included in the taxable amount at the determination of the scope of the special rules on vouchers.

Interest is, as above-mentioned, a consideration that constitutes a composite transaction, and which would cause problems regarding the fixing of a border between taxation and exemption, if not exemption was stipulated for financial services in the ML and the VAR Directive. Akother concept in the field of financial services which could cause the problems mentioned, and which I have mentioend in another context is options.[7] A composite transaction by an agreement which concerns a sale of an option regarding goods placed in an authorised tax warehouse according to Ch. 9 c sec. 3 of the ML situated within the country and sale of the goods after it has ceased to be placed in such a warehouse can cause that the tax amount for VAT will be lowered corresponding to the interest on the option. It is in conflict with the general rules of the VAT, but is possible, when it is a matter of one of the categories mentioned in Ch. 9 c sec. 9 of the ML (e.g. copper, coffee and tea), due to the special rules on who is tax liable in connection with transactions of goods in certain warehouses – like here with tax warehouses – in Ch. 9 c of the ML, which are based on the articles 154-163 of the VAT Directive. Therefore, I state in Forssén 2018a inter alia the following especially about article 9 of the Implementing Regulation and article 24(1) of the VAT Directive concerning private law options, regarding the need of a clarification in that directive rule.[8]

Article 9 of the Implementing Regulation concerns inter alia the main rule of transaction of services in the VAT Directive, i.e. article 24(1) of the VAT Directive. By article 9 of the Implementing Regulation follows that the sale of an option constitutes a transaction of a service according to article 24(1), provided that such a sale is a transaction within the field of application of article 135(1)(f) of the VAT Directive regarding trading of securities. The transaction of the service shall then be deemed as separated from the underlying transactions to which the service is pertaining.

To avoid competition distorting arrangements where the price of certain goods is lowered by transactions composed by sales of option and goods, I consider that there is a need of a clarification of what is comprised by the main rule in article 24(1) of the VAT Directive. The clarification should be made by introduction of a special item in article 24, not by article 9 of the Implementing Regulation.

> Thus, a concept like trading of securities should also henceforth be developed by the CJEU's case-law, like what has already been done by the CJEU-case C-2/95 (SDC) meaning that the trading of securities comprise documents which changes the legal and financial situation between the parties. It follows already by the CJEU-case C-235/00 (CSC) that the exemption in the directive's art. 135(1)(f) for transaction of securities

[6] See prop. 2017/18:213 p. 24

[7] See *Balans fördjupning* 2018 (pp. 3-10), *Konkurrensfördelar med varuomsättningar efter momsfria omsättningar av varor i vissa lager och av finansiella tjänster* (Eng., Competition advantages with supplies of goods after VAT free supplies of goods in certain warehouses and of financial services). (Below Forssén 2018a).

[8] See Forssén 2018a p. 9.

> regards transactions which entail legal and economical changes between the parties, whereby supply of a service which is only material, technical or administrative and which does not cause such changes between the parties constitutes taxable transactions. In my opinion it can be perceived as unclear whether an option constitutes securities for VAT purposes, if it especially for options would be stated in article 9 of the Implementing Regulation what alreayd follows by the CJEU's case-law.

For example the stockmarket is a second-hand market and there is no limit of it regarding options to purchase or sell shares. Thus, it should not exist any limitation of what constitutes securities besides what already is following by the last sentence of art. 135(1)(f) of the VAT Directive (and by article 15(2) of the VAT Directive). However, in my opinion there is a need to clarify what sort of options that are comprised by the unqualified exemption from taxation for financial servises, so that the specification means a fixing of a border of exemptions from taxation regarding trading of securities against private law options for which a second-hand market is missing as comprised by the general taxation of goods and services. Without such a clarifying fixing of a border, as a suggestion in a special item in article 24 of the VAT Directive, I consider that also the emission of private law options is comprised by the exemption from taxation according to article 135(1)(f) of the VAT Directive.

2.2 Money

In Forssén 2017a, I mentioned especially the Supreme Administrative Court's (*Högsta förvaltningsdomstolen*, HFD) advance ruling HFD 2016 ref. 6 and CJEU's preliminary ruling in that case, C-264/14 (Hedqvist). I made the following criticism against the HFD's ruling regarding the question on what is for VAT purposes constituting a transaction of service versus what constitutes money.

HFD 2016 ref. 6 concerned the question whether exchange services regarding bitcoins are comprised by the exemption from taxation regarding transactions of financial services in Ch. 3 sec. 9 of the ML. However, in the verdict is only a simplified judgment made of the question, where it is stated that bitcoins *is a means of payment*I (Sw., ”är ett betalningsmedel”) which *shows great similarities with electronical money* (Sw., ”visar stora likheter med elektroniska pengar”). What was decisive for the exchange services being deemed comprised by the exemption was that *supply of bitcoins constitutes activity required to be reported as financial activity* (Sw., ”tillhandahållande av bitcoins utgör verksamhet som kräver anmälningsplikt såsom finansiell verksamhet”). However, the HFD overlooked in my opinion the question on the difference between legal and illegal bitcoins, and reasons in its judgment only about *transactions consisting of exchange of traditional currency into the virtual currency bitcoin and vice versa* (Sw., ”transaktioner […] som består av växling av traditionell valuta till den virtuella valutan bitcoin och omvänt”). In my opinion can the virtual currency bitcoin not be deemed equal with e-money without a deeper analysis of what is meant with money. Thus, I consider that neither the advance ruling HFD 2016 ref. 6 nor the CJEU's preliminary ruling in the case, C-264/14 (Hedqvist), have the sufficient underpinning. In my opinion should new trials of bitcoins for VAT purposes be made, where a terminology with such various meaning that is stated for example in the Government's report on electronical money (SOU 1998:14), regarding what alternately is understood with money, is regarded.

