Goods and services at composite transactions – interpretation and application according to the Swedish VAT Act and the EU's VAT Directive

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PREFACE

Goods and services at composite transactions – interpretation and application according to the Swedish VAT Act and the EU's VAT Directive is my translation of my book *Vara och tjänst vid sammansatta transaktioner – tolkning och tillämpning enligt mervärdesskattelagen och EU:s mervärdesskattedirektiv* from August 2020. It is a book about the concepts goods, services and supply at so-called composite transactions in *mervärdesskattelagen (1994:200*, here abbreviated ML), i.e. the Swedish VAT Act, and about so-called composite transactions for VAT purposes. The questions in this book concern whether those concepts are EU conform (directive conform).

If the concepts are not EU conform suggestions will be presented *de lege ferenda* concerning alterations that should be made in the ML, so that it is made complying (conform) with the EU's VAT Directive (2006/112/EC). It may also be so that the VAT Directive or the Council implementing regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, the so-called Implementing Regulation, will be proven necessary to alter.

This book is the result of a project I started late in 2017 concerning application problems regarding composite transactions in the field of value added tax (VAT). In 2015 I engaged in a thesis project at Örebro University on composite transactions for VAT purposes, but in the end of 2017 I was considered not having anything more to contribute with by *Research Team Tax Law* at the institution for Law, Psychology and Social work. However, it has not curbed my commitment in the subject. I have as a preliminary study to this book written about composite transactions with respect of VAT in my handbook from 2019, *Momsrullan IV: En handbok för praktiker och forskare*, and in a number of articles during 2018 to 2020. Another contribution to the preliminary study is one of the side issues from my doctor's theis of 2013, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier*.

I do not claim to have written yet another thesis, but with this book I prove the importance of usefulness as one of the criteria for theses. The scope of the book is half the size of a normal thesis and still giving the reader a conception of what is necessary to attend to concerning composite transactions with respect of VAT. Thus, I show that a study of that issue should be made by an examination of what should be considered composite transactions, what is similar to such transactions and what sometimes is denoted composite transactions, but should not be comprised by the concept. This book should be of interest for many, since a new VAT act is suggested in SOU 2020:31.

This book is intended for students and reserachers in the field of VAT, but also for those who need to go into the VAT law in legal proceedings where the subject is concerned.

Stockholm in November 2022
Björn Forssén

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ABBREVIATIONS

Aa, Verdicts in cases on tax, etc. (abbreviation in RÅ)
approx., approximately
art., article
BL, *bolagslagen*, *lag (1980:1102) om handelsbolag och enkla bolag* (the Partnership and Non-registered Partnership Act)
C, curia (about the CJEU)
Cit., citation
Div., division
dnr, day-book number
EC, European Community
ECLI, European Case Law Identifier – used in electronic Reports of Cases wherein from 2012 publishing is exclusively made of the CJEU's etc. verdicts. Publishing is no longer made in the printed form REG etc.
EEC, European Economic Community
e.g., exempli gratia, for example
Eng., English
ESO, *Expertgruppen för studier i offentlig ekonomi* (the Expert group for studies in public economy)
et al., et alii, and others
etc., etcetera
EU, the European Union or the Union
GML, *lag (1968:430) om mervärdeskatt* (the first Swedish VAT act – replaced by the ML)
HFD, *Högsta förvaltningsdomstolen* [the Supreme Administrative Court (before 2011 *Regeringsrätten*)] – also about the HFD's yearbook
i.e., id est, that is
JB, *jordabalken (1970:994)* [the Swedish Land Code]
JFT, *Tidskrift utgiven av Juridiska Föreningen i Finland* (The journal published by the Law Society of Finland)
Kungl. Maj:ts, *Kunglig majestäts* (formerly the Government)
ML, *mervärdesskattelagen (1994:200)* [the Value Added Tax Act 1994]
Moms, abbreviation of *mervärdesskatt* (VAT)
NML, *En ny mervärdesskattelag – förslag av utredningen SOU 2020:31* (A new value-added tax act – prioposal by the investigation SOU 2020:31)
No/no., number
not., *notismål* (notice case)
nr, number
p., page; pp., pages
para., paragraph
Prop., *Regeringens proposition* (Government bill)
ref., *referatmål* (reference case)
REG, *Rättsfallssamling från EU-domstolen, Tribunalen och Personaldomstolen* (the Swedish language version of the European

Court Reports, ECR; from 2012 publishing is exclusively made of the CJEU's etc. verdicts in the ECLI)
RF, *regeringsformen (1974:152)* [the Swedish Constitution]
RÅ, *Regeringsrättens årsbok* (from 2011 the HFD's yearbook)
SEK, Swedish krona/kronor
sen., sentence
SFL, *skatteförfarandelagen (2011:1244)* [the Taxation Procedure Act]
SFS, *svensk författningssamling* (Swedish Code of Statutes)
SOU, *statens offentliga utredningar* (the Government's official reports/investigations)
SRN, *skatterättsnämnden* (the Board of Advance Tax Rulings)
SvSkT, *Svensk Skattetidning* (Swedish Tax Journal)
Sw., Swedish
TEU, the Treaty on European Union
TFEU, the Treaty on the Functioning of the EU
URL, *lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk* [the Copyright Act]
VAT, value added tax (*mervärdesskatt*)
www, worldwide web

1. INTRODUCTION

1.1 SUBJECT AND BACKGROUND

The subject in this book is value added tax (VAT). The VAT is a tax on consumption and the basic purpose with the tax is to distinguish the entrepreneurs, the taxable persons, from the consumers, who often are ordinary private persons or employees of an enterprise. By item 2 of the portal article to the European union's (EU) VAT Directive (2006/112/EC), the VAT Directive, follows that the VAT according to the EU law comprises the production and distribution of goods and services, whereby the tax on the general consumption of such efforts shall be exactly proportional to the price of them. The enterprises have obligations and rights according to the VAT system and by article 1(2) of the VAT Directive also follows that enterprises which are liable to pay VAT to the State on the production and distribution of goods or services have the right to deduct their expenses for VAT charged in previous stages of the ennobling chain regarding the present goods or services, and that this applies up to and including the retail trade stage. The consumer finally purchasing the goods or services has no obligations or rights according to the VAT system, but is burdened as a so-called tax carrier by the VAT on the accumulated value-added on the production and distribution of the goods or the services, by he or she paying the price including VAT on the goods or the services.

In this book is in the first place questions on the tax object treated, i.e. the effort in form of goods or services that the tax subject, the entrepreneur (the taxable person), produces or distributes. The questions about composite transactions concern cases where the tax object contains efforts of different character with respect of whether they are taxable transactions or exempted from VAT or comprised by different tax rats. Then it is a matter of deciding if the price – the consideration – regards one single effort or if it shall be devided into different goods and/or services in the respects mentioned.

Thus, in this book I write about the concepts goods and services in connection with *sammansatta transaktioner*.[1] In these respects are questions on interpretation and application according to *mervärdesskattelagen (1994:200*, here abbreviated ML) and the VAT directive treated. VAT according to the ML is a Swedish tax. However, Sweden has by the EU-accession on 1 January, 1995 transferred the

[1] The expressions corresponding with *sammansatta transaktioner* is in Eng.: *composite transactions* or *composite supplies*.

competence in inter alia the field of VAT to the EU.[2] In accordance with what the Court of Justice of the EU (CJEU) is stating in the first para. of item 3 in the summary of Costa (Case 6-64) this means that the EU law is a legal system of its own that applies before national law and which is binding for the Member States' courts. For the two legislations, the ML and the VAT Directive, applies according to art. 288 third para. of the Treaty on the Functioning of the EU (TFEU) that the directive rules are binding for Sweden as a member state of the EU to implement into the ML, if they have so-called direct effect, so that the intended result with the directive is achieved.[3] This means that the VAT questions in this book are treated in relation to two legislations, the ML and the VAT Directive. Thus, I interpret the meaning of the concepts goods and services according to the ML and put forward certain application questions for them in connection with composite transactions.

In a combined project consisting of my licentiate's thesis, *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen*,[4] and my doctor's thesis, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier*,[5] I analysed the determination of the tax subject in Ch. 4 sec. 1 of the ML and the special rule in Ch. 6 sec. 2 of the ML on tax and payment liability to VAT concerning the enterprise form *enkla bolag* [Eng. (approx.) joint ventures] and *partrederier* (Eng., shipping partnerships), which are a sort of enkla bolag, respectively, and these rules compliance with the main rule on who is deemed to be a taxable person in art. 9(1) first para. of the VAT Directive.

These were the main issues in the two theses, and here I go further with certain questions concerning the tax object according to the ML and their compliance (conformity) with the EU law, in the first place the VAT Directive. The questions concern the concepts goods and services at composite transactions regarding goods and/or services.

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[2] See Ch. 10 sec. 6 of *regeringsformen (1974:152*, here abbreviated RF, and art:s 4(1) and 5(2) Treaty of European Union (TEU) and prop. 1994/95:19 (*Sveriges medlemskap i Europeiska unionen*) Part 1 pp. 111, 470, 471 and 507.

[3] See prop. 1994/95:19 Part 1 p. 486, where it is (in translation) stated, with reference to the CJEU-case van Gend en Loos (26/62), that it is required for direct effect that the rule is *unconditional, precise and complete*. See also *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier*, by Björn Forssén, Örebro Studies in Law 4, Örebro 2013 (cit. Forssén 2013). Full text in open access on www.forssen.com and www.diva-portal.org.

[4] *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen*, by Björn Forssén, Jure Förlag AB, Stockholm 2011 (cit. Forssén 2011). Full text in open access on www.forssen.com and www.diva-portal.org.

[5] Forssén 2013.

In the doctor's thesis one side issue concerned the tax object, namely the question about applicable tax rate regarding copyrights to literary and artistic works, where the area of tension lies between on the one hand the main rule on a general tax rate of 25 per cent, according to Ch. 7 sec. 1 first para of the ML, and on the other hand the reduced tax rate of 6 per cent, according to Ch. 7 sec. 1 third para. no. 8 of the ML, where reference is made to sec:s 1, 4 or 5 of *lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk*, here abbreviated URL, i.e. the Swedish Copyright Act.[6] I described that a particular problem exists with that question, where joint works according to sec. 6 of the URL created under the enterprise form *enkla bolag* and not under other enterprise forms are concerned, since *enkla bolag* (and *partrederier*) are not legal entities, in opposition to natural persons and legal persons, like limited companies (Sw., *aktiebolag*) or partnerships (Sw., *handelsbolag*).[7] I come back to this problem in this work, when I describe the application problems with composite transactions in the field of VAT.

I have written a number of articles where I treat application problems with composite transactions in the field of VAT,[8] and I have furthermore mentioned such problems in my handbook for practicians and researchers.[9] In this work I also come back to these articles and the handbook, when I describe the mentioned application problems. The articles and the handbook, together with the treatment of the mentioned side issue on the tax object in my doctor's thesis, thus make together a preliminary study to the present work.

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[6] The rule Ch. 7 sec. 1 third para. no. 8 was altered on 1 July, 2019, by SFS 2019:261, to Ch. 7 sec. 1 third para. no. 9 of the ML. See also section 12 213 111 in *Momsrullan IV: En handbok för praktiker och forskare*, by Björn Forssén, self-published 2019 (cit. Forssén 2019a). Full text in open access on www.forssen.com.

[7] See Forssén 2013, sections 1.1.2, 2.8, 6.5, 6.6, 7.1.3.6 and 7.2.

[8] See my articles in: Tidskrift utgiven av Juridiska Föreningen i Finland (JFT), JFT 5/2018 pp. 307-328, *Juridisk semiotik och tecken på skattebrott i den artistiska miljön* (cit. Forssén 2018a); Svensk Skattetidning (SvSkT) 2018 pp. 646-658, *Kulturproduktion i enkla bolag och tillämpliga momssatser samt momssituationen för bolag som producerar artistframträdanden* (cit. Forssén 2018b); Balans Fördjupningsbilaga 1 2018 pp. 3-10, *Konkurrensfördelar med varuomsättningar efter momsfria omsättningar av varor i vissa lager och av finansiella tjänster* (cit. Forssén 2018c), e-version on www.tidningenbalans.se and on www.forssen.com; JFT 1/2019 pp. 61-70, *Om rättsliga figurer som inte utgör rättssubjekt – den finska och svenska mervärdesskattelagen i förhållande till EU-rätten* (cit. Forssén 2019b); and SvSkT 2020 pp. 160-172, *Sammansatta transaktioner och semiotik beträffande moms* (cit. Forssén 2020a). All articles in full text in open access on www.forssen.com.

[9] See Forssén 2019a, section 12 210 000, where I state that I in that work, in sections 12 211 000-12 214 050, makes an examination of inter alia the drawing-up of boundaries between transactions of different character regarding VAT or different applicable VAT rates. In Forssén 2019a are composite transactions mentioned in the following sections: 12 210 010, 12 212 140, 12 213 151, 12 213 212, 12 213 232, 12 215 225, 12 216 511 and 12 216 552.

1.2 PROBLEMS

I treat, as mentioned,[10] in the first place questions on the tax object. The efforts examined consists of goods and services, according to as well the ML as the VAT Directive. Before the application problems with composite transactions regarding goods and/or services are treated, the analysis in this work therefore concerns whether the concepts goods and services respectively according to Ch. 1 sec. 6 of the ML are EU conform (the two concepts are stated in that rule in the singular in Swedish, i.e. *vara* and *tjänst* respectively). The issue about composite transactions concerns, as also has been mentioned,[11] cases where the tax object contains efforts of different character with respect of whether they are taxable transactions or exempted from VAT or comprised by different tax rates, whereby the questions concern the decision if the price – the consideration – regards one single effort or if it shall be divided into different goods and/or services in the respects mentioned.

The problems in this work are treated in the following order.

1. The question whether the concepts goods and services according to Ch. 1 sec. 6 of the ML are EU conform is interpreted firstly.

2. Thereafter are cases treated regarding application where the tax object contains efforts of different character with respect of whether they are taxable transactions or exempted from VAT or comprised by different tax rates (composite transactions).

   Another application question which are mentioned regarding composite transactions concern what applies about a (one) consideration that regards more than one transaction or delivery or supply, i.e. regarding more than one taxable event.

Before I go further in section 1.3 describing the way of carrying out the study in this work, I may partly mention that composite transactions are not defined in neither the ML nor the VAT Directive, but still describe something about what can be read out from the two legislations to support the treatment of them, partly account for the determination of the taxable amount, when it is a matter of the main rules on taxable transactions regarding of goods or services according to the ML, being in compliance (conform) with the determination of taxable supply of goods or supply of services according to the main rules in the VAT Directive.

[10] See section 1.1.
[11] See section 1.1.

Although there is no definition of composite transactions in the ML, questions on VAT and such transactions often concern Ch. 7 sec. 7 of the ML, where a principle of division is stated as a 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. The rule Ch. 7 sec. 7 of the ML has (in translation) the following wording:

> *Ch. 7 kap. sec. 7 of the ML*
>
> *When a transaction only partly leads to tax liability and the taxable amount for that part of the transaction causing tax liability cannot be established, the taxable amount shall be determined by division on a reasonable basis*.
>
> *The first paragraph has a corresponding application for the division of the taxable amount when tax according to this act is levied with different percentages*.

If a division is not possible, the CJEU considers that a principle of the principal instead applies, where the dominating part of the mentioned sort of composite transactions decides the question on taxation or exemption and the question on applicable tax rate respectively.[12] The CJEU considers that a division of a composite transaction must not be an artificial split.[13]

Thus, there is neither any definition of composite transactions in the VAT Directive, but what is meant with such transactions according to the directive may be considered following of the case-law that the CJEU is expressing as the, according to art. 267 TFEU, highest interpreter of the EU law.[14] When it is a matter of deciding whether a composite transaction shall be treated according to the principle of division or be considered a single effort (supply), the statements mentioned below by the CJEU in the EU-case C-41/04 (Levob) are of guidance. According to item 2 in the ”Levob”-case regarded the judgment of the question whether VAT would be paid on various transactions including software, adaptation of it to the needs of Levob, installation of the software and education of Levob’s personnel to use it. The following statements by the CJEU are of guidance for determining whether a composite transaction shall be divided or considered a single supply:

[12] See the CJEU-case C-349/96 (CPP), item 32. See also Forssén 2020a p. 161.
[13] See the CJEU.case C-41/04 (Levob), the first part of item 30. See also Forssén 2019a, sections 12 210 010 and 12 212 140.
[14] See also Forssén 2011, section 1.2.6 and Forssén 2013, section 1.2.2.

- ”[W]here two or more elements or acts supplied by a taxable person to a customer, being a typical consumer, are so closely linked that they form objectively, from an economic point of view, a whole transaction, which it would be artificial to split, all those elements or acts constitute a single supply for purposes of the application of VAT.”[15]

- ”This is true of a transaction by which a taxable person supplies to a consumer standard software previously developed, put on the market and recorded on a carrier and subsequently customises that software to that purchaser's specific requirements, even where separate prices are paid.”[16]

- ”[S]uch a single supply is to be classified as a 'supply of services' where it is apparent that the customisation in question is neither minor nor ancillary but, on the contrary, predominates; such is the case in particular where in the light of factors such as its extent, cost or duration the customisation is of decisive importance in enabling the purchaser to use the customised software.”[17]

I finish this section by showing that the determination of the taxable amount according to the main rules on taxable transactions of goods or services according to the ML is complying with the determination of taxable deliveries of goods or supplies of services according to the main rules in the VAT Directive.

According to the main rule in Ch. 7 sec. 2 of the ML the taxable amount for a taxable transaction of goods or services consists of the consideration that the vendor shall get from the purchaser.[18] With consideration is meant according (in translation) to Ch. 7 sec. 3 c first para. of the ML *all that the vendor has received or shall receive from the purchaser or a third party, including such contributions which are directly linked to the price of the goods or the services*. The main rule for the determination of the taxable amount for taxable deliveries of goods or supplies of services in art. 73 of the VAT Directive, which has the following wording:

[15] See the EU-case C-41/04 (Levob), item 30 first indentation.
[16] See the EU-case C-41/04 (Levob), item 30 second indentation.
[17] See the EU-case C-41/04 (Levob), item 30 third indentation.
[18] See Ch. 7 sec. 2 first para. first sen. and sec. 3 no. 1 of the ML. See also Forssén 2019a, section 12 201 023.

Art. 73 of the VAT Directive

> ”In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the L 347/20 EN Official Journal of the European Union 11.12.2006 customer or a third party, including subsidies directly linked to the price of the supply.”

In section 1.3 I state that I limit the study in this work of the concepts goods and services according to the ML at composite transactions to concern the main rules of supply of goods and supply of services respectively in art. 14(1) and 24(1) respectively of the VAT Directive. Therefore I consider in this study too the main rules on taxable amount and consideration according to the ML, i.e. I consider that it is a matter of transaction of goods or services for payment or something that can be estimated in the value of money, and disregard questions on the taxable amount according to art:s 74-77 of the directive, concerning withdrawal situations or at transfer of goods to another Member State, if not otherwise stated. Thus, for the further presentation, I conclude that the main rule on the taxable amount in Ch. 7 sec. 2 of the ML is complying with the main rule of the determination of the taxable amount for delivery of goods or supply of services in art. 73 of the VAT Directive.

1.3 WAY OF CARRYING OUT THE STUDY

In the present work is first an analysis made in accordance with what is stated in section 1.2 of the concepts goods and services in Ch. 1 sec. 6 of the ML in relation to the EU law in the field. Since the VAT Directive does not contain any independent determination of the two concepts, there will be partly, regarding goods, a systematical analysis of the directive rules on supply of goods and supply of services, partly, regarding services, an analysis of those directive rules in relation to what is meant by service according to art. 57 first para. TFEU. Thus, the EU conformity with the concepts goods and services will be tried in relation to the EU law regarding partly secondary law, partly secondary and primary law.[19]

For the two legislations, the ML and the VAT Directive, applies regarding primary law that the directive rules are binding for Sweden to implement in the ML, if they hade so-called direct effect, so that the intended result with the VAT Directive is achieved.[20] There is an obligation for the Member States’ courts to do a directive conform (EU

[19] See section 2.3.1.
[20] See section 1.1 regarding art. 288 third para. TFEU.

conform) interpretation of the ML ”as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter”.[21] Regulations from the EU are directly applicable in each Member State,[22] and shall, unlike directives like the VAT Directive, not be implemented in the national legislation, i.e. like in the ML. In the field of VAT was, on 15 March, 2011, with application from 1 July, 2011 the Council’s implementing regulation (EU) No 282/2011 introduced laying down implementing measures for the VAT Directive (the Implementing Regulation), where such implementing measures are stipulated for supply of services according to art:s 24-29 of the VAT Directive. The study in this work of the concepts goods and services according to the ML at composite transactions is limited to concern the main rules for supply of goods and supply of services respectively in art. 14(1) and 24(1) respectively of the VAT Directive. If the concepts goods and services in the ML are not complying with the main rules on delivery of goods and supply of services according to the directive, I leave in Chapter 2 suggestions *de lege ferenda* on alterations in the ML or in the VAT Directive, before I go further with raising questions on composite transactions regarding goods and/or services.[23]

Thus, I interpret first the meaning of the concepts goods and services according to Ch. 1 sec. 6 of the ML in relation to the main rules for supply of goods and supply of services respectively in art. 14(1) and 24(1) respectively of the VAT Directive, whereby also the Implementing Regulation is regarded, but in the first place regarding what is stated in art:s 8 and 9 of the Implementing Regulation which consern the application of art. 24(1) of the VAT Directive.

If the ML will be deemed EU conform regarding the concepts goods and services, I am going further without leaving any suggestion on alterations of the two concepts in the ML, and put forward certain application questions for them in connection with composite transactions. These questions concern, as mentioned,[24] cases where the tax object contains efforts of different character with respect of whether they are taxable transactions or exempted from VAT or comprised by

[21] See item 8 of the EU-case C-106/89 (Marleasing), where the CJEU also refers to the EU-case 14/83 (von Colson and Kamann) which established the principle of EU conform interpretation. See also Forssén 2013, section 1.2.3.
[22] See art. 288 second para. TFEU.
[23] De lege ferenda: About the law that should be made. A statement *de lege ferenda* is expressing a desire of how future legal rules should be in a certain respect. See p. 94 in *Juridikens begrepp* (4th edition), by Stefan Melin, Iustus förlag, Uppsala 2010 (cit. Melin 2010); and p. 35 in *Juridikens termer*, 8th edition, by Sture Bergström, Torgny Håstad, Per Henrik Lindblom and Staffan Rylander, Almqvist & Wiksell Förlag/Liber AB, Falköping 1997 (cit. Bergström et al. 1997). See also Forssén 2011, section 1.1.3.1 and Forssén 2013, section 1.2.1.
[24] See section 1.2.

different tax rates. The questions concern the decision of whether the price – the consideration – regards one single supply or if it shall be divided into different goods and/or services in the respects mentioned.

By art. 113 TFEU follows a harmonisation demand for the Member States' legislations on indirect taxes, like VAR, and a request of inter alia that the VAT must not distort the competition on the internal market. In the latter respect there is also support in the primary law for the principle of a neutral VAT, where the basic idea in practice is that the consumers shall not choose deliverer of goods or supplier of services due to differences in the valu-added taxation for various prodeucers or distributors producing or distributing similar products.[25] By recital 7 of the preamble to the VAT Directive follows that the tax rates and the exemptions from VAT are not fully harmonised, but that the neutrality in competition still should apply for the common system of VAT in the Member States, by similar goods and services bearing the same tax burden, whatever the length of the production and distribution chain up to the consumer.

Since the value-added taxation of supply of goods and supply of services respectively are not harmonised, I limit the problemizing of composite transactions regarding goods and/or services to concern the Swedish national ML in relation to the EU law in the field, whereby the trial of the EU conformity regards certain case studies of the application of the ML concerning composite transactions from precisely a transaction related perspective on the tax object and the consideration. As a support to do the case studies regarding composite transactions in Chapter 4, and thereby leaving suggestions *de lege ferenda* of alterations in the ML or in the VAT Directive and the Implementing Regulation, I create a tool in Chapter 3.

An ingredient in the creation of the mentioned tool in Chapter 3 is that I divide the services into five different categories. The intention is not that the tool taken by itself shall constitute the method for the analysis in this work. Thus, the tool in itself shall not be perceived as some kind of logical or mathematical method for the analysis of the concept services for VAT purposes. The tool shall not at all be perceived as anything else than a support for the analysis, i.e. a model – a tool – to support the analysis in this work. I have in another work treated that it is not meaningful for those making examinations of the subject VAT to make logic and mathematics to the method in itself for a study, insead of using logic and mathematics only as models – tools – to support the

[25] See recital 4 of the preamble to the VAT Directive and also recitals 5 and 7 of the preamble to the VAT Directive and art. 1(2) of the VAT Directive.

analysis.[26] I call making logic and mathematics the method in itself for studies of the VAT law *the trap of mathematics* (Sw., *matematikfällan*), and thus recommend logic and matematics only to be used as a tool (model) for the research of the VAT law. Thereby should the research and other studies of the VAT law become better and more useful for the appliers of the law and also stimulate the legislator to create better rules with respect of communication, to avoid gaps occurring in the rules.[27]

1.4 DELIMITATIONS

The presentation of the questions on the tax object, i.e. the questions on goods and services and composite transactions regarding goods and/or services, in this work concrn, if not otherwise stated, the main rules regarding transactions and supplies for a consideration respectively.[28]

With consideration, when I judge transactions and supplies for a consideration respectively, I mean payment in money or something that can be estimated in the value of money. With money I mean: cash, book money, arithmetical units, standard of value, paying power, instruments, e-money and digital money, which the Investigation on electronical money SOU 1998:14, deemed as means of payment. I have elsewhere reasoned about so-called bitcoins or other virtual currency in connection with the expression paying power (Sw., *betalkraft*) and the problem that it is not possible to distinguish for VAT purposes between legal and illegal activities with bitcoins, if an amendment is not made in Ch. 3 sec. 9 of the ML meaning that exemption from VAT for bank- and financing services and trading of securities is not comprising exchange services regarding virtual currencies like bitcoin, if not an obligation to report as a financial activity is fulfilled and a permit thereby is issued by *Finansinspektionen* (Eng., Sweden's financial supervisory authority).[29] I do not go into other problems with bitcoins and VAT in this work.

If not otherwise stated, I disregard from for example questions on withdrawal taxation and issues on accounting rules in Ch. 13 of the ML or rules on procedure in *skatteförfarandelagen (2011:1244*, here abbreviated SFL), i.e. the Swedish Taxation Procedure Act. It is the material rules in the ML regarding obligations and rights that is the basis for the questions on accounting for VAT and the taxation procedure in the field of VAT, not the other way around. Thus, I do not

[26] See my article in Balans Fördjupningsbilaga 2 2020 pp. 17-27, *Matematikfällan i forskningen – avseende mervärdesskatterätten* (cit. Forssén 2020b), e-version on www.tidningenbalans.se and on www.forssen.com.
[27] See Forssén 2020b p. 18.
[28] See sections 1.2 and 1.3.
[29] See my article in SvSkT 2017 pp. 95-106, *Bitcoins och mervärdesskatt* (cit. Forssén 2017a) pp. 104 and 105. Full text in open access on www.forssen.com.

come back in this work to side issue E in my licentiate's thesis, which concerned the question whether a lacking EU conformity exists regarding the determination of the obligation to register to VAT due to that obligation being connected to the concept tax liability (Sw., *skattskyldighet*) in the ML according to *skattebetalningslagen (1997:483)* and its successor the SFL.[30]

A special rule regarding transactions in Ch. 2 of the ML is Ch. 2 sec. 1 b, which on 1 January, 2016 replaced Ch. 3 sec. 25 by SFS 2015:888. The exemption for trading of assets in connection with trading of a going concern in Ch. 2 sec. 1 b of the ML regards the transaction in itself, unlike the predecessor Ch. 3 sec. 25 of the ML, where the exemption from value-added taxation was an exemption from VAT for the transaction.[31] No change of the freedom from taxation or the scope of the right of deduction is intended. It is merely a matter of an adaptation of the ML in the present respect to the VAT Directive, where art:s 19 and 29 mean that any supply of goods or supply of services shall not emerge in the present case of transfer of a totality of assets or part thereo.[32] Since Ch. 2 sec. 1 b is a special rule on transaction in the ML, I disregard from it in this work and set the focus instead, as mentioned, on the main rules regarding transactions. In the present respect may be mentioned that the predecessor to the rule, i.e. Ch. 3 sec. 25 of the ML, has been mentioned in the research by professor Eleonor Kristoffersson.[33]

Furthermore, it may be mentioned that special rules were introduced on transactions concerning vouchers with respect of VAT on 1 January, 2019, by SFS 2018:1333. Those rules are based on changes of the VAT Directive according to the Council's directive (EU) 2016/1065. Thedy concern in the first place the concept supply at transactions with vouchers, but also in such cases what especially apply concerning the emergence of tax liability, the taxable amount and the accounting of VAT. Since the rules on vouchers with respect of VAT are special rules about supplies in the ML, I do not make any analysis of those in this work, but I mention the rules on voucers with respct of VAT only in connection with the application questions in Chapter 4, to give a contrast to the rule on exemption from VAT for financing services, i.e. Ch. 3 sec. 9 of the ML. Thus, I come back in section 4.3 to inter alia an

[30] See Forssén 2011, section 8.1.6. See also Forssén 2013, section 2.4 in the ending overview regarding Forssén 2011 and Forssén 2013.
[31] See Forssén 2019a, section 12 211 120.
[32] See prop. 2015/16:19 (*Vissa frågor på området för indirekta skatter*) p. 63.
[33] See *Mervärdesskatt vid omstruktureringar*, by Eleonor Alhager (nowadays Kristoffersson), Iustus förlag, Uppsala 2001 (cit. Alhager 2001).

article that I have written about vouchers with respect of VAT.[34] I have mentioned vouchers with respect of VAT also elsewhere.[35] I have left some remarks taken by themselves on the rules about vouchers with respect of VAT which were introduced into the ML in 2019, but I mention in this work only Ch. 2 sec. 13 of the ML and give here (in translation) its wording:

> *Ch. 2 sec. 13 of the ML, according to SFS 2018:1333*
>
> *When a transfer of a multi-purpose voucher is made by another person than the taxable person carrying out such a transaction that is considered in sec. 12, shall all supplies of services that can be identified, for example distributions- and marketing services, be deemed transactions.*
>
> The use of the expression *en annan person* (Eng., another person) in Ch. 2 sec. 13 of the ML does not comply with the nearest corresponding rule in the VAT Directive, article 30b(2) second para., where the expression *en annan beskattningsbar person* (Eng., another taxable person) is used. The rule Ch. 2 sec. 13 of the ML should in accordance with the directive rule regard a *beskattningsbar person* (Eng., taxable person) that transfer a multi-purpose voucher for the taxable person carrying out the delivery of the goods in question or the supply of the services in question that the voucher concerns. The vendor of the voucher function as a distributor of the voucher for the person who shall deliver the goods or supply the services. Both those persons shall be taxable persons, which folloe by the wording of the corresponding rule in the VAT Directive, i.e. article 30b(2) second para. of the directive. By the use of the expression *en annan person* instead of *en annan beskattningsbar person* regarding the distributor of the voucher in Ch. 2 sec. 13 of the ML could the rule be interpreted so that an ordinary private person would be considered a distributor of the voucher and comprised by the ML. That violates the basic principle of VAT for the VAT system, which is mentioned in section 1.2, and which means that the tax subjects shall be distinguished from the consumers. Thus, I suggest *de lege ferenda* that the expression *en annan person* in Ch. 2 sec. 13 of the ML will be altered to *en annan beskattningsbar person*. By the way, I e-mailed on 25 June, 2019 information about Ch. 2 sec. 13 of the ML not complying with the wording of article 30b(2) second para. of the VAT Directive to the administrative director of *Expertgruppen för studier i offentlig ekonomi (ESO)* by the Treasury, who answered 2019-06-27 that the information was sent on to the Treasury's tax division.[36]

Concerning the material rules on liabilities and rights with respect of the VAT for a taxable person it is the liabilities that are the basis for the rights. Since the determination of the tax object is a decisive question for the emergence of the liability to pay VAT, I disregard in this work from questions on the right of deduction for input tax by the vendor of goods and/or services. For instance is not what applies regarding

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[34] See my article in SvSkT 2019 pp. 329–346, *Vouchrar och moms – regeltekniska aspekter och förslag till forskning* (cit. Forssén 2019c). Full text in open access on www.forssen.com.

[35] See Forssén 2019a, section 11 100 000 and sections 12 216 000-12 216 552. See also *Vouchrar i momshänseende* by Björn Forssén, self-published 2019 (cit. Forssén 2019d). Full text in open access on www.forssen.com.

[36] See Forssén 2019c, section 3.

division of the input tax in cases of so-called mixed activity, according to Ch. 8 sec. 13 of the ML and art. 173 of the VAT directive, treated in this presentation concerning the vendor. Thus, I will neither come back in this work to side issue D in my licentitate's thesis, which concerned the lack of EU conformity regarding the question of when the right of deduction emerges due to the main rule of the right of deduction's emergence and scope in Ch. 8 sec. 3 first para. of the ML building that right on the prerequisite tax liability (Sw., *skattskyldighet*) instead of on the concept taxable person (Sw., *beskattningsbar person*), which applies acording to the main rule of the right of deduction in art. 168 a of the VAT Directive.[37]

However, I mention in the case studies regarding composite transactins by a vendor what various judgments thereby mean due to the right of deduction of input tax by the purchaser, where a consumer thus is not entitled to such a right and a taxable person can have a full right of deduction, no right of deduction or a right of deduction based on a reasonable division when carrying out a mixed activity.

1.5 RESEARCH IN THE FIELD OF VAT LAW

There has not been any study especially regarding the concepts *vara* and *tjänst* in the ML (the two concepts are in the singular in Ch. 1 sec. 6 of the ML and I use plural in English, i.e. *goods* and *services*) and of their compliance with the EU law in the field of VAT law, despite there are theses which have concerned the tax object and thereby questions of transaction and exemption from VAT.[38] In the field of indirect taxes the concept *vara* in the ML has been mentioned in connection with research on customs.[39] I comment this as follows:[40]

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[37] See Forssén 2011, section 8.1.6. See also Forssén 2013, section 2.4 in the ending overview regarding Forssén 2011 and Forssén 2013.

[38] See *Nordisk mervärdesskatterätt – behandlingen av utländska företag, varor eller tjänster inom ramen för nationella lagar*, by Björn Westberg, Juristförlaget JF AB, Stockholm 1994 (cit. Westberg 1994); Alhager 2001; Financial Activities in European VAT A Theoretical and Legal Research of the European VAT System and the Actual and Preferred Treatment of Financial Activities, by Oskar Henkow, Kluwer Law International, Alphen aan den Rijn 2008 (cit. Henkow 2008); Cross-Border Consumption Taxation of Digital Supplies, by Pernilla Rendahl, IBFD, Amsterdam 2009 (cit. Rendahl 2009); *Neutral uttagsbeskattning på mervärdesskatteområdet*, by Mikaela Sonnerby, Norstedts Juridik, Stockholm 2010 (cit. Sonnerby 2010); Insurance in European VAT On the Current and Preferred Treatment in the Light of the New Zealand and Australian GST Systems, by Marta Papis-Almansa, Department of Business Law, Lund University, Lund 2016 (cit. Papis-Almansa 2016); and *Leveranser och unionsinterna förvärv i mervärdesskatterätten* by Mikael Ek, Iustus förlag, Uppsala 2019 (cit. Ek 2019).

[39] See H*armoniserade tulltaxor Införlivande, tolkning och tillämpning av internationella regler för varuklassificering*, by Christina Moëll, Juristförlaget i Lund, Lund 1996 (cit. Moëll 1996).

- In the mentioned research on customs it is stated that the concept *vara*, as a consequence of the ML on 1 July, 1994 replacing *lagen (1968:430) om mervärdesskatt*, here abbreviated GML, got *the same construction as within the EU*.[41]

- There is also stated that limited efforts have been made to create a unified concept *vara* for a few fields of law, and it was denoted as otherwise unclear both on a national and an international level what is the closer meaning of the concept *vara*.[42]

- Thereby may also be mentioned that it is stated therein that *it would hardly be possible or even meaningful to establish a unified concept* vara *for all fields of law*. *One should instead continue with determining the meaning of the concept with respect of the present legislation*.[43]

Thus, I state in section 1.3 that I in this work interpret whether the concepts *vara* and *tjänst* according to the ML are complying with the EU law, before I go further and put forward certain application questions for the two concepts in connection with composite transactions.

1.6 LANGUAGE QUESTIONS

The Lisbon Treaty of 2007 contains the TEU and the TFEU, which have the same legal value and are mentioned *the treaties*.[44] By the Lisbon Treaty it is furthermore stated that the EU's *Charter* of Fundamental Rights shall have the same legal value as the treaties.[45]

- The Lisbon Treaty was introduced in Sweden on 1 December, 2009 by SFS 2008:1095 and 2009:1110. The EC Treaty (the Rome treaty) from 1957 changed name to the TFEU, but the TEU from 1993 remains with certain alterations.

- In the TEU and TFEU the EU is called the Union.

- According to article 1 TEU has the Union replaced and succeeded the European community (EC). Therefore, I use the EU instead of the EC and EU law (Union law), Union concepts,

[40] See also Forssén 2019a, section 12 201 010.
[41] See Moëll 1996 p. 38.
[42] See Moëll 1996 p. 40.
[43] See Moëll 1996 p. 41.
[44] See art. 1 third para. TEU and art. 1(2) TFEU.
[45] See art. 6(1) first para. TEU.

> EU conform and the CJEU. At references to inter alia case law from the time before the Lisbon Treaty may EC and EC law (Community law), Community concepts, EC conform and the ECJ be used.

Sometimes I use the expression the general rules in the ML. Thereby, I mean in the first place the prerequisites of the main rule in the ML on who is *skattskyldig*, i.e. tax liable, according to Ch. 1 sec. 2 first para. no. 1 of the ML with reference to sec. 1 first para. no. 1. The equivalent expression in the VAT Directive is *liable for payment of VAT* (to the tax authorities).[46] By the special rules on tax liability I mean the special rules on who is *skattskyldig* (tax liable) according to Ch. 6, Ch. 9 and Ch. 9 c of the ML.[47]

Moreover, I use in this work sometimes the expression ordinary private person, and mean thereby mean such a consumer for VAT purposes who is not comprised by the main rule on taxable person according to Ch. 4 sec. 1 first para. first sen. of the ML and article 9(1) first para. of the VAT Directive. By an ordinary private person I mean then, besides consumers in general, a natural person who at the most is carrying out a hobby activity and thus is not considered a taxable person, i.e. who is not an entrepreneur. If not otherwise stated, I also mean by an ordinary private person a natural person who is working to obtain income but as an employee.[48] Furthermore, I mean by an ordinary private person anatural person who is an ordinary private lender, and who is not carrying out finance activity.

In certain cases I make a distinction between *föremål* (Eng., things) and *objekt* (Eng., objects). Then I mean by *things* that a transaction regards a material thing, immovable property or some other tangible property, whereas I by objects mean that the transaction of a service concerns another service, i.e. the object of the transaction of the service is another service.[49]

I use the expression *dividing problem* (Sw., *uppdelningsproblem*), when I write about composite transactions with respect of VAT. I use the expression *border problem* (Sw., *gränsdragningsproblem*), if it is not at all possible to identify different ingredients for VAT purposes of an effort (supply). Then it is only a matter of whether one or the other rule in the ML regarding the tax object shall be applied. In such a case it is a matter of whether the supply in question is comprised by the principle

[46] See section 2.1.
[47] See Ch. 1 sec. 2 last para. of the ML.
[48] See section 1.1.
[49] See section 3.2.2.

of generally taxable transactions of goods and service or by an exemption from VAT and whether the supply, provided that it is taxable, is comprised by the general tax rate of 25 per cent or by the reduced tax rates of 12 and 6 per cent or zero rate. With a zero rate tax rate I mean transactions of goods or services that are comprised by a qualified exemption from VAT entailing a right of reimbursement of input tax, unlike what I denote unqualified exemptions from VAT, which entails neither right of deduction nor right of reimbursement for input tax on acquistions and imports to the activity.

The concepts *vara* and *tjänst* in Ch. 1 sec. 6 of the ML are in the singular in Swedish and I use plural in English, i.e. *goods* and *services*.

1.7 OUTLINE OF THIS BOOK

In *Chapter 2* I examine the concepts in the ML that are relevant for the determination of the tax object, and whether they are complying (conform) with the EU law, i.e. in the first place with the VAT Directive, whereby also the Implementing Regulation and the TFEU are regarded.

If the concepts *vara* and *tjänst* in the ML are EU conform (the two concepts are in the singular in Ch. 1 sec. 6 of the ML and I use plural in English, i.e. *goods* and *services*), I go further in *Chapter 3*, without leaving any suggestions on alterations of the concepts, by creating a tool to support certain case studies – application questions – that I am putting forward in *Chapter 4* concerning composite transactions regarding goods and/or services. These questions concern cases where the tax object contains supplies of different character with respect of whether they are taxable transactions or exempted from VAT or comprised by different tax rates.

In *Chapter 5* I summarize the study in this work of the VAT law concerning the concepts goods and services and composite transactions regarding goods and/or services, and leave some concluding viewpoints.

In *Chapter 6* I account for the rules in the suggestion of a new VAT act (NML) which was submitted in June 2020 in SOU 2020:31 for which I am leaving suggestions of alterations in the corresponding rules in the ML.

2. THE TAX OBJECT AND CONCEPTS IN THE ML IN RELATION TO THE EU LAW

2.1 INTRODUCTION

The material rules on liabilities and rights with respect of VAT correspond structural in comparison of the ML with the VAT Directive. I use to illustrate the relationship between liabilities and rights with the following figure.[50]

<table>
<tr><td colspan="4">Persons</td></tr>
<tr><td colspan="3">Taxable persons [the ML and the VAT Directivet]</td><td>Others:
consumers/tax carriers</td></tr>
<tr><td colspan="3">Transaction of vara or tjänst (Ch. 1 sec. 6 of the ML)/
Supply of goods or supply of services [art:s 14(1) and 24(1) of the VAT Directive]</td><td rowspan="4"></td></tr>
<tr><td>Taxable</td><td>From taxation
qualified exempted</td><td>From taxation
unqualified exempted</td></tr>
<tr><td>Right of deduction
of input tax</td><td>Right of reimbursement
of input tax</td><td colspan="2" rowspan="2">Not right of deduction/reimbursement
of input tax

.</td></tr>
<tr><td colspan="2">Certain purchases which are comprised by prohibtion of deduction: Not right of deduction/reimbursement of input tax</td></tr>
</table>

The main rule in the ML on who is liable to pay VAT (*skattskyldig*) is Ch. 1 sec. 2 first para. no. 1, with reference to sec. 1 first para. no. 1, whereof follows that he who (Sw., *den som*) is taxable person and in that capacity makes a taxable transaction of goods or services within the country is tax liable. Thus, the prerequisites on who is liable to pay VAT according to the main rule in Ch. 1 sec. 2 first para. no. 1 of the ML and art. 193 of the VAT Directive correspond with each other. The only difference is that the ML for that liability uses the concept *skattskyldig* (Eng., tax liable), whereas the VAT Directive uses *betalningsskyldig* (Eng., payment liable) for a person liable for payment of VAT to the State.[51]

Thus, the figure above reflects that Schemat ovan återspeglar sålunda att *den som* (Eng., he who) is taxable person is *skattskyldig* (Eng., tax

[50] See Forssén 2019a, section 11 100 000. See also Forssén 2011, section 1.1.1 and Forssén 2013, section 3.2.
[51] See art:s 194, 197.2, 199, 199a, 199b.1, 201, 204.1 and 205 of the VAT Directive.

liable) or *betalningsskyldig* (Eng., payment liable) according to the ML and according to the VAT Directive respectively

- if he in the capacity of taxable person,[52]

- within the country, for a consideration makes a taxable transaction of goods or of a service or supply of goods or supply of services.[53]

In this study I treat in the first place questions about the tax object.[54] The character of the goods or services that is comprised by a taxable person's transaction according to the ML and supply according to the VAT Directive can be taxable or exemption from VAT may apply. If the character of the supplies is both taxable and in certain cases exempted from VAT, the taxable person has a mixed activity. Since the determination of the tax object's character is deciding to what extent right of deduction for input tax exists in a taxable person's economic activity, and not the other way around, I disregard, as mentioned,[55] in this study from the right of deduction for VAT purposes by the vendor of goods and/or services, and for example from questions on mixed activity by him.

On the other hand I mention, as also mentioned,[56] in the case studies regarding composite transactions by a vendor what different judgments of whether it is a matter of whether such a transaction exists, and if so the consideration concerns one single supply or shall be divided, and what it means due to the right of deduction for input tax by the purchaser. Thereby I put formward assumptions whether the purchaser is a consumer, and thus lacking right of deduction, or a taxable person, who is assumed having full right of deduction, no right of deduction or a right of deduction based on a reasonable division when carrying out a mixed activity.

The VAT is not accounted for on a group level, which is a general principle in the ML and the VAT Directive. This follows by the expression *den som* (Eng., he who) being used in the main rule on the tax subject, i.e. on who is taxable person, according to Ch. 4 sec. 1 first para. first sen. of the ML and art. 9(1) first para. of the VAT Directive. Each subject shall be deemed in itself, where the liability to pay VAT is

[52] See Ch. 4 sec. 1 first para. first sen. of the ML and art. 9(1) first para. of the VAT Directive.
[53] See Ch. 2 sec. 1 first para. no. 1 and third para. of the ML and art. 2(1)(a) and (c) of the VAT Directive.
[54] See sections 1.2 and 1.3.
[55] See section 1.4.
[56] See section 1.4.

concerned. This general principle aplied already before the directive rule was introduced literally in the rule of the ML mentioned, by SFS 2013:368 on 1 July, 2013.[57] It follows by the expression *den som* (Eng., he who) being used also in the main rule on who is *skattskyldig* (Eng., tax liable) in Ch. 1 sec. 2 first para. no. 1 of the ML and by the expression *den beskattningsbara person som* (Eng., the taxable person who) being used in the main rule on who is *betalningsskyldig* (Eng., payment liable) in art. 193 of the VAT Directive and by the word *denne* (Eng., him) being used regarding taxable person in art. 2(1)(a) and (c) of the VAT Directive.[58] Thus, the questions in this work which concern the tax subject are tried based on the premise that each subject receives his consideration for the supply consisting of the tax object.

I have already concluded that the main rule on the taxable amount in Ch. 7 sec. 2 of the ML is complying with the main rule for the determination of the taxable amount for supply of goods or suppley of services in art. 73 of the VAT Directive. According to both rules the taxable amount for a taxable transaction of goods or services consists of the consideration that the vendor shall receive from the purchaser or a third party, including contributions which are directly linked to the price of the goods or the services.[59]

Since the rule is that VAT is not accounted for on a group level and the analysis in this work regarding the tax object in the first place concerns the concepts vara and tjänst in relation to the main rules for supply of goods and supply of services in art:s 14(1) and 24(1) of the VAT Directive, whereby that analysis is made without the riht of deduction being concerned, I disregard from it in the further presentation as well as from questions on EU conformity with the rules on VAT groups in Ch. 6 a of the ML and questions on the EU conformity with the rules in Ch. 7 sec:s 3 a-3 d of the ML on revaluation of the consideration in cases of transactions between so-called allied (Sw., *förbundna*) partners, where under or over pricing of the goods or the services is made and any of the partners has a mixed activity with respect of VAT.[60]

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[57] See also prop. 2012/13:124 (*Beskattningsbar person – en teknisk anpassning av mervärdesskattelagen*) pp. 1, 71 and 95.
[58] See Forssén 2013, section 3.2
[59] See section 1.2.
[60] The rules on VAT groups and revaluation of consideration between allied partners were introduced in the ML by SFS 1998:346, on 1 July, 1998, and by SFS 2007:1376, on 1 January, 2008, and are based on facultative rules of the VAT Directive, namely art:s 11 and 80 of the directive. Art. 11 is equivalent to the previous art. 4(4) third and second para:s if the EC's Sixht VAT Directive (77/388/EEC). Due to the EU-case C-412/03 (*Hotel Scandic Gåsabäck*), where the preliminary ruling was obtained by *Högsta förvaltningsdomstolen (HFD)*, i.e. the Swedish Supreme Administrative Court, in the advanced ruling RÅ 2005 not. 51, the general rules on withdrawal were altered in the ML on 1 January, 2008, by SFS 2007:1376, so that it nowadays must be a

For the recently mentioned reason I disregard in the further presentation also from the rule on exemption from VAT for transactions of certain internal (Sw., *vissa interna*) services in Ch. 3 sec. 23 a of the ML, which nearest corresponding rule is art. 132(1)(f) of the VAT Directive. The rule was introduced in the ML by SFS 1998:346 together with the rules on VAT grops in Ch. 6 a of the ML, and are – unlike the rules in Ch. 6 a – mandatory. The exemption from VAT for certain internal services according to Ch. 3 sec. 23 a of the ML shall therefore be applied restrictively, and only applies for transaction of services which are supplied within an independent coalition of natural or legal persons, if the activity otherwise do not entail tax liability.[61] For instance, the exemption applies within the field of health care for transactions of services which unrelated groups of professionals with medical or similar character are supplying its members and which concern their exempted activities.[62]

Since I limit the study in this work to the concepts goods and services according to the ML at composite transactions to concern the main rules for supply of goods and supply of services in art:s 14(1) and 24(1) of the VAT Directive, I also start from the main rules on taxable amount and consideration according to the ML. Thus, I start in the further presentation from the assumption that is a matter of transaction of goods or services for payment in money or in exchange of something that can be estimated in the value of money. I disregard questions on taxable amount art:s 74-77 of the directive, i.e. disregard questions regarding withdrawal situations or transfer of goods to another Member State, if not otherwise stated.[63] Thereby, it is for the further presentation of interest in the first place that I, as mentioned, have concluded that the main rule on the taxable amount in Ch. 7 sec. 2 of the ML is complying with the main rule for the determination of the taxable amount for supply of goods or supply of services in art. 73 of the VAT Directive.

Thus, in this chapter I interpret in the first place the meaning of the concepts *goods* and *services* according to Ch. 1 sec. 6 of the ML in

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matter of a supply for free and not only an under pricing for withdrawal taxation according to the ML becoming applicable. By SFS 2007:1376 were at the same time the rules on revaluation of consideration between allied partners at under or over pricing introduced, but those rules work apply independently and not as an alternative to the rules on withdrawal. See Forssén 2011, section 3.5.2.1 and Forssén 2013, section 6.4.3.

[61] See Forssén 2019a, section 12 202 022. See also *Momshandboken Enligt 2001 års regler*, Norstedts Juridik, Stockholm 2001 (cit. Forssén 2001) pp. 100 and 101. Full text in open access on www.forssen.com.

[62] See prop. 1997/98:148 (*Gruppregistrering i mervärdesskattesystemet, m.m.*) pp. 63 and 64 and the EU-case 348/87 (SUFA) and also Forssén 2001 pp. 100 and 101.

[63] See sections 1.2 and 1.4.

relation to the main rules for *supply of goods* and *supply of services* in art:s 14(1) and 24(1) of the VAT Directive.

- If the concepts goods and services in the ML are not in compliance with the main rules on supply of goods and supply of services according to the directive, I leave suggestions *de lege ferenda* on alterations in the ML.

- If the concepts goods and services in the ML are proven EU conform, I go further without leaving any suggestions on alterations of the two concepts in the ML, and put forward ceratain application questions for them in connection with composite transactions. These questions concern cases where the tax object contains efforts of different character regarding whether they are taxable transactions or exempted from VAT or comprised by different tax rates.[64]

The application questions concerning composite transactions concern the decision of whether the price – the consideration – consists of one single supply or shall be divided into different goods and/or services with respect of differences consisting of the transactions being taxable or exempted from VAT or comprised by different tax rates. To do the case studies regarding composite transactions in Chapter 4, I create in Chapter 3 a tool.[65] However, in this chapter I am first treating the following questions, to be able to interpret whether the concepts goods and services in the ML are complying with the main rules on supply of goods and supply of services according to the VAT DirectiveI.

- In section 2.2 I mention the tax subject and the tax object as necessary prerequisites for the liability to pay VAT according to the main rule in the ML in relation to the other two cases of tax liability in the ML. This is to emphasize that the questions on the tax object in this study are treated from a taxable person's perspective, and not regarding the cases where an ordinary private person can be liable to pay VAT.

- In section 2.3.1 I interpret then whether the concepts goods and services in Ch. 1 sec. 6 of the ML are supported by the EU law, whereby both primary law and secondary law are regarded. The EU law consists of primary law and secondary law. The primary law of interest here is above all the treaties.[66] The EU's institutions issues the secondary legislation, which consists of

[64] See section 1.3.
[65] See sections 1.3 and 1.7.
[66] See section 1.6.

regulations and directives and decisions, recommendations and opinions.[67] By virtue of art. 288 TFEU the secondary law is created by the EU's institutions, why the secondary law sometimes is called derived law. The primary law is most created by the EU's member states, and thus having primacy before secondary law. Regulatuons and directives, such as the Implementing Regulation and the VAT Directive, and decisions are, unlike recommendations and opinions, binding for the Member States.[68]

Any problem with respect of the relationship between the primary law and the secondary law will not occur in the present context, since the TFEU is completing the VAT Directive at the trial in section 2.3.1 of the concepts goods and services in the VAT Directive, where there is no definition of the two concepts, but the directive instead is defining what is meant by supply of goods and supply of services, whereby, as mentioned, the main rules in art:s 14(1) and 24(1) are regarded.

Furthermore, in section 2.3.2 I examine whether the fixing of a border between goods and services according to Ch. 1 sec. 6 of the ML may be considered EU conform also with regard of *fastigheter* (Eng., approx. real estate) being comprised by the concept goods in Ch. 1 sec. 6 first sen. of the ML. Although if I conclude that the ML is EU conform in that respect, I mention in sections 2.7.1 and 2.7.2 certain problems that still may remain on the theme of EU conformity with the ML, when it is a matter of the determination of the scope of the value-added taxation in the field of *fastigheter*.

- In section 2.4 I examine the main rule on supply of services in art. 24(1) of the VAT Directive especially by starting from the application regulations laid down for that directive rule in art:s 8 and p of the Implementing Regulation. A service can concern goods, but a service can also regard another service. The questions are in the first place about whether it is possible to determine any special category from that analysis, and which can be used in connection with my creation of the tool in Chapter 3 for the carrying out of the case studies regarding composite transaction in Chapter 4, and if there is any special

[67] See art. 288 TFEU. The EU's institutions are according to art. 13.1 TEU: the European Parliament, the European Council, the Council, the European Commission, the CJEU, the European Central Bank and the Court of Auditors.
[68] See also Forssén 2013, section 1.2.3.

service to judge in connection with the analysis of the application problems.

In the preamble to a legislation, like the VAT Directive or the Implementing Regulation, the recitals – motives – for the rules therein are statedi.The recitals in the preamble can be supporting the interpretation of the articles in the legislation, but those apply before an item of the recitals in the legislation if it would contradict the wording of the article in itself.[69]

- The main rule on the taxable amount in Ch. 7 sec. 2 of the ML is, as above-mentiond in this section, complying with the main rule on the determination of the taxable amount for supply of goods or supply of services in art. 73 of the VAT Directive. According to both the main rules the taxable amount for a taxable transaction of goods or services consists of the consideration that the vendor shall receive from the purchaser. In section 2.5.1 I judge whether the main rules for *omsättning av vara* (Eng., approx. transaction of goods) and *omsättning av tjänst* (Eng., approx. transaction of services) are complying with the main rules for the transactions which shall be subject to VAT according to the VAT Directive, when it is a matter of using the concept *ersättning* (Eng., consideration) in that respect.

- In section 2.5.2 I mention the concept *ersättning* (Eng., consideration) regarding taxable event and the VAT becoming chargeable, and judge if there is any application question regarding the tax object and single payments, and if it then shall be treated in this work.

- Concerning the taxable transactions according to the VAT Directive there are measures established in art:s 6, 6a, 6b, 7, 8, 9 and 9a in the Implementing Regulation for the application of art:s 24-29 in the VAT Directive regarding supply of services. In section 2.6 I am taking up problems about the existence of two legislations from the EU on the meaning of supply of services.

- In sections 2.7.1 and 2.7.2 I mention, as mentioned, certain problems concerning whether the ML is EU conform when it is a matter of the determination of the scope of the value-added taxation in the field of *fastigheter* (Eng., approx. real estate), which may remain although I would conclude in section 2.3.2 that the fixing of a border between goods and services according to Ch. 1 sec. 6 of the ML is EU conform also with regard of

[69] See also Forssén 2019a, section 12 216 113.

fastigheter being comprised of the concept goods in the first sentence of that rule

- In section 2.8 I make conclusions, with reference to the examination in sections 2.2-2.7.2, concerning the tax object, and whether the determination of it in the ML is complying with the VAT Diective and in which respects I am leaving suggestions *de lege ferenda* when this is not the case. With respect of these conclusions I go further in Chapter 3 by creating a tool for certain case studies – application questions – which I put forward in *Chapter 4* concerning composite transactions regarding goods and/or services.[70]

2.2 TAXABLE PERSON

By SFS 2013:368 was on 1 July, 2013 the connection to the income tax law for the determination of the tax subject according to the ML revoked. Nowadays the main rule for who is taxable person according to the ML, i.e. Ch. 4 sec. 1 first para. first sen., contains the same wording as the main rule for who is taxable person according to the VAT Directive, i.e. art. 9(1) first para., namely the following:

> ”Med beskattningsbar person avses den som, oavsett på vilken plats, självständigt bedriver en ekonomisk verksamhet, oberoende av dess syfte eller resultat.” (Eng., ‘Taxable person’ shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.)

The basic purpose with the VAT is to distinguish the entrepreneurs, the taxable persons, from the consumers, that is from ordinary private persons or employees of an enterprise.[71] An ordinary private person cannot be liable to pay VAT on a taxable transaction of goods or services, since he is not acting in the capacity of taxable person at a sale of the goods or services, for example of his own private bicycle.

That the object is *skattepliktigt* (Eng., taxable) according to the ML or taxable according to the VAT Directive is a necessary condition for an *omsättning* (Eng., transaction) according to the ML or supply of goods or supply of services according to the VAT Directive, but it is not sufficient to cause that the person making the transaction, supplying the goods or supplying the services shall be *skattskyldig* (Eng., tax liable) according to the ML or *betalningsskyldig* (Eng., payment liable) according to the VAT Directive. The person in question must also have

[70] See sections 1.3 and 1.7.
[71] See section 1.1.

the character of taxable person according to Ch. 4 sec. 1 first para. first sen. of the ML and art. 9(1) first para. of the VAT Directive.

Thus, it is understood at the further presentation that the questions on the tax object are treated from the perspective of a taxable person, since the questions, if not otherwise stated, concern the main rule on who is tax liable according to Ch. 1 sec. 2 first para. no. 1 of the ML, where a reference is made to the emergence of tax liability according to sec. 1 first para. no. 1 at a transaction within the country of goods or services which are taxable and made by a taxable person in that capacity. A consumer can only be tax liable for a taxable intra-Union acquisition of goods, under certain conditions, and for imports of taxable goods to the country respectively, i.e. according to Ch. 1 sec. 2 second para. no. 5 of the ML, with refernce to sec. 1 first para. no. 5, and according to Ch. 1 sec. 2 second para. no. 6 and sec. 1 first para. no. 3 of the ML respectively. Hereby I emphasize that the questions on the tax object in this study are treated from the perspective of a taxable person, and not with respect of the cases where an ordinary private person can be comprised by liability to pay VAT.

2.3 GOODS AND SERVICES[72]

2.3.1 In general

The VAT Directive does not contain any independent definition of the concepts goods and services. The VAT Directive gives instead an indirect conception of what is meant by the two concepts, by it containing determinations of what is meant by *supply of goods* and *supply of services* respectively.

> *Köplagen (1990:931)*, i.e. the Swedish Sale of Goods Act, lacks importance for the fixing of a border between goods and services. In the world of VAT it is sufficient to know that goods are tangible property (including *fastigheter* – Eng., approx. real estate) plus gas, heat, refrigeration and electricity. Everything else that can be supplied are services.[73] By the way has the EU Commission on 11 October, 2011 left a suggestion on a common European sale of goods act that would be voluntary.[74]

[72] See also Forssén 2019a, section 12 201 010.
[73] See Forssén 2001 p. 46.
[74] See www.europa.eu. See also *Produktansvar – introduktionsbok*: Third edition, by Björn Forssén, self-published 2019 (cit. Forssén 2019e), section 4.2 and Forssén 2019a, section 12 201 010. Both are available in full text in open access on www.forssen.com.

According the main rules on what constitute taxable transactions according to art:s 14(1) and 24(1) of the VAT Directive:

- ’supply of goods’ shall mean the transfer of the right to dispose of tangible property as owner;[75] and

- ‘supply of services’ shall mean any transaction which does not constitute a supply of goods.[76]

However, Ch. 1 sec. 6 of the ML defines the concepts *vara* and *tjänst*, namely according to the following:

- ”Med *vara* förstås materiella ting, bland dem fastigheter och gas, samt värme, kyla och elektrisk kraft” (Eng., With goods is meant tangible property, including real estate and gas and heat, refrigeration and electricity).[77]

- ”Med *tjänst* förstås allt annat som kan tillhandahållas” (Eng., With services is meant everything else that can be supplied).[78]

In the secondary law in the field of VAT there is support for the independent definition of *vara* (Eng., goods) in Ch. 1 sec. 6 first sen. of the ML, namely in art. 15(1) of the VAT Directive, whose wording is cited below. There it is stated that electricity, gas, heat or refrigeration and similar *shall* be on an equality with tangible property.

Art. 15(1) of the VAT Directive

”Electricity, gas, heat, refrigeration and the like shall be treated as tangible property.”

Moreover it is stated in art. 15(2) of the VAT Directive, whose wording is cited below, what the Member States *may* consider as tangible property.

Art. 15(2) of the VAT Directive

”Member States may regard the following as tangible property:

(a) certain interests in immovable property;

[75] See art. 14(1) of the VAT Directive.
[76] See art. 24(1) of the VAT Directive.
[77] See Ch. 1 sec. 6 first sen. of the ML.
[78] See Ch. 1 sec. 6 second sen. of the ML.

(b) rights in rem giving the holder thereof a right of use over immovable property;

(c) shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof."

Thus, although the VAT Directive does not contain any independent definition of the concepts goods and services the VAT Directive's determination of tangible property give support to the definition of goods in Ch. 1 sec. 6 first sen. of the ML. The independent definition of tangible property in the VAT Directive corresponds with the definition of goods in the ML.

However, support is lacking in the secondary law in the field of VAT for the definition of services according to Ch. 1 sec. 6 second sen. of the ML. It is not only a lacking independent definition of the concept services in the VAT Directive, but the directive does neither give any supporting guidance for the determination of the concept services. Instead a support in primary law follows in principle for the definition of services in the ML, by art. 57 first para. TFEU,[79] according to the following:

- Art. 57 first para. TFEU has the following wording:

  "Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons."

  Art. 57 TFEU corresponds with Ch. 1 sec. 6 second para. of the ML, by the negative determination of services entailing that they do not comprise efforts under the freedom of movement for goods. On the other hand the comparison between Ch. 1 sec. 6 second para. of the ML and art. 57 TFEU is lacking insofar that the freedoms regarding persons and capital are excluded from the concept services according to art. 57 TFEU. The hiring out of personnel constitutes an exampel of a taxable transaction according to the main rule thereon in art. 24(1) of the VAT Directive, and a financial transaction would also be a taxable transaction if not exemption from VAT was stipulated for financial transactions in art. 135(1)(d)-(f) of the VAT Directive.

[79] Art. 57 TFEU corresponds with art. 50 of the EC Treaty and art. 60 of the Rome Treaty.

> By the way may also be mentioned that there are references to the primary law and art. 60 of the Rome Treaty – nowadays art. 57 TFEU – in the secondary law in other fields than the field of VAT, where the determination of the concept services is concerned. In a statement from the EU Commission in the field of the information society's services it is mentioned that the concept services is defined in recital 19 of the preamble to directive 98/48/EC with reference to art. 60 of the Rome Treaty.[80]

Thus, basically art. 57 first para. TFEU gives a support in principle to the definition of services according to Ch. 1 sec. 6 second para. of the ML. This support in primary law is also confirmed indirectly by the secondary law in the field of VAT, by what is constituting *supply of services* being negative determined according to the main rule in art. 24(1) of the VAT Directive so that thereby is meant "any transaction which does not constitute a supply of goods". Since the definition of goods in the ML corresponds with the definition in the VAT Directive, and the negative determination of services in relation to efforts which are comprised by the freedom of movement for goods according to the primary law basically corresponds with the determination of what constitutes supply of services according to the VAT Directive, which also shall be negative and made in relation to what constitutes supply of goods according to the directive, is the definition of services in the ML complying with the EU law. Although the VAT Directive does not contain any independent definition of the concepts goods and services the primary law's determination of what basically is meant with supply of services gives support for the definition of services in Ch. 1 sec. 6 second sen. of the ML.

What already here can be concluded giving rise to a non-EU conform determination of the tax object in the ML is that it in Ch. 1 sec. 3 third para. first sen. Is defined what is meant by *supply of goods*. I cite the wording of the rule here.

> *Ch. 1 sec. 3 third para. first sen. of the ML, wording according to SFS 2018:1333*
>
> "Med leverans av en vara förstås att varan avlämnas eller att den sänds till en köpare mot postförskott eller efterkrav" (Eng., With supply of goods is meant that the goods are delivered or sent to a purchaser cash on delivery).

[80] See section 3.1 in the Commission's *rapport KOM (2003) 69 slutlig*.

The rule implies, by the use of the word *avlämnas* (Eng., delivered), that a property law element, like the handing over of the goods, would be required for a supply of goods being deemed existing. By the main rule in art. 14(1) of the VAT Directive regarding *supply of goods* no such limitation appears, but it is sufficient with a delivery being considered existing by law of contracts. That follows by the directive rule, as mentioned above, stating that with *supply of goods* is meant ”the transfer of the right to dispose of tangible property as owner”. I refer hereby also to Ek 2019, which refers to that the CJEU considers, based on the wording of the predecessor to art. 14(1), i.e. art. 5(1) of the Sixth VAT Directive (77/388/EEC), that the concept delivery cannot be assigned to transfer of ownership in accordance with formal demands in national legal systems. According to the CJEU the concept comprises all transfer of tangible property from one party to another that gives the purchaser a possibility to actually command the property as if he was its owner.[81] I share that standpoint. Thus, I suggest *de lege ferenda* that Ch. 1 sec. 3 third para. first sen. shall be abolished from the ML, which should be regarded for the further presentation.

2.3.2 The concept *fastighet* (Eng., approx. real estate)

The fixing of a border between goods and services in the ML is in my opinion EU conform also with regard of *fastigheter* (Eng., approx. real estate) being comprised by the concept goods in Ch. 1 sec. 6 first sen. of the ML, whereby I may mention the following.

In the research on customs it has been stated that the concept goods got *the same construction as within the EU*, by the ML replacing on 1 July, 1994 the GML.[82] In an article I mention that the concept goods thereby was EU-adapted so that Ch. 1 sec. 6, which state what is meant with goods and services according to the ML, also states that *fastigheter* (Eng., approx. real estate) too constitute goods.[83]

The concept goods according to Ch. 1 sec. 6 first sen. of the ML includes thus, concerning tangible property, *fastigheter*. By SFS 2016:1208 was on 1 January, 2017 the determination of the concept *fastighet* (Eng., approx. real estate) according to Ch. 1 sec. 11 of the ML, so that the connection to the concept *fastighet* in *jordabalken*

[81] See the EU-case 320/88 (Safe) items 6 and 7, and a reference to the case in Ek 2019 p. 148.
[82] See section 1.5 concerning reference to Moëll 1996 p. 38.
[83] See prop. 1993/94:99 (*Ny mervärdesskattelag*) p. 107, whereto I refer in my article in SvSkT 2017 pp. 309-320, *Vissa momsfrågor avseende fastighetsområdet* (cit. Forssén 2017b) p. 309. Full text in open access on www.forssen.com. See section 2.3.1 regarding the wording of Ch. 1 sec. 6 of the ML.

(1970:994, here abbreviated JB), i.e. the Swedish Land Code, was revoked.[84] The rule Ch. 1 sec. 11 of the ML has the following wording:

Ch. 1 sec. 11 of the ML, wording according to SFS 2016:1208

”Med fastighet avses fast egendom enligt artikel 13b i rådets genomförandeförordning (EU) nr 282/2011 av den 15 mars 2011 om fastställande av tillämpningsföreskrifter för direktiv 2006/112/EG om ett gemensamt system för mervärdesskatt” (Eng., with *fastighet*, Eng., approx. real estate, is meant immovable property according to art. 13b of the Implementing Regulation).

Thus, for the determination of the concept *fastighet* (Eng., approx. real estate) in the ML Ch. 1 sec. 11 nowadays refers to the concept *fast egendom* (Eng., *immovable property*) according to enligt art. 13b of the Implementing Regulation, instead of to the narrower concept *fastighet* in the JB. Art. 13b was introduced into the Implementing Regulation by the regulation (EU) No 1042/2013, i.e. with application from 1 January, 2015.[85] Art. 13 b of the Implementing Regulation has the following:

Art. 13b of the Implementing Regulation

”For the application of Directive 2006/112/EC, the following shall be regarded as ’immovable property’:

(a) any specific part of the earth, on or below its surface, over which title and possession can be created;

(b) any building or construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved;

(c) any item that has been installed and makes up an integral part of a building or construction without which the building or construction is incomplete, such as doors, windows, roofs, staircases and lifts;

(d) any item, equipment or machine permanently installed in a building or construction which cannot be moved without destroying or altering the building or construction.”

That the definition of *fastighet* in Ch. 1 sec. 11 has been replaced by a reference to *fast egendom* according to art. 13b of the Implementing Regulation is the legislator considering appropriate, since the reference

[84] See Forssén 2017b p. 310.
[85] See section 2.6.

to the Implementing Regulation is dynamic, i.e. regards the at all points of time applying wording of art. 13b of the Implementing Regulation.[86]

For the fixing of a border between goods and services in Ch. 1 sec. 6 of the ML should the connection of the concept *fastighet* to *immovable property* according to art. 13b of the Implementing Regulation mean that that fixing of a border becomes EU conform. Services which previously regarded immovable property, and were deemed constituting services due to the connection of the concept *fastighet* in the ML to the JB leading to a narrower determination of the concept goods than what follows from the concept immovable property, are nowadays defined as goods by the connection of the concept *fastighet* to art. 13b of the Implementing Regulation, which means that the fixing of a border between goods and services in the field of *fastigheter* (plural of *fastighet*) is EU conform.

Although the fixing of a border between goods and services according to Ch. 1 sec. 6 of the ML may be considered EU conform in the field of *fastigheter*, by the connection of the concept *fastighet* to art. 13b of the Implementing Regulation, can certain problems remain regarding whether the ML is EU conform where the determination of the scope of the VAT in the field of *fastigheter* is concerned. I come back to these in the sections 2.7.1 and 2.7.2.

2.4 THE MAIN RULE IN THE VAT DIRECTIVE ON SUPPLY OF SERVICES AND THE IMPLEMENTING REGULATION

He who transfer ownership of goods to another person is making a supply of goods according to main rule on supply of goods in art. 14(1) of the VAT Diective. If he regarding the same goods instead makes another transaction, he is making a supply of services, according to the main rule on supply of services in art. 24(1) of the VAT Directive. However, a service does not have to concern goods. Supply of services according to the directive can concern other services, and it is in that case still a matter of a transaction which does not constitute supply of goods, according to art. 24(1).

Thus, the services are harder to apply than the goods, and concerning the taxable transactions according to the VAT Directive Chapter IV of the Implementin Regulation contains art:s 6, 6a, 6b, 7, 8, 9 and 9a, which constitute application measures regarding suply of services

[86] See prop. 2016/17:14 (*Ny definition av fastighetsbegreppet i mervärdesskattelagen*) p. 18.

according to art:s 24-29 of the VAT Directive.[87] Art:s 8 and 9 in the Implementing Regulation concern rhe application of the main rule for supply of services according to art. 24(1) in the directive, and they have the following wording:

Art. 8 of the Implementing Regulation

”If a taxable person only assembles the various parts of a machine all of which were provided to him by his customer, that transaction shall be a supply of services within the meaning of Article 24(1) of Directive 2006/112/EC.”

Art. 9 of the Implementing Regulation

”The sale of an option, where such a sale is a transaction falling within the scope of point (f) of Article 135(1) of Directive 2006/112/EC, shall be a supply of services within the meaning of Article 24(1) of that Directive. That supply of services shall be distinct from the underlying transactions to which the services relate.”

Art. 8 of the Implementing Regulation shows that a category of supply of services regards that the work has been separated from the manufacturing process to create goods, and supplied by the manufacturer, who sells his know-how, whereas the tangible assets – the parts of machinery to be assembled – are owned by the customer. The supply of the work constitutes a supply of a service according to the main rule in art. 24(1) of the VAT Directive from the application measure in art. 8 of the Implementing Regulation. If the person in question would have owned also the parts machinery, he would have commanded as owner over the finished goods and thereby supplied goods to the customer, according to the main rule for supply of goods in art. 14(1) of the VAT Directive.[88]

Thus, art. 8 of the Implementing Regulation shows that a category of services according to the main rule on supply of services in art. 24(1) of the VAT Directive is constituted by the work being separated from the manufacturing process to create goods. In section 2.8 I reason further based on that conclusion to be able to make conclusions whether more such categories of services can be identified.

Art. 9 of the Implementing Regulation means that the field of exemption from VAT regarding trading of securities according to art. 135(1)(f) of

[87] In this section I mention art:s 8 and 9 of the Implementing Regulation, and gets back in section 2.6 to the other art:s in Chapter IV of the Implementing Regulation.
[88] See also Forssén 2019a, section 12 213 235.

the VAT Directive is limited, so that the exemption does not comprise the sale of an option, which for that matter constitutes securities, but represent ownership to goods or such rights or securities that concern rights in immocable property.[89]

Before the Impementing Regulation was introduced on 15 March, 2011 with application from 1 July, 2011, it was already established in the CJEU's case-law what the CJEU deemed constituting from VAT exempted trading of securities, namely the following:

- According to the EU-case C-2/95 (SDC) the CJEU considers that the from VAT exempted trading of securities comprises actions that changes the legal and financial situation between the parties.

- By the EU-case C-235/00 (CSC) it already followed that the exemption in art. 135(1)(f) for securities regarding transactions that leads to legal and economical changes between the parties, whereby supply of a service that is only material, technical or administrative and which does not lead to such changes between the parties constitutes taxable transactions.

That what is already following by the CJEU's case-law especially for options in the Implementing Regulation is giving the conception that it would be unclear whether an option constitutes a security with respect of VAT, which is not the case. For example the stockmarket is a second-hand market and there is no limit of it regarding options to purchase or sell shares. 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.

If there should be any specification, it should be made in the VAT Directive, instead of in the Implementing Regulation, and regard the fixing of a border between on the one hand securities in the form of shares and options etc. for which there is a market and on the other hand what can be denoted as private law options. Private law options often regard other property than shares and are issued by companies to the personnel or the shareholders. If such an option is personal and cannot be sold further, it would be a matter of a taxable supply of services, according to art. 24(1) of the VAT Directive. A specification of what is comprised by the main rule in art. 24(1) should thus be made by introduction of a special item in art. 24, not by art. 9 of the Implementing Regulation. A concept like trading of securities should thus be developed only by the CJEU's case-law, like what already had

[89] See art. 135(1)(f) with reference to art. 15(2) of the VAT Directive.

occurred before the Implementing Regulation was introduced, by the EU-cases C-2/95 (SDC) and C-235/00 (CSC).[90]

Already before Sweden's EU-accession in 1995 I stated that it does not exist any market for a private law option, and that the issuing of such an option therefore is not constituting from VAT exempted trading of securities.[91] I come back to private law options as a special service to judge in connection with the analysis of the application problems, whereby they are mentioned in connection with the special rules in Ch. 9 c of the ML on tax liability and exemption from VAT concerning goods in certain warehouses.

2.5 SUPPLY, TRANSACTION AND CONSIDERATION AND TAXABLE EVENT AND THE VAT BECOMING CHARGEABLE

2.5.1 Supply, transaction and consideration

Supply of goods and supply of services in the VAT Directive correspond with *omsättning av vara* (Eng., transaction of goods – *vara* is in the singular) and *omsättning av tjänst* (Eng., transaction of service) in the ML. According to the main rules in Ch. 2 sec. 1 first para. no. 1 and third para. no. 1 is meant by transaction of goods that goods are transferred for a *consideration* and by transfer of service that a service is performed for a *consideration*, transferred or in another way supplied to someone.

The concept *consideration* is used also in the main rules in the VAT directive for what transactions shall be subject to VAT concerning supply of goods and supply of services. This follows by art. 2(1)(a) and (c) of the VAT Directive, which have the following wordings:

Art. 2(1)(a) of the VAT Directive

"The supply of goods for consideration within the territory of a Member State by a taxable person acting as such".

Art. 2(1)(c) of the VAT Directive

"The supply of services for consideration within the territory of a Member State by a taxable person acting as such".

[90] See also Forssén 2019a, section 12 213 235.

[91] See *Mervärdesskatt En handbok* (second edition), by Björn Forssén, Publica, Stockholm 1994 (cit. Forssén 1994), section 6.2.4. Full text in open access on www.forssen.com. See also Forssén 2019a, section 12 213 235.

Thus, the main rules for *transactions of goods* and *transaction of service* in the ML are complying with the main rules for which transactions that shall be subject to VAT in the VAT Directive, since the concept consideration is used in all those rules in the ML and the VAT Directive. With respect of the main rule on the taxable amount in Ch. 7 sec. 2 of the ML being in compliance with the main rule for the determination of the taxable amount for supply of goods or supply of services in art. 73 of the VAT Directive, by the taxable amount according to those two main rules being constituted of the consideration that the vendor shall obtain from the purchaser for the goods or the service, the use of the concept consideration in the ML thereby becomes complying with the use of the same concept in the VAT Directive for the determination of the VAT which shall be paid by the taxable person selling the goods or the service.