3 The tax subject in relation to what can be considered constituting subsidies from the State

When it is a matter of the liabilities meant to be considered by a person deemed to be a taxable person – tax subject – it may be mentioned that the CJEU in the case on labour legislation C-212/04 (Adeneler et al.) considered that the principle of an EU conform (directive conform) interpretaion of a rule in national law does not mean an obligation for the Member States to interpret the rule in conflict with its wording (*contra legem*), which I mentioned in my doctor's thesis.[9] Thus, the constitutional principle of legality applying for taxation meausres according to Ch. 8 sec. 2 first para. no. 2 of *regeringsformen (1974:152)*, the 1974 Instrument of Government, means that a directive rule cannot be enforced against the will of the individual, if a literal interpretation of the corresponding rule in the ML does not cover the taxation measure by the State.[10]

Concerning the rights that a taxable person has by being comprised by the VAT, it is in my opinion to be denoted as an extreme interpretation result regarding a rule in the ML that an ordinary private person would be comprised by the VAT and have a right of VAT deduction, for example for purchases at the grocer's shop. That would namely set aside the fundamental conditions for the VAT according to the EU law, i.e. the basic idea that the VAT is a tax on consumption which shall be carried by the consumer, who normally is a private person.[11]

If the consumer – like a taxable person (entrepreneur) could make a claim regarding VAT against the State, it would be a matter of some sort of subsidy from the State. Then it is not only a matter of an illicit subsidy from the State to a taxable person, but a case of an ordinary private person being able to invoke the interpretation result to in principle getting money from the State as if it would be a question of a claim of input tax against the State.

> Such an interpretation result regarding a rule in the ML would in my opinion not be an interest worthy of protection according to the constitutional principle of legality for taxation measures. The claim against the State should not be possible to exercise by the individual, since it would be based on an extreme interpretation result and exercising of the right that would follow by the wording of the rule would be in conflict with the principle of prohibition of abusive practice, which follows by the CJEU's case C-255/02 (Halifax et al.).[12] I have mentioned this also in Forssén 2019a, where I inter alia mention that the expression "annan person" (Eng., other person) in Ch. 2 sec. 13 of the ML should be altered into "beskattningsbar person" (Eng., taxable person), so that an ordinary private person (consumer) cannot be comprised by the special rules on vouchers for VAT purposes which were introduced in the ML on 1 January, 2019 according to the Council's directive (EU) 2016/1065.[13]

[9] See *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier* [Eng., Tax and payment liability to VAT in *enkla bolag* (approx. joint ventures) and *partrederier* (shipping partnerships)], Örebro Studies in Law 4 2013 (below Forssén 2013), section 1.2.2.
[10] See Forssén 2013, sections 1.2.2 and 2.7.
[11] See Forssén 2013, section 2.7.
[12] See Forssén 2013, section 2.7.
[13] See Forssén 2019a pp. 331-333.

4 One consideration and one and the same agreement respectively can entail questions on number of transactions and on transactions of goods and services and transaction in the form of withdrawal at the same time

4.1 One consideration can correspond with more than one transaction

In Forssén 2019a, I mentioned that there is not any common EU-definition of intermediation with respect of VAT.[14] It means that interpretation and application problems concerning another of the special rules on who is tax liable than the mentioned Ch. 9 c of the ML, namely concerning the special rule in Ch. 6 sec. 7 of the ML on the tax liability for intermediation *in one's own name* (Sw., *i eget namn*) of goods or service for a mandator.

The special rule on tax liability in Ch. 6 sec. 7 of the ML means that the intermedaition of goods or services gives rise to a transaction as well for the intermediary as for the mandator. Nearest corresponding rules in the VAT Directive are the articles 14(2)(c) and 28 of the directive. In the present context, I do not go into any comparison of the rules and their scope, but I may here instead point out that the same consideration can be deemed corresponding with more than one transaction according to the HFD's case RÅ 2002 ref. 113. According to that case the HFD's case-law means that an intermediary who in his own name sells for example goods for the mandator can be deemed making a special transaction regarding the intermediation service that the intermediary thereby is making for the mandator, and not only the transaction that the intermediary like the mandator is considered making of the goods according to Ch. 6 sec. 7 of the ML.[15]