2.5.2 Taxable event and the VAT becoming chargeable

According to art. 62 of the VAT Directive are by *chargeable event* and *the VAT becoming chargeable* meant:

- the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled, and

- that the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.

According to the main rule in art. 63 of the VAT Directive the chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.

By the VAT becoming chargeable for the State against a taxable person who is a vendor of goods or a service, the right of deduction for the VAT emerges in principle for a purchase of the goods or the service, since the supply thus has occurred, provided that the purchaser is a taxable person who has a right of deduction or right of reimbursement for acquisitions or imports in his economic activity.[92] According to art. 167 of the VAT Directive a reciprocity principle thus applies.

The reciprocity principle is one of the principles which leads to a principle of a neutral VAT being upheld. The principle of neutrality in the field of VAT is considered emanating from art. 2 of the EC's first VAT Directive (67/227/EEC), which has been replaced by art. 1(2) of the VAT Directive. Those principles are the basic parts of the VAT

[92] See art:s 167, 168 a and 169 of the VAT Directive.

principle according to the EU law, and can be read out from art. 1(2) as the mentioned reciprocity principle and the principle of passing on the tax burden.

According to recital 5 first sen. in the preamble to the VAT Directive a value-added taxation system becomes simple and most neutral when the VAT is taken out as generally as possible and comprises all stages of production and distribution and supply of services. The ideal with the VAT principle according to the EU law is that the consumer, who in the end shall carry the VAT on the goods produced or service supplied by involved enterprises in such an ennobling chain, does not pay tax on the tax, i.e. so-called cumulative effects should be avoided for the VAT to be neutral both with respect of competition and consumption.[93] The scope of rules on exemption from VAT in Ch. 3 of the ML shall be interpreted restrictively, since the CJEU's case-law states so concerning art:s 131-137 of the VAT Directive on exemption from VAT for certain transactions.[94]

By art. 64(1) of the VAT Directive follows that supply of goods and supply of services made continuously over a period of time (successive supplies) shall be regarded as being completed on expiry of the periods to which statements of account or payments relate. However, it follows by art. 64(2) of the directive that the Member States may provide that such continuous supply of goods or supply of services in certain cases shall be regarded as being completed at least at intervals of one year.

If a payment is to be made on account before the goods or services are supplied, it follows by art. 65 of the VAT directive that the VAT on such an advanced payment shall become chargeable on receipt of the payment and on the amount received.

If no consideration is left for a transaction of goods or of a service and supply of goods or supply of a service respectively, can withdrawal taxation occur in pursuance of the withdrawal rules in Ch. 2 sec. 1 first para. no. 2 and third para. no. 2 of the ML and art. 16 first para. and art. 26(1)(b) of the VAT Directive respectively. However, for the presentation in this work rules, as mentioned,[95] that the questions on the tax object concern, if not otherwise stated, the main rules regarding transactions and supplies for consideration respectively.

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[93] See Forssén 2013, sections 2.4.1.2, 2.4.1.3 and 2.4.1.4.
[94] See e.g. the EU-cases 235/85 (*kommissionen mot Nederländerna*), item 7; 348/87 (SUFA), items 10 and 13; C-186/89 (Van Tiem), item 17; C-2/95 (SDC), item 20; C-358/97 (*kommissionen mot Irland*), item 52; C-150/99 (*Stockholm Lindöpark*); item 25; C-269/00 (Seeling), item 44; and C-275/01 (Sinclair Collins), item 23. See also Forssén 2019a, section 12 210 010.
[95] See sections 1.2, 1.3 and 1.4.

However, a question for the context is what applies concerning supply of goods and supply of services which are made continuously over a certain period of time, if only a single payment is paid for this. That question concerns although in the first place the status of the tax subject, and whether a single payment can constitute economic activity according to Ch. 4 sec. 1 first para. first sen. of the ML and art. 9(1) first para. of the VAT Directive compared with the so-called criterion of obtaining income on a continuing basis in Ch. 4 sec. 1 second para. second sen. and art. 9(1) second para. second sen. of the two legislations. By the CJEU in the case C-412/03 (*Hotel Scandic Gåsabäck*), items 21-26, is stating as sufficient to avoid withdrawal taxation that a consideration – although symbolic – is issued which can be expressed in money for supply of goods or supply of services, should a single payment be possible to consider as constituting an economic activity. It is only if the person in question from the beginning intends to supply goods and supply services for free that the CJEU, according to the case 89/81 (Hong-Kong Trade), item 13, considers that he does not have the character of taxable person.[96]

The question on what applies concerning supply of goods and supply of services made on a continuous basis over a certain period of time, if only a single payment is issued for this, is, concerning the tax object, in the first place an application question where accounting is concerned. I have mentioned that question in my research, but referred it to be addressed in another work.[97] Nobody has knowingly brought up the question whether the vendor in such a case can be considered non-tax liable for withdrawal in another accounting period than that during which he has received the amount (the single payment). I have therefore mentioned that question somewhat more, whereby I argue against such measures of taxation, since it in that case would be a matter of a taxation based on the accounting rules and not on the rule of withdrawal in itself. The question should be part of a larger work on the procedure rules in the field of VAT, where the accounting rules infleunce on the concept transaction in the form of withdrawal would be one of the issues.[98] Since the questions on the tax object in this work concern, if not otherwise stated, transactions and supplies for consideration, the present application question with respect of accounting is not mentioned more in this work.[99]

[96] See Forssén 2011, section 3.5.2.1. See also Forssén 2019a, section 12 201 022.
[97] See Forssén 2011, section 3.5.2.1.
[98] See Forssén 2019a, section 12 201 022.
[99] See section 1.4.

2.6 PROBLEMS WITH TWO LEGISLATIONS ON THE MEANING OF SUPPLY OF SERVICES

Chapter IV of the Implementing Regulation contains, in art:s 6, 6a, 6b, 7, 8, 9 and 9a, application measures for the rules on taxable transactions regarding supply of services in art:s 24-29 of the VAT Directive.[100] In this section I bring up problems with the meaning of supply of services thus determined in two legislations from the EU: i.e. the VAT Directive and the Implementing Regulation.

The Implementing Regulation was introduced on 15 March, 2011 with application from 1 July, 2011.[101] Then Chapter IV of the Implementing Regulation only contained art:s 6, 7, 8 and 9. Art. 6 states what is meant with restaurant- and cateringservices. Art. 7 states what the concept *electronically supplied services* comprise concerning what is stated in the VAT Directive on services supplied via the Internet or an electronic network, where the supply is mostly automatized. Art:s 8 and 9 concern, as mentioned,[102] the application of the main rule on supply of services in art. 24(1) of the VAT Directive.

By the regulation (EU) No. 1042/2013 on 7 October, 2013 were introduced, with application from 1 January, 2015, also art:s 6a, 6b and 9a in Chapter IV of the Implementing Regulation concerning the application of the rules on supply of telecommunications services and broadcasting services and electronically supplied services in art:s 24(2) and 28 of the VAT Directive. At the same time the concept *electronically supplied services* in art. 7, was altered in item 3 of that article, so that therein nowadays is stated what item 1 in art. 7 shall not comprise concerning such services, and no longer what shall not be covered ”in particular” by item 1 in art. 7 of the Implementing Regulation.

I consider that it especially regarding electronically supplied services exists a problem with supply of services being determined in two legilslations from the EU, whereby I state the following.[103]

- In connection with the introduction on 1 January, 2015 of the so-called special regimes on VAT for telecommunications services, radio and television broadcasting and electronically supplied services, by alterations in the ML, *lagen (2011:1245) om särskilda ordningar för mervärdesskatt för*

[100] See section 2.4.
[101] See section 1.3.
[102] See section 2.4.
[103] See also Forssén 2019a, section 12 213 235.

telekommunikationstjänster, radio- och tv-sändningar och elektroniska tjänster and the SFL according to SFS 2014:940-943 it was stated in the preparatory work that the list of five different sorts of electronically supplied services in annex II to the VAT Directive, with the headline INDICATIVE LIST OF THE ELECTRONICALLY SUPPLIED SERVICES REFERRED TO IN POINT (C) OF THE FIRST PARAGRAPH OF ARTICLE 58, is not exhaustive. It constitutes according to the preparatory work only an exemplification, and the intention is that the list will cover more examples than those listed, *both such already existing today and not existing today but that will exist in the future*.[104]

- According to recital 11 of the preamble to the Implementing Regulation should, for increased clerness, the transactions identified as *electronically supplied services* be listed without the lists being considered final or exhaustive. The problem with trying to regulate what exists today and in the uture concerning electronically supplied services is that the future is in practice continuously already here. In art. 7 of the Impementing Regulation I do not for example find anything about products supplied by assistance of so-called 3D-printers, and there is neither anything about that in annex II to the VAT Directive.

- To regulate for VAT purposes such a dynamic and unforeseeable field as products supplied by electronical services requires thus a high frequency regarding the updating of the legislations. Thus, I consider that it is precarious from demands of legal certainty on foreseeable decisions of taxation, to let necessary updating be made, not by a development of art:s 24-29 of the VAT Directive, but by further exemplifications in art. 7 of the Implementing Regulation on what is menat by electronically supplied services. The Implementing Regulation is directly applicable according to art. 288 second para. TFEU and shall therefore, unlike the VAT Directive, not be implemented into the ML.[105]

- Since 1995 applies that tje Member State's courts are obligated to do a directive conform (EU conform) interpretation of the ML.[106] The rules in the VAT Directive shall, in pursuance of the directives' binding character for the Member States according to

[104] See prop. 2013/14:224 (*Nya mervärdesskatteregler om omsättningsland för telekommunikationstjänster, radio- och tv-sändningar och elektroniska tjänster*) p. 59. See also Forssén 2019a, sections 12 213 235 and 21 363 230.
[105] See sections 1.1, 1.3 and 2.1. See also prop. 2013/14:224 p. 56.
[106] See section 1.3.

art. 288 third para. TFEU, be implemented in the ML. If a rule in the VAT Directive has not been implemented in the ML or has not been implemented correctly in the ML and therefore is not corresponding with a rule in the ML, the individual can invoke the directive rule before the national rule if the directive rule has direct effect, since the EU law is considered having primacy before national law, in accordance with the CJEU's conception in the case 6-64 (Costa).[107] The State on its behalf cannot in such a case invoke the directive rule to the individual's disavantage before the rule in the ML against his or her will, since reverse vertical direct effect is not valid. That follows by the CJEU concluding in item 47 of the case 152/84 (Marshall) that it is not complying with the binding character of the directives if a Member State which has failed to take in time the prescribed measures of implementation in the directive would be able to invoke its own omission against the individual.[108]

- The existence of two legislations from the EU to which rules in the ML on liability to account for output tax shall be tried leads to risk regarding legal certainty, instead of clarifying the rule in question in the ML, namely insofar that it entails that liabilities for the individual are driven through on basis of the regulation without respect of the principle of legality for taxation measures in Ch. 8 sec. 2 first para. no. 2 of the RF or the prohibition of retroactive tax legislaltion in Ch. 2 sec. 10 second para. of the RF. In accordance with item 110 of the CJEU's case C-212/04 (Adeneler et al.) an EU conform interpretation does not mean an obligation for the Member States to interpret a rule in the national act, e.g. in the ML, in conflict with its wording (*contra legem*).[109]

- I suggest the introduction in art. 24 of the VAT Directive, similar to item 2 regarding telecommunications services, of a special item on the determination of what is meant by electronically supplied services, and that such a directive rule is implemented as a rule on what is meant by transaction of electronical services in Ch. 2 of the ML. Then will not the law appliers face the interpretation difficulty regarding whether the Implementing Regulation, as the extra secondary law law source, is updated in relation to the development in the business life where the use of electronically supplied services is

[107] See section 1.1. See also Forssén 2011, section 2.3.2 and Forssén 2013, section 1.2.3.
[108] See Forssén 2011, section 2.3.1.
[109] See Forssén 2013, section 1.2.2.

concerned. The problem in question should be taken up on the EU level by the legislator.

Since art. 7 of the Implementing Regulation does not concern the main rule on electronically supplied services in art. 24(1) of the VAT Directive, I disregard in the further presentation, if not otherwise stated, from the problems I bring up in this section regarding that the meaning of supply of services is determined in two legislations from the EU.

2.7 ESPECIALLY ABOUT THE SCOPE OF THE VAT IN THE FIELD OF *FASTIGHETER* (Eng., approx. real estates)

2.7.1 Voluntary tax liability, bankrupt's estates and capital goods

Although the fixing of a border between goods and services according to Ch. 1 sec. 6 of the ML may be deemed EU conform also with respect of the concept *fastighet*, by the connection to the concept immovable property in art. 13b in the Implemeting Regulation instead of to the to *fastighet* according to the JB, which since 1 January, 2017 applies for the definition of the concept *fastighet* in Ch. 1 sec. 11 of the ML, can, as I mention finally in section 2.3.2, certain problems which concern the value-added taxation's scope in the field of *fastigheter* remain. I am going through these problems in this section.

In the article I mention in section 2.3.2 I bring up some problems which I deem remains with the concept *fastighet* also after the reform of that concept in the ML on 1 January, 2017, namely regarding:

- the concept *fastighet* in connection with voluntary tax liability for letting of *fastighet* according to Ch. 9 of the ML, and the question whether it is EU conform that an ordinary private person who is owner of a fastighet can be subject to such tax liability;[110]

- the concept *fastighet* in connection with VAT questions about accounting in bankruptcy, and thereby the special rule on tax liability for bankrupt's estates in Ch. 6 sec. 3 of the ML;[111] och

- the rules on adjustment of deductions of input tax for capital goods which constitute *fastigheter* in Ch. 8 a of the ML, concerning the receiver in bankruptcy's liability to draw up a

[110] See Forssén 2017b, sections 1, 2 and 5.
[111] See Forssén 2017b, sections 1, 3 and 5. The rule Ch. 6 sec. 3 in the ML has by the way been subject to research by Jesper Öberg, by his doctor's thesis: *Mervärdesbeskattning vid obestånd* (second edition). Cit. Öberg 2001.

document according to Ch. 8 a sec:s 15-17 of the ML at transfer of such capital goods (section 4).[112]

Both the recently mentioned cases are not of interest for the study in this work of composite transactions in the field of VAT. The rule in Ch. 6 sec. 3 is one of the special rules on tax liability which are to be found in Ch. 6, Ch. 9 and Ch. 9 c of the ML,[113] which chapters I have mentioned earlier.[114] For a bankrupt's estate applies according to Ch. 6 sec. 3 of the ML that it is tax liable for a transaction in the activity after the decision on bankruptcy, provided that the debtor was tax liable to VAT. If a problem concerning the tax object, i.e. transaction of gods or service, would have existed for the debtor, the receiver in bankruptcy has so to speak only taken over the problem, when he is making transactions at the liquidation of the bankrupt's estate. The rules on adjustment of deductions of input tax for capital goods in Ch. 8 a of the ML shall not be applied if withdrawal taxation according to Ch. 2 of the ML is present.[115] The rules on adjustment of deductions can taken by themselves cause either an increased or an decreased right of deduction for the input tax paid at the acquisition of the capital goods, but they lack interest in the present work, since the questions that I will treat do not apply for the material rules on the rights in the VAT system, but the liabilities. The rules on adjustment of deductions fall off also in that respect due to they, in case of altered use of capital goods in a mixed activity, constitute an alternative to the withdrawal rules, which I have delimited, to instead judge the main rules on transactions of goods or services according to the ML in relation to the main rules on supply of goods or supply of services in the VAT Directive.[116]

The question if it is EU conform that an ordinary private person can be comprised by voluntary tax liability for letting of *fastighet* according to the special rules in Ch. 9 of the ML is a problem of a certain interest for the study in this work. I have concluded that the rules on voluntary tax liability in Ch. 9 of the ML lacks the limitation to taxable persons that is stipulated in the facultative rule in the VAT Directive that gives a freedom of choice for taxation of transactions constituting leasing out of and letting of immovable property, art. 137(1)(d). The use of the word *fastighetsägare* (Eng., owner of real estate) means that voluntary tax liability can comprise also an ordinary private person who is

[112] See Forssén 2017b, sections 1, 4 and 5.
[113] See Ch. 1 sec. 2 last para. of the ML.
[114] See section 1.6.
[115] See Ch. 8 a sec. 5 no. 1 of the ML.
[116] See section 1.4.

fastighetsägare, since it is used without an expressed limitation to regard *fastighetsägare* which are taxable persons.[117]

- A solution to the problem would be to introduce a special paragraph in the main rule on voluntary tax liability, Ch. 9 sec. 1, and in the rule on voluntary tax liability due to special reasoms, Ch. 9 sec. 2, where reference in both cases is made to the main rule on who is tax liable in Ch. 1 sec. 2 first para. no. 1 of the ML.[118] Then the voluntary tax liability according to Ch. 9 of the ML is limited to apply to taxable persons, since taxable person is one of the necessary prerequisites for tax liability to occur, according to Ch. 1 sec. 1 first para. whereto reference is made in Ch. 1 sec. 2 first para. no. 1 of the ML. In the present wordings of Ch. 9 sec:s 1 and 2 it is stated that the rules cause liability to pay VAT according to Ch. 1 sec. 1 first para. no. 1, but for inter alia *fastighetsägare*, and thus the category of tax liables is expanded by addition of who is tax liable according to the main rule in Ch. 1 sec. 2 first para. no. 1 to comprise also ordinary private persons who are *fastighetsägare*, by Ch. 1 sec. 2 last para. stating that inter alia Ch. 9 contains special rules on who is tax liable.

- An alternative solution would be to write taxable person in conjunction with inter alia the word *fastighetsägare* in Ch. 9 sec:s 1 and 2 of the ML.

The present problem has thus at least two solutions, which I suggest *de lege fererenda*, so that Ch. 9 of the ML becomes EU conform, i.e. complying with art. 137(1)(d) of the VAT Directive. Since the problem does not concern the general rules in the ML, in the present respect applies for the further presentation that I disregard the special rules on tax liability in Ch. 9 of the ML.

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[117] See Forssén 2013, section 7.1.3.3 (subheading *Särskilt om frivillig skattskyldighet*) and Forssén 2017b, section 2. See also Forssén 2019a, section 12 212 211. See furthermore my article in Balans Fördjupningsbilaga 1 2019 pp. 10-16, *Luckor och andra brister i mervärdesskattelagen på fastighetsområdet* (cit. Forssén 2019f) p. 11 and 12, e-version on www.tidningenbalans.se and on www.forssen.com.

[118] See Forssén 2017b, section 5. There I compare also with that the determination of whether a VAT group's activity shall be deemed causing tax liability according to the rules for VAT group's in Ch. 6 a of the ML is made with reference in a special para., Ch. 6 a sec. 1 second para, to the main rule on tax liability in the general rules in Ch. 1 sec. 2 first para. no. 1. That technique for the determination of the tax liability for a VAT group I compared with when I, regarding Ch. 6 sec. 2 of the ML (and Ch. 5 sec 2 of the SFL), suggested solutions to the problems with determining tax and payment liability for VAT in *enkla bolag* and *partrederier* – see Forssén 2013, section 7.1.3.2.

If not otherwise stated, I disregard in the further presentation from the mentioned special problems that can exist in the field of *fastigheter* with respect of VAT. This with respect of the fixing of a border between goods and services in Ch. 1 sec. 6 of the ML being EU conform in the field of *fastigheter*, since the concept *fastighet* in that rule and otherwise in the ML nowadays is defined by the connection of the concept *fastighet* to art. 13b of the Implementing Regulation.

2.7.2 The main rule on exemption from VAT in the field of *fastigheter* (Eng., approx. real estates)

Although I in the previous section have concluded that the fixing of a border between goods and services in Ch. 1 sec. 6 of the ML has become EU conform also with respect of the concept goods comprising *fastigheter*, by the reform on 1 Janaury, 2017 of the definition of *fastighet* in Ch. 1 sec. 11 of the ML, I leave, on the theme EU conformity with the ML, suggestions *de lege ferenda* concerning the determination in the ML of the scope of the value-added taxation in the field of *fastigheter*. That concerns the exemption from VAT in the field according to Ch. 3 sec. 2 of the ML, whereby I state the following:

- In connection with the alteration of the rules in the ML on withdrawal between allied partners, by SFS 2007:1376 on 1 January, 2008,[119] it was mentioned in the preparatory work that the rule in Ch. 3 sec. 2 first para. of the ML, whose wording is expressed below, has been questioned from the EU law in the field of VAT insofar that it would lack support in the VAT Directive and Sweden's accession treaty with the EU for exemption from VAT for transfer of rights to *fastigheter*, like tenancy rights and tenant-owners' rights.[120] The legislator judged that art. 15(2) of the VAT Directive entails that the accession treaty also comprises newly produced tenant-owners' flats and tenancy rights flats,[121] and stated it as a confirmation of a statement in the official report SOU 1994:88 (*Mervärdesskatten och EG*), which was carried out in connection with Sweden's EU-accession, and where the investigation considered that *the Swedish rule in Ch. 3 sec. 2 first para. of the ML on exemption at transfer and letting of inter alia tenancy rights and tenant-owners' rights is EC conform and may remain*.[122]

[119] See section 2.1.
[120] See prop. 2007/08:25 (*Förlängd redovisningsperiod och vissa andra mervärdesskattefrågor*) p. 111. See also Forssén 2019a, section 12 212 010.
[121] See prop. 2007/08:25 p. 112. See also Forssén 2019a, section 12 212 010.
[122] See prop. 2007/08:25 p. 111.

Ch. 3 sec. 2 first para. of the ML, wording according to SFS 2007:1376

”Från skatteplikt undantas, med de begränsningar som följer av 3 §, omsättning av fastigheter samt överlåtelse och upplåtelse av arrenden, hyresrätter, bostadsrätter, tomträtter, servitutsrätter och andra rättigheter till fastigheter” (Eng., From VAT is exempted, with the limitations following by sec. 3, transaction of real estate and transfer and letting of tenancy, tenancy rights, tenant-owners’ rights, leaseholder rights, easement and other rights to real estate).

- However, the problem on the theme EU conformity is in my opinion still that Ch. 3 sec. 2 first para. means that the ML puts forward a main rule in the field of *fastigheter* of exemption from VAT for transactions of *fastigheter* and transfer and letting of rights to *fastigheter*. The mandatory taxable transactions in the field of *fastigheter* are determined by enumeration in Ch. 3 sec. 3 first para of which letting or transfer in the field that is not comprised by exemption according to the main rule,[123] and I express here (in translation) the wording of that rule:

Ch. 3 sec. 3 first parat.of the ML, according to SFS 2016:1208

The exemption according to sec. 2 does not comprise
1. letting or transfer of machinery and equipment permanently installed,
2. transaction of growing woods, cultivation and other vegetation without connection to transfer of the land,
3. letting or transfer of right to agricultural lease, fellin right and other comparable right, right to take soil, stone or other natural products and right to hunting, fishing or grazing,
4. letting of rooms in hotels or similar activities and letting of camping ground and similar in camping activity,
5. letting of premises and other places for parking, including mooring and anchoring, of means of transport,
6. letting of safe-deposit boxes,
7. letting of space for advertising on real estate,
8. letting for animals of buildings and land,
9. lettting fior traffic of road, bridge or tunnel and letting of the tracks for railway traffic,
10. short-term letting of premises and grounds for practising sport,
11. letting of bus and train terminal to traffic operators, and
12. letting to a mobile phone operator of space for equipment on a mast or similar construction and appurtenant space for technical equipment comprised by the letting.

However, in the VAT Directive the determination of the scope of the taxable transactions regarding immocable property is made in the opposite order, why value-added taxation in the field is broader in principle according to the VAT Directive

[123] By the way it is expressed in Ch. 3 sec. 3 second-fourth para:s rules on voluntary tax liability in relation to Ch. 9 of the ML – see section 2.7.1.

compared with the ML. In the VAT Directive the taxable transactions are determined regarding immovable property by the facultative rule art. 15(2), whose wording is expressed in section 2.3.1, and the exemptions from VAT are stated in the also facultative rules art. 137(1)(b)-(d), which are expressed here:

Art. 137(1)(b)-(d) of the VAT Directive

”Member States may allow taxable persons a right of option for taxation in respect of the following transactions:

(a) the financial transactions referred to in points (b) to (g) of Article 135(1);

(b) the supply of a building or of parts thereof, and of the land on which the building stands, other than the supply referred to in point (a) of Article 12(1);

(c) the supply of land which has not been built on other than the supply of building land referred to in point (b) of Article 12(1);

(d) the leasing or letting of immovable property.”

- Although the directive rules in art:s 15(2) and 137(1)(b)-(d) are facultative and not mandatory, the structure in the ML for the determination of the scope of the value-added taxation in the field of *fastigheter* should follow the same order as according to art:s 15(2) and 137(1)(b)-(d) of the VAT Directive, so that the field of *fastigheter* in principle is comprised by value-added taxation and the exemptions from VAT Även are exempted according to special rules in Ch. 3 of the ML. The enumeration of the mandatory taxable transactions in the field of *fastigheter* in Ch. 3 sec. 3 first para. of the ML is in itself extensive by the 12 items that the rule contains, and some of the items are furthermore expanding by use therein of expressions like ”annan jämförlig rättighet” (Eng., *other comparable right*) or ”liknande verksamhet” (Eng., *similar activity*), why the value-added taxation in the field of *fastigheter* according to the ML in practice is fairly far-reaching. However, it is in conflict with the principle of a neutral VAT that the main rule in the field of *fastigheter* in the ML is exemption from VAT, when the opposite rules in the VAT Directive.

- Thus, I suggest that Ch. 3 sec. 2 first para. will be abolished from the ML, so that the field of *fastigheter* is comprised by the VAT liability in general for transactions of goods and services according to Ch. 3 sec. 1 first para. of the ML, and exemptions from taxation expressed according to special rules in Ch. 3 of the ML.

At the same time the concept *fastighet* in Ch. 1 sec. 11 of the ML was altered on 1 January, 2017 by SFS 2016:1208 Ch. 3 sec. 2 *second* para. of the ML was also altered.

Ch. 3 sec. 2 §second para. of the ML, wording according to SFS 2016:1208

> ”Undantaget för upplåtelse av nyttjanderätter till fastigheter omfattar också underordnade tillhandahållanden, exempelvis upplåtarens tillhandahållande av gas, vatten, elektricitet, värme och nätutrustning för mottagning av radio- och televisionssändningar, om tillhandahållandet är en del av upplåtelsen av nyttjanderätten” (Eng., The exemption for letting of right of use to real estate comprises also subordinate supplies, for example the lessor’s supply of gas, water, heating and net equipment for reception of radio and television broadcasting, if the supply is part of the letting of the rights).

The cases previously stated as ”ett led i” (Eng., in line of) the from VAT exempted letting of *fastighet* according to the main rule in first para. of the rule constitutes nowadays an *exemplification* of what can be ”en del av” (Eng., a part of) the letting. According to the legislator is that alteration not an immediate consequence of the EU-adjustment of the definition of the concept *fastighet* according to the ML (by the connection to immmovable property in art. 13b of the Implementing Regulation), but constitutes only another adjustment of the ML to the VAT Directive.[124] The legislator states that the alteration meaning that the supply shall be *a part of* the letting of right of use to the real estate gives a better correspondence with the CJEU’s case-law, so that a judgment of whether the supply is to be considered as *a part of the letting of the right* or as a ”separat transaktion” (Eng., separate transaction) must start from the circumstances in the individual case with respect of the EU law.[125]

The legislator’s statements in connection with the concept *fastighet* in Ch. 1 sec. 11 of the ML being altered on 1 January, 2017 according to what is accounted for in this section confirm only, for judging whether a composite transaction shall be divided or deemed as a single supply, that what I have concluded as applying in general in that respect in section 1.2 based on the EU-cases C-349/96 (CPP) and C-41/04 (Levob), also applies in the field of *fastigheter*.

Thus, Ch. 3 sec. 2 second para. of the ML in itself has no function leading to the determination of the value-added taxation becoming better adjusted to the VAT Directive, why I *de lege ferenda* suggest that the entire Ch. 3 sec. 2 will be abolished from the ML. Thereby would the scope of the value-added taxation in the field of *fastigheter* become

[124] See prop. 2016/17:14 p. 30. See also Forssén 2019a, section 12 212 010.
[125] See prop. 2016/17:14 p. 30.

determined by the VAT liability in general for transactions of goods and services according to Ch. 3 sec. 1 first para. of the ML, and exemptions from taxation expressed according to special rules in Ch. 3 of the ML..

For the further presentation I do not come back to the suggestions of alterations *de lege ferenda* of the ML which I have left in this section and in the previous section regarding the field of *fastigheter*. They affect as a matter of fact the scope of the value-added taxation in the field, but have in principle no significance for the questions on composite transactions in the field of VAT. What is essential in that respect for the further presentation is, as I concluded in section 2.3.2, that the fixing of a border between goods and services according to Ch. 1 sec. 6 of the ML has become EU conform also with respect of the concept goods comprising *fastigheter*, since the concept *fastighet* in that rule and otherwise in the ML from 1 January, 2017 no longer being determined by a reference in Ch. 1 sec. 11 of the JB, but by it for the definition of the concept *fastighet* nowadays exists a reference in Ch. 1 sec. 11 of the ML to the concept immovable property according to art. 13b of the Implementing Regulation.

2.8 CONCLUSIONS CONCERNING THE TAX OBJECT

After the examination in the sections 2.2-2.7.2 I make the following conclusions concerning the tax object, and whether the determination of it in the ML is complying with the VAT Directive.

If not otherwise stated, this work concerns the main rule on who is *skattskyldig* (Eng., tax liable) according to Ch. 1 sec. 2 first para. no. 1 of the ML, where a reference is made to emergence of the tax liability according to se. 1 first para. no. 1 for transactions within the country (Sweden) of goods or services which are taxable and made by a taxable person in that capacity. Thus, I emphasize for the further presentation that the questions on the tax object in this study are treated from the perspective of a taxable person, and not regarding the cases where an ordinary private person can be comprised by the liability to pay VAT. A consumer can only be tax liable at intra-Union acquisitions of goods (UIF), under certain circumstances, and at imports of goods which are taxable respectively, i.e. according to Ch. 1 sec. 2 second para. no. 5 of the ML, with reference to sec. 1 first para. no. 2, and according to Ch. 1 sec. 2 second para. no. 6 and sec. 1 first para. no. 3 of the ML respectively, and I disregard those cases of tax liability, if not otherwise stated.[126]

[126] See section 2.2.

The concepts *vara* (Eng., goods – *vara* is in the singular) and tjänst (Eng., service) are complying with the EU law:

- In the VAT Directive there is support in art. 15(1) for the independent definition of goods in Ch. 1 sec. 6 first sen. of the ML.

- By the basic determination in art. 57 first para. TFEU of what is meant by service together with the main rule in art. 24(1) of the VAT Directive of what is meant by supply of services the EU law also give support for the deinition of service in Ch. 1 sec. 6 second sen. of the ML.[127]

The fixing of a border between goods and services according to Ch. 1 sec. 6 of the ML is EU conform also with regard of *fastigheter* (Eng., approx. real estate) being comprised by the concept goods in Ch. 1 sec. 6 first sen. of the ML. By SFS 2016:1208 was on 1 January, 2017 the definition of *fastighet* (Eng., approx. real estate) in Ch. 1 sec. 11 of the ML altered, so that the connection in that rule to *fastighet* according to the JB was replaced with a reference to the concept immovable property in art. 13b of the Implementing Regulation. This means that services which previously regarded immovable property, and were deemed constituting services due to the connection of the concept *fastighet* in the ML to the JB caused a narrower determination of the concept goods than what follows from the concept immovable property, nowadays defined as goods by the connection of the concept *fastighet* to art. 13b of the Implementing Regulation. This means that the fixing of a border between goods and services in the field of *fastigheter* is EU conform.[128]

Although the ML is EU conform nowadays concerning the fixing of a border between goods and services also with respect of *fastigheter* being comprised by the concept goods in Ch. 1 sec. 6 first sen. of the ML, I have concluded that certain problems may remain regarding whether the ML is EU conform where the determination of the scope of the value-added taxation in the field of *fastigheter* is concerned. Therefore, I suggest *de lege ferenda* the following:

- I suggest two technical solutions for the rules on voluntary tax liability in Ch. 9 of the ML to become in compliance with art. 137(1)(d) of the VAT Directive, so that the possibility of such a tax liability applies to taxable persons and not also to an ordinary private person who is an owner of a *fastighet*.[129]

[127] See section 2.3.1.
[128] See section 2.3.2.
[129] See section 2.7.1.

- I suggest that Ch. 3 sec. 2 will be abolished from the ML, so that the field of *fastigheter* is comprised by the general tax liability for transactions of goods and services according to Ch. 3 sec. 1 first para. of the ML, and with exemptions from VAT in the field expressed in special rules in Ch. 3 of the ML. The present order, with Ch. 3 sec. 2 first para. stipulating a main rule in the field of *fastigheter* of exemption from VAT with the rules on mandatory tax liability enumerated in Ch. 3 sec. 3 as exemptions from the exemption, is the opposite compared to what rules in the VAT Directive, and thus in conflict with the principle of a neutral VAT.[130]

For the further presentation I do not come back to the suggestions *de lege ferenda* which I have left for concerning the field of *fastigheter*. The suggestions affect as a matter of fact the scope of the value-added taxation in that field, but are in principle not of any significance for the questions on composite transactions. What is of importance in that respect for the further presentation is that the fixing of a border between goods and services in Ch. 1 sec. 6 of the ML has become EU conform also with respect of the concept goods in Ch. 1 sec. 6 first sen. comprising *fastigheter* too.[131] I may also mention that I in section 2.3.1 has suggested *de lege ferenda* that the definition of *supply of goods* in Ch. 1 sec. 3 third para. first sen. should be abolished from the ML, since the use of the word *avlämnas* (Eng., delivered) in the rule implies that a property law element would be required for a supply of goods being deemed existing. That is in conflict with the main rule on what is meant by supply of goods in art. 14(1) of the VAT Directive, where such a limitation is not stated, but it is sufficient with a delivery being considered existing by law of contracts. This shall also be regarded for the further presentation.

In the next chapter I come back to the review in the present chapter of the main rule of supply of services in art. 24(1) of the VAT Directive and art. 8 of the Implementing Regulation, which establishes one of the Implementing Regulations for art. 24(1) of the directive. Thus, art. 8 of the Implementing Regulation shows that one category of supply of services constitutes of the work being separated from the manufacturing process for the creation of goods. The manufacturer sells his know-how, whereas the tangible assets – the parts of machinery to be assembled – are owned by the customer. The work constitutes a supply of services according to the main rule in art. 24(1) of the VAT Directive based on art. 8 of the Implementing Regulation. If the manufacturer would have

[130] See section 2.7.2.
[131] See section 2.7.2.

owned also the parts of machinery, he would have commanded as owner over the finished goods and thereby supplied goods to the customer, according to the main rule for supply of goods in art. 14(1) of the VAT Directive.[132]

The fixing of a border between goods and services in accordance with art. 14(1) of the VAT Directive and art. 24(1) in the directive together with art. 8 of the Implementing Regulation is used in Chapter 3 in connection with the division I make of the services into five categories, I-V,[133] to create a tool for the analysis in Chapter 4 of certain application problems concerning composite transactions in the field of VAT. The recently mentioned supply of services consisting of the work being separated from the manufacturing process for the creation of goods is comprised by category I of my division of the services to create that tool.[134]

The right of possession is a composite concept. It contains fractions of rights like the right to command over goods or services. If a right of disposal of goods is let, it is not a matter of the right of possession being transferred, and according to art. 24(1) in the VAT Directive, compared with art. 14(1) in the directive, it is a question of a supply of a service when the goods is hired out.[135] This is also a category of services that is put forward in Chapter 3, to create the tool for the analysis in Chapter 4.[136]

The preparatory work to the reform of the concept service in the predecessor to the ML, i.e. in the GML, that was made on 1 January, 1991 according to SFS 1990:576, whereby transactions of services were made generally taxable in the same way as already applied for transactions of goods, confirms, by reference to the EC's Sixth VAT Directive (77/38/EEC), the interpretation of art. 24(1) in relation to art. 14(1) of the VAT Directive, which has replaced the Sixth Directive. There it is stated that with a transaction of goods is meant only transfer of ownership to the goods. There is stated as an example of transaction of a service letting or transfer of right of use to goods or *fastighet*. Moreover, it is stated that the same applies to letting or transfer of intellectual property.[137] That corresponds with the interpretation of art. 24(1) of the VAT Directive meaning that supply of a service can regard

[132] See section 2.4.
[133] See section 3.2.1.
[134] See section 3.2.2 regarding category I, work on things, intermediation and personal services etc.
[135] See section 2.4.
[136] See section 3.2.2 regarding category II, fractions of rights to things.
[137] See prop. 1989/90:111 (*Reformerad mervärdeskatt m.m.*) p. 189.

other services.[138] This is another category of services that is put forward in Chapter 3, to create the tool for the analysis in Chapter 4.[139] In the context may also be mentioned that the concpet goods in Swedish VAT law nowadays also comprise all material things, i.e. also *fastigheter*, which follows by Ch. 1 sec. 6 first sen. of the ML.[140] That alteration was made by the ML being replaced by the ML on 1 July, 1994.[141]

In Chapter 4 I come back to the other application measure for the main rule on supply of services in art. 24(1) of the VAT Directive, i.e. art. 9 of the Implemeting Regulation. Art. 9 of the Implementing Regulation contains an application measure that limits the field for exemption from VAT concerning trading of securities according to art. 135(1)(f) of the VAT Directive, so that the exemption does not comprise the sale of an option, which taken by itself constitutes securities, but which represents ownership to goods or rights in immovable property.

Thus, art. 9 of the Implementing Regulation shows that private law options constitutes a special category of services to judge in connection with the study in Chapter 4 of the Implementing Regulation concerning composite transactions in the field of VAT, whereby they are mentioned in connection with the special rules in Ch. 9 c of the ML on tax liability and exemption from VAT regarding goods in certain warehouses.[142]

Concerning the question whether the main rules for the main rules for *omsättning av vara* (Eng., approx. transaction of goods) and *omsättning av tjänst* (Eng., approx. transaction of services) respectively in Ch. 2 sec. 1 first para. no. 1 and third para. no. 1 of the ML respectively are complying with the main rules for the transactions which shall be subject to VAT according to art. 2(1)(a) and (c) of the VAT Directive respectively, when it is a matter of the use of the concept *ersättning* (Eng., consideration), I have concluded that the ML is EU conform in that respect. Thus, by the main rule on the taxable amount in Ch. 7 sec. 2 of the ML being in compliance with the main rule for the determination of the taxable amount for supply of goods or supply of services in art. 73 of the VAT Directive, due to the the taxable amount according to both those main rules being constituted by the consideration which the vendor shall obtain from the purchaser for the goods or the services, the use of the concept consideration in the ML becomes complying with the use of the same concept in the VAT

[138] See section 2.4.
[139] See section 3.2.2 regarding category III, objects constituting services.
[140] See section 2.3.1.
[141] See prop. 1993/94:99 p. 105. See also Forssén 2019a, section 12 201 010.
[142] See section 2.4.