Although the question whether the same consideration can be deemed corresponding more than one transaction often diappear in practice, by the intermediary having made his mark-up in the pricing of the goods and therefore does not take out any special commission for the intermediation service, the question is still decisive in principle for the one or those who are treating composite transactions for VAT purposes. The problem in question exists, due to the VAT Directive lacking a definition of the concept intermediation, regardless whether an analysis of the intermediation question is made only of the ML or by an EU conform (directive conform) interpretation where, in accordance with article 288 third para of the TFEU, the result that shall be achieved with the VAT Directive is, if possible, regarded.[16]

> By the way, the special rule on tax liability in Ch. 6 sec. 7 of the ML is originating from the general goods tax from 1959, which was replaced by the first Swedish legislation on VAT of 1969, i.e. of *lag (1968:430) om mervärdeskatt*, more precisely from third para. first sen. in the instructions to sec. 12 of *Kungl. Maj:ts förordning (1959:507) om allmän varuskatt* (Eng., the Swedish royal regulation on general goods tax). The same applies to the so-called representative rule, Ch. 6 sec. 2 of the ML, which originates from the regulation of 1959. I consider that the same question exists regarding Ch. 6 sec. 7 that I treated concerning the representative rule in Forssén 2013, namely whether the tax subject according to the ML can be an ordinary private person or an employee by a taxable person, [17] which is in conflict with the main rule on who is taxable person according to the main rule article 9(1) first para. of the VAT Directive, whose wording has been implemented literally in Ch. 4 sec. 1 of the ML, its wording according to SFS 2013:368. I have mentioned that question regarding Ch. 6 sec. 7 of the ML in another context,[18] and stay here to save space at referring thereto and reconnecting to my article in the SvSkT on hiring out of personnel within health care and social

[14] See prop. 2017/18:213 p. 18.
[15] See Forssén 2019a p. 336.
[16] See Forssén 2019a p. 336.
[17] See Forssén 2013, sections 1.5, 6.2.1.1 and 7.1.3.3.
[18] See *Momsrullan: En handbok för praktiker och forskare* (Eng., The VAT roll: A handbook for practicians and researchers), Melker Förlag 2018 (below Forssén 2018b), pp. 81 and 82.

care.[19] There I refer to that I have mentioned that the CJEU according to items 23 and 24 of the CJEU-case C-594/13 (”go fair” Zeitarbeit) states that the exemption from taxation of supply of services and goods closely linked to welfare or social security work in article 132(1)(g) of the VAT Directive is not directly applicable on personnel in a staffing enterprise, since it is not the employees who are the taxable person and that they according to article 10 of the directive are excluded from that concept precisely in their capacity of employees.[20] In my opinion, that confirms that already an interpretation result meaning that employees would be comprised by the VAT is to be denoted as extreme, since it sets aside the for the VAT fundamental distinction that shall be made between taxable persons and consumers, which typically are ordinary private persons or employees by taxable persons.[21]

4.2 One and the same agreement can entail questions on transactions of goods and services and transaction in the form of withdrawal at the same time

When writing a contract the ambition is often to determine a common price for several efforts which shall lead to a final product. It can mean that several VAT questions are treated as one, with a common tax amout, when a division of the question should be made in more than one step for VAT purposes.

I have inter alia in the SvSkT brought up the problems in question in connection with the rules on so-called tax liability within the building sector which were introduced into the ML on 1 July, 2007, by SFS 2006:1031 (and SFS 2006:1293), which was done by permission from the EU according to article 27 of the Sixth VAT Directive 77/388/EEC (nowadays article 395 of the VAT Directive), to prevent certain types of tax evasion or tax avoidance.[22] I state there that the legislator may have overlooked that a temporary participant in a chain of contractors can avoid the rules on reverse charge and instead apply the general VAT rules. An enterprise which is both supplying external contract services and erects buildings under personal management has right of deduction in the whole of his building activity and is subject to taxation by withdrawal for services on his own buildings. The transfer of the building – the goods – is exempted from taxation according to the main rule in the field of real estate (Sw., *fastighetsområdet*), Ch. 3 sec. 2 first para. of the ML. The building services becomes instead subject of value-added taxation at the contractor who is completing the building in his own building activity, before selling the building (the goods) VAT free, by the completion constituting a transaction in the form of withdrawal – i.e. a withdrawal of service according to Ch. 2 sec. 7 of the ML. Then an enterprise that is tax liable, and aqquires the building VAT free from the temporary participant in the chain of contractors can, according to Ch. 8 sec. 4 no. 4 of the ML, deduct the VAT on withdrawal, even if the temporary participant in question has not paid output tax to the State on the transaction that the withdrawal of building services constitutes, despite that he is liable to do so.[23] That is in conflict with the idea with the rules on reverse charge, i.e. that they shall stop a building enterprise invoicing contract services by charging output tax but not accounting for and paying it to the State, whereas an enterprise in