Directive for the determination of the VAT which shall be paid by the taxable person who sells the goods or the services..[143]

I have mentioned the concept consideration also concerning taxable event and the VAT becoming chargeable, whereby I have pointed out that there exists an application question regarding single payments for supply of goods and supply of services which are made continuously, but that it should be brought up in connection with a larger work on the procedure rules in the field of VAT. However, the question will not be mentioned more in this work, since the focus here is not set on the tax subject, but on questions about the tax object, whereby the further presentation, as mentioned,[144] concerns, if not otherwise stated, the main rules regarding transactions and supplies for consideration, regardless of the period of time which the consideration comprises.[145] However is, as mentioned,[146] one of the questions which is mentioned in the further presentation what rules concerning one consideration that regards more than one transaction or delivery or supply, i.e. more than one taxable event. For that question I come back to my preliminary study to this work, and thereby in the first place concerning the special rule in Ch. 6 sec. 7 of the ML on tax liability for intermediation in one's own name (Sw., *i eget namn*) of goods or services on account for another person, whereby the agent obtains the payment (consideration) for the goods or the services.[147]

By the way I have in this chapter brought up that there is a special problem about the meaning of supply of services being determined in two legsilations from the EU, i.e. the VAT Directive and the Implementing Regulation. It concerns art. 7 of the Implementing Regulation, where the concept *electronically supplied services* is determined. The appliers of law are thereby confronted with the interpretation difficulty concerning whether the Implementing Regulation, as the extra secondary law law source, is updated in relation to the development in the business life regarding the use of electronically supplied services. Therefore, I suggest that it in art. 24 of the VAT Directive will be introduced (like with item 2 regarding telecommunications services) a special item on the determination of what is meant by electronically supplied services, and that such a directive rule will be implemented as a rule on what is meant by electronical service in Ch. 2 of the ML. The problem in question should

[143] See section 2.5.1.
[144] See sections 1.2, 1.3 and 2.5.2.
[145] See section 2.5.2.
[146] See section 1.2.
[147] See section 1.2 and Forssén 2020a, section 4.1 with the headline "En ersättning kan motsvara fler än en omsättning" (Eng., One consideration can correspond to more than one transaction).

be brought up on the EU level by the legislator. However, art. 7 of the Implementing Regulation does not concern the main rule on supply of services in art. 24(1) of the VAT Directive. Therefore, I disregard in the further presentation, if not otherwise stated, from the problems which I have mentioned about the meaning of supply of services being determined in two legislations from the EU.[148]

[148] See section 2.6.

3. A TOOL FOR THE CASE STUDIES

3.1 INTRODUCTION

In this chapter I create a tool for the study of various composite transactions regarding goods and services.

The problem on composite transactions concerns, as mentioned,[149] cases where the tax object contains efforts of different character regarding whether they are taxable transactions or exempted from VAT or comprised by different tax rates. The application questions concern the decision of whether the price – the consideration – regards one single supply or if it shall be divided into different goods and/or services in the respects mentioned.

There is, as mentioned, not any definition of composite transactions in either the ML or the VAT Directive. Instead follows by Ch. 7 sec. 7 of the ML and the CJEU's case-law, according to the cases C-349/96 (CPP) and C-41/04 (Levob):[150]

> that division of the effort applies as a main rule and, if division is not possible, applies instead a principle of the principal, where the dominating part in a composite transaction decides the question if taxation or exemption shall apply and the question on applicable tax rate respectively; and
>
> that a division of a composite transaction must not be an artificial split.

The CJEU considers in the case C-41/04 (Levob), item 30 first indentation, that the following applies to decide whether a composite transaction shall be divided or seen as one single supply:[151]

> "[W]here two or more elements or acts supplied by a taxable person to a customer, being a typical consumer, are so closely linked that they form objectively, from an economic point of view, a whole transaction, which it would be artificial to split, all those elements or acts constitute a single supply for purposes of the application of VAT."

[149] See sections 1.1 and 1.2.
[150] See section 1.2.
[151] See section 1.2.

Since the study in this work concerns the tax object and the material rules on liabilities in the VAT system with respect of composite transaction regarding goods and/or services, and not the rights in the VAT system, I reproduce here, modified with regard of the tax rates, the parts in the figure over the relationship between the liabilities and the rights of the VAT system in section 2.1 which concern the determination of whether the tax object contains efforts of different character with respect of whether they are taxable transactions or exempted from VAT.

Tranaction of goods or services (the ML)/ Supply of goodss or supply of services (the VAT Directive)		
a Taxable, at tax rate: 1) 25 per cent 2) 12 per cent 3) 6 per cent	b) From VAT qualified exempted: zero rate (0 per cent)	c) From VAT unqualified exempted

I comment the figure above as follows:

The most common is that transactions are taxable, since it according to Ch. 3 sec. 1 first para. of the ML applies a principle of the principal of VAT liability in general for transactions of goods and services [a)].

Sweden has the possibilities in accordance with the accession treaty with the EU to have zero rate in certain cases. Those transactions I name from VAT qualified exemptions [b)].

The transactions which leads to neither deduction nor reimbursement right of input tax or imports in an economic activity by a taxable person I name from VAT unqualified exemptions [c)].

If a) exists shall a determination be made of whether only the main rule on the general tax rate of 25 per cent for taxable transactions applies or if any of the two reduced tax rates on 12 and 6 per cent is current regarding the taxable person's transactions.

I make based on the figure above the following overview of the combinations of dividing problems concerning composite transactions with respet of VAT:

Transactions entailing deduction or reimbursement and transactions not leading to right of deduction or reimbursement: a and b *and* a or b and c respectively.

Taxable transactions which are comprised by the general tax rate (the normal tax rate) of 25 per cent according to Ch. 7 sec. 1 first para. of the ML and taxable transactions which are comprised by anyone of the reduced tax rates of 12 or 6 per cent according to Ch. 7 sec. 1 second and third para:s of the ML or by a zero rate according to to any of the rules in Ch. 3 of the ML in relation to Ch. 10 sec. 11 first para. of the ML (from VAT qualified exemptions): a 1) and a 2) or a 3) or a 2) and a 3) *and* a 1), a 2) or a 3) and b) respectively.

In section 2.7.2 I reproduce the wordings of Ch. 3 sec. 2 first para. meaning that from VAT unqualified exemptions apply in the field of *fastigheter* and by Ch. 3 sec. 3 first para. items 1-12 of the ML, where it is stated for which cases in the field of *fastigheter* mandatory VAT liability rules. Below I reproduce the wordings of the main rule on from VAT qualified exemprtions (zero rate), Ch. 10 sec. 11 first para. of the ML,a nd the rules on tax rates, Ch. 7 sec. 1 of the ML.

Ch. 10 kap. sec. 11 first para. of the ML, wording according to SFS 2017:1196

”Den som i en ekonomisk verksamhet omsätter varor eller tjänster inom landet har rätt till återbetalning av ingående skatt för vilken denne saknar rätt till avdrag enligt 8 kap. på grund av att omsättningen är undantagen från skatteplikt enligt 3 kap. 19 § första stycket 2, 21 §, 21 a §, 21 b §, 22 §, 23 § 2, 4 eller 7, 26 a §, 30 a §, 30 c §, 30 e §, 31 §, 31 a §, 32 § eller enligt 9 c kap. 1 §” (Eng., He who in an economis activity makes transactions of goods or services within the country is entitled to reimbursement of input tax for which he lacks right of deduction according to Ch. 8 due to the transaction being exempt from VAT according to Ch. 3 sec. 19 first para item 2, sec. 21, sec. 21 a, sec. 21 b, sec. 22, sec. 23 item 2, 4 or 7, sec. 26 a, sec. 30 a, sec. 30 c, sec. 30 e, sec. 31, sec. 31 a, sec. 32 or Ch. 9 c sec. 1).

Ch. 7 sec. 1 of the ML, according to 2019:261 (in translation)

Tax according to this act is taken out with 25 per cent on the taxable amount if not otherwise follow by second or third para.

The tax is taken out with 12 per cent on the taxable amount for

1. *letting of rooms in hotels or similar activities and letting of camping ground and similar in camping activity*,
2. *transaction of such works of art which are regarded in Ch. 9 a sec. 5, and which are owned by the originator or his or her estate*,
3. *imports of such works of art, collectors' items and antiques which are regarded in Ch. 9 a sec:s 5-7*,
4. *transaction, UIF and imports of such food-stuffs regarded in article 2 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, with exemption for*

a) *other water regarded in article 6 of COUNCIL DIRECTIVE 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, altered by Regulation (EC) No 1882/2003 of the European Parliament and of the Council, than water in bottle or receptacle for sale, and*

b) *spirits, wine and strong beer*,

5. *transaction of restaurant- and cateringservices, with exemption for the part of the service that regards spirits, wine and strong beer, and*

6. *repairs of bicycles with pedal- or crankdevice, shoes, leather goods, clothes and household linen*.

The tax is taken out with 6 per cent on the taxable amount for

1. *transaction, UIF and imports of the following goods, if not otherwise follow by Ch. 3 sec:s 13 and 14, provided that the goods are not entirely or mainly fitted for advertising*:

- books, brochures, booklets and similar products, also in form of separate sheets,

- papers and periodicals,

- picture-books, drawing-books and colouring books for children,

- music notes, and

- maps, including atlases, wall maps and topographical maps,

2. *transaction, UIF and imports of programmes and catalogues for activity regarded in items 6, 7, 8 or 11 and another transaction than for own activity, UIF and imports of programmes and catalogues regarded in Ch. 3 sec. 18, all provided that the programmes and catalogues are not entirely or mainly fitted for advertising,*

3. *transaction of radio papers and transaction, UIF and imports of cassette papers, if not otherwise follows by Ch. 3 sec. 17, and of cassettes or some other technical medium which reproduce a reading of the content in goods comprised by item 1,*

4. *transaction, UIF and imports of goods which by sign language, braille or other such method make writing or other information available especially for persons with a reading impairment, if not otherwise follows by Ch. 3 sec. 4,*

5. *transaction of such products which are regared in items 1-4, if they*

a) *are supplied electronically,*

b) *not entirely or mainly are fitted for advertising, and*

c) *not entirely or mainly consist of motion pictures or audible music,*

6. *admission to concerts, circus-, theatre-, opera- or balletperformances or other comparable performances,*

7. *services regarded in Ch. 3 sec. 11 items 2 and 4 if the activity is not carried out by and neither continuous in more than a small extent is supported by the public service,*

8. *admission to and showing of zoological parks, showing of nature territories outside population centres and Natura 2000 areas,*

9. *letting or transfer of rights which are comprised ny sec:s 1, 4 or 5 of the URL, although not when it is a matter of photographs, advertising material, systems and programmes for automatic data processing (ADB) or film, videogramme or other comparable recording regarding information,*

10. *letting or transfer of right to audio- or picture recording of a practising artists performance of a literary or artistic work,*

11. *transaction of services within the sector of sports which is stated in Ch. 3 sec. 11 a first para. and which is not exemped from VAT according to the second para. of the same rule, and*

12. *conveyance of passengers except such conveyance where the element of travelling is of a subordinate significance.*

In the present study I do not go thtrough whether the scope of exemption from VAT or the scope of exemption from the normal tax rate according to the ML are conform with the VAT Directive. The tax rates and the exemptions in the field of VAT are, as mentioned,[152] not entirely exhaustive, and therefore I set in the further presentation the focus on judging various case studies regarding composite transactions

[152] See section 1.3.

concerning goods and/or services, where the application questions regard whether the price – the consideration – regards one single effort or if it shall be devided into different goods and/or services. Thereby I put forward various cases in practice with application questions in Chapter 4 from the schematic overview above with the basic question on the main rules of tax liability and a normal tax rate being put against (contra) efforts comprised of exemption from VAT or reduced tax rates or normal tax rate eccording to the ML. Therefore, I only conclude here that the normal tax rate and the reduced tax rates are EU conform and that Sweden is allowed to use zero rate in certain cases by virtue of the accession treaty to the EU.

According to Ch. 3 sec. 1 first para. of the ML are transaction of goods and services and imports of goods taxable, if not otherwise stated in Ch. 3 of the ML. By the second para. of the rule follows that also import of goods is exempt from VAT, if the the transaction of the goods is exempt from VAT according to Ch. 3 of the ML. The principle of a general tax liability for transactions of goods or services and imports of goods with especicially stated exemptions is complying with the VAT Directive generally stating that supply of goods and supply of services and imports of goods constitute taxable transactions, which follows by inter alia the main rules for supply of goods and supply of services in art:s 14(1) and 24(1) and the rule on imports of goods in art. 30, with especicially stated exemptions from VAT in art:s 131-137.

According to Ch. 7 sec. 1 first para. of the ML the tax rate is 25 per cent on the taxable amount, if not otherwise follows by second or third para. of the rule. Thus, the general tax rate for taxable transaction of goods or services is 25 per cent, and in the rule's second and third para. respectively is stated in which cases of such transactions that the reduced tax rates of 12 and 6 per cent respectively apply. This order regarding the tax rates in the ML is complying with the VAT Directive stating in art. 96 that the Member States shall apply a normal tax rate and stating in art. 98(1) that the Member States may apply one or two reduced tax rates. Art:s 97 and 99(1) respectively mean that the VAT Directive only stipulate minimum levels for the normal tax rate and the reduced tax rates of 15 and 5 per cent respectively.[153] Also in that respect is Ch. 7 sec. 1 of the ML in compliance with the VAT Directive. Thus, according to the VAT Directive can a Member State apply up to three different tax rates for the VAT.[154] However may Sweden for a transitional period in certain

[153] See also prop. 1994/95:19 Part 1 pp. 140, 142 and 143.
[154] See prop. 1994/95:19 Part 1 p. 140.

cases apply a so-called zero rate.[155] It means that in those cases of transactions of goods or services exemption from VAT apply, but so-called right of reimbursement for input tax applies instead of right of deduction for input tax on acquisitions or imports which are relating to the making of such zero rated transactions of goods or services.[156] By the way may be mentioned that before the ML replaced the GML zero rated transactions of goods or services were denoted as technical tax liability.[157]

The difficulties at the analysis in Chapter 4 of the application questions regarding composite transactions emerge first concerning the services. The goods can be shaped in may various ways, but it is possible to deem objectively that it is a matter of goods, since goods are tangible property plus gas, heat, refrigeration and electricity. Everything else that can be supplied constitute services, and the difficulties with applying the rules in the ML and the VAT Directive on composite transactions regard therefore first the services.[158] To make the analysis of the application questions in Chapter 4 easier I create a tool in the present chapter, and one element of that tool is that I in the sections 3.2.1 and 3.2.2 divide the services with respect of VAT into five categories. Some of these categories I have already mentioned in section 2.8, and they make a basis at the division of the services into different categories in sections 3.2.1 and 3.2.2.

In section 3.3 I create the tool, which shall serve as support at the analysis of certain composite transactions in Chapter 4, by me starting *partly* from the review in the present section of combinations of division problems concerning composite transactions with respect of VAT, *partly* from what I conclude at the going through of the five categories of services in section 3.2.2.

[155] See prop. 1994/95:19 Part 1 p. 143.
[156] Regarding the main rule for deduction of input tax: see the main rules in Ch. 8 sec. 3 first para. of the ML and art. 169 a of the VAT Directive. Regarding the rule on reimbursement for input tax: see in the first place Ch. 10 sec. 11 first para. of the ML and art. 169 of the VAT Directive.
[157] See prop. 1993/94:99 p. 226. See also: Forssén 2011, section 6.2; Forssén 2019a, section 12 216 211; *Mervärdeskatt En läro- och grundbok i moms*, by Björn Forssén, Publica, Stockholm 1993 (cit. Forssén 1993), section 6.5.2; and Forssén 1994, section 6.5.2.
[158] See sections 2.3.1, 2.4 and 2.8.

3.2 DIVISION OF SERVICES INTO FIVE DIFFERENT CATEGORIES[159]

3.2.1 In general about the five categories of sevices

To create the tool in Chapter 4 of the application questions concerning various composite transactions regarding goods and services I make a division of the services into different categories. I come back in that respect to my VAT books from 1993 and 1994 and a division which I made there of the services into five (5) categories.[160] Some of these are, as I mention in section 3.1, the same as I have mentioned in section 2.8 and they, denoted categories I-III, constitute the basis at the division below of the services into five categories, I-V.

The first category of services (I) consist of pure consumption services meaning that the purchaser finally consumes the service, simply by enjoying it or by it being provided with goods so that the service becomes an inseparable part of the goods. Examples of services according to this category consist of work on things, like repairs of goods,[161] intermediation and personal services.

The second category of services (II) consists of fractions of rights to things. The right of possession is a composite concept, which consists of different fractions of rights like the right of command. If all rights to a thing (goods) are transferred, it is a matter of transaction and supply of goods according to the ML and the VAT Directive, whereas it is instead a matter of transaction and supply of a service respectively if the the right of disposal of the goods is let, i.e. if the goods are hired out.[162]

That distinction is rather clear, but difficulties may above all exist when the tansaction question does not regard a material thing. If a transaction regards a material thing, immovable property or some other goods, I write sometimes that the transaction regards a *thing*. Then I distinguish such efforts from transaction of a service which regars another service, i.e. from transaction of services according to category III, where I use the word *object*.[163] Thus, in category III is the object for the transaction of a service another service.[164]

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[159] See also Forssén 2019a, section 12 202 101.
[160] See Forssén 1993, section 6.2.1.1 and Forssén 1994, section 6.2.1.1.
[161] See sections 2.4 and 2.8.
[162] See sections 2.4 and 2.8.
[163] See Forssén 1994, section 6.2.1.1. See also section 1.6.
[164] See sections 2.4 and 2.8.

Both the other categories of services to create the tool for the analysis of composite transactions contain partly of the making of new services (IV), partly of non-profit shares in things and objects (V).

Thus, the five categories into which I divide the services in the present context are:

I. work on things, intermediation and personal services etc.;
II. fractions of rights to things;
III. objects constituting services;
IV. the making of new services; and
V. non-profit shares in things and objects.

I comment the categories I-V regarding services further in section 3.2.2 with regard of their respective meaning.

3.2.2 The meaning of the five categories of services

I. Work on things, intermediation and personal services etc.[165]

This category of transaction of services concerns efforts which mean that a vendor of such services undertake to perform on behalf of a purchaser of the services something of a practical character. For example it is about a thing being worked upon, a vendor of a house being brought together with a purchaser or a hair-cut being performed.

There is no definition of the concept intermediation in the ML. There is neither any common EU-definition of intermediation with respect of VAT.[166]

However, in accordance with the general rules in the ML rules that an intermediation of goods or of another service for consideration is a transaction of a service, and in the preparatory work to the reformation of the concept service in the Swedish VAT law, which was carried out in 1991,[167] it is stated that such an intermediation service can consist of that a broker, intermediary, only bring together a vendor and a purchaser of for example a *fastighet* and that the intermediation service as a main rule is taxable.[168] I refer intermediation services to the present category, if the intermediation service regards a thing, i.e. a *fastighet* or other tangible goods, or regards goods which constitute gas, heat, refrigeration and electricity.

[165] See sections 2.8 and 3.1. See also Forssén 1994, section 6.2.1.1.
[166] See prop. 2017/18:213 (*Mervärdesskatteregler för vouchrar*). See also Forssén 2020a p. 167 and Forssén 2019c p. 334.
[167] See section 2.8.
[168] See prop. 1989/90:111 pp. 106 and 189.

Thus, an intermediation service is comprised by the general tax liability for transaction of goods and sercices in Ch. 3 sec. 1 first para. of the ML. For an intermediation service being comprised by exemption from VAT it must be stated in any of the rules in Ch. 3 of the NL, which is the case with intermediation of securities and intermediation of insurances respectively according to Ch. 3 sec:s 9 and 10 of the ML respectively. However, I refer those two cases to category III, i.e. transaction of services where the object of the transaction of the service is another servicet. The intermediation service concerns in the two cases a security or an insurance, which are objects also constituting services. Those are exempt from VAT and it is stipulated in the two rules that the intermediation of a security or of a share also are tax-free with respect of VAT. In other cases of intermediation services regarding another service the intermediation of such an object is taxable, regardless of the character with respect of VAT of the thus mediated object.

Common for the present category of services compared with services according to the other four categories is that they cannot be sold further by the purchaser. It is according to the present category inter alia a matter of pure consumption services meaning that the purchaser finally consumes the service, simply by enjoying it – like with the above-mentioned performimg of a hair-cut (personal service) – or by it being provided with goods so that the service becomes an inseparable part of the goods.

When it is a matter of work on things, the service can consist of something that has been broken out from a manufacturing process regarding goods. For example it can concern a repair service regarding goods similar to the assembly which was carried out when the goods repaired once were manufactured.[169] However, the complete manufacturing of goods by a process containing all elements of what taken by iself can be called services is not a transaction of a service, but then it is a matter of the manufacturer supplying goods to the orderer, i.e. ordinary sale of goods and thus transaction of goods. By transaction of goods is meant, as mentioned, only transfer of the ownership to the goods.[170]

[169] See section 2.8.
[170] See prop. 1989/90:111 p. 189. See Forssén 2019a, section 12 201 010.

II. Fractions of rights to things[171]

The right of possession is, as mentioned, a composite concept. It contains fractions of rights like the right to command over goods or services. I state the following to describe my category II of services:

> The right of disposal of a thing or an object is the most common example of what is meant by a fraction of rights. The right of disposal can be said *existing* already by the owner of the thing or the object having access to it himself. Transaction of service concerns, as mentioned, for example letting or transfer of right of use to goods, whereas transfer of the ownership to the goods constitutes transfer of goods.[172]
>
> If a right of disposal to goods is let, it is not a matter of transfer of the ownership of the goods. According to art. 24(1) of the VAT Directive, compared with art. 14(1) of the directive, it is a matter of a supply of a service when goods are hired out.
>
> The right of disposal can be indicated by it being registered, e.g. easement registered by *Lantmäteriet* (Eng., The Swedish Land Survey) regarding a *fastighet*. The right of disposal becomes visible also by the disposal taken by itself over the thing or the object, e.g. at the letting of a thing, i.e. of a *fastighet* or other tangible goods, for example a car.

III. Objects constituting services[173]

In connection with the survey of category I above I state that intermediation services belong to that category, if the intermediation service regards a thing, i.e. a *fastighet* or other tangible goods, or regards goods which constitute gas, heat, refrigeration or electricity, whereas services consisting of intermediation of securities or insurances are included in the present category, since it in both those cases is a matter of the object for the transaction of the intermediation service being another service. For the intermediation service to be comprised by exemption from VAT it must be stated in any of the rules in Ch. 3 of the ML, which is the case with intermediation services regarding securities and regarding insurances respectively according to Ch. 3 sec:s 9 and 10 of the ML respectively. However, I refer those two cases of intermediation services, as mentioned, to the present category of

[171] See sections 2.8 and 3.1. See also Forssén 1994, section 6.2.1.1.
[172] See section 2.8. See also prop. 1989/90:111 p. 189. See Forssén 2019a, section 12 201 010.
[173] See sections 2.8 and 3.1. See also Forssén 1994, section 6.2.1.1.

transaction of services, i.e. transaction of services where the object for the transaction is another service. The intermediation service regards a security or an insurande, and those objects also constitute services.

Thus, the conclusion is that the intermediation services regarding things are included in my category I of services and are taxable, whereas intermediation services regarding objects, i.e. transaction of services where the object for the service is another service, are included in my category III of services. In the present category there are two cases of (unqualified) exemptions from VAT for the intermediation service, namely Ch. 3 sec. 9 of the ML regarding intermediation of securities and Ch. 3 sec. 10 of the ML regarding intermediation of insurances.

Although intellectual efforts belong to the present category of services, i.e. objects which constitute services. An intellectrual effort of a certain qulity – so-called threshold of originality[174] – can be protected against infringement from others than the rightholders according to the intellectual property rules in e.g. the URL.[175] Examples of such sole rights are the right of patent, right of trademark, right of design and the mentioned copyrights to literary and artistic works.

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[174] According to *Immaterialrätt och otillbörlig konkurrens* Fourteenth edition, 2017, by Ulf Bernitz, Lars Pehrson, Jan Rosén and Claes Sandgren, Handelsbolaget Immateriellt Rättsskydd i Stockholm, Stockholm 2017 (cit. Bernitz et al. 2017), p. 57 the term *threshold of originality* is often used as a comprehensive expression of what must characterize a work for it to be protected for intellectual property law purposes: *If a court today uses the words* ”verkshöjd” (Eng., threshold of originality) *or* ”särprägel” (Eng., distinctive character) *in their considerations on originality, there is no reason to only therefore consider that something else is meant than the originality that is required according to the EU-directives' determination as it has come to be illustrated by the CJEU in a vast number of cases*.

[175] See *Kultur utan moms*, article in SvSkT 1991 pp. 267-275, by Erik Eklund (cit. Eklund 1991), where he on p. 269, due to the reformation 1991 of the concept service (see section 2.8), states, concerning the demand that a literary or artistic work for intellectual property protection must have reached the threshold of originality, that a trashy art painter's (Sw, *hötorgsmålare*) rights possibly not are comprised, but that it is *hardly likely that any such judgment can be made either by the court or, let alone, the tax authorities*. I consider that it for VAT purposes normally should be decided in practice according to the agreement between the parties, i.e. the vendor and the purchaser of the work, whether it is a matter of a work protected by it fulflilling the criterion of independence (the unique principle – the threshold of originality) in sec. 1 of the URL and that it, if lacking a contract for interpretation, should be decided first by a trial in court if the threshold of originality is reached. This should be done in an administrative court if the dispute stands between on the one hand *Skatteverket* (Eng., the tax authority) and on the other hand the vendor or the purchaser. Thereby should, if a civil law process regarding the question on the threshold of originality has taken place for example due to an application for a summons regarding intellectual property infringement, the administrative court typically follow the decision in a general court.

The existence of the rights protected according to the intellectual property law is indicated by a registreation of the object being made, e.g. by the idea for which the application of registration of a patent can be submitted to *Patent- och registreringsverket* (Eng., Swedish Intellectual property office), or by the object being expressed in a book manuscript on paper or as a digital product on the Internet, i.e. published in print or digital.

> An author publish his book himself (self-publish) or by a publishing house. The royalty received by the author from the publishing house corresponds to a taxable transaction of service,[176] and is comprised by the reduced VAT rate of 6 per cent.[177] Publishing houses selling copies of the book make taxable transactions of goods,[178] and are by the way also comprised by the reduced VAT rate of 6 per cent for their transaactions.[179]

IV. The making of new services[180]

Goods can be shaped in a vast number of various appearances and designs etc. In the same way can a vast number of various services exist. What is simple with the goods with respect of VAT is that the consist of material things, i.e. tangible property, and gas, heat, refrigeration and electricity. What is hard with the services with respect of VAT is that they consist of everything else that can be supplied by somebody.[181] Therefore I make a division of the services into different categories, so that those who are handling an application question concerning composite transactions regarding goods and/or services get a support for their thinking, when the services need to be structured for the judgment with respect of VAT on whether the consideration that the entrepreneur receives for his effort regarding goods or services in its entirety or various parts of an effort, which can consist of combinations of goods and services or combinations of diffrent services.

Thus, the division of the services into different categories is only as a support to study the application questions concerning composite transactions where services are included, so that a tool can be created in this chapter as a support for the study in Chapter 4 of such questions. It is, as mentioned,[182] not a matter of anything else than creating a model – a tool – for the support of the study, where the tool is not supposed to be

[176] See Ch. 3 sec. 1 first para. of the ML.
[177] See Ch. 7 sec. 1 third para. no. 9 of the ML.
[178] See Ch. 3 sec. 1 first para. of the ML.
[179] See Ch. 7 sec. 1 third para. no. 1 of the ML.
[180] See section 3.1. See also Forssén 1994, section 6.2.1.1.
[181] See section 3.1.
[182] See section 1.3.

considered as the method in itself for the analysis in this work. The division of the services into five different categories means in that perspective neither any exhaustive description of what is constituting services with respect of VAT.

Services can be indentified by being performed, like regarding the services according to category I, by concerning a thing, like regarding the services according to category II, or by being possible to identify by registration or publishing, like regarding the services according to category III. Furthermore can what I, concerning the present category, denotes new services be created simply by those being carried out, i.e. they emerge when an agreement on sale of something which is not goods is closed between two parties, the vendor and the purchaser.

Thus, I denote the present category of services *the making of new services*, i.e. services which can be created by the parties themselves, whereby I reason as follows:

> By the definition of what is meant with a service according to Ch. 1 sec. 6 of the ML can certain services simply be said being *indicated* by the transaction taken by itself of the same service.
>
> The service is quite simply *created* by anything at all, which is not goods, being transferred, which shows that it can be supplied and thereby constituting a service according to Ch. 1 sec. 6 of the ML.

In the latter respect people are creating an institutional circumstance, by the agreement if it thereby created object is in compliance with the right to negotiate, which is confirmed by *avtalslagen* (Eng., the law of contract) and its rules are optional.[183] The agreement on supply of the object for consideration means that a transaction exists according to law of contracts, and that a transaction of service exists according to Ch. 2 sec. 1 third para. no. 1 of the ML.

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[183] See sec. 1 second para. of *lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område*, whereof follows that sec:s 2-9 in that act apply if not otherwise follows of the offer or the answer, i.e. the agreement, or by trade custom or practice. I mention also in the context the so-called *Avtalslagen 2010* (which is not tahen by the Swedish Parrliament). In sec:s 1-3 of *Avtalslagen 2010*, with the headline *Avtalsfrihet*, is stated that *Parties are not onliged to enter agreements. Parties have the freedom to commit to agreements and to agree upon the content of an agreement*. See www.avtalslagen2010.se. Optional law rule: *A rule which is not an imperative* – see Melin 2010 p. 101.

V. Non-profit shares in things and objects[184]

With a non-profit share is meant a right to a certain quota, percentage or similar of a fortune. Thus, in the present category of services it is not a question of a right to a certain thing or object, but of a non-profit share in a thing or an object. Since the share can be transferred – supplied – and is not constituting goods, it constitutes a service according to Ch. 1 sec. 6 of the ML.[185]

A non-profit share of a thing or an object is not the same as a fraction of a right to a thing according to category II in my division of services into five different categories, I-V. A fraction of a right to a thing can for example regard special right of disposal in a certain way over the thing, like an easement (right of disposal) which means a right to use a road through a certain *fastighet* (the thing). A non-profit share of the *fastigheten*, according to the present category, means on the other hand that someone owns a certain share expressed in e.g. per cent of the *fastigheten* (the thing).

> If not all shares are owned by the same legal entity, it is a matter of two or more who owns such non-profit shares in the thing, i.e. joint ownership. Concerning the concept joint ownership the CJEU has in item 66 in the EU-case C-63/04 (Centralan Property) expressed that the various ways in which the Member States apply the concept joint ownership is proof of the possibilty that the right to dispose as owner of property can be held by more than one person.
>
> However, in my opinion should in such cases a non-profit share be deemed existing which can be a transaction by each co-owner as a transaction of a service according to the present category, regardless whether such a transaction regards a thing or an object. In my opinion lies however the difficulty with respect of VAT in scuh cases in the first place in the emergence of a special and complicated fixing of a border, namely between joint ownership and joint venture (Sw., *enkelt bolag*).

There is no special rules for joint ownership in the ML, whereas there is a special rule on tax liability for VAT in *enkla bolag* (and *partrederier*) – Eng., approx. joint ventures (shipping partnerships) – in Ch. 6 sec. 2 of the ML (and Ch. 5 sec. 2 of the SFL), the so-called representative

[184] See sections 2.3.1 and 3.1. See also Forssén 1994, section 6.2.1.1.
[185] See Forssén 2019a, section 12 201 010.

rule.[186] There is no equivalent to the representative rule in the VAT Directive. For details I refer in Forssén 2019a to my doctor's thesis.[187]

In section 5.5 of Forssén 2013 I mention inter alia enkelt bolag according to *lagen (1980:1102) om handelsbolag och enkla bolag, bolagslagen (BL)*, Eng., the Swedish Partnership and Non-registered Partnership Act, in relation to joint ownership according to *lag (1904:48 s. 1) om samäganderätt*, Eng., the Swedish act on joint ownership. I note there that a relationship of joint ownership has crtain similarities with partnerships according to the BL, and that it in practice can be difficult to decide whether a relationship constitutes a partnership or joint ownership. The picture is thereto complicated further with respect of VAT by the question whether a non-legal entity – like an *enkelt bolag* (or *partrederi*) – can be considered constituting taxable person, according to Ch. 4 sec. 1 first para. first sen. of the ML and art. 9(1) first para. of the VAT Directive. This is one of the basic questions in Forssén 2013, and which remain for *enkla bolag* (and *partrederier*) also after the reform of the ML that was carried out on 1 July 2013, by SFS 2013:368, and which means that the recently mentioned directive rule was implemented literally in Ch. 4 sec. 1 first para. first sen. of the ML for the determination of taxable person.[188] That reform concerned namely not the representative rule in Ch. 6 sec. 2 of the ML.

In Forssén 2019a is the representative rule mentioned only in the sections 12 201 031 and 12 201 032 as a comparison to the special rule on tax liability for intermediaries according to Ch. 6 sec. 7 of the ML. Therefore I refer for detail question to my doctor's thesis, Forssén 2013, where VAT and *enkla bolag* (and *partrederier*) are concerned. Here may only be mentioned, regarding cases of two or more owners to shares in things or objects, that I consider that each owner of shares should be treated for himself for VAT purposes, if it is a matter of joint ownership to the thing or the object and it thus not is a matter of *enkelt bolag* (or *partrederi*) existing between them, whereby the representative rule in Ch. 6 sec. 2 of the ML has not arisen.

However, in the latter respect I may mention the following, like what I have stated in sections 6.2.2.4, 6.6 and 7.1.3.3 in Forssén 2013. I consider that it, at the application of voluntary tax liability according to Ch. 9 of the ML in cases where two or more jointly owns a *fastighet* which is hired out to a tax liable businessman, should be possible for them – precisely as knowingly is the case today – to apply for one of them to be appointed by *Skatteverket* (Eng., the tax authority) according

[186] See Forssén 2019a, section 12 201 020.
[187] See Forssén 2019a, section 12 201 020.
[188] See section 2.1.

to Ch. 6 sec. 2 second sen. of the ML (with reference to Ch. 5 sec. 2 of the SFL) as representative for the collection of the VAT in the hiring out activity.

In the firther study of composite transactions in this work I mention however not the mentioned procedure question, but only the application question at joint ownership of a non-profit share in a thing or an object, when a transaction of a service consists of transfer for considerartion of such a non-profit share. Thereby I come back to section 5.5 in Forssén 2013 and that I, as mentioned, consider that each owner of shares should be treated for himself for VAT purposes, whereby I disregard from other questions on *enkla bolag* (and *partrederier*), to instead, as also has been mentioned, refer to Forssén 2013 for detail questions in such respects. The question whether a non-legal entity – like an *enkelt bolag* (or *partrederi*) – can be deemed constituting taxable person, according to Ch. 4 sec. 1 first para. first sen. of the ML and art. 9(1) first para. of the VAT Directive, should be decided on the EU level, which I have stated in Forssén 2013.[189]

Where *enkla bolag* and application problems are concerned I come back furthermore in this presentation, as mentioned,[190] to the side issue in Forssén 2013 regarding the problem with the application of the rule on reduced tax rates of 6 per cent in Ch. 7 sec. 1 third para. no. 9 (previously no. 8), when it is a matter of common literary and artistic works created under the enterprise form *enkelt bolag* and not in other company formsd, and the problem with the rule not comprising joint works according to sec. 6 of the URL, but works created by legal entities independently according to sec:s 1, 4 or 5 of the URL. The problem with *enkla bolag* and VAT is independent of what happens with the question on *enkla bolag* and other non-legal entities and whether they would come to be comprised by the concept taxable person according to Ch. 4 sec. 1 first para. first sen. of the ML and art. 9(1) first para. of the VAT Directive. I have mentioned the question on joint works and *enkla bolag* also in another work after that I wrote Forssén 2013.[191] Thus, I come come back in this work to the application question in that respect, i.e. regarding joint works produced in *enkla bolag*, when I describe the application problems with cmposite transactions in the field of VAT. In that context I bring up Legal Semiotics as a complement of the study concerning inter alia these questions.

[189] See Forssén 2013, sections 7.1.3.2 and 7.2. See also Forssén 2019b p. 70.
[190] See section 1.1.
[191] See Forssén 2018a pp. 317-320, Forssén 2018b pp. 650-652 and Forssén 2020a p. 171, where I also refer to Forssén 2018a.

3.3 A TOOL TO SUPPORT THE ANALYSIS OF COMPOSITE TRANSACTIONS

Introduction

In this section I create, as mentioned,[192] the tool, which shall serve as support at the analysis of certain composite transactions in Chapter 4. I do that by starting from:

partly the overview in section 3.1 of the combination of the division problems concerning composite transactions with respect of VAT,

partly what I have concluded at the review of the five different categries of services in section 3.2.2.

I assume in the case studies in Chapter 4 that it is a question of a vendor whose effort constitutes a composite transaction regarding goods and/or services, and that the problem concern whether the consideration regards one single supply or shall be divided, and what that means depending on the right of deduction for input tax by the prurchaser. Therefore I put forward assumptions of whether the purchaser:

is a consumer, and thus lacking right of deduction; or

is a taxable person, which is presumed having full right of deduction, no right of deduction or right of deduction on a reasonable basis if he has a mixed activity.[193]

Assume that it is a matter of sales of goods within the country (Sweden), and in the ennobling up to a buyer, B., who is an ordinary private person, i.e. a consumer, the ennobling chain of involved enterprises consists of the following operators:

- Producer, P.;
- Wholesaler, W.; and
- Retailer, R.

The tax rate for the goods is the general of 25 per cent. All enterprises in the ennobling chain up to B. are tax liable for sale of the goods. Assume that P. sells the goods for SEK 100 excluding VAT to W., who sells the goods for SEK 140 excluding VAT to R. Since all involved enterprises have full right of deduction for inout tax on acquisitions in their activities, B. is burdened, as tax carrier, of VAT in the price –

[192] See section 3.1.
[193] See sections 1.4 and 2.1.

consideration – which R. finally take for for the goods vis-à-vis consumer, in this vcase B. If D's price for the goods is SEK 200 excluding, the price including VAT is SEK 250 (200 x 25 %=50; 200 + 50=250). B. is thus burdened as tax carrier by a VAT expense of SEK 50, i.e. by the VAT which is included in the price SEK 250. Link by link in the ennobling chain can this be described with the following example:

Link 1 (P. – W.)
P. invoice W.:
100 + output tax 20=125 (100 x 25 %=25; 100 + 25=25).
W. makes a deduction for charged VAT, 25.

Link 2 (W. – R.)
W. invoice R.:
140 + output tax 35=175 (140 x 25 %=35; 140 + 35=175).
R. makes a decuction for charged VAT, 35.