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[19] See SvSkT 2017 (pp. 15-25), *Bemanningsföretagens momsstatus inom vård och omsorg*, Eng., The staffing enterprises’ VAT status within health care and social care (below Forssén 2017b).
[20] See Forssén 2017b p. 17.
[21] See Forssén 2018b p. 82.
[22] See SvSkT 2007 (pp. 195-206), *Omvänd skattskyldighet inom byggsektorn – skapar den flera momsproblem än den löser?*, Eng., Reverse charge within the building sector – does it cause more VAT problems than it solves?, and Ny Juridik (Eng., New law) 1/2007 (pp. 46-60), *Omvänd skattskyldighet inom byggsektorn – skapar flera momsproblem än den åtgärdar?*, Eng., Reverse charge within the building sector – does it cause more VAT problems than it is fixing?
[23] See also Balans fördjupning 1/2019 (pp. 10-16), *Luckor och andra brister i mervärdesskattelagen på fastighetsområdet*, Eng., Gaps and other lacks in the VAT act in the field of real estate (below Forssén 2019c), pp. 14 and 15). On 1 January, 2016 was, by SFS 2015:888, Ch. 8 sec. 4 first para. no. 4 altered into Ch. 8 sec. 4 no. 4 of the ML.

the chain of contractors that purchases the services has the right to make a deduction of the VAT amount paid as input tax.

Thus, in my opinion can one and the same contract regarding commission of a building contain judgments for VAT purposes of all of the concepts, goods, service and withdrawal. In my opinion, it is important to consider for anyone writing a contract on for instance sale of a building, with or without land, so that the taxable amount for VAT will be correct and a contractor in such a case accounts for the VAT amounting to the building under personal management. The situation is only seemingly a composite transaction, when the contractor is invoicing a price to the purchaser of the building as a lump sum according tp the contract, and only account output tax to the State with the same amount that has been deducted as input tax on the acquisition regarding the erecting of the building. It is for VAT purposes a matter of two different transactions, although the price is determined in one and the same contract. For the carrying out of the building service, the contractor shall account for withdrawal VAT and accounts the sale of the building (the goods) as VAT free. Even if the building would be sold the same day as it can be used, and VAT on the withdrawal shall be accounted for according to Ch. 13 sec. 13 of the ML in the VAT return for the same accounting period as for which VAT free transaction due to the sale is accounted, it is a matter of different transactions, i.e. of two for VAT purposes in principle separate transactions – the erecting of the building under personal management (the withdrawal) and the sale of the finished building respectively.

> Moreover, the contractor shall typically acount more output tax on the withdrawal of the building service than what he has deducted as input tax on acquisitions regarding the building under personal management. This follows by Ch. 7 sec. 5 first para. stipulating that the tax amount for withdrawal according to Ch. 2 sec. 7 or sec. 8 of the ML, concerning services regarding real estate, rights of tenancy and tenant-owners' rights, consisting not only of the costs invested in for instance the erecting of a building, but also of a calculated interest on equity and, for the case the contractor is a natural person and not a legal person, of the value of the work that the tax liable person has done personally when carrying out the building procedure. Thus, to use in the contract regarding the sale of the building, without a closer judgment, a lump sum as a common tax amount for the building services and for the VAT free sale of the building, with or without land, can cause increase of the VAT in retrospect for the contractor, regardless of the enterprise form the contarctor is using.

I consider, with respect of the above-mentioned, that the legislation on the whole should review the withdrawal rule for building activities in Ch. 2 sec. 7 of the ML. If the legislator wants to stop practices to circumvent the rules on reverse charge within the building sector according to the ML which are leading to the State losing VAT incomes, should furthermore an overview of the withdrawal rule in Ch. 2 sec. 7 of the ML be made in relation to precisely the rules on reverse charge.

5 Semiotics as an element in tools to support judgments of complex VAT questions

In Forssén 2019b, I have, as mentioned in the introduction, written about a model for researchers and solicitors as a support for the treatment of the external limits of the VAT. Here I come back to something that should give both the legislator and researchers and Här solicitors working with rules on VAT support, where writing and interpretation of rules on VAT are concerned, regardless of which models they are using, namely my article from 2018 in *Tidskrift utgiven av Juridiska Föreningen i Finland* [Eng., The journal published by the Law Society of Finland (abbreviated JFT)], which is about using legal semiotics within for instance the VAT law.[24]

[24] See JFT 5/2018 (pp. 307-328), *Juridisk semiotik och tecken på skattebrott i den artistiska miljön*, Eng., On signs of tax crime in an artistic environment (below Forssén 2018c).

In Forssén 2018c, I developed a side issue from Forssén 2013 regarding applicable tax rate in connection with the creation of artistic and literary works, when authors and artists create common literary and artistic works and use the enterprise form *enkelt bolag* (Eng., approximately a joint venture) for the co-operation, for instance to create a stage play or a film. I focused on the question whether each one of them, by his or her contribution (transaction) to the co-operation in the *enkla bolaget* (Eng., approx. joint venture) results in the play (or the film), has created a literary or artistic work comprised by sec:s 1, 4 or 5 of *upphovsrättslagen (1960:729)*, URL – Eng., the Copyright Act. In that case, he or she is liable to account for VAT at the reduced tax rate of 6 per cent, and if so is not the case applies instead the general tax rate of 25 per cent for his or her transaction. This is due to the rule on reduced VAT in the present case, Ch. 7 sec. 1 third para. no. 9 of the ML,[25] refers to the rules for independent works according to sec:s 1, 4 or 5 of the URL, and thus applies for the person whose work is deemed fulfilling the unique principle and thereby passing the threshold of originality, whereas an *enkelt bolag* is not a legal entity and common works according to sec. 6 of the URL are not stated in Ch. 7 sec. 1 third para. no. 9 of the ML. Then applies, for each participant in the described situation with composite transaction for creation of the finished work, that each transaction in itself is comprised by the general tax rate of 25 per cent according to Ch. 7 sec. 1 first para. of the ML.