Link 3 (R. – B.)
R.. invoice (or gives receipt) to B.:
200 + putput tax 50=250 (200 x 25%=50; 200 + 50=250)

This means that P., W. and R. account VAT to the State according to the following:

P.,
output tax: SEK 20
[I disregard from deduction by P., and illustrate only the passing on of VAT link by link in the ennobling chain regarding the goods in question.]
P. pays to the State, SEK 20.

W.,
output tax, SEK 35
input tax, SEK 20
W. pays to the State, SEK 15 (35 – 20).

R.,
output tax, SEK 50
input tax, SEK 35
R. pays to the State, SEK 15 (50 – 35).

Totally pays P., W. and R. SEK 50 in VAT to the State (20 + 15 + 15=50).

The example illustrates that P., W. and R. are paying net to the State the same amount of VAR, SEK 50, as B. is paying in the price for the goods to R.

By all involved enterprises in the ennobling chain of the goods, which the consumer B. buys from R., being tax liable, and having a full right of deduction for input tax on acquisitions and imports in their activities, the consumer is in the end not burdened by a tax on tax, i.e. a cumulative effect. This is the ideal idea with the VAT according to the

EU law, like it is expressed by the VAT principle in art. 1(2) of the VAT Directive. At the further review should therefore be regarded that the scope of of rules on exemption from VAT in Ch. 3 of the ML shall be interpreted restrictively, since the CJEU's case law states this concerning art:s 131-137 of the VAT Directiveon exemption from VAT for certain transactions.[194]

In principle the same applies with respect of VAT as mentioned recently in the example regarding goods, if the product instead is a service.

Assume that the vendor's product instead consists of a composite transaction where goods and/or services are included, and that the buyer is a consumer, and thus lacks right of deduction for input tax on his prurcjases, pr a taxable person with full right of deduction, no right of dedcution or a right of deduction based on a reasonable division when carrying out a mixed activity.

For those different circumstances by the purchaser I create from the overview of combinations of divsion problems in section 3.1 and from what I have concluded at the review of my five categories of services in section 3.2.2, a structure which shall function as a tool – a model – for the analysis of certain application questions regarding the vendor's composite transactions regarding goods and/or services in Chapter 4. The tool consists of a number of questions based on the overview in section 3.1 and the division of the services into different categories which I mention in section 3.2.2.

The tool for support of the study of composite transactions

The tool for support of the study of composite transactions with respect of VAT is created by the questions according to below and supported, if there exist elements of services in the transactions, by the division of the services into five categoris in sections 3.2.1 and 3.2.2.

The first question

Is it possible, regarding the effort that a vendor renders a buyer which is deemed an average consumer:

> to separate two or more parts of the effort or
>
> do the parts have such a close connection that they objectively from an economic perspective constitute a unity which would be artificial to try to split?

[194] See avsnitt 2.5.2.

Answer

> If it would be artificial to separate the parts of the effort, a principle of the principal applies. In such a case shall, according to the CJEU's case law, the dominating part in the composite transaction decide the question whether taxation or exemption shall apply and the question on applicable tax rate respectively.[195]
>
> Thus, in this case there is no reason to go further with more questions.
>
> If it is not artificial to separate the parts of the effort, it is however relevant to go further with more questions.

The second and the third question

> If it thus is not artificial to separate the parts of the effort, shall a division be made of the consideration with respect of the effort's different parts having different character on the theme taxation or exemption of concerning the existence of different tax rates. The following questions arise thereby.
>
> The second question
>
> Shall a division be made of the consideration, so that the different parts are treated differently by the vendor with regad on whether they shall be included in the taxable amount for VAT (taxation) or not (unqualified exemption from taxation)?
>
> The third question
>
> If a taxable part occur in the effort, the question arises: Shall that part be comprised by the general tax rate of 25 per cent or any of the reduced tax rates of 12 and 6 per cent respectively or by zero rate?

Questions on various combinations of division problems from the scond and third question

The second and third question contains division problems concerning the different parts of the composite transaction. I express therefore

[195] See sections 1.2 and 3.1.

below the figure in section 3.1 and the overview there of different transactions of goods and/or services according to the ML.

Tranaction of goods or services (the ML)/ Supply of goodss or supply of services (the VAT Directive)		
a Taxable, at tax rate: 1) 25 per cent 2) 12 per cent 3) 6 per cent	b) From VAT qualified exempted: zero rate (0 per cent)	c) From VAT unqualified exempted

I have in section 3.1 made the following overview of combinations of division problems concerning composite transactions with respect of VAT.

The combinations: a and b *and* a or b and c

> Deduction- or reimbursement entailing transactions and non deductible- or reimbursement entailing transactions: a and b *and* a or b and c.

The combinations: a 1) and a 2) or a 3) or a 2) and a 3) *and* a 1), a 2) or a 3) and b)

> Taxable transactions which are comprised by the main rule of the general tax rate (normal tax rate) on 25 per cent according to Ch. 7 sec. 1 first para. of the ML and taxable transactions which are comprise by anyone of the reduced tax rates on 12 or 6 per cent according to Ch. 7 sec. 1 second and third para:s of the ML or by zero rate according to anyone of the rules in Ch. 3 of the ML in relation to Ch. 10 sec. 11 first para. of the ML: a 1) and a 2) or a 3) or a 2) and a 3) *and* a 1), a 2) or a 3) and b).

Support to judge the various combinations at elements of services

If it occur services in the various combinations of transactions of goods and/or services according to above, I have in the sections 3.2.1 and 3.2.2 divided the services into fve categories.

The five categories into which I have divided the services in the present context are:

I. work on things, intermediation and personal services etc.;
II. fractions of rights to things;
III. objects constituting services;

IV. the making of new services; and
V. non-profit shares in things and objects.

Common for the services in category I compared with the services according to the other four categories (II-V) is that they cannot be sold further by the purchaser. In category I it is a matter of pure consumption services meaning that the purchaser finally consumes the service, simply by enjoying it – like with the performimg of a hair-cut (personal service) – or by the service being provided with goods and becoming an inseparable part of the goods.

I stay for the creation of this tool at the conclusion that the services in category I are distinct from the services in the categories II-V in the recently described way. At the analysis in Chapter 4 of the application questions – case studies – regarding composite transactions this tool shall only constitute a support, and when necessary to go further with the judgment of diffrent sorts of services I come back to section 3.2.2 regarding details in the division of the services into the five categories.

For the application questions in Chapter 4 I come back to the links 1-3 in the ennobling chain according to above in the present section.

4. REVIEW OF CERTAIN CASE STUDIES

4.1 INTRODUCTION

The application questions in this chapter are treated under the premise that it is a question of composite transactions, and the basic problem concerns the question whether the consideration which the buyer of a product is leaving to the vendor shall be divided due to the effort consisting of goods and/or services or if the consideration shall be deemed considering one single supply. The cases in practice in this chapter concerns thus *division problems*, and not *problems on the fixing of a border* which can occur if it is not a question of a composite transaction, i.e. if different elements with respect of VAT in the effort cannot be identified. Such a *problen on the fixing of a border* only concerns whether one or another rule in the ML regarding the tax object shall be applied.[196]

I refer the division problems concerning composite transactions to two sections: Division I and Division II::

- In Div. I it is a matter of the considerartion for the effort in question being received by only one vendor, whereby the division problem concerns whether one or more transactions shall be deemed existing. If only one single transaction is deemed existing, the rules on the transaction's character with respect of VAT and the tax rate comprised by the dominating element in the effort apply.

- In Div. II it is a matter of the consideration for the effort in question being received by one person, whereby the division problem does not concern that the consideration gives rise to one single transaction by him (see Div. I), but to transactions by more than that person *or* by more than that person and at the same time to more than one transaction by him.

The division problems in the two divisions can be given a schematic description according to what follows by this figure from section 3.1;

The figure in section 3.1: the overview of different transactions according to the ML

Tranaction of goods or services (the ML)/ Supply of goodss or supply of services (the VAT Directive)		
a Taxable, at tax rate: 1) 25 per cent 2) 12 per cent 3) 6 per cent	b) From VAT qualified exempted: zero rate (0 per cent)	c) From VAT unqualified exempted

[196] See section 1.6.

Div. I

The consideration regards one single transaction by the Vendor (V), which shall refer the whole of the consideration to:

- a 1), the taxable amount for a transaction of taxable transaction of goods or services with application of the tax rate 25 per cent, if the dominating element of the effort consists of transaction of goods or services which are comprised by the general tax rate and with application of the general tax rate;

- a 2) or a 3), whereby the reduced tax rate 12 per cent or 6 per cent is applied at the accounting of VAT, if the dominating element of the effort is comprised by anyone of the rules for those alternatives;

- b), whereby zero rate is applied at the determination of the taxable amount, if the dominating element of the effort is comprised by that alternative; and

- c), whereby tax-free transaction is accounted for, if the dominating element of the effort is comprised by the rules for that alternative.

V shall refer the consideration to more than one transaction, e.g. two transactions, i.e.:

- to a 1) *and* to a 2), a 3), b) or c); or
- it is a matter of other combinations of these alternatives in the figure above.

Div. II

Here it is a question of whether the consideration gives rise

- to transactions by more than V; or
- to transactions by more than V *and* more than one transaction by V (see Div. I).

Before I go further with the choice of cases in practice (case studies), I conclude that Ch. 7 sec. 7 of the ML only works for division of composite transactions when it is question of whether one V shall divide the consideration received into more than one transaction (see Div. I). The rule Ch. 7 sec. 7 of the ML does not regard problems with composite transactions, where it is a matter of jdging whether the consideration gives rise to transactions by more than V (see Div. II). Therefore I suggest already here *de lege ferenda* that Ch. 7 sec. 7 of the ML will be altered insofar as the rule not only regards divison after reasonable basis of the taxable amount regarding one single transaction by V, but also comprises questions regarding whether the consideration gives rise to transactions by more than V.

Since the VAT Directive lacks a rule on composite transactions, the legislator should take up on the EU level the question of introduction of such a directive rule, which would be implemented into the ML, by Ch. 7 sec. 7 being altered or replaced by an entirely new rule.

For the choice of case studies concerning application questions regarding composite transactions in this chapter I start from my description in section 3.3 of an ennobling chain regarding production and distribution of goods and services:

P. (producer) – W. (wholesaler) – R. (retailer) – B. (buyer
[Led 1, P. – G.; Led 2, G. – D.; Led 3, D. – K.]

Link 3 (R. – B,)

B. is assumed to be an average consumer – an ordinary private person. B. lacks thus right of deduction for the VAT that is included in the consideration that B. is leaving to R. for the goods or the service which R. is selling to B.

For B. are the following combinations of division of the consideration which B. is leaving to the vendor R. of interest:

a 1) and a 2) or a 3) or a 2) and a 3) *and* a 1), a 2) or a 3) and b) respectively, where

a 1) means that VAT is included in the consideration for goods or services which are comprised by the principle of generally taxable transactions of goods and services according to Ch. 3 sec. 1 first para. of the ML, calculated according to the general tax rate of 25 per cent, according to Ch. 7 sec. 1 first para. of the ML, with 20 *öre* in each *krona*;
a 2) means that VAT is included in the consideration calculated according to the reduced VAT rate of 12 per cent, according to anyone of the rules in Ch. 7 sec. 1 second para. of the ML, with 10 *kronor* (plural of *krona*) and 71 *öre* in each *krona*;
a 3) means that VAT is included in the consideration according to the reduced tax rate of 6 per cent, according to anyone of the rules in Ch. 7 sec. 1 thid para. of the ML, with 5 *kronor* and 66 *öre* in each *krona*;
b) means that VAT is not included in the consideration, according to anyone of the rules on exemption from VAT in Ch. 3 of the ML for which right of reimbursement for input tax exists in R's activity according to Ch. 10 sec. 11 first para. of the ML [qualified exemptions from VAT (zero rate)]; and
c) means that VAT is not inclued in the consideration, according to anyone of the rules in Ch. 3 of the ML which stipulate exemption from VAT and for which neither right of deduction nor right of reimbursement for input tax exists in R's activity (unqualified exemptions from VAT).

Link 1 (P. – W.) and Led 2 (W. – R.)

P. and W. are assumed to be taxable persons, which both are assumed to have full right of deduction or right of reimbursement for input tax in their activities. This means that B. as tax carrier is not burdened by any latent VAT cost in the consideration which he in the end pays to R. In other words no tax on tax, so-called cumulative effect occurs.

If P. or W. however lacks right of deduction or right of reimbursement for input tax in his activity or only have the right of deduction or right of reimbursement after reasonable basis, i.e. have a mixed activity, tax on tax occurs, a cumulative effect, which means that B. will be burdened of a latent VAT cost in the consideration which he in the end leaves to R.

Concerning P. or W. is thus following combinations of division of the consideration which P. receives from W. (Link 1) or which W. receives from R. (Link 2) of interest:

a and b *and* a or b and c respectively.

Div. I: Choice of case studies

For cases in practice to the application questions regarding composite transactions pertaining to Div. I I limit the choice to the main fields according to Ch. 3 of the ML which contains rules on unqualified exemptions from VAT, i.e. to c.

I am going through certain rules from those main fields of exemptions from VAT in Ch. 3 of the ML and put forward those in relation to the principle of generally taxable transactions of goods and services in Ch. 3 sec. 1 first para. of the ML, i.e. in relation to a 1).

The division problems in the present case studies it is thus a matter of V. referring the consideration to two transactions, i.e.:

- to a 1) *and* c.

If the division problems cannnot be handled concerning the rules on exemption from VAT for the main fields thereby which I choose from Ch. 3 of the ML, is the ML not legally certain for the application of composite transactions with respect of VAT already for that reason. Among the main fields in Ch. 3 of the ML which are comprised by unqualified exemptions from VAT I have chosen to treat:

the field of *fastigheter* (Ch. 3 sec. 2 of the ML); and
bank- and financing services and trading of securities (Ch. 3 sec. 9 of the ML).

Furthermore, I treat, as mentioned,[197] private law options as financing services exempt from VAT to be judged in connection with the special rules in Ch. 9 c of the ML on tax liability and exemption from VAT concerning certain warehouses.

Division problems can occur concerning the fields health care, social care and education. However, I do not treat application questions regarding composite transactions for those fields. Concerning health care and social care and education the transactions consist of personal services, which by the way are referred yo category I according to my division of services in sections 3.2.1 and 3.2.2, i.e. services which, like other services in that category, constitute pure consumption services insofar that B. in the end consumes the service. Exemption from VAT occur for supply of health care and social care and education. The services can be supplied

[197] See sections 2.4 and 2.8.

together with goods which he who makes the transaction of the service transfer as a part of that supply. Then is however division problems typically lacking in the light of the exemption for the main service comprising also goods *and* goods and services respectively which are transferred as a part of the supply of the service regarding health care or social care *and* education respectively. Compare the main rule on exemption from VAT in Ch. 3 sec. 4 first para. of the ML for the fields healt care, dental care and social care *and*, regarding education for which the conditions for exemption from VAT are fulfilled respectively, Ch. 3 sec. 8 first and second para. of the ML.[198]

Div. II: Choice of case studies

In this chapter I come back, as mentioned,[199] to the special rule in Ch. 6 sec. 7 of the ML on tax liability for intermediation in one's own name (Sw., *i eget namn*) of goods or a sevice on behalf of someone else, whereby the intermediary receives the payment (consideration) for the goods or the service.

The special rule on tax liability gives rise to transactions regarding the underlying goods and service by both the intermediary and his principal, when the intermediary as vendor (V) receives the consideration from the buyer, B. Moreover is the actual intermediation considered constituting a service taken by itself according to the HFD's case law (RÅ 2002 ref. 113), why Ch. 6 sec. 7 of the ML not only gives rise to transactions by the intermediary V and his principal, but also to two transactions by V.

Thus is Ch. 6 sec. 7 interesting as case study for application questions regarding composite transactions pertaining to Div. II and the alternative that the consideration as V receives gives rise to trnsactions by more than V *and* more than one transaction by V.

In sections 4.2-4.4.4 I treat, regarding composite transactions pertaining to Div. I, the following.

In section 4.2 are certain composite transactions in the field of *fastigheter* mentioned. In pursuance of what I state in section 2.7.2 I do not go into my suggestions *de lege ferenda* of the ML regarding the field of *fastigheter*, i.e. I start from current law and assume that the main rule on exemption from VAT in the field of *fastigheter* according to Ch. 3 sec. 2 first para. of the ML still is current.

[198] See Forssén 2019a: section 12 213 212, regarding health care; section 12 213 213 regarding dental care; section 12 213 214, regarding social care; and sections 12 213 220-224, regarding the field of education.
[199] See section 2.8. See also section 3.2.2 regarding category V of services according to my division of services into five categories.

What is essential for the application questions on composite transactions in section 4.2 is that the fixing of a border between goods and services in Ch. 1 sec. 6 of the ML has become EU conform also with respect of the concept goods comprising *fastigheter*, by the concept *fastighet* in that rule and otherwise in the ML since 1 January, 2017 is determined by a reference in Ch. 1 sec. 11 of the ML to the concept immovable property according to art. 13b of the Implementing Regulation, and no longer by reference to the JB.[200]

In section 4.3 are bank- and financing services and trading of securities according to Ch. 3 sec. 9 of the ML mentioned.

In sections 4.4.1-4.4.4 are private law options as financing services mentioned in connectin with the special rules in Ch. 9 c of the ML on tax liability and exemption from VAT for goods in certain warehouses.

In section 4.5-4.7 I treat, regarding composite transactions pertaining to Div. II, the following, and leave suggestions *de lege ferenda*.[201]

In section 4.5 is the special rule on tax liability for intermediation services in Ch. 6 sec. 7 of the ML mentioned as a case in practice concerning the alternative in Div. II meaning that the consideration which the intermediary V receives from the buyer B. gives rise to transactions by more than V *and* more than one transaction by V.

In section 4.6 I take up, as mentioned in connection with the review of category V of services in section 3.2.2, the application at joint owneship of a non-profit share in a thing or an object, when a transaction of a service consists in transfer for consideration of such a non-profit share. Thereby I come back to section 5.5 in Forssén 2013 and that I consider that each owner of shares should be treated for himself for VAT purposes. Then I set the focus only on cases of joint ownership, and refer to Forssén 2013 for other detail questions on *enkla bolag* (and *partrederier*).

However, in section 4.7 I come back, as alos mentioned,[202] to the side issue in Forssén 2013 regarding the application of the rule on reduced VAT rate of 6 per cent in Ch. 7 sec. 1 third para. no. 9 (previously no. 8), when it is matter of common literary and artistic works created under the entreprise form *enkelt bolag*, and the problem with the rule not comprising common works according to sec. 6 of the URL. Thereby I come back to that I in three articles has gone further with this side issue

[200] See sections 2.3.2 and 2.7.2.
[201] Sometimes I go back to the preliminary study in form of my articles mentioned in section 1.1.
[202] See sections 1.1 and 3.2.2 concerning category V regarding the services.

from Forssén 2013,[203] and in two of them has taken up Legal Semiotics as a complement of the study of that question as a composite transaction.

In section 4.8 I summarize the conclusions from sections 4.2-4.7.

4.2 CERTAIN COMPOSITE TRANSACTIONS IN THE FIELD OF *FASTIGHETER* (Eng., approx. Real estates)[204]

If a transaction contains a service in the form of letting of *fastighet* as well as other services or goods, a composite transaction exists. It becomes necessary to judge whether the transaction shall be value-added taxed entirely, partly or not at all.[205]

The main rule for composite transactions on the whole is according to Ch. 7 sec. 7 of the ML that efforts of different VAT character or which are comprised by different VAT rates is division (the division principle): Are the efforts separable shall they be treated separately in an invoice regarding the composite transaction. Is it not possible to apply the division principle, the VAT chareacter or applicable VAT rate regarding a composite transaction shall be determined from the element in the supply which is dominating (the principle of the principal).[206]

In connection with the VAT reform of 1991 (SFS 1990:576)[207] the head of the ministry expressed (in translation) inter alia the following of interest for the question on VAT and composite transactions in the field of *fastigheter*:

> *The exemption from VAT regards in principle transactions, whose main meaning is that the lessor put forward the fastigheten or part thereof to the lessee's disposal. The fixing of a border between taxable service and tax-free letting of fastighet exists already under the present regime. It applies primarily to storage and letting of space for advertising. Storage is with some limitations a taxable service according to the present sec. 10. Letting of warehouse or other space to someone who himself stores goods is however not recognized as a storage service but is considered as letting of fastighet. This fixing of a border should remain in principle. In the second paragraph of the item of instruction is however suggested*

[203] See Forssén 2018a pp. 317-320, Forssén 2018b pp. 650-652 and Forssén 2020a p. 171, where I also refer to Forssén 2018a.
[204] See also Forssén 2019a, section 12 212 140.
[205] See also Forssén 2001 p. 168.
[206] See sections 1.2, 3.1, 3.3 and 4.1.
[207] See section 2.8 and section 3.2.2 regarding category III of services.

introduction of certain extensions of the tax liability in certain cases, like at letting of safe-deposit boxes.[208]

I consider that the legislator's statement shows for the present context that composite transactions in the field of *fastigheter* concerns a question of division or not regarding the main rule on exemption from VAT in Ch. 3 sec. 2 first para. and the principle of generally taxable transactions of goods and services in Ch. 3 sec. 1 first para. *and* regarding exemption according to Ch. 3 sec. 2 first para. and taxation according to 'the exemptions from exemption' in Ch. 3 sec. 3 first para. items 1-12 of the ML respectively. In section 2.7.2 express the wordings of Ch. 3 sec. 2 first para. meaning that unqualified exemption from VAT applies in the field of *fastigheter* and of Ch. 3 sec. 3 first para. items 1-12, where it is stated for certain cases in the field of *fastigheter* that mandatory taxation apply.

In the preparatory work to the reform on 1 January, 2017 (SFS 2016:1208), regarding the concept *fastighet* in Ch. 1 sec. 11 of the ML,[209] the legislator states the following concerning the trial of whether a composite or several transactions shall be deemed existing:[210]

- Each transaction shall usually be seen as separate and independent, but if a transaction consists of several parts it must however be judged if it shall be deemed as a matter of one single transaction or severela separate transactions.

- One single trnsaction shall be deemed existing when two or more parts have such a close connection that they together constitue one single indivisible economic transaction and that it therefore would be *artificial* trying to separate de different parts from each other.

- An examination must be made regarding which parts that are characteristic to judge whether it is a question of one or several transactions. For the judgment shall guidance be obtained by the average customer's conception.

- One single transaction is deemed to exist also when one or several parts constitute the main transaction and the other or the others of the parts shall be deemed as subordinate and treated for for taxation purposes in the same way ad the main one. The

[208] See prop. 1989/90:111 pp. 196 and 197. See also Forssén 2001 pp. 168 and 169.
[209] See sections 2.3.2, 2.7.2, 2.8 and 4.1.
[210] See prop. 2016/17:14 pp. 26, 27 and 29, where the legislator, as his conception on how that trial shall take place, refers to e.g. the EU-cases C-42/14 (Wojskowa Agencja Mieszkaniowa) and C-392/11 (Field Fisher Waterhouse LLP).

legislator states thereby that one part shall be deemed as subordinate especicially when the customers are not asking for it taken by itself, but it is only a means to enjoy in the best way the main service or goods.

- The legislator also mentions that when it is a matter of letting of places for parking [which are comprised by taxation according to art. 135(2) first para. b of the VAT Directive – see also Ch. 3 sec. 3 first para. no. 5 of the ML] the CJEU has in the case 173/88 (Henriksen) found that the letting is exempt from VAT, if it is made in close connection to an exempted hiring out of immovable property for another purpose than for example housing.[211]

Thus, the legislator's conception on application of division versus a principle of the principal for composite transactions in the field of *fastigheter* corresponds well with the CJEU's case law according to the cases C-349/96 (CPP) and C-41/04 (Levob), which can be summarized as follows:

- If division is not possible, the CJEU considers that a principle of the principal rules. Then the dominating element in the composite transaction decides if taxation or exemption shall be applied and the question on applicable tax rate respectively. The CJEU considers also that a division of a composite transaction must not be made in an artificial way.[212]

Also the HFD's and the CJEU's case law concerning the determination of whether transactions in the field of fastigheter are composite or shall be deemed independent (separate) and thus be divided correspond with what the CJEU, according to what has been recently described, considers in general thereof. I go through the following case law from the HFD and the CJEU to support this, whereby the essential thing the comparison s that the courts emphasize that a divison of a composite transaction must not be made in an artificial way.

- The HFD has in the advance ruling HFD 2017 not. 12 judged that a municipality's letting for boats of land and harbours respectively constitute transaction of separate services. The HFD considered at a collected judgment that the lettings could not be deemed having such a close connection that it would be artificial

[211] See also Forssén 2011, section 5.2, where I treat parking activity in Swedish case law, whereby I refer – besides to inter alia the EU-case 173/88 (Henriksen) – to RÅ 2003 ref. 80 and RÅ 2007 ref. 13.
[212] See section 1.2.

to separate them from each other. The HFD referred in that respect to the CJEU, especially concerning the question whether it would be artificial to separate different parts of a transaction from each other, for that judgment attaching weight on inter alia if the transaction is of use for the customer only if all parts of it are there.[213]

- The HFD noted moreover that it by the CJEU's case law follows that although different parts of a transaction can be supplied each and everyone in itself it can be artificial to separate the parts, if the customer asks for precisely the combination of the different parts.[214] Although it could be deemed having a value for the lessee that the lettings put together made mooring and storage possible all-the-year-round, it could according to the HFD not be considered that a condition for the letting of the harbour would be of use for the lessee was that he also had access to land where the boats could be storaged during the winter. Neither could the lessee's use of having access to land for winter storage be deemed depending on the lessor also providing boat places in the water.

- To this came that the lettings were made in separate agreements with separate pricing, whereby the HFD however noted that the CJEU considers, according to item 44 in the case C-224/11 (BGZ Leasing), that separate invoicing and pricing of services taken by itself speaks for that it is a matter of independent transactions, but that it is not of a decisive importance for that judgment. The HFD considered however that it could be assumed that access to the harbour as well as to winter storage had an independent value for the lessee. Thereby appeared neither part as subordinate to another, why the HFD considered that it neither on that basis could be deemed being a question of one single composite supply.

Since the scope of rules on exemption from VAT in Ch. 3 of the ML shall be interpreted restrictively,[215] there are rather few services needed besides the actual supply of for example premises for it no longer being considered a question of exemption according to Ch. 3 sec. 2 first para., but of a supply which is taxable according to the rule on generally

[213] The HFD invoked the following EU-cases: C-461/08 (Don Bosco Onroerend Goed), item 39; and C-175/09 (AXA UK), item 23.
[214] The HFD invoked hereby the EU-case C-44/11 (Deutsche Bank), items 24-28. The case "Deutsche Bank" is besides mentioned on the same theme in Forssén 2019a, section 12 213 151 – see also below in section 4.3.
[215] See section 2.5.2.

taxable transactions of goods and services in Ch. 3 sec. 1 first para. of the ML:

- For example a supply of a conference arrangement should in my opinion be deemed fully taxable taxable according to Ch. 3 sec. 1 first para. of the ML, since it is a quetion of a supply where the other services are demanded in themselves and the actual supply of the premises may be considered subordinate to them.[216] That conception is in my opinion confirmed by the advance ruling RÅ 2007 ref. 33. There considered *Skatterättsnämnden (SRN)*, Eng., the Swedish Board of Advance Tax Rulings, that letting of premises for conferences for several years had been developed to a business branch where the supply in the activity of various arrangements, devices and other facilities due to an increased competition had come to be one in relation to the actual letting of premises more and more dominationg element. The supplies in the case was according to the SRN examples of such an activity where a great number of services were offered the conference participants besides the in both time and space ratively limite dright of disposal of certain premises where the conference was held. The SRN found therefore that the letting of the premises in the composite conference arrangement was only a means for the applicant to be able to in the best way supply the by the customer demanded service regarding the arrangement. The SRN thereby referred to these two EU-cases: C-150/99 (Stockholm Lindöpark), item 27; and, above-mentioned, C-349/96 (CPP). The SRN considered that the service was not exempted from VAT and that the general VAT rate of 25 per cent applied for the supply of it. The HFD confirmed the SRN's ruling.

- Concerning conference arrangements in hotels or similar exist by the way a fixing of a border between on the one hand 'the éxemption from the exemption' according to Ch. 3 sec. 3 first para. no. 4 of the ML, where the reduced VAT rate of 12 per cent applies according to Ch. 7 sec. 1 second para. no. 1 of the ML, and on the other hand Ch. 3 sec. 1 first para. of the ML, where the general VAT rate on 25 per cent applies according to Ch. 7 sec. 1 first para. of the ML. Since deviations from the general VAT rules shall be applied restrictively, my opinion is that the general VAT rate of 25 per cent according to Ch. 7 sec. 1 first para. of the ML should apply for conference arrangements, even if they are supplied in hotels or similar.

[216] See also Forssén 2001 pp. 169 and 170.

Thus, the HFD's advance ruling RÅ 2007 ref. 33 shows that there can be problems also regarding composite transactions in the field of *fastigheter* consisting of different taxable supplies, where the difference thus only concerns the question on applicable tax rate.

- If the hotel in the advance ruling not only supplies the conference premises with conference services, but also supply letting of rooms (hotel rooms) and serving and issues one common invoice for the entire supply, the following applies in my opinion.

  The main rule on division in Ch. 7 sec. 7 of the ML should be applied, so that hotel rooms and serving are charged separately with application of the reduced tax rate of 12 per cent for the letting of rooms (Ch. 7 sec. 1 second para. no. 1) and for serving (Ch. 7 sc. 1 second para. no. 5), whereas the general VAT rate of 25 per cent is applied for the conference service (including conference premises).

4.3 BANK- AND FINANCING SERVICES AND TRADING OF SECURITIES[217]

Unqualified exemption from VAT is stipulated in Ch. 3 sec. 9 of the ML for bank- and financing services and trading of securities. At the same time it is stated there that certain services which are supplied within a bank etc. are comprised by taxation. I express (in translation) the wording of that rule here:

Ch. 3 sec. 9 of the ML, according to SFS 2013:567

Exempted from VAT are transactions of bank- and financing services and such transaction which constitutes trading of securities or thereby comparable activity.

With bank- and financing services are not regarded trust departments, debt-collecting services, admistrative services regarding factoring or letting of safe-deposit boxes.

With trading of securities is meant
1. *transaction and mediation of shares, other participation rights and claims, regardless whether they are represented by securities or not, and*
2. *administration of mutual funds according to* lagen (2004:46) om värdepappersfonder (Eng., the Swedish act on mutual funds) *and*

[217] See also Forssén 2019a, section 12 213 151.

special funds according to lagen (2013:561) om förvaltare av alternativa investeringsfonder (Eng., the Swedish act on adminstrators of alternative investment funds).

The present exemption from VAT and limitation of the exemption for certain cases are nearest corresponded by art. 135(1)(b)-(g) of the VAT Directive.

The scope of rules on exemption from VAT in Ch. 3 of the ML shall, as mentioned,[218] be interpreted restrictively. This follows by the CJEU's case law regarding art:s 131–137 of the VAT Directive on exemption from VAT for certain transaction.[219] Thus, the exemption from VAT in question shall be in contrast to the vast consultation field, which is comprised by the main rule on generally taxable transactions of goods and services according to Ch. 3 sec. 1 first para. of the ML. Consultation services are supplied within investigative and advisory activities within economical, administrative and legal fields in a broad sense. For example it applies to technical consultation services. This was stated by the legislator in connection with the services being made taxable in general in 19991 (like what already was the case with the goods), by SFS 1990:576.[220]

Thus, it does not take much for a service within the fields of bank- and financing services and trading of securities to be deemed taxable according to the ML. It is only such services which are comprised by exemption according to Ch. 3 sec. 9 of the ML – see art. 135(1)(b)-(g) of the VAT Directive – that are exempted from VAT within those sectors. The legislator has despite this considered that it is urgent to especicially note in Ch. 3 sec. 9 second para of the ML that the exemption is limited insofar that it does not comprise trust departments, debt-collecting services, admistrative services regarding factoring or letting of safe-deposit boxes, which cases thus are taxable [see art. 135(1)(d) of the VAT Directive, where the limitation in question is stated explicitly for debt collecting]. The limitation of the exemption regarding letting of safe-deposit boxes in Ch. 3 sec. 9 second para. corresponds by the way with that it in the field of *fastigheter* is especicially noted in Ch. 3 sec. 3 first para. no. 6 of the ML that a

[218] See sections 2.5.2, 3.3 and 4.2.
[219] See e.g. the EU-cases 235/85 (Commission v. the Netherlands), item 7; 348/87 (SUFA), items 10 and 13; C-186/89 (Van Tiem), item 17; C-2/95 (SDC), item 20; C-358/97 (Commission v. Ireland), item 52; C-150/99 (Stockholm Lindöpark); item 25; C-269/00 (Seeling), item 44; and C-275/01 (Sinclair Collins), item 23. See also section 2.5.2 and Forssén 2019a, section 12 210 010.
[220] See prop. 1989/90:111 p. 105. See also sections 2.8, 3.2.2 (regarding category III of services) and 4.2 and Forssén 2001 p. 206.

mandatory taxation exists for letting of safe-deposit boxes, i.e. e.g. safe-deposit boxes in banks.[221]

The typical bank- or financing service is constituted by a consideration (transaction) in the form of interest on a loan or other normal credit. An interest consists actually of a typical value-added which in principle could be value-added taxed. If exemption from VAT would not be stipulated in Ch. 3 sec. 9 of the ML, would interest be a taxable transaction according to Ch. 3 sec. 1 first para. of the ML.[222]

Such a fixing of a border problem can be about the question on what constitutes a consideration where the earnings consist of a so-called float. Previously I have 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.[223] I have also mentioned that this occurs by the coupon enterprises too.[224] In the preparatory work to the special rules on transactions concerning vouchers with respect of VAT, which were introduced in the ML on 1 January, 2019 by SFS 2018:1333,[225] it is stated as an example of instruments that can be vouchers inter alia luncheon coupons.[226] The coupon enterprise's earnings 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 the market for restaurant vouchers, like luncheon coupons, has in itself decreased considerably the last decades, why the importance of the rules on vouchers that were introduced in 2019 in the ML is less for a restaurant enterprise than what it would have been previous.[227] However, this does not change that it in principle can occur fixing of a border problems for example between what is such an interest that constitutes consideraion for a financial service which is exempted from VAT according to Ch. 3 sec. 9 of the ML, also at the determination of the scope of the special rules on vouchers.[228]

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[221] See section 2.7.2.
[222] See SOU 1989:35 (*Reformerad mervärdeskatt m.m.*) Part 1 p. 192. See also: Forssén 1993 p. 105; Forssén 1994 p. 139; *Momshandboken Enligt 1998 års regler*, Norstedts Juridik, Stockholm 1998 (cit. Forssén 1998) p. 174; Forssén 2001 p. 208; and Forssén 2011, section 3.4.1.
[223] See Forssén 2017a p. 103, Forssén 2019c p. 343 and Forssén 2019d p. 80.
[224] See Forssén 2019c p. 343 and Forssén 2019d p. 80.
[225] See section 1.4.
[226] See prop. 2017/18:213 p. 15.
[227] See prop. 2017/18:213 p. 24.
[228] See Forssén 2019 c p. 344.

Since the rules on vouchers with respect of VAT are special rules on transaction in the ML, I make, as mentioned,[229] no analysis of those taken by themselves in this work. I stay at the review here above regarding the float and vouchers and the contrasting effect which it gives to the rule on exemption from VAT for financial services, i.e. Ch. 3 sec. 9 of the ML. I express here (in translation) only the wording of the definition of vouchers in Ch. 1 sec. 20 of the ML, and notice that it means that a voucher for VAT purposes does not constitute a financial service, but a proof of value which shall be accepted in exchange for goods or services which it regards. A voucher is that a proof of value which shall be accepted as consideration for an underlying transaction, a supply of goods or a supply of services.[230]

> *Ch. 1 sec. 20 of the ML, according to SFS 2018:1333*
>
> *With voucher is meant an instrument for which it exists an obligation to accept it as consideration or partial consideration for supply of goods or supply of services. The goods or services which shall be supplied or the potential deliverers or suppliers identity must be noted either on the instrument or in the adherent documentation which contain the terms for usage of the instrument.*

For the determination of the tax object in the present respect ut should be considered that a pure interest is a cost for the loan of money and means only that that value is transferred between two persons. For it to be a matter of a vendor and buyer and a transaction according to Cj. 2 of the ML, a value-added must be added to the cost. It can primarily seem to be surprising that VAT could be levied on e.g. a bank interest, if not exemption from VAT was stipulated for bank- and financing services (and for trading of securities) in Ch. 3 sec. 9 of the ML – see art. 135(1)(b)-(g) of the VAT Directive. However, the entire bank interest does not constitute a pure interest for the bank's borrowing cost, but a part of the bank interest constitutes payment for administration, wages, premises, profit etc. The latter part of the bank interest consists thus of a typical value-added, which would be included in the amount for value-added taxation, if not bank interest was exempted from VAT according to Ch. 3 sc. 9 of the ML.[231]

Supply of a VAT-free financial service cannot be used for *matching* with a taxable transaction of goods or services, so that the taxable amount for such a transaction is lowered by set-off of a discount of the interest for the financial service due to fast payment of for example a loan which constitutes a financial service. Each transaction shall be

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[229] See section 1.4.
[230] See Forssén 2019d p. 14.
[231] See Forssén 2011, section 3.4.1 with reference to SOU 1989:35 Part 1 p. 192. See also Forssén 1993 p. 105, Forssén 1994 p. 139, Forssén 1998 p. 174 and Forssén 2001 p. 208.

judged in itself. If for example a building proprietor gets a lowering of the interest on a building loan, by him making an agreement with his bank to lift the loan in a faster pace, can the lowered interest cost for him normally not be used for a set-off of the building contractor's price for the building work ordered by the building proprietor. The HFD considers in the case RÅ 1991 ref. 105, which regarded taxable amount for goods (dator equipment) that it is ineterst on an approved customer credit which should be kept out of the taxation value (the taxable amount). The interest that the vendor of the goods (or the service) himself pays and which is included as a cost element at the calculation of prices shall instead be included in the taxation value (the taxable amountt). In line of this aproach lies also the HFD's advance ruling RÅ 1986 ref. 46, where a limited company, which by a leasing agreement hired out a machine, received a deposited amount which the company had at its disposal interest free (so-called deposition leasing). The National Tax Board's council for law matters (the predecessor of the SRN) considered that also the value of the benefit, which the company received to command over for its own account and which amount the customer (the lessee) deposited at the company, would be included in the taxation value (the taxable amount) for the hiring out of the machine. The HFD later on confirmed the advance ruling.[232] Thus, I conclude that the general rules in the ML mean that it in the example above is not possible to lower the taxable amount for goods or services by the vendor setting off a part of the price against a lowering of the interest on a financial service from the customer. It must be a question of the vendor leaving a customer credit and receiving interest on it, for it to be a question of interest which shall not be included in the taxable amount for the vendor's goods or services.

I am coming back to the question on lowering the taxable amount for a taxable goods or service by for example the described *matching* of the price for the goods or the services with a tax-free financial service in section 4.4, where I bring up the question on private law options as financial services in connection with the special rules in Ch. 9 c of the ML on tax liability and exemption from VAT for goods in certain warehouses.