> To make easier the judgment of the complex situation when production companies within the sector of culture shall apply the VAT rules on each part of a composite transaction I use a doll's house as an idea figure regarding the theatre where the finished stage play shall be performed, so that the taxable persons who take part in the creative process will be given a more simple judgment of his or her own regarding which tax rate he or she shall apply, depending on to which room of the theatre – or step in the creative process – the person in question is pertained.[26] By the way, I have in the SvSkT, like in Forssén 2013, described the same problem regarding the rule in question on reduced tax rate without the idea figure of a doll's house, i.e. without an element of semiotics in connection with the way of approach to judge complex VAT problems.[27]

The doll's house is an example of the use of semiotics as a support for the judgment of for example complex questions within law, where the idea figure of the doll's house forms various contexts for different parts of the creative process which shall result in for instance a stage play. I state in Forssén 2018c that semiotics of tax law should be used as an element in models – tools – as support to judge complex questions, to, concerning different contexts where a certain concept occur, reason about various environments, like in the mentioned example on VAT with an imagined theatre where the play that shall be created could be performed. Objective signs which constitute connotations to for example a judgment of a rule on VAT can also consist of certain attributes connected to a certain person. I also brought up inter alia the following imagined example from the artists' world, which may illustrate how such a judgment can be made.

> The painter Michael Angelo wears a beret. He is an actor too, and wears also then his beret, which thereby constitutes an attribute to a character he is making on stage and on films. Therefore, the beret in itself can be sufficient to determine if he supplies a right according to sec. 1 of the URL, when he for instance is appearing in a stage play or a film. What then can be decisive is that he is wearing his beret in such an environment. Thus, the beret can, besides its practical function as a headgear, constitute an attribute, an objective sign that

[25] By SFS 2019:261 was on 1 July, 2019 the third para. no. 8 altered into third para. no. 9 of Ch. 7 sec. 1 of the ML.
[26] See Forssén 2018c pp. 317-320.
[27] See SvSkT 2018 (pp. 646-658), *Kulturproduktion i enkla bolag och tillämpliga momssatser samt momssituationen för bolag som producerar artistframträdanden*, Cultural production in *enkla bolag* (approx. joint ventures) and applicable VAT rates and the VAT situation for *bolag* producing artistic performances (below Forssén 2018d), pp. 650-652.

he is not only acting in the capacity of the private person Michael Angelo but rather as the artist Michael Angelo. Thus, the actor Michael Angelo can be deemed performing an artistic work already by him, when he performs in a stage play or in a film, wearing his beet, and thereby be deemed making a from VAT exempted transaction of service according to Ch. 3 sec. 11 no. 1 of the ML.[28]

6 Summary

By this article I am aiming to show how a deep analysis of concepts can be necessary to make to judge for VAT purposes composite transactions and to determine the VAT's external limits. Therefore, I do not go into more typical application questions or stay at transaction oriented perspectives on the tax object, but regards also comples questions concerning the determination of the tax subject. I reconnect to what I have written in various contexts regarding the problems in question, and aim here to present a main thread for the research in the field of VAT, where complex questions about composite transactions and the VAT's external limits respectively are concerned.

I reason about the external limits of the VAT especially in relation to certain concepts, namely subsidies (Sw., *bidrag*), interest (Sw., *ränta*) and money (Sw., *pengar*), according to the following:[29]

- In sections 2.1 and 2.2 respectively, I mention the tax object in relation to interest and options and money respectively.

- In section 3, I mention the tax subject in relation to whar can be deemed subsidies from the State.

- In sections 4.1 and 4.2 respectively, I mention that one consideration can entail questions on number of transactions and that one and the same agreement can contain questions on transactions of goods and services and transaction in the form of withdrawal at the same time.

- In section 5, I mention semiotics as an element in models – tools – as support to judge complex VAT questions.

A composite transaction by an agreement which concerns a sale of an option regarding goods placed in an authorised tax warehouse situated within the country and sale of the goods after it has ceased to be placed in such a warehouse can cause that the tax amount for VAT will be lowered corresponding to the interest on the option. It is in conflict with the general rules, but is possible, when it is a matter of goods according to one of the categories mentioned in Ch. 9 c sec. 9 of the ML (e.g. copper, coffee and tea), due to the special rules on who is tax liable in connection with transactions of goods in certain warehouses in Ch. 9 c of the ML, which are based on the articles 154-163 of the VAT Directive. Therefore, I consider that there is a need of a clarification of which sorts of options that are exeempted from taxation for financial services regarding trading of securities against private law options. Without such a clarifying fixing of a border, as a suggestion in a special item in article 24 of the VAT Directive, I consider that also the emission of private law options is comprised by the exemption from