By the VAT-free field being interpreted and applied restrictively and the bank- and financing sector being able to comprise taxable consultant services etc. it is usual with composite transactions in the present field, where the question is whether the principle of division or the principle of the principal in pursuance of Ch. 7 sec. 7 of the ML shall be applied.

[232] See also Forssén 2019a, sections 12 215 210, 12 215 224 and 12 215 225. See also Forssén 2001 p. 214.

In that respect I may mention something about so-called *corporate finance*-activity.

Corporate finance-activity does not constitute any unequivocal concept. Such an activity can be said consisting of a number of different services like market surveys, company valuation, legal and economical consultations and transfer of shares in a limited company. Those services are supplied sometimes by lawyers, authorized public accountants, tax consultants and others on a consultant basis and often also by e.g. banks.

The question whether taxation according to the main rule in Ch. 3 sec. 1 first para. on generally taxable transactions of goods and services or exemption from VAT for financial services according to Ch. 3 sec. 9 exists must be judged separately for each one of the services in the supply. If a common consideration is paid the taxable amount is determined by division on a reasonable basis accoding to the division principle, if the services are separable. In that case the value of the different services must be judged separately, for the tax to be calculated on a correct taxable amount, i.e. for the taxable services in the composite supply as the *corporate finance*-supply constitutes. The from taxation exempted consideration as the actual transfer of shares or intermediation of shares entails is treated in itself, and can be compared with the VAT-free courtage fee which normally is taken out by banks and financing institutes in connection with trading regarding transfer or intermediation of shares, i.e. trading of securities.[233] The HFD has, regarding *corporate finance*-activity, considered that if different services in connection with an assignment to mediate shares is not demanded in itself by the mandator the supply is seen as one single service regarding intermediation of shares, and that the transaction of that service is exempted from VAT according to Ch. 3 sec. 9 of the ML.[234] If it is not a mater of such an intermediation, but of a commitment in relation to an issuer of securities to uphold a second-hand market for those, the commitment is comprised by the principle of generally taxable transactions of goods and services in Ch. 3 sec. 1 first para. of the ML.[235]

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[233] See also Forssén 2001 p. 214.

[234] See RÅ 2001 not. 23, where the HFD also refers to the EU-case C-349/96 (CPP).

[235] See RÅ 2004 ref. 100, where the HFD considered this regarding transaction of so-called market maker-sevices. In the case it was referred under *Rättsfall* (Eng., Case law) to the following verdicts. From the HFD: RÅ 2003 ref. 72, regarding so-called courtage division; RÅ 2003 ref. 90 (advance ruling); and RÅ 2003 ref. 94. From the CJEU: C-172/96 (First National Bank of Chicago); C-349/96 (CPP); and C-235/00 (CSC). In its turn it is referred: in RÅ 2003 ref. 72, under *Rättsfall*, to the EU-case C-235/00 (CSC); in RÅ 2003 ref. 90, under *Rättsfall*, to RÅ 1999 ref. 9, RÅ 2001 ref. 69, RÅ 2002 ref. 9, RÅ 2003 ref. 24 and the EU-cases C-231/94 (Faaborg-Gelting Linien) and C-349/96 (CPP); and in RÅ 2003 ref. 94, under *Rättsfall*, to RÅ 2001 not. 23 and

In the advance ruling HFD 2018 not. 32 the HFD considered, regarding discretionary portfolio management, that the question whether a transaction consists of several parts or one single supply shall be determined by a collected judgment. With reference in the first place to the CJEU's preliminary ruling C-44/11 (Deutsche Bank), items 18-21, the HFD considered that each supply usually shall be seen as separate and independent, but that it exists onse single supply inter alia when one part constitutes the main, dominating, service, whereas another part must be deemed as subordinate.

Thus, I conclude that the HFD's and the CJEU's case law regarding composite transactions where financial services are included correspond, like with my conclusion in section 4.2 regarding composite transactions in the field of fastigheter, with the CJEU's case law in general concerning the question whether the effort shall be divided or seen as one single transaction: If division is not possible, a principle of the principal applies, i.e. the dominating element in the composite transaction on taxation or exemption shall be applied, and a division of a composite transaction must not be made in an artificial way.

In the context may be mentioned that the exemption from VAT for mediation of securities according to Ch. 3 sec. 9 of the ML, together with the exemption from VAT for mediation of insurances, is unique among the intermediation services with respect of VAT. It is namely only in those two cases that (unqualified) exemptions from VAT occur for an intermediation service. In other cases is an intermediation service in itself comprised by a main rule on generally taxable transactions of goods and services according to Ch. 3 sec. 1 first para. of the ML.[236] Thereby I come back, to give a comprehensive picture of the problems with the distinction between taxation and exemption regarding the intermediation services, to my division of the services into five different categories in section 3.2.2, whereby I especially may mention the following about the categories I and III:

The above-mentioned regarding the distinction between taxation and exemption concerning intermediation services shows the importance of judging if for example a broker mediates a *fastighet* or shares in a company that owns a *fastighet*. An intermediation of a *fastighet* is a service which I refer to category I according to my division of the services into five different categories, i.e. the mediation of a service

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the EU-case C-235/00 (CSC). In RÅ 2003 ref. 90 it is referred under *Litteratur* (Eng., Literature) to prop. 1993/94:99 p. 136f.

[236] See section 3.2.2 regarding mu division of the services intp different categories and here regarding category III, objects constituting services.

which regards a thing (the *fastigheten*). The intermediation service is comprised by the principle of generally taxable transactions according to Ch. 3 sec. 1 first para. and applicable tax rate is the general of 25 per cent according to the main rule in Ch. 7 sec. 1 first para. of the ML. A mediation of securities (the shares) is on the other hand a service where the object for the transaction of the intermediation service is another service (the share or the shares). Such an intermediation service I refer to category III according to my division of the services. The intermediation service is in such a case comprised by the exemption from VAT for mediation of securiteis, lik with the underlying transaction of the securities in question, which follows by the exemption from VAT regarding the trading of securties in Ch. 3 sec. 9 first para. and third para. no. 1 of the ML.[237]

Since the concept intermediation is not defined in either the ML or the VAT Directive,[238] the categories I and III of services in section 3.2.2 function as a support to judge whether the intermediation service is taxable or exempted from VAT, according to the following:

> If the mediation concerns a thing, i.e. something tangible (including *fastigheter*), or gas, heat, refrigeration or electricity, the transaction of the intermediation service is taxable. The intermediation service always belongs to category I of services, if it regards goods.
>
> If the object for the transaction of the intermediation service is another service, the intermediation service is typically taxable, but the transaction of the intermediation service is comprised by exemption from VAT if the object for it is securities or insurances. The intermediation service belongs to category III of services if it regards another service, and if such a mediated service consists securities or insurances, which services thus are VAT-free, is also the intermediation service tax-free with respet of VAT. In other cases of intermediation services belonging to category III is however the intermediation service taxable.

The HFD has in the advance ruling HFD 2011 ref. 21 considered that a broker's mediation of the shares in a company, which contained a *fastighet*, was comprised by exemption from VAT according to Ch. 3 sec. 9 of the ML and art. 135(1)(f) of the VAT Directive. If the broker instead had sold the *fastigheten* for the company, the intermediation service would have been comprised by the main rule on generally taxable transactions of goods and services according to Ch. 3 sec. 1 first para. of the ML.

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[237] See section 3.2.2 regarding the categories I and III concerning the services.
[238] See section 3.2.2 regarding category I of services.

By the way it may be mentioned that if the buyer of the intermediation service regarding the securities or of the mediation of an insurance is established in a country outside the EU the intermediary's transaction of the intermediation service is comprised by qualified exemption from VAT, i.e. the intermediary has a right of reimbursement for input tax on acquisitions and imprts in such a part of his activity.[239]

4.4 SPECIAL RULES ON TAX LIABILITY IN CH. 9 c OF THE ML FOR GOODS IN CERTAIN WAREHOUSES AND RIGHT OF OPTION AS A FINANCING SERVICE [240]

4.4.1 Introduction

In this section I bring up a special case of composite transactions, namely when transaction of private law options as financing services is made in connection with the special rules in Ch. 9 c of the ML on tax liability and exemption from VAT for goods in certain warehouses. The rules in Ch. 9 c were introduced in the ML on 1 January 1996, by SFS 1995:1286, and is one of the cases stated in Ch. 1 sec. 2 last para. of the ML concerning *special rules on who is in certain cases are tax liable*.[241] The present special rules in Ch. 9 c of the ML on goods in certain warehouses are nearest corresponded by the rules in art:s 154-163 of the VAT Directive. The question is whether competition advantages can be achieved through a composite transaction by an enterprise which makes transactions of goods after that VAT-free transactions of goods in certain warehouses and of financial services has been made.[242]

For the present question I may at first come back to the example in section 4.3 regarding that the taxable amount for a building contractor's carrying out of a building contract cannot be lowered by a set-off of the price for the contract against the building proprietor's lowering of the interest cost regarding a building loan, by the building proprietor agreeing with his bank to lift the loan in a faster pace. From the HFD's case law (RÅ 1986 ref. 46 and RÅ 1991 ref. 105) I have in section 4.3 judged that the lowering of the taxable amount which would be the consequence of the described *matching* of taxable efforts with tax-free is in conflict with the general rules in the ML. It is not possible to lower the taxable amount for goods or services by the vendor setting off a part of the price against a lowering of the interest on a financial service from the customer. It must be a matter of the vendor leaving a customer credit

[239] See Ch. 10 sec. 11 second para. no. 1 and no. 2 of the ML.
[240] See also Forssén 2018c and Forssén 2019a, sections 12 215 200-12 215 230.
[241] See sections 1.6, 2.7.1 and 4.1.
[242] See Forssén 2018c.

and receives interest on it, for it to be a matter of an interest which shall not be included in the taxable amount for the vendor's goods or service.

The present problem is however about whether the special rules in Ch. 9 c of the ML meaning that the mentioned case law from the HFD can be circumvented, if is a question of whether such goods are comprised by thise rules and, in the mean time that the goods are placed in a warehouse according to Ch. 9 c, a tax-free transaction of goods matched with a private law option which is a tax-free financial service according to Ch. 3 sec. 9 of the ML. In the present respect my example building contract services does not apply, but I assume here that it is a matter of determining the taxable amount for goods which are comprised by Ch. 9 c sec. 9 of the ML.

Thus, the problem here is not about application of the general rules on the tax object in the ML, but the special rules on tax liability and exemption from VAT for goods in certain warehouses in Ch. 9 c of the ML. The goods which it can be a question of in this case of composite transactions are stipulated in Ch. 9 c sec. 9, why I express (in translation) the wording of that rule here:

Ch. 9 c sec. 9 of the ML, according to SFS 2013:1105

In sec. 1 first para. no. 1 and no. 4 and in sec. 3 are regarded goods which are referred to the following numbers of the Combined nomenclature (Sw., Kombinerade nomenklaturen, here abbreviated KN), i.e. KN-no., according to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff,

1. *tin (KN-no. 8001),*
2. *copper (KN-no:s 7402, 7403, 7405 or 7408),*
3. *zinc (KN-no. 7901),*
4. *nickel (KN-no. 7502),*
5. *aluminium (KN-no. 7601),*
6. *lead (KN-no. 7801),*
7. *indium (KN-no. ex 8112 91 or ex 8112 99),*
8. *corn (KN-no:s 1001 to 1005, 1006: only untreated rice, or 1007 to 1008),*
9. *oil plants and oleaginous fruits (KN-no:s 1201 to 1207), coconut, Brazilian nut and cashew nut (KN-no. 0801), other nuts (KN-no. 0802) or olives (KN-no. 0711 20),*
10. *corn and seed for sowing, including soybeans (KN-no:s 1201 to 1207),*
11. *coffee, not roasted (KN-no:s 0901 11 00 or 0901 12 00),*
12. *tea (KN-no. 0902),*
13. *cocoa beans, whole or broken, raw or roasted (KN-no. 1801),*
14. *unrefined sugar (KN-no:s 1701 11 or 1701 12),*
15. *rubber, in original forms or as plates, sheets or stripes (KN-no:s 4001 or 4002),*
16. *wool (KN-no. 5101),*
17. *chemicals in bulk (Chapters 28 and 29),*
18. *mineral oils, including hydrogenated vegetable and animal oils and fats, natural gas, biogas, propane and butane; also including crude petroleum oils (KN-*

no:s 2709, 2710, 2711 11 00, 2711 12, 2711 13, 2711 19 00, 2711 21 00 or 2711 29 00),

19. *silver (KN-no. 7106),*
20. *platinum; palladium, rhodium (KN-no:s 7110 11 00, 7110 21 00 or 7110 31 00),*
21. *potatoes (KN-no. 0701),*
22. *vegetable oils and fats and their fractions, regardless they are refined or not, however not chemically modified (KN-no:s 1507 to 1515),*
23. *timber (KN-no:s 4407 10 or 4409 10),*
24. *ethyl alcohol, E85 and ED95 (KN-no:s 2207 or 3823 90 99),*
25. *fatty acid methyl esters (KN-no. 3823 90 99),*
26. *crude tall oil (KN-no. 3803 00 10), and*
27. *additives in motor fuel (KN-o:s 3811 11 10, 3811 11 90, 3811 19 00 or 3811 90 00).*

I assume in the case study, which I am going through on the present theme regarding composite transactions, that the goods in question are a consignment of copper (see item 2 of the enumeration above) which is placed in a certain warehouse in the form of a so-called tax warehouse (Sw., *skatteupplag*). I expresss here the rules on exmption from VAT which apply for goods according to the enumeration in Ch. 9 c sec. 9 when they are transferred in different sorts of certain warehouses and what is meant by tax warehouse, etc.:

According to Ch. 9 c sec. 1 first para. no. 1, no. 3 and no. 4 of the ML are the following transactions of goods exempt from VAT:

a transfer of goods stated in Ch. 9 c sec. 9, if the goods are meant to be placed in such a tax warehouse within the country (Sweden) which is stated in Ch. 9 c sec. 3;

a transfer of goods which is stated in Ch. 9 c sec. 9, if it is transferred during the time when they are placed in a tax warehouse within the country (Sweden) wj´hich is stated in Ch. 9 c sec. 3; and

a transfer of non-Union goods which is made in an installation for temporary storage, a customs warehouse or a free zone within the country (Sweden), if they are transferred during the time they are placed there.

The freedom of tax for a transaction of goods in those cases apply according to Ch. 9 c sec. 1 second para. of the ML only under the condition that it is not aimed for final use or consumption, i.e. that the transaction is made to someone who trades with goods and not to a consumer or anyone who shall use it in his activity.[243]

With *tax warehouse* is meant according to Ch. 9 c sec. 3 of the:

for goods in sec. 9, which constitute energy products according to Ch. 1 sec. 4 of *lagen (1994:1776) om skatt på energi* (i.e. the Swedish Energy Tax Act) and are comprised by the procedure rules stated in sec. 3 a of the same chapter, such authorised tax warehouses which are carried out by a warehousekeeper authorised according to Ch. 4 sec. 3 of that acto;

[243] See Forssén 2019a, section 12 215 221.

for ethyl alcohol, such authorised tax warehouses which are carried out by a warehousekeeper which has been authorised according to sec. 9 of *lagen (1994:1564) om alkoholskatt* (i.e. the Swedish act on alcohol tax); and

for other goods in sec. 9, such authorised tax warehouses which are carried out by a warehousekeeper authorised according to sec. 7.

With *non-Union goods, installation for temporary storage, customs warehouses and free zones* are meant according to Ch. 9 c sec. 2 of the ML the same as in REGULATION (EU) No 952/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 October 2013 laying down the Union Customs Code (the so-called Union Customs Code).[244]

By the way it may be mentioned that the special rules on who is tax liable in Ch. 9 c of the ML can comprise also a buyer who is a consumer, i.e. an ordinary private person, since sec. 5 in Ch. 9 c states that it is *den* (Eng., the one) who cause that the goods cease to be placed in such a way that is regarded in Ch. 9 c sec. 1 who will be liable to pay the VAT which shall be taken out thereby. However, it must according to *Skatteverket* not be unusually that someone who is not taxable person applying the rules on exemption from VAT in customs warhouses and tax warehouses.[245] I disregard from this question, since it may be conceived as insignificant in practice, and thus I assume in the further presentation that he who is applying the rules in question is a taxable person.

In section 4.4.2 I am going through a case study which is showing that the State loses VAT incomes if what I call a matching procedure is used in connection with the rules on goods in certain warehouses in Ch. 9 c of the ML and in section 4.4.3 I leave suggestions *de lege ferenda* regarding this. In section 4.4.4 I summarize my conclusions and suggestions *de lege ferenda* in the sections 4.4.2 and 4.4.3.

4.4.2 Special rules on goods in certain warehouses in relation to the rules on exemption from VAT for financing services[246]

The review above of the HFD's case law (RÅ 1986 ref. 46 and RÅ 1991 ref. 105) in relation to the example with the lowering of the taxable amount for the building services concerns the general rues in the ML. The question here is whether the special rules in Ch. 9 c of the ML mean that the HFD's case lan can be circumvented if it is a matter of such goods which are comprosed by those rules and the measure is taken, during the time the goods are placed in a warehouse according to

[244] See Forssén 2019a, section 12 215 222.
[245] See *Skatteverket's s*tandpoint 2014-02-14, dnr 131 770374-13/111, *"Tjänst på vara i tullager eller skatteupplag, mervärdesskatt"*. See www.skatteverket.se. See also Forssén 2019a, section 12 215 225.
[246] See also Forssén 2019a, section 12 215 225.

Ch. 9 c, meaning that a VAT-free tranaction of the goods is matched against a VAT-free financial service according to Ch. 3 sec. 9 of the ML.

I assume that goods which a buyer acquire from a vendor are such goods that are enumerated in Ch. 9 c sec. 9, for example copper, and which the vendor has placed in an authorised tax warehouse according to Ch. 9 c sec. 3 of the ML located within the country. If so can the goods during the time hey have been placed there been transferred without charge of VAT, according to Ch. 9 c sec. 1 first para. no. 1 of the ML. Thus, the question – at comparison with the example on building services – is now what applies instead concerning the taxable amount in connection with the goods being taken out from the tax warehouse and VAT charged according to Ch. 9 c sec. 5 of the ML, if the taxable amount and thereby the price have been lowered due to an arrangement which is based on a matching of the transaction of the goods against a tax-free financial service, which consists of supply of a private law option regarding the goods.

By Ch. 9 c sec. 1 first para. no. 2 follows that exemption from VAT exists *for transaction of services which concern such a transaction that is stated in sec. 1*, i.e. in Ch. 9 c sec. 1 first para. no. 1 of the ML. It can be questioned if there at a later taxable withdrawal of the goods from the tax warehouse exists motives, from the VAT Directive, for asserting that the taxable amount should be determined without respect of the matching against the financial service, which would be in line with the HFD's case law concerning the general rules in the ML. However, I do not find any such motives concerning the special rules in Ch. 9 c of the ML, and the problems have neither been mentioned yet in theses in the field of VAT.[247]

Thus, I consider, with reservation for abusive practice being possible to exist if the same goods are comprised by repeated such measures that I describe here during the time they are placed in a tax warehouse, that support is lacking for lowering the taxable amount and thereby the price on goods by the following *examples* of measures:

- X and Y are both assumed to be Swedish entrepreneurs whose activities cause tax liability and thus entitling them to right of deduction for input tax or imports in the activity according to the main rule in Ch. 8 sec. 3 first para. of the ML.

[247] See e.g. pp. 257-281 regarding Taxable Amount i Henkow 2008, and pp. 143-150 and pp. 175-183 regarding *Skattesats och beskattningsunderlag* (Eng., Tax rates and taxable amount) and *Beskattningsunderlag och Omvärdering av beskattningsunderlaget* (Eng., Taxable amount and Revaluation of the taxable amount) in Sonnerby 2010.

Neither of the two is assumed to have so-called mixed activity, why they have full right of deduction for input tax. Thus, the rules on revaluation to market value of the pricing between allied partners in Ch. 7 sec:s 3 a-3 d of the ML do not come up.[248]

- Y owns a storage of the base metal copper (goods) and X is interested of buying a certain volume of those goods. Y has placed the goods in a tax warehouse in Sweden, and the market value of the volume which X is interested in acquiring from Y is SEK 10,000 excluding VAT, i.e. SEK 12,500 including VAT, whereof VAT of SEK 2,500.

- Y has a loan in bank of SEK 1,000,000, and could lower the calculated price on his goods, if Y could be paid in a faster pace for the goods from X, so that Y could pay less interest to the bank due to Y being able to pay off faster on the bank loan. However, X and Y know that the State, from the HFD's case law regarding the general rules in the ML, still would assert that the price is SEK 10,000 excluding VAT, and that the VAT on the sale of the bulk of copper shall be SEK 2 500 (25 % x 10,000).

X and Y are aiming to use the special rules for tax warehouses in Ch. 9 c of the ML in relation to the rules on financial services in Ch. 3 sec. 9 of the ML by the following alternative scenarios for a better competition situation towards other suppliers of the same sort of goods, by lowering the price including VAT to the customer of X.

- Y issues an option to X on entitling X to buy the bulk of copper.

  X pays for the option a premium to Y of 5 per cent of the market value of the bulk of copper.

  Y's issuing, sale of the option is exempt from VAT as a financial service.

  X pays 4 per cent on the market value excluding VAT, i.e. SEK 400 (4 % x 10,000).

  Y receives from X: SEK 400. See below A).

  Y receives from X SEK 9,600 (10,000 – 400) for the bulk of copper, which is sold by Y without VAT due to the transaction being made when the goods are placed in the tax warehouse. The

[248] See section 2.1.

option is thus used by Y's sale of the goods to X, when the goods were placed in the tax warehouse. See below B).

Y's incomes for the bulk of copper becomes SEK 10,000 (400 + 9,600), i.e. Y's result is not lowered due to the alternative scenario.

- X makes a withdrawal of the goods – the bulk of copper – from the tax warehouse and accounts output tax of SEK 2,400 (25 % x 9,600). X may deduct the corresponding amount as input tax. See below C).

  The cost for X becomes SEK 10,000 (400 + 9,600) regarding the acquisition of the bulk of copper, i.e. the result for X is not lowered due to the alternative scenario.

By the alternative scenario with an income for the option of SEK 400 can Y get a better cash flow and pay off on the bank loan, and thereby lower the calculated price on the sale of goods to X under the level of SEK 9,600, by the bank interest and thereby the total costs becoming lower for Y, before the sale of the goods is made to X. Assume that Y can lower the price with an additional SEK 40 excluding VAT due to the HFD's case law disqualifying a lowered taxable amount with respect of the general rules in the ML, but not concerning the present special rules for goods in tax warehouses and the matching against financial service. That entails the following:

- Y's result is not affected, since the cost for the bank interest becomes SEK 40 lower and corresponds with the further lowering of the price on the goods of SEK 40 excluding VAT to SEK 9,500 excluding VAT (9 600 – 40).

- X sets a price to custome fpr the goods in question of SEK 9,960 excluding VAT (10,000 – 40). X result is not affected, since the price corresponds with the cost for the option of SEK 400 plus the purchase price for the goods of SEK 9,560 (400 + 9 560=9 960).

- X customer pays SEK 12,450 including VAT instead of SEK 12,500, i.e. SEK 9,960 plus 25 per cent VAT, SEK 2,490, thereon becomes SEK 12,450 (9,960 + 2,490). See below D). That gives X a competition advantage towards other suppliers of the same sort of goods, by the price becoming SEK 50 lower including VAT for the customer of X (12,500 – 12,450), i.e. SEK 40 excluding VAT.

- The State gets SEK 10 less in VAT incomes (2,500 – 2,490). The option of SEK 400 lowers the VAT with SEK 100 on the withdrawal of goods from SEK 2,500 to SEK 2,400, but it becomes a zero-sum game since output tax and input cancel each other out. See below C). It is due to Y not lowering his total costs by decreasing the bank interest as the price to the customer of X can be lowered with SEK 40 without it affecting the result either by X or Y. The State's VAT incomes become less correspondingly, i.e. SEK 10 lower (2 ,500 – 2,490 or 25 % x 40 or 20 % x 50).

Above has for the sake of simplicity been assumed that X does not make any mark-up for profit when the goods are sold further to customer. The procedure with matching of the special rules in Ch. 9 c of the ML against the rules on financial services in Ch. 3 sec. 9 of the ML can be used for a mark-up for profit corresponding only with a part of the lowered price that it entails, and still mean that the price to end customer becomes lower than for suppliers who are not using the procedure.

Assume that X makes a mark-up for profit equal to half the lowering of the price of SEK 40 excluding VAT which the procedure in the example is causing. It means that X is setting as a price for the goods SEK 9,980 excluding VAT (9,960 + ½ x 40). Thus, the price to customer becomes 12,475 including VAT [9,980 + 2,495 (25 % x 9,980)], which is SEK 25 lower than the alternative SEK 12,500 including VAT. In this case, with a mark-up for profit in the price to customer, the State's VAT incomes becomes SEK 5 less (2,500 – 2,495=5), instead of SEK 10 less which is the case when X makes no mark-up for profit at all.

The State's VAT incomes become less if the matching procedure is used without a mark-up for profit in the price to custmer compared with if the matching procedure is used with a mark-up profit should taken by itself entail a change of law, since it is obvious that it is in conflict with the principle of a neutral VAT. Therefore, I leave suggestions *de lege ferenda* in section 4.4.3 on measures regarding this.

Furthermore, I leave the following comments to the example of above.

A) Y's transfer of the option to X constitutes securities and the transaction of it is exempted from VAT according to the rules on financial services – see Ch. 3 sec. 9 first para. and third para. no. 1 of the ML and art. 135(1)(f) of the VAT Directive. In the last sentence of the directive rule it is stated that from the concept securities etc. is excluded in the present context documents which represent ownership to goods and such rights or securities

which are regarded in art. 15(2). Art. 15(2) is lacking interest here, since it concerns rights fo immovable property.

Of interest is instead art. 9 of the Implementing Regulation, where it is stated that the sale of an option in the case that such a transaction would fall within the application scope for art. 135(1)(f) of the directive and constitutet taxable transaction according to the main rule for supply of services, art. 24(1) of the VAT Directive, shall such a supply of services ”be distinct from the underlting transactions to which the services relate”. Since the option is not setting up ownership to the bulk of copper (the goods), before it has been called, should in my opinion the premium which Y receives from X for issuing, sale of the option be deemed exempted from VAT according to Ch. 3 sec. 9 first para. and third para. no. 1 and art. 135(1)(f) of the VAT Directive.

B) Y’s sale of the bulk of copper constitutes a VAT-free transaction of goods according to Ch. 9 c sec. 1 first para. no. 4 compared with sec. 9 no. 2 of the ML, since the transaction is made during the time the goods are placed in the tax warehouse.

C) If the buyer of the goods – here X – causes the goods cease to be placed in the tax warehous, he becomes tax liable, according to Ch. 9 c sec:s 4 and 5 of the ML, but may deduct that VAT as input tax, if he has right of deduction or reimbursement for input tax in his activity, since the output tax which shall be accounted for to the State in that case also constitutes input tax according to Ch. 8 sec. 2 second para. of the ML. Thus, for the State it becomes equal to nil: output tax 2,400 minus input tax 2,400.

D) When the goods are transferred by X after that they have been taken out from the tax warehouse, the main rule on generally taxable transactions of goods and services according to Ch. 3 sec. 1 first para. of the ML applies and the normal tax rate of 25 per cent applies for the goods in question – copper – according to Ch. 7 sec. 1 first para. of the ML.

I may for the context mention that a mixed activity can emerge by Y in the example and that thus the rules on revaluation in Ch. 7 sec:s 3 a-3 d of the ML come up, whereby the following apply:

The element of VAT-free financial service by the use of the option in the example can cause that Y gets a mixed activity which limits the right of deduction for input tax. Then can – in case the parties are so-called allied parts according to the rules in Ch. 7 sec. 3 a-3 d of the ML – revaluation of the pricing of the goods in question to market value come up due to those rules (and Ch. 1 sec. 9 of the ML).

> If such a VAT-free transaction regarding financial services by Y is lower than five (5) per cent of Y's transactions in total (i.e. of VAT-free transaction plus taxable transaction), Y has however still full right of deduction for input tax according to the so-called 95-per cent rule in Ch. 8 sec. 14 first para. no. 1 of the ML. Thereby is Y's activity not comprised by the limitation of of the right of deduction in mixed activities according to Ch. 8 sec. 13 of the ML, and Y is not comprised by Ch. 7 sec. 3 b no. 2 of the ML of the revaluation rules.
>
> In the example the relation between VAT-free transaction of an option and total transactions at Y four (4) per cent (400/10 000). Thus, the revaluation rules do not come up, although X and Y are allied parts accordning to those rules.

I leave the following commenst to the example of above:

- The problem in question can – without limitation to goods accounted for in sec. 9 of Ch. 9 c – also concern non-Union goods placed in other forms of certain warehouses than tax warehouses, namely in an installation for temporary storage, a customs warehouse or a free zone within the country. However is, in my opinion the problem not equally obvious in such cases, since exemption from VAT for services then is constituted by services made *in* such a warehouse (see Ch. 9 c sec. 1 first para. no. 3) and not – like with Ch. 9 c sec. 1 first para. no. ***2*** – by services *which concern* a transaction of goods placed in the tax warehouse.[249] With respect of process may furthermore be mentioned that it is *Skatteverket* that has the burden of proof regarding the amount of the transaction,[250] i.e. regarding the taxable amount.

Thus, the described matching procedure to lower the taxable amount for VAT is in the first place of interest regarding goods according to anyone of the 27 items in Ch. 9 c sec. 9 of the ML, like copper, which are placed in a tax warehouse. Furthermore, it is, with respect of the relation between VAT-free transaction of option and total transaction not disqualifying the 95-per cent rule for full right of deduction for input tax in mixed activities, the procedure of interest for enterprises with large volumes of that sort of goods.

If the circumstances are like inte example of above, i.e. that the transactions consist of two transactions being made for receiving of two consieration, thus one consideration for each transaction, it is according

[249] See Ch. 9 c sec. 1 first para. no. 3 of the ML. See also Ch. 9 c sec. 1 first para. no. 4, which for goods placed in a tax warehouse according to Ch. 9 c sec. 1 firts para. no. 1 stipulates exemption from VAT for services made in such a warehouse.

[250] See HFD 2014 ref. 40, which taken by itself concerned application of the rules in Ch. 7 sec. 3 a of the ML on revaluation., but where the HFD stated (in translation) that *a startingpoint for the judgment is that* Skatteverket *has the burden of proof as far as the amount of the transaction is concerned*.

to my opinion in section 4.1 not a question of composite transactions, since I am, for both divisions whereto I refer such transactions, assuming that it is a question of one single consideration occurring.

Thus, in the example with two considerartions it is a matter of a problem that resembles questions about what I denote composite transactions. Such cases are also of interest, so that the analysis of application questions with respect of what are given an effect of contrast. Thus, I conclude that regarding the in the example of above described problem, where *two* VAT-free transactions of goods and financial service respectively are caused by *two* considerations to one and the same person, with the following taxable transaction of goods which he makes when the goods have ceased to be placed in the tax warehouse, it is possible with the matching procedure regarding Y's transactions of the option and the goods which are placed in the tax warehouse respectively, to achieve that the taxable amount on X's taking out of the goods becomes lower for VAT purposes.

If a composite transaction by Y instead would be deemed concerning *one* consideration and thereby *one* transaction, the transaction can

1) be deemed having different character for VAT purposes with respect of the option and the goods respectively *or*

2) the consideration be deemed given partly as an advance payment, partly as the remaining part of the consideration that establish transaction of goods according to Ch. 2 sec. 1 first para. no. 1 of the ML, which I denote the advance payment case.

I consider that a matching procedure cannot be used in anyone of these cases for lowering the taxable amount of the goods at X's taking out of them from the tax warehouse. That presupposes that it is a question of two transactions at different points of time by Y: first a VAT-free transaction of the option and then a VAT-free transaction of the goods when they are placed in the tax warehouse.

1) In the present case with *one* transaction at *one* moment by Y shall the transaction in the first mentioned case be divided into two parts of different character with respect of VAT, according to the division principle which is the main rule in such cases according to Ch. 7 sec. 7 of the ML: The part of the transaction which regards the VAT-free financial service does not give a right of deduction for input tax in the activity, whereas the part of the transaction which regards the VAT-free transaction of the goods which are placed in the tax warehouse gives a right of reimbursement for input tax on the acquisitions in the

activity, which means that a so-called *zero rate taxation* is taking place in that part.

2) In the other case – the advance payment case – a principle of the principal may be applied, where the transaction of the goods should be deemed constituting the dominating element of Y's effort, why the transaction is comprised by a *zero rate taxation* for VAT purposes, where the advance payment will be included as a part of the taxable amount for such a *zero rate taxation* by Y, when Y sells the goods to X during the time the goods still are placed in the tax warehouse. The following applies for X concerning the advance payment.

An advance payment leads to tax liability for he who receives it, if the transaction of the goods or the service are taxable when when the advance payment is received (see Ch. 1 sec. 3 second para. second sen. of the ML). This means that the advance payment does not cause tax liability for Y, since the goods are placed in the tax warehouse and a transaction of the goods then would be exempted from VAT according to Ch. 9 c sec. 1 first para. no. 4 compared with sec. 9 no. 2 of the ML – see above B). Y sells the goods to X VAT-free when the goods are placed in the tax warehouse.

This entails however not that Y's right to lift off input tax on acquisitions in the activity is limited, since the transaction which is exempted from VAT according to Ch. 9 c sec. 1, as mentioned, gives a right of reimbursement for input tax in the activity according to Ch. 10 sec. 11 first para. of the ML. In other words is, as follows of above, the advance payment included in a taxable amount of SEK 10,000 excluding VAT which entails a *zero rate taxation* by Y when Y sells the goods to X during the time when they are placed in the tax warehouse.

Thus, in the advance payment cases it is, apart from in case 1), not a question of Y making a from VAT unqualified exempted transaction of a service which neither would entail right of deduction nor right of reimbursement of input tax in the activity.

By the way it may be mentioned that if X would be established in a country outside the EU that service would also be *zero rated* (see Ch. 10 sec. 11 *second* para. no. 1 of the ML), and Y would neither in case 1) need to observe rules on mixed activity or (for the case X and Y are allied parts) the revaluation rules. Under the same presupposition, i.e. that X would be established outside the EU, applies furthermore the same for Y in the case of above, where Y is deemed making *two* transactions for the reason that Y receives *two* considerations.

4.4.3 Especially about article 9 of the Implementing Regulation and article 24(1) of the VAT Directive and private rights of option – concerning the need of specification in article 24(1) of the VAT Directive[251]

Art. 9 of the Implementing Regulation concerns, as mentioned,[252] inter alia the main rule regarding supply of services in the VAT Directive, i.e. art. 24(1) of the directive. Art. 9 of the Implementing Regulation states that the sale of an option shall, in the cases where such a sale is a transaction within the scope of application of art. 135(1)(f) of the VAT Directive, constitute such a supply of services that is regarded in art. 24(1) of the directive. Thereby shall the supply of services be regarded as separated from the underlying transactions to which the services are pertaining.

I consider that the review in section 4.4.2 shows that there exists a need of specification of what is comprised by the main rule in art. 24(1) of the directive. It should be made by introduction of a special item in art. 24(1), not by art. 9 of the Implementing Regulation. I consider that a conception like trading of securities aslo in the future should be developed by the CJEU's case law, like what already has been the case by the CJEU's case C-2/95 (CSC) meaning that trading of securities comprise documents which changes the legal and financial situation between the parties. Already from the EU-case C-235/00 (CSC) it is evident that the exemption in the directive's art. 135(1)(f) for transaction of securities 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. To especially for options state in art. 9 of the Implementing Regulation what already follows by the CJEU's case law can in my opinion give the conception that it would be unclear whether options constitute securities with respect of VAT. For example the stockmarket is a second-hand and there is no limitation of it with regard of options to buy or sell shares. There should not be any limitation of what constitutes securities besides what already follows by the last sentence in art. 135(1)(f) of the VAT Directive [and of art. 15(2) of the VAT Directive]. There exists however in my opinion a need of specification of what sort of options which are comprised by the exemption from VAT for financial services, whereby I may state the following:

[251] See also Forssén 2019a, section 12 215 226.
[252] See section 2.4.

- If such a specification of the exemption from VAT that I mention above shall be made, it should be made in the VAT Directive, instead of in the Implementing Regulation.

- Regardless of in what legislation the specicication will be made, it should regard the fixing of a border between on the one hand securities in the form of shares and options etc. for which a market exists and on the other hand what I denote as private law options. Private law options often concern other property than shares and are issued by companies to their empolyees or the shareholders. If such an option is personal and cannot be transferred further, it would in my opinion be a matter of a taxable service with respect of VAT. Before Sweden's EU-accession in 1995 I stated that it did not exist any market for private law options, and therefore the issuing of such an option does not constitute trading of securities.[253] Now it does not exist any such fic´xing of a border towards private law options, why I consider that the issuing of those are comprised by the exemption from VAT according to art. 135(1)(f) of the VAT Directive.

Thus I suggest *de lege ferenda*:

partly that a specification will be introduced in the VAT Directive meaning that private law options are not comprised by the exemption from VAT for financial services in art. 135(1)(f) of the VAT Directive,

partly that the specification will be introduced into the main rule of supply of services art. 24(1) of the directive, whereby the determination of whether the sale of an option which falls within the scope of application for exemptions from VAT according to art. 135(1)(f) of the VAT Directive constitutes a supply of services according to art. 24(1) is made in a special item in art. 24 of the VAT Directive, not by art. 9 of the Implementing Regulation.

These rule alterations should be brought up by the legislator on the EU level, to take care of the described problem in section 4.4.2 with a matching procedure in connection with the application of the rules on goods in certain warehouses in Ch. 9 c of the ML. Thus, I consider that the legislator should bring up suggestions of the mentioned alterations in the VAT Directive and in the Implementing Regulation, before any alteration is made in the present respect in Ch. 3 sec. 9 of the ML.

[253] See Forssén 1994 pp. 142 and 143.

4.4.4 Summary of conclusions and suggestions *de lege ferenda*

I have not found anything in the EU's VAT Directive or in the Implementing Regulation disqualifying a matching/set-off of a VAT-free transaction of goods taking place during the time they are placed in a tax warehouse according to Ch. 9 c of the ML against a VAT-free financial service according to Ch. 3 sec. 9 of the ML to be able to cause that the taxable amount and thereby the price of a taxable transactio of goods being lowered after the have been taken out from the tax warehouse. The legislator should regard that the vendor and the buyer thereby can circumvent the HFD's case law (RÅ 1986 ref. 46 and RÅ 1991 ref. 105) regarding the general rules of the ML, which means that the taxable amount of the goods may not be lowered by it being *matched* by a discount for *fast payment*.