[28] See Forssén 2018c pp. 323-325.
[29] See section 1.

taxation according to article 135(1)(f) of the VAT Directive, making possible the mentioned arrangements to lower the tax amount for the purpose of gaining competition advantages.[30]

On the theme of what constitutes money, I consider that the HFD and the CJEU respectively in the advance ruling HFD 2016 ref. 6 and in the preliminary ruling in the case, C-264/14 (Hedqvist), respectively, are not making sufficiently underpinned judgments, when the interpretation result is that exchange services regarding the virtual currency bitcoin is deemed comprised by the exemption from taxation regarding transaction of financial services in Ch. 3 sec. 9 of the ML. The HFD overlooked the question on the difference between legal and illegal bitcoins, and reasons in its judgment only about *transactions consisting of exchange of traditional currency into the virtual currency bitcoin and vice versa*. In my opinion can the virtual currency bitcoin not be deemed equal with e-money like what is the case in HFD 2016 ref. 6 without a deeper analysis of what is meant with money also being regarded. Therefore, I consider that new trials of bitcoins for VAT purposes should be made, where a terminology with such various meaning that is stated for example in the Government's report on electronical money (SOU 1998:14), regarding what alternately is understood with money, is regarded.[31]

Concerning the rights that a taxable person has by being comprised by the VAT, an interpretation result regarding a rule in the ML meaning that an ordinary private person is comprised by the VAT and has a right of VAT deduction, for example for purchases at the grocer's shop, is to be denoted as extreme. That sets aside the fundamental conditions for the VAT according to the EU law, i.e. the basic idea that the VAT is a tax on consumption which shall be carried by the consumer, who normally is a private person. The individual should not be able to exercise such a right of VAT deduction only because the wording of the rule opens for ordinary private persons – consumers – also being comprised by the VAT. In my opinion, such an interpretation result would not be an interest worthy of protection according to the constitutional principle of legality for taxation measures, and a consumer's exercising of the right that would follow by the wording of the rule would be in conflict with the principle of prohibition of abusive practice, which follows by the CJEU's case C-255/02 (Halifax et al.). I have mentioned this recently in Forssén 2019a, where I inter alia mention that the expression ”annan person” (Eng., other person) in Ch. 2 sec. 13 of the ML should be altered into ”beskattningsbar person” (Eng., taxable person), so that an ordinary private person (consumer) cannot be comprised by the special rules on vouchers for VAT purposes which were introduced in the ML on 1 January, 2019 according to the Council's directive (EU) 2016/1065.[32]

The special rule on tax liability in Ch. 6 sec. 7 of the ML means that the intermediation of goods or services gives rise to a trnsaction for the intermediary as well as for the mandator. According to the HFD's case-law (RÅ 2002 ref. 113), an intermediary who for instance sells goods for the mandator can be deemed making a special transaction regarding the intermediation service that the intermediary thereby is making for the mandator, and not only the transaction that the intermediary like the mandator is considered making of the goods according to Ch. 6 sec. 7 of the ML. Although the question whether the same consideration can be deemed corresponding more than one transaction often diappear in practice, by the intermediary having made his mark-up in the pricing of the goods without taking out any special commission for the intermediation service, the question is still decisive for the one or

[30] See section 2.1.
[31] See section 2.2.
[32] See section 3.

those who are treating composite transactions for VAT purposes. The problem is especially interesting above all due to the lack of a common EU-definition of intermediation fo VAT purposes.[33]

One and the same contract regarding commission of a building can for VAT purposes contain judgments of transaction of goods and transaction in the form of withdrawal of service. Therefore, it is important for anyone writing a contract on for instance sale of a building, with or without land, that the situation seemingly can appear to be a composite transaction, when the contractor is invoicing a price to the purchaser of the building as a lump sum according to the contract. If the contractor only accounts for output tax to the State with the same amount that has been deducted as input tax on the acquisition regarding the erecting of the building, it can cause him increase of VAT retrospectively. It is namely for VAT purposes a matter of two different transactions, although the price is determined in one and the same contract. For the carrying out of the building service, the contractor shall account for withdrawal VAT and accounts the sale of the building (the goods) as VAT free, which applies even if the building would be sold the same day as it can be used. Then shall VAT on the withdrawal be accounted for according to Ch. 13 sec. 13 of the ML in the VAT return for the same accounting period as for which VAT free transaction due to the sale is accounted, but it is although a matter of two different transactions, i.e. of two for VAT purposes in principle separate transactions – the erecting of the building under personal management (the withdrawal) and the sale of the finished building respectively.