The present problem is starting from that it basically is a matter of two considerations to one and the same person which are matched. Thus, it is not a question of what I denote composite transactions in section 4.1, where I am assuming that the person in question receives one single consideration. The present problem resembles however application questions on composite transactions. Such cases are also of interest, to give en effect of contrast to the analysis of application questions regarding composite transactions with respect of VAT. Therefore, I am going through in section 4.4.2 an example of the problem with matching in connection with the rules on goods in certain warehouses in Ch. 9 c of the ML. It consists of *two* VAT-free transactions of goods and financial service is entailed by *two* considerations to one and the same person, with a following taxable transaction of the goods which he makes when the goods have ceased to be placed in the tax warehouse. By the special rules in Ch. 9 c of the ML, which are based on art:s 154-163 of the VAT Directive, it exists a codified exemption from the CJEU's case law meaning that a composite transaction may not be divided in an artificial way. It is only a matter of a procedure similar to a composite transaction, when the two VAT-free transactions are carried out during the time when the goods are placed in a tax warehouse. In that way it is possible, by the matching procedure regarding the VAT-free transactions of the option and of the goods which are placed in the tax warehouse, to lower the taxable amount on the taxable transaction of the goods which is made after the goods having ceased to be placed in the tax warehouse. Besides, the State's VAT incomes become lower if the matching procedure is used without a mark-up for profit on the transaction to the customer that is made after the goods have been placed in the tax warehouse compared with if the matching procedure being used with a mark-up for profit. Thus, it is obvious that the secnario is in conflict with the principle of a neutral VAT. Therefore, I

leave suggestions *de lege ferenda* in section 4.4.3 about measures regarding this.

In section 4.4.3 I conclude that there exists a need of specification of what sort of options are comprised by the exemption from VAT for financial services in art. 135(1)(f) of the VAT Directive. However, it should be made by the introduction of a special item in art. 24 of the VAT Directive, not by art. 9 of the Implementing Regulation. To especially for options state in art. 9 of the Implementing Regulation what already follows by the CJEU's case law can give the conception that it would be unclear whether an option constitutes securities for VAT purposes. Thus, I suggest *de lege ferenda* in section 4.4.3:

> partly that a specification will be introduced in the VAT Directive meaning that private law options are not comprised by the exemption from VAT for financial services in art. 135(1)(f) of the VAT Directive,
>
> partly that the specification will be introduced into the main rule of supply of services art. 24(1) of the directive, whereby the determination of whether the sale of an option which falls within the scope of application for exemptions from VAT according to art. 135(1)(f) of the VAT Directive constitutes a supply of services according to art. 24(1) is made in a special item in art. 24 of the VAT Directive, not by art. 9 of the Implementing Regulation.

These rule alterations should be brought up by the legislator on the EU level, before any change is made in the present respect in Ch. 3 sec. 9 of the ML.

By the way, it may be mentioned that I in section 4.4.3 mention that the problem in question also can – without limitation to goods enumerated in sec. 9 of Ch. 9 c – apply to non-Union goods placed in other forms of certain tax warehouses than tax warehouses, namely in an installation for temporary storage, a customs warehouse or a free zone within the country. However, I consider that the problem is not equally obvious in such cases, since exemption from VAT for services then is constituted by services made *in* such a warehouse (see Ch. 9 c sec. 1 first para. no. 3), unlike the example in section 4.4.2, where it is a question of Ch. 9 c sec. 1 first para. no. ***2***, i.e. of services *which concern* a transaction of goods placed in a tax warehouse.

Furthermore, I mention in section 4.4.1 that the special rules on who is tax laible in Ch. 9 c of the ML can comprise also a buyer who is a consumer, i.e. an ordinary private person, since sec. 5 in Ch. 9 c states that it is *den* (Eng., the one) who cause that the goods cease to be placed

in such a way that is regarded in Ch. 9 c sec. 1 who will be liable to pay the VAT which shall be taken out thereby. However, *Skatteverket* considers that it is unusual that someone who is not taxable person applies the rules on exemption from VAT in customs warhouses and tax warehouses.[254] Since that question may be conceived as insignificant in practice, I have disregarded it and started in sections 4.4.2 and 4.4.3 from that he who applies the rules in Ch. 9 c of the ML is a taxable person. Thus, I do not leave any suggestion of alterations in the rules on goods in certain warehouses in Ch. 9 c of the ML and neither in the nearest correspoding rules in art:s 154-163 of the VAT Dierctive.

4.5 THE SPECIAL RULE ON TAX LIABILITY FOR INTERMEDIARY SERVICES IN CH. 6 SEC. 7 OF THE ML [255]

In this section I bring up the special rule on tax liability for imtermediation services in Ch. 6 sec. 7 of the ML as a case study concerning the alternative in Div. II meaning that the consideration which the intermediary receives from the buyer gives rise transactions by more than the intermediary *and* more than one transaction by the intermediary.

In section 3.2.2 I mention, in connection with the review of services in category I, that it does not exist any definition of the concept intermediation in the ML, and that there neither exists any common EU-definition of intermediation with respct of VAT. This entails interpretation and application problems concerning another of the special rules on who is tax liable than recently mentioned Ch. 9 c of the ML, namely regarding the special rule in Ch. 6 sec. 7 of the ML on tax liability for intermediation in one's own name (Sw., *i eget namn*) of goods or a service for a principal. I express the wording of Ch. 6 sec. 7 of the ML here:

> *Ch. 6 sec. 7 of the ML*
>
> ”Om någon i eget namn förmedlar en vara eller en tjänst för annans räkning och uppbär likviden för varan eller tjänsten skall vid bedömning av skattskyldigheten för omsättningen av varan eller tjänsten denna anses omsatt såväl av honom som av hans huvudman” (Eng., If someone in his own name mediates goods or services on behalf of someone else and receives the payment for the goods or the services shall at the judgment of the tax liabilty for the transaction of the goods or the services it be deemed transferred by him as well by his principal).

The special rule on tax liability in Ch. 6 sec. 7 of the ML has no direct equivalence in the VAT Directive, but is there nearest corresponded by

[254] See *Skatteverket's* standpoint 2014-02-14, dnr 131 770374-13/111.
[255] See also Forssén 2019c, section 4.1.

two rules, one of them, art. 14(2)(c), on goods and the other one, art. 28, on services. I express the wordings of both the directive rules here:

Art. 14(2)(c) of the VAT Directive

”In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:
[---]
the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.”

Commentary

This means that an agent who is trading goods is treated in the same way as he who in the capacity of self-seller is comprised by the main rule on supply of goods in art. 14(1) of the VAT Directive.

Art. 28 of the VAT Directive

”Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.”

Commentary

He who in his own name mediates services, is treated in the same way as he who is trading goods on commission, i.e. like a self-seller.

Thus, in both the directive rules the intermediary is deemed to make a transaction and a purchase regarding the goods or the service. The difference that I am emphasizing here with Ch. 6 sec. 7 of the ML compared with the two directive rules is that Ch. 6 sec. 7 means that the intermediary, concerning the consideration which he receives from the buyer of the mediated goods or service, is deemed to make not only the same transaction as the principal makes, but also an intermediation service. Thus, the consideration which the intermediary receives from the buyer gives rise to transactions by more than the intermediarfy, i.e. by the principal, *and* to more than one transaction by the intermediary, i.e. the intermeiary himself is deemed to make the principal’s transaction and in addition an intermediary service.

The latter judgment I base on the HFD’s case law according to the case RÅ 2002 ref. 113. That case means that an intermediary who in his own name sells for example goods for the principal can be deemed making a special transaction concerning the intermediation service which the intermediary makes for the principal, and not only the transaction which the intermediary like the principal is deemed to make of the goods according to Ch. 6 sec. 7 of the ML.[256]

[256] See Forssén 2019c p. 336.

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 somebody treating composite transactions with respect of VAT. Since neither the ML nor the VAT Directive define what is regarded with intermediation according to the general VAT rules, should a clarification be introduced in Ch. 6 sec. 7 of the ML meaning that the rule, regarding one and the same consideration which the intermediary receives from the buyer of the underlying goods or service, cannot be deemed giving rise to more than one transaction for the intermediary. If the intermediary shall be deemed making also an intermediation service, should it arise first if the intermediary also receives a special consideration for the intermediation service in itself. Thus, I leave that as a suggestion of change of Ch. 6 sec. 7 of the ML *de lege ferenda*.

I consider myself having support for my suggestion in an advance ruling from the HFD, RÅ 1995 not. 16, i.e. that it should be deemed as an extreme interpretation to consider that Ch. 6 sec. 7 of the ML would comprise what is meant with cases on commission within trading. Instead of such an extensive interpretation the HFD's advance ruling meant only the negative statement that the rule in Ch. 6 sec. 7 of the ML is not regarded to be applied at what that within the incoe tax law is denoted as a so-called false agent-relationship.[257] What is not working at a comparison of the interpretation of Ch. 6 sec. 7 of the ML in RÅ 1995 not. 16 with the interpretation in RÅ 2002 ref. 113 is that the HFD in RÅ 1995 not. 16, despite its reasonably limited interpretation of the rule, considers that *the tax liability shall be decided with support of general rules in the act*. This I consider that the HFD is not doing in the case RÅ 2002 ref. 113. There the HFD is making an interpretation besides the general rules in the ML, which in the present respect should be based on the above in this section expressed general rules in the VAT Directive, when the HFD in RÅ 2002 ref. 113 considers that an intermediary who in his own name sells for example goods for the principal can be deemed making a special transaction regarding the intermediation service that the intermediary thereby makes for the principal, and not only the transaction which the intermediary like the principal is deemed making according to Ch. 6 sec. 7 of the ML. Therefore should my suggestion of a clarification in the special rule on tax liability in Ch. 6 sec. 7 of the ML be made. The rule should thereby, regarding one and the same consideration that the intermediary receives from the buyer of the underlying goods or service, not be deemed giving rise to more than one transaction for the

[257] See Forssén 2019a, sections 12 201 021 and 12 201 033.

intermediary. The HFD's statement in RÅ 1995 not. 16 about that the tax liability shall be decided with support of general rules in the ML does not change that RÅ 2002 ref. 113 gives rise to a clarification in principle of the special rule Ch. 6 sec. 7 in the ML in pursuance of my suggestion *de lege ferenda* according to above.

By the way it is not only the lack of a common EU-definition of intermediation with respect of VAT that entails the mentioned change of Ch. 6 sec. 7 of the ML. The rule should also be altered so that it does not gives rise to the same interpretation question as concerning the representative rule, Ch. 6 sec. 2 of the ML,[258] i.e. whether the tax subject according to the ML can be an oridnary private person. Thus, I suggest *de lege ferenda* that it also will be clarified in Ch. 6 sec. 7 of the ML that the special tax liability only comprises an intermediary who is taxable person.

In section 2.7.1 I mention that the determination of whether a VAT group's activity shall be deemed casuing tax liability according to the rules for VAT groups in Ch. 6 a of the ML is made, with reference in a special para., Ch. 6 a sec. 1 second para., to the main rule on tax liability in the general rules in Ch. 1 sec. 2 first para. no. 1. A technique which I compared with also when I, regarding Ch. 6 sec. 2 of the ML (and Ch. 5 sec. 2 of the SFL), suggested solutions of the problen with determining tax and payment liabillty for VAT in *enkla bolag* and *partrederier*.[259] In the same way can the mentioned clarification be made in Ch. 6 sec. 7 regarding that the rule does not mean that an ordinaru private person shall be deemed constituting a tax subject according to the ML.

That the present wording of Ch. 6 sec. 7 of the ML gives an interpretation result which means that a tax liable intermediary can be an ordinary private person means that the tax subject also can be an empolyee by a taxable person. That is in conflict with the CJEU's case law regarding the general rules on who is a tax subject for VAT purposes, where the main rule on who is taxable person is to be found in art. 9(1) first para, of the VAT Directive which has beem implemented litterally in Ch. 4 sec. 1 first para. first sen. of the ML.[260] That an employee by a taxable person would be able having the character of taxable person in precisely his capacity of employee deems the CJEU in the case C-594/13 ("go fair" Zeitarbeit) as not possible. The CJEU states inter alia that the exemption in art. 132(1)(g) of the

[258] See sections 1.1, 2.7.1 and 3.2.2 regarding category V regarding the services and Forssén 2013.
[259] See Forssén 2013, section 7.1.3.2.
[260] See sections 2.1 and 3.2.2 regarding category V concerning the services and Forssén 2013.

VAT Directive cannot be applied directly on personnel in a staffing enterprise.[261] It is not the employees in such an enterprise who are taxable persons in accordance with art. 9(1) first para. of the VAT Directive, why the CJEU deems that the employees are excluded from that concept precisely in their capacities of employees, which follows by art. 10 of the directive.[262] Thereby it is in my opinion important to limit Ch. 6 sec. 7 of the ML, so that that rule as one of the special rules on tax liability in the ML does not expand the scope of who is tax subject to apply also to ordinary private persons either in the capacity of consumers or employees by taxable persons.[263]

That a reformation of the rule Ch. 6 sec. 7 of the ML is demanded follows in my opinion in itself of the rule originating from the general goods tax from 1959 which was replaced by the GML, more precisely from the 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 rule has been transferred therefrom via the GML to the ML and is thus nowadays to be found in Ch. 6 sec. 7. In that way has the special rule on tax liability regarding mediation in Ch. 6 sec. 7 of the ML the same historical background as the representative rule in Ch. 6 sec. 2 of the ML (and Ch. 5 sec. 2 of the SFL).[264] That Ch. 6 sec. 7 originates from the time before Sweden's EU-accession on 1 January, 1995, and even from the time before Sweden had a VAT legislation (1969), should in my opinion contribute to that rule in the ML being investigated by the legislator on the theme EU conformity. For such work I refer to my suggestions *de lege ferenda* regarding Ch. 6 sec. 7 of the ML according to above.

By the way may be mentioned that the rule in Ch. 6 sec. 7 of the ML has never been subject to research. In previous research in the field of VAT is the rule mentioned only briefly by professor Eleonor Kristoffersson, who states that the rule probably not would be

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[261] See item 24 in the EU-case C-594/13 (”go fair” Zeitarbeit).
[262] See item 23 in the EU-case C-594/13 (”go fair” Zeitarbeit).
[263] See my article in SvSkT 2017 pp. 15-25, *Bemanningsföretagens momsstatus inom vård och omsorg* (cit. Forssén 2017c) pp. 19 and 24. Full text in open access on www.forssen.com. See also Forssén 2019a, section 12 201 032 and my article in JFT 4/2019 pp. 240-253, *Moms och bemanning inom vård och omsorg – den finska och svenska mervärdesskattelagen i förhållande till EU-rätten* (cit. Forssén 2019g), where I refer to that I have mentioned the EU-case C-594/13 (”go fair” Zeitarbeit) in Forssén 2017c, and moves on with a comparison of the ML with the Finnish VAT Act, *mervärdesskattelagen (1501/1993)*, whereby I however mention the staffing question within health care ans social care without regard of the special Swedish VAT rule on intermediaries in Ch. 6 sec. 7 of the ML. Full text in open access on www.forssen.com.
[264] See Forssén 2013 pp. 35, 61, 124, 147 and 148 regarding that also the representative rule originates from the legislation of the general goods tax.

applicable only on such relationships that are regarded in the Swedish Act on Commission (Sw., *kommissionslagen*), but also in certain other situations where an intermediary is closing agreements in his own name on behalf of someone else, whereby fronting relationships are stated as an exmple o cases comprised by Ch. 6 sec. 7 of the ML.[265] That is an interpretaion, but it may at least be deemed non-EU conform.

A reflection for futher research is thereby that the expression ”i eget namn” (Eng., in his own name) exists not only in Ch. 6 sec. 7 in the ML, but also in the rules on what especially applies to certain travel agencies in Ch. 9 b of the ML. In Ch. 9 b sec. 1 of the ML it is stated that a travel agency is deemed supplying the traveller a so-called travelling service, which means that the travel agency is deemed to do one single transaction for the consideration that the traveller pays for using the underlying goods and services, like air trip and room in hotel, which the travel agency mediates in its own name to the traveller. However, I do not denote the travelling services as composite transactions, since the consideration from the traveller only gives rise to a transaction by the travel agency, whereas the travel agency has acquired the underlying goods and services from subcontractors like airlines and hotels. It is not one and the same consideration that gives rise to transactions by more than the receiver of the consideration from the traveller, but the travel agency accounts for the money which the travel agency shall not keep further to the subcontractors who make their transactions against the consideration they thereby receives from the travel agency. It is neither a question of a case resembling a composite transaction, since it, contrary to what is the case with the matching in connection with the application of the rules on goods in certain warehouses in Ch. 9 c of the ML, according to sections 4.4.1-4.4.4 above, is not a question of the travel agency dividing its own consideration into two parts.

The special rules on certain travel agencies in Ch. 9 b were introduced into the ML on 1 January, 1996, by SFS 1995:700, and are nearest corresponded by art:s 306-310 of the VAT Directive.[266]

4.6 TRADING OF NON-PROFIT SHARES IN THINGS AND OBJECTS AT JOINT OWNERSHIP

In this section I bring up, as mentioned in connection with the review of category V of services in section 3.2.2, an applicatuon question at joint ownership of a non-profit share in a thing or an object, when a transaction of service cnsists of transfer for consideration of such a non-

[265] See Alhager 2001 p. 160.
[266] See also Forssén 2019a, section 12 213 234.

profit share. Before I express below a case in practice in that respect I refer to section 5.5 in Forssén 2013 and that I consider that each owner of shares at joint ownership should be treated for himself for VAT purposes. It can in practice be hard to decide whether a joint ownership relationship according to *lag (1904:48 s. 1) om samäganderätt*, Eng., the Swedish act on joint ownership, or an enkelt bolag according to the BL exists. However, I disregard from problems concerning the delimitation between what is an *enkelt bolag* (Eng., approx. joint venture) consisting of two or more persons or a case of joint ownership between two or more persons, but assume at the review of the case study in this section that two persons are included in a joint ownership relationship, and that they each by himself shall be judged for VAT purposes regarding his measures, i.e. that they each by himslef shall be judged from the main rule on who is tax liable according to Ch. 1 sec. 2 first para. no. 1 of the ML. It is *den som* (Eng., he who is) taxable person and in that capacity makes a taxable transaction of goods or services within the country who is tax liable or payment liable according to the main rule in art. 193 of the VAT Directive.[267]

Thus, I disregard from the special rule on tax liability according to Ch. 6 sec. 2 of the ML in *enkla bolag* (and *partrederier*), and refer to Forssén 2013 for detail questions on *enkla bolag* for VAT purposes. However, I come back in section 4.7 to the side issue in Forssén 2013 regarding the problems with the application of the rule on reduced tax rate of 6 per cent in Ch. 7 sec. 1 third para. no. 9 (previously no. 8) of the ML, when it is a matter of common literary and artistic works created under the enterprise form *enkelt bolag*.

To illustrate the problems in the present respect I refer to Forssén 1994, where I for that purpose went through a case in practice and reasoned about transactions of goods which means supply of goods, but without physical movement.[268] In the present context I may emphasize the reasoning there in connection with trading of non-profit shares at joint ownership.

Although transactions of goods which only can be identified by law of contracts, like when goods are supplied without physical movement, should ne deemed comprised by what is regarded with transaction according to the main rules on transaction of goods and services in Ch. 2 sec. 1 first para. No. 1 *and* third para. no. 1 respectively of the ML. Compare with that I in section 2.3.1 suggests *de lege ferenda* that the

[267] See section 2.1.

[268] See Forssén 1994, section 6.4.2.1: ”Leverans av vara ’utan fysisk förflyttning’” (Eng., Supply of goods ’without physical movement’). See also Forssén 1993, section 6.4.2.1.

definition of *leverans av en vara* (Eng., supply of goods) in Ch. 1 sec. 3 third para. first se. should be abolished from the ML, since the use of the word *avlämnas* (Eng., delivery) in the rule indicates that a law of property moment would be requested for a supply of goods existing. That is in conflict with the main rule on what is regarded with supply of goods in art. 14(1) of the VAT Directive, where no such limitation is stated, but it is sufficient with a supply being deemed taking place by law of contracts.

If the transaction of goods cannot be identified in the form of a physical movement of them, should it thus in certain cases instead be deemed as a transaction of a service, for example at transfer of oil between oil companies which are co-storing oil in cisterns. The transaction of the oil is in that case like trading of a non-profit share in the jointly owned oil.

Assume that X shall sell oil to a customer and in different ways according to below must take from the oil belonging to Y.

X has oil in storage by an independent storage company. Y has also oil stored by that company. X and Y owns their oil, but the storing of it is in the same cistern, so-called *samlagring* (Eng., co-storing). For natural reasons is it thereby not possible to know whether X takes out of Y's or his own oil from the depot by the storage company and vice versa. When fungible property (for example oil) which is co-stored is taken out from the storage room (for example the cistern) can a transaction be said taking place first when the person in question is taking out more than his own stored quantity, i.e. when an overdrawn takeout is made. This can be established for example once a month, whereby adjustment is made a clearing in the book-keeping so that X *återlämnar* (Eng., returns) to Y the quantity taken out belonging to Y, i.e. the overdrawn takeout or keeps it as his.

Another situation can be that X, for practical reasons, must take out of Y's oil from another cistern within the depot. This depending on how the drawing off-system within the depot is arranged. The purpose of the procedure is to make easier the administrative and practical handling at the drawing off of oil from the cisterns in the depot. Neither in this case is it a question of X getting a better product or ay other advantage by the procedure – it is the same sort of oil in the cisterns. Also in this case is the takeout of oil adjusted by a clearing in the bok-keeping so that Y from X's stored oil is assigned (Sw., *tilldelas*) a quantity of oil corresponding with X's takeout from Y's cistern. Thus, neither in this case is any physical movement between Y and X or vice vesa taking place, but an adjustment of an overdrawn takeout is also here made afterwards by a clearing in the book-keeping.

The HFD has in an advance ruling on income tax, RÅ 1979 Aa 66, which concerned co-storing of oil, established the ruling given by The National Tax Board's council for law matters (the predecessor of the SRN). The council considered in its ruling, that right of write-down of stock was not allowed if oil temporarily was made available over the end of the accounting period. The oil was not deemed stock item by the receiver. The council probably had in mind that such measures were taken in a tax planning purpose.

Although the advance ruling was about income tax, the reasoning in it should in my opinion apply also to the VAT. Despite that oil physically is taken out by X from what Y has stored by the storage company, must the *intention* (Sw., *avsikten*) that the same quantity would be *returned* to Y, by a clearing in the book-keeping, entail that a supply cannot be deemed to have taken place for VAT purposes. A clearing in the book-keeping, for example once a minth, should be made first if X has made an overdraw according to aboe, whereby Y is demed having made a transaction of oil to X if X is keeping the overdraw as his property.

Since it anyway is not possible to identify Y's delivery of oil to X in the form of a physical movement of the oil, should in my opinion the transaction which Y is deemed making, by X keeping his overdraw of the jointly owned oil from cistern and which is manifested by a clearing in the book-keeping, be considered as a case of trading of non-profit shares at joint ownership in pursuance of category V of services according to my division of the services in section 3.2.2. It should in my opinion mean that Y's transfer to X is deemed constituting a transaction of service according to the main rule in Ch. 2 sec. 1 third para. no. 1 of the ML, i.e. transaction of a service which consists of a non-profit share in the goods (the oil) corresponding with the overdraw that X keeps, instead of a transaction of the goods (the oil) according to Ch. 2 sec. 1 first para. no. 1 of the ML. To avoid that the field for exemption from VAT for trading of securities according to Ch. 3 sec. 9 first para. and third para. no. 1 of the ML becoming too extensive,[269] and thereby in conflict with the last sentence in art. 135(1)(f) of the VAT Directive, I suggest *de lege ferenda* that Ch. 3 sec. 9 of the ML is completed with a paragraph where it is stated that the exemption from VAT is not comprising trading of securities which exclusively concerns documents representing ownership of goods. Thereby will not such a transaction of service in the present respect, which consists of transfer of a non-profit share in goods at joint ownership, exempted from VAT, but comprised

[269] See section 4.3, where I express (in translation) the wording of Ch. 3 sec. 9 of the ML. According to third para. no. 1 is with trading of securities meant *transaction and mediation of shares, other participation rights and claims, regardless whether they are represented by securities or not,*

like other transfers of goods of the principle of generally taxable transactions of goods and services according to Ch. 3 sec. 1 first para. of the ML.

With my suggestion of alteration of Ch. 3 sec. 9 of the ML can the case in question of composite transactions be regarded according to the following:

X receives a consideration from his customer for the sale of oil. This means that X is making a taxable transaction of goods, and the consideration also entails, by X keeping his overdraw of the with Y co-stored oil, a transfer from Y to X. The transaction constitutes taken by itself a supply of goods, but it is deemed as a taxable transaction of service by Y expressed as a transfer of a non-profit share in the jointly owned oil. That share corresponds with the overdraw which X is keeping.

4.7 LEGAL SEMIOTICS AS A COMPLEMENT FOR STUDIES OF COMPLEX VAT QUESTIONS

In this section I refer, as mentioned,[270] to the side issue in Forssén 2013 regarding the problem with the application of the rule on reduced tax rate of 6 per cent in Ch. 7 sec. 1 third para. no. 9 (previously no. 8) ML,[271] when it is a matter of common literary and artistic works created under the enterprise form *enkelt bolag* and not in other enterprise forms. The problem is still that the rule does not comprise common works according to sec. 6 of the URL, but works created by legal entities according to sec:s 1, 4 or 5 of the URL. The question was a side issue in Forssén 2013, and I have moved on with in three articlesr,[272] where I in two of these have taken up Legal Semiotics (the Semiotics of Law) as a complement of the study of the composite transaction on which the present VAT question is an example.[273] Such a complement of – like here – a study of *division problems* concerning composite transactions for VAT purposes is of course alse useful for analysis of *border problems* for VAT purposes.[274]

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[270] See sections 1.1, 3.2.2 (regarding category V concerning the services) and 4.1.

[271] By SFS 2019:261 was on 1 July, 2019 the third para. no. 8 altered to the third para. no. 9 of Ch. 7 sec. 1 of the ML.

[272] Forssén 2018a, Forssén 2018b and Forssén 2020a. In Forssén 2020a, section 5 I refer to Forssén 2018a.

[273] See Forssén 2018a, section 3.1 ”Ett enkelt bolag samt ett litterärt eller konstnärligt verk” (Eng., An *enkelt bolag* and a litterary and artistic work) and Forssén 2020a, section 5.

[274] See section 4.1 regarding my division of the problems in the present respects into *uppdelningsproblem* (Eng., division problems), concerning composite transactions with respect of VAT, and *gränsdragningsproblem* (Eng., border problems) with

> Before I account for my idea on Legal Semiotics as a complement in these respects, I may mention again that the problem with the application of the present rule on reduced tax rate when a common work is created under the enterprise form *enkelt bolag* is independent of what happens with with the main question in Forssén 2013, i.e. the question on *enkla bolag* and other non-legal entities and whether they could be comprised of the concept taxable person according to Ch. 4 sec. 1 first para. first sen. of the ML and art. 9(1) first para. of the VAT Directive.[275]

Thus, in Forssén 2018a I developed the side issue from Forssén 2013 concerning applicable tax rate in connection with the creation of artistic and literary works, when authors and artists create common works and use the enterprise form *enkelt bolag* for the co-operation. It is for example a matter of creating a stage play or a film, where an orderer of the stage play or the film pays a consideration one for all to the authors and artists who create the common work. I express below my shorter version in Forssén 2020a of how semiotics can constitute a complement at studies of complex VAT questions, like this from Forssén 2013.[276]

I set the focus on the question whether each of the authors and artists, by his or her contribution to the co-operation in *enkla bolaget* resulting in the stage play (or the film), has created a literary or artistic work comprised by sec:s 1, 4 or 5 of the URL. If they are taxable persons, he or she is in that case liable to account for VAT by the reduced tax rate of 6 per cent, and if this is not the case applies instead the general tax rate of 25 per cent for his or her transaction. This follows by the rule on reduced tax rate in the present case, Ch. 7 sec. 1 third para. no. 9 of the ML, referring to the rules for independent works according to sec:s 1, 4 or 5 of the URL, and applies thus for the person whose work is deemed fulfilling the unique principle and thereby passing the threshold of originality.[277] However, 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

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respect of VAT, i.e. questions on whether one or the other rule in the ML regarding the tax object shall be applied.

[275] See section 3.2.2 regarding category V concerning the services.

[276] See Forssén 2020a, section 5.

[277] Regarding *verkshöjd* (Eng., threshold of originality): see section 3.2.2 regarding category III of the services, where I express the conception of the meaning of that concept in Bernitz et al. 2017 and Eklund 1991.

figure regarding the theatre where the finished stage play shall be performed. Thereby will each of the taxable persons who take part in the creative process 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.[278]

> By the way I have, 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.[279]

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 2018a 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. For instance as in the present 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. Therefore I brought up in Forssén 2018a also inter alia the following imagined example from the artists' world. It 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. It is then an attribute – prop – to a character that he is doing on stage and on film. Thus, the beret could as such be enough to determine if he is supplying a right under sec. 1 of the URL, when he for instance is appearing in a theatre play or a film. What is decisive then could be that he is wearing his beret in such an environment. Thus, the beret could besides its practical function as a headgear, constitute an attribute, here an objective sign that he is not only acting in the capacity of the private person Michael Angelo but rather as the artist Michael Angelo. In that way could the actor Michael Angelo can be deemed performing a literary or artistic work already by him, when he performs in a stage play or a in a film, wearing his beret, and thereby be deemed making a from VAT exempted transaction of service according to Ch. 3 sec. 11 no. 1 of the ML and not a taxable service according to the main rule on

[278] See Forssén 2018a pp. 317-320 (section 3.1 "Ett enkelt bolag samt ett litterärt eller konstnärligt verk" – Eng., An *enkelt bolag* and a litterary and artistic work) whereto I refer also in Forssén 2020a, section 5.
[279] See Forssén 2018b pp. 650-652.

taxation of transactions of goods and services in Ch. 3 sec. 1 first para. of the ML.[280]

The review in this section shows that a completion of for instance a law dogmatic study in the subject of VAT with elements of Legal Semiotics is of interest both concerning the division problems regarding composite transactions, like concerning the tax rate question in connection with the creation of the stage play under the enterprise form *enkelt bolag*, and regarding the border problems, like concernimg the artist who is either comprised by taxation or by exemption from VAT at the performing of a literary or artistic work.[281]

4.8 CONCLUSIONS

The carrying out of the case studies regarding application questions in this chapter started in the introduction section 4.1 with me putting forward a distinction between what I denote division problems and border problems. The division problems concern questions on composite transactions. The basic problem regards then whether the consideration which the buyer of a product pays to the vendor shall be divided due to the effort consisting of different goods and/or services or whether the the consideration shall be deemed regarding one single effort. The application questions in this chapter have been treated from the premise that it is a question of composite transactions. The border problems can occur if it is not a question of a composite transaction. Then cannot different elements for VAT purposes be identified at all in the effort. A border problem concerns only whether one or another rule in the ML regarding the tax object shall be applied. I refer the division problems concerning composite transactions to two divisions: Division I and Division II:

> In Div. I it is a matter of the considerartion for the effort in question being received by only one vendor, whereby the division problem concerns whether one or more transactions shall be deemed existing. If only one single transaction is deemed existing, the rules on the transaction's character with respect of VAT and the tax rate comprised by the dominating element in the effort apply.
>
> In Div. II it is a matter of the consideration for the effort in question being received by one person, whereby the division problem does not concern that the consideration gives rise to one single transaction by him (see Div. I), but to transactions by more than that person *or* by more than that person and at the same time to more than one transaction by him.

Since Ch. 7 sec. 7 of the ML only works for division of composite transactions when it is a question of whether one vendor (V) shall divide

[280] See Forssén 2018a pp. 323-325.
[281] See also Forssén 2018a p. 320

received consideration into more than one transaction (see Div. I), I suggest *de lege ferenda* that Ch 7 sec. 7 of the ML will be changed so that the rule not only concerns division on a reasonable basis of the taxable amount regarding one single transaction by V, but also comprises questions concerning whether the consideration gives rise to transactions by more than V (see Div. II). In the light of the VAT Directive lacking a rule on composite transactions, I consider that the legislator should bring up on the EU level the question of introduction of such a directive rule, which would be implemented in the ML, by Ch. 7 sec. 7 being altered or replaced with an entirely new rule.

For the choice of case studies concerning application questions regarding composite transactions in this chapter I have started from my description in section 3.3 of an ennobling chain regarding production and distribution of goods and services.

In the sections 4.2-4.4.4 and 4.5-4.7 respectively I treat composite transactions referable to Div. I and Div. II respectively, and leave in some of the cases suggestions *de lege ferenda*.

In section 4.2 I have, concerning the field of *fastigheter*, concluded, that the legislator's conception of application of division versus a principle of the principal for composite transactions in the field of *fastigheter* corresponds with the CJEU's case law according to the cases C-349/96 (CPP) and C-41/04 (Levob), which I summarize according to the following:

> If division is not possible, the CJEU considers that a principle of the principal applies. Then the dominating part in the composite transaction decides whether taxation or exemption shall be applied and the question of applicable tax rate. The CJEU considers also that a division of a composite transaction must not be made in an artificial way.[282]

Although the HFD's and the CJEU's case law especially concerning the judgment of whether transactions in the field of fastigheter are composite or shall be deemed separate and thus divided has been proven corresponing with what the CJEU consider in general thereof.

In section 4.3 I have concluded, that the HFD's and the CJEU's case law concerning composite transactions where financial services are included also correspond with the the CJEU's case law in general regarding the question whether the effort shall be divided or regarded as one single transaction: If division is not possible, a principle of the principal rules, i.e. the dominating part in the composite transaction of

[282] See section 1.2.

taxation or exemption shall be applied, and a division of a composite transaction must not be made in an artificial way.

In sections 4.4.1-4.4.4 I have taken up a special case of composite transactions, namely when transfer of private law options as financial services are made in connection with the special rules in Ch. 9 c of the ML on tax liability and exemption from VAT for goods in certain warehouses. Those special rules in the ML are nearest corresponding by the rules in art:s 154-163 of the VAT Directive. The question that I have examined is whether competition advantages can be achieved by a composite transaction by an enterprise which makes transactions of goods after VAT-free transactions of goods in certain warehouse and of financial services have been made.

In section 4.4.2 I have thus gone through an example of the problem with matching in connection with the rules on goods in certain warehouses in Ch. 9 c of the ML. It consists of *two* VAT-free transactions of goods and financial service respectively being caused by *two* considerations to one and the same person, with a following taxable transaction of goods which he makes when the goods have ceased to be placed in the tax warehouse. By the special rules in Ch. 9 c of the ML, which are based on art:s 154-163 of the VAT Directive, a codified exemption exists from the CJEU's case law meaning that a composite transaction must not be divided in an artificial way. It is namely only a matter of a procedure which resembles a composite transaction, when both the VAT-free transactions are carried out during the time the goods are placed in a tax warehouse. Thereby it is possible to, by the matching procedure regarding the VAT-free transactions of the option and of the goods which are placed in the tax warehouse respectively, lower the taxable amount on the taxable transaction of the goods made after that the goods have ceased to be placed in the tax warehouse. Besides, the State's VAT incomes become lower if the matching procedure is used without a mark-up for profit on the transfer to the customer which is made after that the goods have been placed in the tax warehouse compared with if the matching procedure is used with a mark-up for profit. The scenario is thus obviously in conflict with the principle of a neutral VAT.

In section 4.4.3 I therefore leave the following suggestions *de lege ferenda* of measures against the described matching procedure, which I also mention in section 4.4.4:

> A specification should be introduced in the VAT Directive meaning that private law options are not comprised by the exemption from VAT for financial services in art. 135(1)(f) of the VAT Directive.

That specification should be introduced into the main rule of supply of services art. 24(1) of the directive, whereby the determination of whether the sale of an option which falls within the scope of application for exemptions from VAT according to art. 135(1)(f) of the VAT Directive constitutes a supply of services according to art. 24(1) is made in a special item in art. 24 of the VAT Directive, not by art. 9 of the Implementing Regulation.

The alterations of rules I am suggesting should be taken up by the legislator on the EU level, before any chaneg in the present respct is made in the rule on exemption from VAT for bank- and financing services or trading of securities in Ch. 3 sec. 9 of the ML.

In section 4.5 I take up the special rule on tax liability for intermediation services in Ch. 6 sec. 7 of the ML as a case study concerning the alternative in Div. II meaning that the consideration which the intermediary receives from the buyer gives rise to transactions by more than the intermediary *and* more than one transaction by the intermediary. The special rule in question in the ML does not have any direct equivalent in the VAT Directive.

The special rule on tax liability in Ch. 6 sec. 7 of the ML is nearest corresponded by two rules in the VAT Directive: art. 14(2)(c), on goods; and art. 28, on services. In both the directive rules the intermediary is considered making one transaction and one purchase regarding the goods or the service. The difference with Ch. 6 sec. 7 of the ML compared with the two directive rules is that Ch. 6 sec. 7 menas that the intermediary, concerning the consideration which he receives from the buyer of the mediated goods or service, is considered making not only the same transaction as the principal is making, but also an intermediation service. In pursuance of the HFD's case law (RÅ 2002 ref. 113) the consideration which the intermediary receives from the buyer gives rise to transactions by more than the intermediary, i.e. by the principal, *and* to more than one transaction by the intermediary, i.e. the intermediary himself is deemed to make the principal's transaction and also an intermediation service.

The question that the same consideration can be deemed corresponding with more than one transaction often disappears 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. However, the question in principle is decisive for somebody treating composite transactions with respect of VAT. Neither the ML nor the VAT Directive define what is regarded with intermediation according to the general VAT rules, and therefore should a clarification be introduced in Ch. 6 sec. 7 of the ML meaning that the

rule, regarding one and the same consideration which the intermediary receives from the buyer of the underlying goods or service, cannot be deemed giving rise to more than one transaction for the intermediary. If the intermediary shall be deemed making also an intermediation service, should it arise first if the intermediary also receives a special consideration for the intermediation service in itself. Thus, I leave that as a sugestion of change of Ch. 6 sec. 7 of the ML *de lege ferenda*.

By the way it is not only the lack of a definition of intermediation in the VAT Directive that entails my suggestion of an alteration of Ch. 6 sec. 7 of the ML. The rule should also be changed so that it does not give rise to the interpretation question whether the tax subject according to the ML can be an ordinary private person. Therefore, I suggest *de lege ferenda* that it also will be clarified in Ch. 6 sec. 7 of the ML that the special tax liability only comprises an intermediary who is taxable person.

In section 4.6 I suggest *de lege ferenda* that Ch. 3 sec. 9 in the ML will be completed with a paragraph where it is stated that the exemption from VAT is not comprising trading of securities which exclusively concerns documents representing ownership of goods. This is to avoid that the field for exemption from VAT for trading of securities acording to Ch. 3 sec. 9 first para. and third para. no. 1 of the ML becomes to extensive, and thereby in conflict with the last sentence in art. 135(1)(f) in the VAT Directive. Thereby will not such a transaction of service which consists of transfer of a non-profit share in goods at joint ownership exempted from VAT, but comprised like other transfers of goods of the principle of generally taxable transactions of goods and services according to Ch. 3 sec. 1 first para. of the ML.