The contractor shall typically acount more output tax on the withdrawal of the building service than what he has deducted as input tax on acquisitions regarding the building under personal management, which follows by Ch. 7 sec. 5 first para. stipulating that the tax amount for withdrawal according to Ch. 2 sec. 7 or sec. 8 of the ML consists not only of the costs invested in for instance the erecting of a building, but also of a calculated interest on equity and of the value of the work that the tax liable person has done personally when carrying out the building procedure. Thus, to use in the contract regarding the sale of the building, without a closer judgment, a lump sum as a common tax amount for the building services and for the VAT free sale of the building, with or without land, can cause increase of the VAT in retrospect for the contractor, regardless of the enterprise form the contarctor is using. Moreover, I state the legislator should review the withdrawal rule in Ch. 2 sec. 7 of the ML for contractors' erecting of buildings under personal management, since it can be used in connection with arrangements to circumvent the rules on so-called reverse charge within the building sector which, by permission from the EU according to article 27 of the Sixth VAT Directive (nowadays article 395 of the VAT Directive), was introduced in the ML on 1 July, 2007.[34]

In Forssén 2013, I brought up as a side issue the problem concerning applicable tax rate, when more than one authors and artists create common works and use the enterprise form *enkelt bolag* (Eng., approximately a joint venture) for the co-operation. In Forssén 2018c, I developed the question regarding the reduced tax rate of 6 per cent according to Ch. 7 sec. 1 third para. no. 8 – nowadays no. 9 – in relation to the general tax rate of 25 per cent according to Ch. 7 sec. 1 first para. of the ML, so that it, by using legal semiotics with various objective signs for certain contexts, shall be easier to pertain a certain person and his or her efforts in connection with the creation of the finished work, for example a stage play or a film, to the for the person relevant rule in the ML. The problem is that the rule on the reduced tax rate

[33] See section 4.1.
[34] See section 4.2.

only refers to the rules on independent works according to sec:s 1, 4 or 5 of the URL – not to the rule on common works in sec. 6 of the URL – and that an *enkelt bolag* (Eng., approx. a joint venture) is not a legal entity. Therefore, each participant in the creation of for example the stage play must be judged for him or her self regarding whether his or her effort shall be deemed fulfilling unique principle and thereby passing the threshold of originality. Therefore, I suggest in the present respect the use of semiotics as an element in models – tools – as support for the legislator as well as for researchers and solicitors who works with rules on VAT, where the writing and interpretation respectively of VAT rules is concerned, regardless of what models they are using.[35]

7 Concluding viewpoints

According to Ch. 1 sec. 2 last para. of the ML there are special rules on who is tax liable in certain cases in Ch. 6, Ch. 9 and Ch. 9 c. In Forssén 2013, I treated the so-called representative rule in Ch. 6 sec. 2 of the ML – and Ch. 5 sec. 2 of *skatteförfarandelagen (2011:1244)*, SFL (Eng., the Taxation Procedure Act) – regarding tax and payment liability to VAT in *enkla bolag* (approx. joint ventures) and *partrederier* (shipping partnerships). Since the mentioned special rules expand the scope of who is tax liable in relation to the general rules, Ch. 1 sec. 2 first para., and the representative rule lacks a limitation in Ch. 6 sec. 2 first para. of who can be partner in an *enkelt bolag* (approx. joint venture) or a *partrederi* (shipping partnership), my interpretation of the representative rule means that also an ordinary private person can be personally liable to VAT in an *enkelt bolag* or a *partrederi* already due to being a partner in that legal figure.[36] The interpretation result is extreme, since it means disregarding the for the VAT fundamental distinction that shall be made between taxable persons and consumers.

I have not gone into the application problems regarding the representative rule, Ch. 6 sec. 2 of the ML (and Ch. 5 sec. 2 of the SFL), in this article, but instead I have moved on by mentioning a couple of the other special cases of tax liability in the ML, i.e. the special rule on intermediation in Ch. 6 sec. 7 of the ML and the rule on who is tax liable in connection with transactions of goods placed in certain warehouses according to Ch. 9 c of the ML.

Regarding Ch. 6 sec. 7 of the ML, I consider that that rule should be the subject of research on the theme EU conformity already due to the lack of a common EU-definition of intermediation for VAT purposes. A study of Ch. 6 sec. 7 of the ML is in my opinion furthermore relevant with regard of the rule, as also is mentioned,[37] containing the same interpretation question as concerning the representative rule, i.e. whether the tax subject according to the ML can be an ordinary private person or an employee by a taxable person, and that it is originating from the general goods tax of 1959, which was replaced by *lag (1968:430) om mervärdeskatt*, more precisely from third para. first sen. in the instructions to sec. 12 of *Kungl. Maj:ts förordning (1959:507) om allmän varuskatt*. The rule has been transferred from there via the VAT legislation of 1968 to the ML and is thus now to be found in Ch. 6 sec. 7.[38] Thereby, the special rule on tax liability regarding intermediation in Ch. 6 sec. 7 of the ML has the same historical background as the representative rule in Ch. 6 sec. 2 of the ML (and Ch. 5 sec. 2 of the SFL), which I, as mentioned,[39] studied in Forssén 2013.[40]

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[35] See section 5.
[36] See Forssén 2013, section 7.1.3.3.
[37] See section 4.1.
[38] See Forssén 2018b p. 39.
[39] See sections 3, 4.1, 5 and 6.

That Ch. 6 sec. 7 is originating from the time before Sweden's EU-accession on 1 January, 1995, and from the time before Sweden had a VAT legislation (1969), should in my opinion contribute to that rule in the ML being given a study on the theme EU conformity, in the same way as regarding the special rule on tax and payment liability to VAT in *enkla bolag* and *partrederier* according to Ch. 6 sec. 2 of the ML (and Ch. 5 sec. 2 of the SFL.

By the way, I may, due to the cultural sector being mentioned in this article, also mention that *Skatteverket* (i.e. the Swedish tax authority) has sometimes invoked Ch. 6 sec. 7 of the ML againts production companies within the cultural and entertainment sectors. *Skatteverket* has then stated that a production company loses the right of deduction for input tax on the acquisitions in the activity, by the company itself, as an intermediary according to Ch. 6 sec. 7, also being deemed making the according to Ch. 3 sec. 11 no. 1 of the ML from taxation exempted performance of a literary or artistic work comprised by the URL, which the active artist in effect is performing. That is sometimes overlooked in the courts and by *Skatterättsnämnden* (SRN), Eng., the Board of Advance Tax Rulings, which was the case in the so-called EMA Telstar-verdict, i.e. the HFD's advance ruling RÅ 2002 ref. 9, both by the HFD and the SRN. Therefore, I have stated in the SvSkT that a new trial of the VAT situation for that kind of production companies should be made in the HFD, to clarify their obligations and rights for VAT purposes with regard of the eventual impratnce of the special rule, on tax liability regarding intermediation in one's own name (Sw., *i eget namn*) of goods or service for a mandator, in Ch. 6 sec. 7 of the ML.[41]

I may also mention that I in Forssén 2013 brought up another of the special cases of tax liability, namely voluntary tax liability for certain lettings of real estate according to Ch. 9 of the ML. There I also judged that the interpretation resul was extreme, since the rules in Ch. 9 of the ML do not limit the freedom of choice for taxation of transactions constituting letting of tenancy and letting of immovable property to apply for taxable persons like according to the facultative article 137(1)(d) of the VAT Directive.[42] An ordinary private person should neither, by the use of the word *fastighetsägare* (Eng., owner of real estate) in Ch. 9 sec:s 1 and 2 regarding the tax subject, be deemed comprised by the ML. I have mentioned this previously also in the SvSkT and in yet another context than Forssén 2013.[43]

Regarding the field of real estate (Sw., *fastighetsområdet*), I may furthermore mention that that field is of interest concerning the problems with VAT and composite transaction in general, and not only regarding what I am stating above about withdrawal of services for building activities according to Ch. 2 sec. 7 in relation to the rules on reverse charge within the building sector in the ML and about the scope of voluntary tax liability for certain lettings of real estate according to Ch. 9 of the ML. Composite transactions are often difficult to judge in the field of VAT in general. I finish with the following viewpoints in that respect.

The right of ownership is a composite right and consists of various part rights like the right of disposal etc. If all rights to goods are transferred, it is a matter of transaction of goods whereas letting of a right to goods – for example real estate constitutes a transaction of service.[44] That

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[40] See Forssén 2013 pp. 35, 61, 124, 147 and 148 regarding that also the representative rule is originating from the legislation on the general goods tax.
[41] See Forssén 2018d pp. 653-655.
[42] See Forssén 2013, section 7.1.3.3.
[43] See SvSkT 2017 (pp. 309-320), *Vissa momsfrågor avseende fastighetsområdet* (Eng., Certain VAT questions regarding the field of real estate), pp. 310-312, and Forssén 2019c pp. 11 and 12.
[44] See article 14(1) of the VAT Directive, where it is stated that "'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner", and article 24(1) of the directive, where it is stated that "'Supply

distinction is rather easy to make. However, difficulties can above all exist when the transaction question does not concern a *föremål* (Eng., a thing) like real estate or another goods, but an *objekt* (Eng., an object) constituting a service. Therefore, I may iterate here, from Forssén 2018c, that I in 2018 brought up an idea that I presented for the first time already in 1993, where I divide the services into five different categories and using precisely the expressions *föremål* and *objekt* respectively for goods and service respectively, to express when a reasoning is about a judgment of transaction of goods and transaction of service respectively.[45] That idea can be developed in the research in the field of VAT, by legal semiotics being used in connection thereby in the way that I am suggesting in this article, so that useful models – tools – will be created to carry out for instance research efforts regarding questions concerning composite transactions and other complex VAT problems. Semiotics in combination with such models, to use connotations giving more refined search possibilities regarding various words and the contexts in which they occur, should lead to innovations regarding algorithms for search engines on the internet – for the benefit of law informatics and for instance the research in the field of VAT.[46]

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of services' shall mean any transaction which does not constitute a supply of goods". See also prop. 1989/90:111 (*Reformerad mervärdeskatt m.m.*), Eng., Reformed VAT etc., p. 189.

[45] See Forssén 2018c p. 327, where I thus refer to the following of my books: *Mervärdeskatt En läro- och grundbok i moms* (Eng., Value-added tax A text and basic book), Publica 1993, pp. 64-72; *Mervärdesskatt En handbok Andra upplagan* (Value-added tax A handbook Second edition), Publica 1994, pp. 88-97; and Forssén 2018b pp. 104-111.

[46] See Forssén 2018c p. 328.