In section 4.7 I come back to the side issue in Forssén 2013 regarding the problem with the application of the rule on reduced tax rate of 6 per cent in Ch. 7 sec. 1 third para. no. 9 (previoisly no. 8) of the ML, when it is a matter of common literary and artistic works created under the enterprise form *enkelt bolag* and not in other enterprise forms. The problem is that the rule does not comprise common works according to sec. 6 of the URL, but works created by legal entities independently according to sec:s 1, 4 or 5 of the URL.

I emphasize that the problem with the rule in question on reduced tax rate, when a common work is created under the entreprise form *enkelt bolag*, is independent of what happens with the main question in Forssén 2013, i.e. the question on *enkla bolag* and other non-legal entities and whether they shall become comprised by the concept taxable person according to Ch. 4 sec. 1 first para. first sen. of the ML and art. 9(1) first para. of the VAT Directive.

The review of the question whether a reduced tax rate of 6 per cent or the general tax rate of 25 per cent shall be applied when it is a matter of common works created under the enterprise form *enkelt bolag* has proved that a law dogmatic study in the subject VAT should be completed with elements of Legal Semiotics. This is of interest both concerning division problems regarding composite transactions, like concerning the present tax rate question in connection with for example the creation of a stage play under the enterprise form *enkelt bolag*, and concerning border problems, like when an artist either is comprised by taxation or by exemption from VAT at the performing of a literary or artistic work.

In Forssén 2019a I have, as mentioned,[283] brought up the idea from Forssén 1993 and Forssén 1994, where I divide the services for VAT purposes into five different categories. This I have moved on with in the present work,[284] and used to develop a tool in sectin 3.3 as support for the study of composite transactions with respect of VAT in this chapter. The review in section 4.7 of Legal Semiotics as a complement of studies of composite transactions for VAT purposes shows that semiotics work as a complement for studies of complex VAT questions. If the research in the subject VAT is not deepened, by something like Legal Semiotics being added to it, I consider that a tradition with pure law dogmatic studies within the tax law, and thereby lack of empirical studies, entails that the research becomes more or less an exercise in deduction. It gives, contrary to inductive analyses, not any new knowledge, since the task for law dogmatic studies only consists of interpreting and systematizing current law.[285] Then the researcher and thereby the research in the subject VAT goes into what I in Forssén 2020b call the trap of mathematics.[286] For someone intending to write a paper or do research in the subject VAT can my article in *Tidningen Balans Fördjupningsbilaga* (Eng., The Periodical Balans Annex with advanced articles) 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 borders – a model for reserchers and solicitors at comparison of the VAT Act with the EU law),[287] also be of interest.

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[283] See section 3.2.1.
[284] See section 3.2.2 regarding the division of the services in the categories I-V.
[285] See Forssén 2018a pp. 327 and 328.
[286] See section 1.3, where I also refer to Forssén 2020b – i.e. to my article "Matematikfällan i forskningen – avseende mervärdesskatterätten" (Eng., The Trap of Mathematics in the Research – regarding the VAT law).
[287] Cit. Forssén 2019h, e-version on www.tidningenbalans.se and on www.forssen.com.

5. SUMMARY AND CONCLUDING VIEWPOINTS

5.1 SUMMARY

5.1.1 The problems in this work

In section 1.2 I state that this work in the first place concerns questions on the tax object, more precisely application questions concerning composite transactions of goods and services. The question is whether the ML is conform in relation to the VAT Directive in that respect. The question is complicated by composite transactions not being defined in either the ML or the VAT Directive.

Before the application problems with composite transactions regarding goods and/or services are treated, I am going through in Chapter 2 whether the concepts goods and services according to Ch. 1 sec. 6 of the ML are EU conform.

The problems in this work are treated in the following order.

1. The question whether the concepts gids and services according to Ch. 1 sec. 6 of the ML are EU conform is interpreted first in Chapter 2.

2. In Chapter 4 are cases in practice mentioend regarding the application, when the tax object contains efforts of different character with regard of whether they are taxable transactions or exempted from VAT or comprised by different tax rates (composite transactions).

   Another application question which is mentioned concerning composite transactions regarding what applies about a consideration which regards more than one transaction and supply, i.e. more than one taxable event.

In Chapter 3 I create a tool to support the carrying out of the case studies regarding composite transactions in Chapter 4.

In Chapter 2 and Chapter 4 respectively I leave suggestions *de lege ferenda* to alterations in the ML or in the VAT Directive and he Implementing Regulation.

Although there is no definition of composite transactions in the ML, questions on VAT and such transactions often concern Ch. 7 sec. 7 of the ML, where a principle of division is stated as a 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, the CJEU considers that a principle of the principal instead applies, where the dominating part of a composite transaction decides the question whether taxation or exemption shall apply and the question on applicable tax rate.[288] The CJEU considers that a division of a composite transaction must not be made in an artificial way.[289] The following statements from the CJEU is of guidance to decide whether a composite transaction shall be divided or seen as one single effort:

- ”[W]here two or more elements or acts supplied by a taxable person to a customer, being a typical consumer, are so closely linked that they form objectively, from an economic point of view, a whole transaction, which it would be artificial to split, all those elements or acts constitute a single supply for purposes of the application of VAT.”[290]

- ”This is true of a transaction by which a taxable person supplies to a consumer standard software previously developed, put on the market and recorded on a carrier and subsequently customises that software to that purchaser's specific requirements, even where separate prices are paid.”[291]

- ”[S]uch a single supply is to be classified as a 'supply of services' where it is apparent that the customisation in question is neither minor nor ancillary but, on the contrary, predominates; such is the case in particular where in the light of factors such as its extent, cost or duration the customisation is of decisive importance in enabling the purchaser to use the customised software.”[292]

In section 1.2 I conclude by the way that the determination of the taxable amount according to the main rules on taxable transactions of giids or services according to the ML is conform with the determination of taxable supply of goods or supply of services according to the main rules in the VAT Directive.

[288] See the CJEU-case C-349/96 (CPP).
[289] See the CJEU.case C-41/04 (Levob), item 30 first indentation.
[290] See the EU-case C-41/04 (Levob), item 30 first indentation.
[291] See the EU-case C-41/04 (Levob), item 30 second indentation.
[292] See the EU-case C-41/04 (Levob), item 30 third indentation.

5.1.2 The carrying out of the study

In section 1.3 I state that I limit the study in this work of the concepts goods and services according to the ML at composite transactions to concern the main rules of supply of goods and supply of services respectively in art. 14(1) and 24(1) respectively of the VAT Directive. Therefore, I start in this study also from the main rules on taxable amount and consideration according to the ML, i.e. I consider that it is a matter of transaction of goods or services for payment or something that can be estimated in the value of money, and disregard questions on the taxable amount according to art:s 74-77 of the directive, concerning withdrawal situations or at transfer of goods to another Member State, if not otherwise stated.

In pursuance of what is stated in section 1.2 I make first an analysis of the concepts goods and services in Ch. 1 sec. 6 of the ML in relation to the EU law in the field. Since the VAT Directive does not contain any independent determination of the two concepts, there will be partly, regarding goods, a systematical analysis of the directive rules on supply of goods and supply of service, partly, regarding service, an analysis of those directive rules in relation to what is meant by service according to art. 57 first para. TFEU. Thus, the EU conformity with the concepts goods and services will be tried in relation to the EU law regarding partly secondary law, partly secondary and primary law.

In Chapter 2 I leave suggestions *de lege ferenda* on alterations in the ML or in the VAT Directive and the Implementing Regulation, if the concepts goods and services in the ML are not conform with the main rules on supply of goods and supply of services according to the directive, before I go further in Chapter 4 with raising application questions on composite transactions regarding goods and/or services.

Thus, I interpret first the meaning of the concepts goods and services according to Ch. 1 sec. 6 of the ML in relation to the main rules for supply of goods and supply of services respectively in art. 14(1) and 24(1) respectively of the VAT Directive, whereby also the Implementing Regulation is regarded, but in the first place regarding what is stated in art:s 8 and 9 of the Implementing Regulation which consern the application of art. 24(1) of the VAT Directive.

If the ML will be deemed EU conform regarding the concepts goods and services, I am going further without leaving any suggestion on alterations of the two concepts in the ML, and put forward certain application questions for them in connection with composite transactions. These questions concern cases where the tax object contains efforts of different character with respect of whether they are

taxable transactions or exempted from VAT or comprised by different tax rates. The questions concern the decision of whether the price – the consideration – regards one single supply or if it shall be divided into different goods and/or services in the respects mentioned.

Since the value-added taxation of supply of goods and supply of services respectively are not harmonised, I limit the problemizing of composite transactions regarding goods and/or services to concern the Swedish national ML in relation to the EU law in the field. The trial of the EU conformity regards then certain case studies concerning the application of the ML regarding composite transactions from precisely a transaction related perspective on the tax object and the consideration.

To do the case studies regarding composite transactions in Chapter 4, and thereby leaving suggestions *de lege ferenda* of alterations in the ML or in the VAT Directive and the Implementing Regulation, I create a tool in Chapter 3. An ingredient in the creation of the tool in Chapter 3 is that I divide the services into five different categories. The intention is not that the tool taken by itself shall constitute the method for the analysis in this work. Thus, the tool in itself shall not be perceived as some kind of logical or mathematical method for the analysis of the concept services for VAT purposes. The tool shall not at all be perceived as anything else than a support for the analysis, i.e. a model – a tool – to support the analysis in this work. I find it objectionable for those making examinations of the subject VAT to make logic and mathematics to the method in itself for their study. Instead should logic and mathematics only be used as models – tools – to support the analysis. I call making logic and mathematics the method in itself for studies of the VAT law *the trap of mathematics* (Sw., *matematikfällan*). Thus, I recommend logic and matematics to be used only as a tool (model) for the research within the VAT law. Thereby should the research and other studies of the VAT law become better and more useful for the appliers of the law and also stimulate the legislator to create better rules with respect of communication, to avoid gaps occurring in the rules.

5.1.3 Conclusions and suggestions *de lege ferenda*

In section 2.8 I conclude, concerning the tax object and whether the determination of it is complying with the VAT Directive, that the conceptions goods and services accoring to Ch. 1 sec. 6 of the ML and the fixing of a border between them is EU conform.

The fixing of a border between goods and services according to Ch. 1 sec. 6 of the ML is EU conform also with respect of *fastigheter* being comprised by the concept goods in Ch. 1 sec. 6 first sen. of the ML.

This is the case since the definition of *fastighet* in Ch. 1 sec. 11 of the ML was altered on 1 January, 2017, by SFS 2016:1208, so that the connection in the rule to *fastighet* according to the JB was replaced with a reference to the concept immovable property in art. 13b of the Implementing Regulation, and considered constituting services due to the connection of the concept *fastighet* in the ML to thr JB causing a narrower determination of goods than what follows from the concept immovable property, are nowadays defined as goods by the connection of the concept *fastighet* to art. 13b of the Implementing Regulation. This means that the fixing of a border between goods and services in the field of *fastigheter* is EU conform.

> By the way I suggest *de lege ferenda* in section 2.3.1 that the definition of *supply of goods* in Ch. 1 sec. 3 third para. first sen. should be abolished from the ML. This is caused by the use of the word *avlämnas* (Eng., delivered) in the rule implying that a property law element would be required for a supply of goods being deemed existing. That is in conflict with the main rule on what is meant by supply of goods in art. 14(1) of the VAT Directive. There it is not stated any such limitation, but it is sufficient with a delivery being considered existing in a law of contracts respect.[293]

Although the ML is EU conform concerning the fixing of a border between goods and services also with respect of *fastigheter* being comprised by the concept goods in Ch. 1 sec. 6 first sen. of the ML, I have concluded that certain problems may remain regarding whether the ML is EU conform where the determination of the scope of the value-added taxation in the field of *fastigheter* is concerned. Therefore, I suggest *de lege ferenda* the following:

- I suggest alterations of the rules on voluntary tax liability in Ch. 9 of the ML so that they become in compliance with art. 137(1)(d) of the VAT Directive, whereby the possibility of such a tax liability applies to taxable persons and not also to an ordinary private person who is an owner of a *fastighet*.

- I suggest that Ch. 3 sec. 2 will be abolished from the ML, so that the field of *fastigheter* is comprised by the principle of generally taxable transactions of goods and services according to Ch. 3 sec. 1 first para. of the ML, and with exemptions from VAT in the field expressed in special rules in Ch. 3 of the ML. The present order, with Ch. 3 sec. 2 first para. stipulating a main rule in the field of *fastigheter* of exemption from VAT with the rules on mandatory tax liability enumerated in Ch. 3 sec. 3 as

[293] See also sections 2.8 and 4.6.

exemptions from the exemption, is the opposite compared to what rules in the VAT Directive, and thus in conflict with the principle of a neutral VAT.

At the analysis of application questions concerning composite transactions in Chapter 4 I have not come back to these suggestions of alterations *de lege ferenda* of the ML regarding the field of *fastigheter*. The suggestions affect as a matter of fact the scope of the value-added taxation in the field, but have in principle no significance for the questions on composite transactions in the field of VAT. What is essential in that respect for this presentation is that the fixing of a border between goods and services in Ch. 1 sec. 6 of the ML has become EU conform also with respect of the concept goods in Ch. 1 sec. 6 first sen. comprising *fastigheter* too.

Since the services are more hard to apply, I reason in section 2.8 about a division of them into different categories, and I bring some of them along to to Chapter 3, where I create the mentioned tool for the analysis in Chapter 4 of application questions regarding composite transactions. One element in the creation of the tool in Chapter 3 is that I divide the services into totally five different categories (I-V). These are treated in sections 3.2.1 and 3.2.2 and consist of the following:

I. work on things, intermediation and personal services etc.;
II. fractions of rights to things;
III. objects constituting services;
IV. the making of new services; and
V. non-profit shares in things and objects.

The categories I-III are mentioned already in my reasoning in section 2.8, and in section 3.2.1 are the categories IV and V added. In section 3.3 I account for the tool made to support the analysis in Chapter 4.

In section 3.3 I create the tool, which shall serve as a support for the analysis of certain composite transactions in Chapter 4, by starting:

partly from the overview in section 3.1 of combinations od division problems concerning composite transactions for VAT purposes,

partly from what I have concluded at the review of the five categories of services in section 3.2.2.

The tool consists of a number of questions based on the overview in section 3.1 and the division of the services into different categories in section 3.2.2. The tool for support of the study of composite transactions for VAT purposes is created by the questions in section 3.3 and

supported, if there exists elements of services in the transactions, by the division of the services into the five categories in sections 3.2.1 and 3.2.2.[294]

The carrying out of the case studies regarding application questions in Chapter 4 starts in the introduction section 4.1 with me putting forward a distinction between what I denote division problems and border problems. The division problems concern questions on composite transactions. The basic problem regards then whether the consideration which the buyer of a product pays to the vendor shall be divided due to the effort consisting of different goods and/or services or whether the the consideration shall be deemed regarding one single effort. I refer the division problems concerning composite transactions to two divisions: Division I and Division II:

> In Div. I it is a matter of the considerartion for the effort in question being received by only one vendor, whereby the division problem concerns whether one or more transactions shall be deemed existing. If only one single transaction is deemed existing, the rules on the transaction's character with respect of VAT and the tax rate comprised by the dominating element in the effort apply.
>
> In Div. II it is a matter of the consideration for the effort in question being received by one person, whereby the division problem does not concern that the consideration gives rise to one single transaction by him (see Div. I), but to transactions by more than that person *or* by more than that person and at the same time to more than one transaction by him.

Since Ch. 7 sec. 7 of the ML only works for division of composite transactions when it is a question of whether one vendor (V) shall divide received consideration into more than one transaction (see Div. I), I suggest *de lege ferenda* that Ch 7 sec. 7 of the ML will be changed so that the rule not only concerns division on a reasonable basis of the taxable amount regarding one single transaction by V, but also comprises questions concerning whether the consideration gives rise to transactions by more than V (see Div. II).

> In the light of the VAT Directive lacking a rule on composite transactions, I consider that the legislator should bring up on the EU level the question of introduction of such a directive rule, which would be implemented in the ML, by Ch. 7 sec. 7 being altered or replaced with an entirely new rule.

For the choice of case studies concerning application questions regarding composite transactions in Chapter 4 I have started from my description in section 3.3 of an ennobling chain regarding production and distribution of goods and services.

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[294] See section 3.3 regarding the tool, under ***Verktyget till stöd för studien av sammansatta transaktioner*** **(**Eng., The tool for support of the study of composite transactions**)**.

In the sections 4.2-4.4.4 and 4.5-4.7 respectively I treat composite transactions referable to Div. I and Div. II respectively, and leave in some of the cases suggestions *de lege ferenda*

In sections 4.2 and 4.3 respectively I do not suggest any alterations in the ML concerning the fields of health care and social care *and* financial services respectively. I have concluded in section 4.2 that the legislator's conception and the HFD's and the CJEU's case law concerning the judgment of whether transactions in the field of *fastigheter* are composite or shall be deemed separate and thus divided correspond with the CJEU's case law thereof in general, according to the cases C-349/96 (CPP) and C-41/04 (Levob). In section 4.3 I have concluded that the HFD's and the CJEU's case law concerning composite transactions where financial services are included also correspond with the CJEU's case law in general in the present respect, which I summarize according to the following:

> If division is not possible, the CJEU considers that a principle of the principal applies. Then the dominating part in the composite transaction decides whether taxation or exemption shall be applied and the question of applicable tax rate. The CJEU considers also that a division of a composite transaction must not be made in an artificial way.

In sections 4.4.1-4.4.4 I have taken up a special case of composite transactions, namely when transfer of private law options as financial services are made in connection with the special rules in Ch. 9 c of the ML on tax liability and exemption from VAT for goods in certain warehouses. Those special rules in the ML are nearest corresponding by the rules in art:s 154-163 of the VAT Directive. The question that I have examined is whether competition advantages can be achieved by a composite transaction by an enterprise which makes transactions of goods after VAT-free transactions of goods in certain warehouse and of financial services have been made.

> In section 4.4.2 I have gone through an example of the problem with matching in connection with the rules on goods in certain warehouses in Ch. 9 c of the ML. It consists of *two* VAT-free transactions of goods and financial service respectively being caused by *two* considerations to one and the same person, with a following taxable transaction of goods which he makes when the goods have ceased to be placed in the tax warehouse. By the special rules in Ch. 9 c of the ML, which are based on art:s 154-163 of the VAT Directive, a codified exemption exists from the CJEU's case law meaning that a composite transaction must not be divided in an artificial way. It is namely only a matter of a procedure which resembles a composite transaction, when both the VAT-free transactions are carried out during the time the goods are placed in a tax warehouse. Thereby it is possible to, by the matching procedure regarding the VAT-free transactions of the option and of the

goods which are placed in the tax warehouse respectively, lower the taxable amount on the taxable transaction of the goods made after that the goods have ceased to be placed in the tax warehouse. Besides, the State's VAT incomes become lower if the matching procedure is used without a mark-up for profit on the transfer to the customer which is made after that the goods have been placed in the tax warehouse compared with if the matching procedure is used with a mark-up for profit. The scenario is thus obviously in conflict with the principle of a neutral VAT.

In sections 4.4.3 and 4.4.4 I leave these suggestions *de lege ferenda* of measures against the described matching procedure:

A specification should be introduced in the VAT Directive meaning that private law options are not comprised by the exemption from VAT for financial services in art. 135(1)(f) of the VAT Directive.

That specification should be introduced into the main rule of supply of services art. 24(1) of the directive, whereby the determination of whether the sale of an option which falls within the scope of application for exemptions from VAT according to art. 135(1)(f) of the VAT Directive constitutes a supply of services according to art. 24(1) is made in a special item in art. 24 of the VAT Directive, not by art. 9 of the Implementing Regulation.

The alterations of rules I am suggesting should be taken up by the legislator on the EU level, before any chaneg in the present respct is made in the rule on exemption from VAT for bank- and financing services or trading of securities in Ch. 3 sec. 9 of the ML.

In section 4.5 I take up the special rule on tax liability for intermediation services in Ch. 6 sec. 7 of the ML as a case study concerning the alternative in Div. II meaning that the consideration which the intermediary receives from the buyer gives rise to transactions by more than the intermediary *and* more than one transaction by the intermediary. The special rule in question in the ML does not have any direct equivalent in the VAT Directive. It is nearest corresponded by two rules in the VAT Directive: art. 14(2)(c), on goods; and art. 28, on services.

In both the directive rules the intermediary is considered making one transaction and one purchase regarding the goods or the service. The difference with Ch. 6 sec. 7 of the ML compared with the two directive rules is that Ch. 6 sec. 7 menas that the intermediary, concerning the consideration which he receives from the buyer of the mediated goods or service, is considered making not only the same transaction as the principal is making, but also an intermediation service. In pursuance of the HFD's case law (RÅ 2002 ref. 113) the consideration which the intermediary receives from the buyer gives rise to transactions by more than the intermediary, i.e. by the principal, *and* to more than one

transaction by the intermediary, i.e. the intermediary himself is deemed to make the principal's transaction and also an intermediation service.

The question that the same consideration can be deemed corresponding with more than one transaction often disappears 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, but it is in principle decisive for somebody treating composite transactions with respect of VAT. Since neither the ML nor the VAT Directive define what is regarded with intermediation according to the general VAT rules, should therefore a clarification be introduced in Ch. 6 sec. 7 of the ML meaning that the rule, regarding one and the same consideration which the intermediary receives from the buyer of the underlying goods or service, cannot be deemed giving rise to more than one transaction for the intermediary. If the intermediary shall be deemed making also an intermediation service, should it arise first if the intermediary also receives a special consideration for the intermediation service in itself. Thus, I leave that as a suggestion of change of Ch. 6 sec. 7 of the ML *de lege ferenda*.

By the way should Ch. 6 sec. 7 of the ML also be changed so that it does not give rise to the interpretation question whether the tax subject according to the ML can be an ordinary private person. Therefore, I suggest *de lege ferenda* that it also will be clarified in Ch. 6 sec. 7 of the ML that the special tax liability only comprises an intermediary who is taxable person.

In section 4.6 I suggest *de lege ferenda* that Ch. 3 sec. 9 in the ML will be completed with a paragraph where it is stated that the exemption from VAT is not comprising trading of securities which exclusively concerns documents representing ownership of goods. Otherwise can the field for exemption from VAT for trading of securities acording to Ch. 3 sec. 9 first para. and third para. no. 1 of the ML be deemed far too extensive, and thereby in conflict with the last sentence in art. 135(1)(f) in the VAT Directive. By my suggestion will not such a transaction of service which consists of transfer of a non-profit share in goods at joint ownership be exempted from VAT, but comprised like other transfers of goods of the principle of generally taxable transactions of goods and services according to Ch. 3 sec. 1 first para. of the ML.

In section 4.7 I come back to the side issue in Forssén 2013 regarding the problem with the application of the rule on reduced tax rate of 6 per cent in Ch. 7 sec. 1 third para. no. 9 (previoisly no. 8) of the ML, when it is a matter of common literary and artistic works created under the enterprise form *enkelt bolag* and not in other enterprise forms. The problem is still that the rule does not comprise common works

according to sec. 6 of the URL, but works created by legal entities independently according to sec:s 1, 4 or 5 of the URL.

> The problem with application of the rule in question on reduced tax rate, when a common work is created under the entreprise form *enkelt bolag*, is by the way independent of what happens with the main question in Forssén 2013, i.e. the question on *enkla bolag* and other non-legal entities and whether they shall become comprised by the concept taxable person according to Ch. 4 sec. 1 first para. first sen. of the ML and art. 9(1) first para. of the VAT Directive.

The review of the question whether a reduced tax rate of 6 per cent or the general tax rate of 25 per cent shall be applied when it is a matter of common works created under the enterprise form *enkelt bolag* has proved that a law dogmatic study in the subject VAT should be completed with elements of Legal Semiotics. This is of interest both concerning division problems regarding composite transactions, like concerning the present tax rate question in connection with for example the creation of a stage play under the enterprise form *enkelt bolag*, and concerning border problems, like when an artist either is comprised by taxation or by exemption from VAT at the performing of a literary or artistic work.

The review in section 4.7 of Legal Semiotics as a complement of studies of composite transactions for VAT purposes shows that semiotics work as a complement for studies of complex VAT questions. I consider that if the research in the subject VAT is not deepened, by something like Legal Semiotics being added to it, a tradition with pure law dogmatic studies within the tax law, and thereby lack of empirical studies, entails that the research becomes more or less an exercise in deduction. It gives, contrary to inductive analyses, not any new knowledge, since the task for law dogmatic studies only consists of interpreting and systematizing current law. Then the researcher and thereby the research in the subject VAT goes into what I call the trap of mathematics.

5.2 CONCLUDING VIEWPOINTS

I have in this work concluded, concerning the tax object and whether the determination of it is complying with the VAT Directive, that the concepts goods and services according to Ch. 1 sec. 6 of the ML and the fixing of a border between them is EU conform.

I have limited the study in this work of the concepts goods and services according to the ML at composite transactions to regard the main rules for supply of goods and supply of services respectively in sec:s art. 14(1) and 24(1) respectively in the VAT Directive. Thereby I have concludes that the HFD's and the CJEU's case law concerning composite transactions in the field of *fastigheter* or where financial

services are included correspond with the CJEU's case law in general regarding the question whether the effort shall be divided or regarded as one single transaction.

I have not gone into transactions which constitute withdrawal, but have set the focus on transactions for consideration, when I have treated the application questions on composite transactions. For further research I suggest therefore that above all the withdrawal rules within the building sector will be treated. I have in another work suggested precisely this, and that a review will be done of income taxation as well as value-added taxation within the building sector. For example is the connection from the special withdrawal rule for building contractor services in Ch. 2 sec. 7 of the ML to what is meant with stock items in a building busieness according to the Swedish Income Tax (1999:1229) of interest, by the VAT being governed by the EU law, whereas the mentioned connection is made to the non-harmonised income tax rules.[295]

In section 4.5 I have also mentioned as a suggestion for further research that the expression ”i eget namn” (Eng., in his own name) exists not only in Ch. 6 sec. 7 in the ML, but also in the rules on what especially applies to certain travel agencies in Ch. 9 b of the ML. I have not gone into Ch. 9 b of the ML and travel agencies which are supplying travellers so-called travelling services in Ch. 9 b sec. 1 of the ML. The rule means that he travel agency is deemed to do one single transaction for the consideration that the traveller pays for using the underlying goods and services, like air trip and room in hotel, which the travel agency mediates in its own name to the traveller. However, I do not denote the travelling services as composite transactions, since the consideration from the traveller only gives rise to a transaction by the travel agency, whereas the travel agency has acquired the underlying goods and services from subcontractors like airlines and hotels. It is not one and the same consideration that gives rise to transactions by more than the receiver of the consideration from the traveller, but the travel agency accounts for the money which the travel agency shall not keep further to the subcontractors who make their transactions against the consideration they thereby receives from the travel agency. It is neither a question of a case resembling a composite transaction, since it, contrary to what is the case with the matching in connection with the application of the rules on goods in certain warehouses in Ch. 9 c of the ML, according to sections 4.4.1-4.4.4, is not a question of the travel agency dividing its own consideration into two parts. However, it is of interest in itself to make research on the expression ”i eget namn” and then with regard of both Ch. 9 b sec. 1 and Ch. 6 sec. 7 of the ML.

[295] See Forssén 2019a, section 12 202 020.

In the context I may mention that *Utredningen om en strukturell översyn av mervärdesskattelagstiftningen i Sverige* (Eng., the Investigation of a structural overview of the value-added taxation in Sweden) has left its report SOU 2020:31, *En ny mervärdesskattelag* (Eng., A new VAT act). If a proposal would be left in pursuance of what the investigation is suggesting, would a new VAT act come into force on 1 January, 2022 (postponed until 1 January, 2023). I have made a commentary via e-mail 2020-06-17 over SOU 2020:31 to the Treasury. Here I may only mention that the investigation inter alia suggests a rule in the new VAT act which would replace Ch. 2 sec. 13 of the ML, namely Ch. 5 sec. 42, whereby the expression ”en annan beskattningsbar person” (Eng., another taxable person) will replace ”en annan person” (Eng., another person).[296] This is in line with what I mention in section 1.4 regarding Ch. 2 sec. 13 of the ML, namely that such an adjustment of the rule should be made and that I have mentioned it in Forssén 2019c and in an e-mail on 25 June, 2019 to the administrative director of *Expertgruppen för studier i offentlig ekonomi (ESO)* by the Treasury, who answered 2019-06-27 that the information had been passed on to the Treasury's tax division. However, I had expected that the adjustment would be made earlier than 2022. Those interested may note that my commentaries of 2020-06-17 to the Treasury regarding the proposal of a new VAT act in SOU 2020:31 would be published in the JFT during 2020 (which also was the case).

If a new VAT act is introduced, like what is proposed in SOU 2020:31, there will probably cause a lot of research to do in the subject VAT in the future. Then can, as I am stating in section 4.7, Legal Semiotics function as a complement for studies of complex VAT questions. Such an element in the research like Legal Semiotics should in my opinion break a tradition of pure law dogmatic studies within the tax law. That tradition entails that the research become more or less only an exercise in deduction, above all as it is not completed with empirical studies. Deduction in itself gives, contrary to inductive analyses, not any new knowledge, since the task for law dogmatic studies only consists of interpreting and systematizing current law. Then the researcher and thereby the research in the subject VAT goes into what I call the trap of mathematics. When it, like in the present case with composite transactions, does not exist any definition in either the ML or the VAT Directive of what that concept means, should a model – a tool – be used or created as a support for the analysis, but it must not become the method in itself for the study to carry out so that the researcher gets stuck in the trap of mathematics.

[296] See SOU 2020:31 Part 1 p. 54.

6. RULES IN THIS BOOK WHICH ARE ALSO MENTIONED IN SOU 2020:31

Since June 2016 has an investigation been in progress of a law technical overview of the value-added tax legislation. *Utredningen om en strukturell översyn av mervärdesskattelagstiftningen i Sverige* (Eng., the Investigation of a structural overview of the value-added taxation in Sweden) has left its report SOU 2020:31, *En ny mervärdesskattelag* (Eng., A new VAT act), in June 2020.

Thus, the Government's investigation suggests that a new VAT act (NML) will replace the current ML on 1 January, 2022 (postponed until 1 January, 2023).

I express below the rules in the ML for which I am suggesting alterations or that they shall be abolished from the ML, and mention if they will or will not get a replacement in the NML according to Annex 5 in SOU 2020:31 Part 2.

Ch. 1 sec. 3 third para. first sen. of the ML replaced in the NML by Ch. 5 sec. 3 § first para.

Ch. 1 kap. sec. 3 third para. first sen. of the ML

"Med leverans av en vara förstås att varan avlämnas eller att den sänds till en köpare mot postförskott eller efterkrav." (Eng., With supply of goods is meant that the goods are delivered or sent to a purchaser cash on delivery).

Ch. 5 kap. sec. 3 first para. of the NML

"Med leverans av varor avses överföring av rätten att såsom ägare förfoga över materiella tillgångar."[297] (Eng., With supply of goods is meant the transfer of the right to dispose over tangible assets.)

Ch. 1 sec. 6 of the ML replaced in the NML by Ch. 5 sec:s 7 and 25

Ch. 1 sec. 6 of the ML

"Med vara förstås materiella ting, bland dem fastigheter och gas, samt värme, kyla och elektrisk kraft. Med tjänst förstås allt annat som kan tillhandahållas." (Eng., With goods is meant tangible property, including real estate and gas and heat, refrigeration and electricity. With services is meant everything else that can be supplied.)

[297] See SOU 2020:31 Part 1 p. 43.

Ch. 5 sec. 7 of the NML

”Med materiella tillgångar likställs el, gas, värme, kyla och liknande.”[298] (Eng., With tangible assets are on an equality electricity, gas, heat, refrigeration and similar.)

Ch. 5 sec. 25 of the NML

”Med tillhandahållande av tjänster avses varje transaktion som inte utgör leverans av varor.”[299] (Eng., With supply of services is meant each transaction which is not constituting supply of goods.)

For comparions with what I bring up in this book on the theme EU conformity regarding the determination of the tax object in the ML I may state that the alterations which would be made if the ML comes into force mean that that determination will be made closer to the VAT Directove's rules. I regard then in the first place the main rules in art:s 14(1) and 24(1) of the directive. In section 2.3.1 I account for, concerning transactions according to art:s 14(1) and 24(1) of the VAT Directive, that there are meant by:

- *supply of goods*, the transfer of the right to dispose of tangible property as owner; and

- *supply of services*, any transaction which does not constitute a supply of goods.

In the prresent respect may also be mentioned that the concept *omsättning* (Eng., transaction) in the ML would be abolished by the NML,[300] and that the definition of *vara* (Eng., goods – the concept *vara* is in the singular in Swedish and I use plural in English) would be abolished, by the main rule in Ch. 5 sec. 3 first para. of the NML on what is meant with supply of goods and that it is stated in Ch. 5 sec. 7 of the NML what in addition to that is meant with tangible assests. However, the concept goods will still remain if the NML comes into force, for example in Ch. 7 sec. 13 regarding taxable event at import of goods. I refer in that respect to section 1.5 and my note from Moëll 1996 regarding efforts to create a uniform concept goods. I consider that a uniform concept goods should be introduced in the secondary law for the field of indirect taxes, i.e. first VAT, customs and excise duties, with eventual ´necessary additions for each discipline. If the definition of goods is replaced in the NML with the expression tangible assets, can application problems arise regarding the indirect taxes as a whole.

Ch. 3 sec:s 2 and 3 first para. replaced in the NML by Ch. 10 sec:s 38 and 39

In section 2.7.2 I express the wordings of Ch. 3 sec. 2 first para. and sec. 3 first para. of the ML. A main rule on exemption from VAT applies in the field of *fastigheter* for VAT purposes (Ch. 3 sec. 2 first para.), and in Ch. 3 sec. 3 first para. it is stated in which cases mandatory taxation applies in the field, by the rule stating 'exemption from the exemption' in sec. 2. In the NML there is no material cange of the scope of the main rule on exemption and mandatory cases of taxation. The difference is that Ch. 10 sec. 38 of the NML states that such an exemption applies, and in Ch. 10 sec. 39

[298] See SOU 2020:31 Part 1 p. 44.
[299] See SOU 2020:31 Part 1 p. 49.
[300] See SOU 2020:31 Part 1 pp. 21 and 22.

first para. of the NML it is stated by way of introduction that ”[s]katteplikt gäller dock för” (Eng., taxation applies however) for the 12 cases enumerated in the rule.[301]

Ch. 9 sec:s 1 and 2 of the ML replaced in the NML by Ch. 12 sec:s 8-13 §§ and by a new VAT regulation

In the field of *fastigheter* there is neither any material change in the NML concerning voluntary tax liability. The rukes in Ch. 9 sec:s 1 and 2 of the ML are suggested to be replaced in the NML by Ch. 12 sec:s 8-13 and by a new VAT-regulation,[302] which thus would replace *mervärdesskatteförordningen (1994:223)* – Eng. the Swedish VAT regulation. It would still be so that the voluntary rules open for an ordinary private person being able to be comprised by them, since the word *fastighetsägare* (Eng., owner of real estate) in the rules means that they can comprise also an ordinary private person who is an owner of real estate. That is contrary to art. 137(1)(d) of the VAT Directive, which limits the taxation to regard owners of real estate who are taxable persons. However, the ML's concept *frivillig skattskyldighet* (Eng., voluntary tax liability) will be replaced by frivillig beskattning (Eng., voluntary taxation), since the concept tax liability would be abolished in the NML.[303] In the NML would the rules in Ch. 9 sec:s 1 and 2 of the ML be denoted as *frivillig beskattning genom mervärdesskatt i fakturan* (Eng., voluntary taxation by VAT in the invoice), Ch. 12 sec:s 8-11 §§, and *frivillig beskattning genom beslut av Skatteverket* (Eng., voluntary taxattion by decision by the tax authority), Ch. 12 sec:s 12 and 13 of the NML.

Ch. 3 sec. 9 of the ML replaced in the NML by Ch. 10 sec. 36

In section 4.3 I express the wording of the rule on exemption from VAT for bank- and financing services and for trading of securities, Ch. 3 sec. 9 of the ML. In the NML would the rule be replaced by Ch. 10 sec. 36, which has the same meaning. The only difference is that in Ch. 10 sec. 36 of the NML would the word *omsättning* (Eng., transaction) be replaced with the word *tillhandahållanden* (Eng., supplies).[304] That is in line with the concept *omsättning* in the ML becoming abolished by the NML.

Ch. 6 sec. 7 of the ML replaced in the NML by Ch. 5 sec. 37 first para.

In section 4.5 I express the special rule on tax liability for intermediation services. In the NML the rule would be replaced by Ch. 5 sec. 37 first para., and then the word *någon* (Eng., somebody) in the rule woud be replaced by *beskattningsbar person* (Eng., taxable person).[305] It does not mean any solution to the problems regarding composite transactions for VAT purposes which I am taking up with the intermediary rule in question. However, the altered wording would solve the problem with the present rule opening for an intermediary who is an ordinary private erson being able to be comprised by the VAT system.

[301] See SOU 2020:31 Part 1 pp. 103 and 104.
[302] See SOU 2020:31 Part 1 pp. 125 and 126.
[303] See SOU 2020:31 Part 1 p. 21.
[304] See SOU 2020:31 Part 1 p. 102.
[305] See SOU 2020:31 Part 1 p. 53

Ch. 7 sec. 7 of the ML replaced in the NML by Ch. 8 sec. 21

In section 1.2 I express the rule in Ch. 7 sec. 7 of the ML on division of the taxable amount for transactions of different taxable character or tax rates. In the NML would the rule be replaced by Ch. 8 sec. 21.[306] No material difference is intended. It is only a matter of adaptations of the words in the rule to the terminology in the VAT Directive. Thus, the word *omsättning* in definite or indefinite form will be replaced by the expressions *leveranser av varor eller tillhandahållanden av tjänster* (Eng., supply of goods or supplies of services) and *de leveranser eller tillhandahållanden* (Eng., the deliveries or supplies) respectively and the word *skattskyldighet* (Eng., tax liability) will be replaced by the word *beskattas* (Eng., subject to taxation). However, those alterations will not mean any solution of the problems regarding composite transactions for VAT purposes which I take up in this book.

Otherwise in this book about SOU 2020:31 – see section 5.2

See also sections 1.4 and 5.2 with my commentaries, regarding the rule on multi-purpose vouchers in Ch. 2 sec. 13 of the ML (whose wording I express in section 1.4), to the administrative director of *Expertgruppen för studier i offentlig ekonomi (ESO)* on 25 June, 2019 and that the rule, as I mention in section 5.2, would be replaced in the NML by Ch. 5 sec. 42. See moreover in section 5.2 regarding my commentary via e-mail on 17 June, 2020 over SOU 2020:31 to the Treasury. The commentary would be published in the JFT, no. 3 or 4, during 2020 (which also was the case – in no. 3).

The NML in relation to questions in my theses

In section 1.4 I state that I am not going through side issues E in licentiate's dissertation (Forssén 2011), but here, concerning the NML, I may mention the following regarding the problems which I have stated regarding the side issues D and E.[307] By the concept tax liability in Ch. 8 sec. 3 first para. of the ML being replaced with taxable person in Ch. 13 sec. 6 of the NML,[308] the determination of the right of deduction's emergence will be EU conform (side issue D). By the scope of application in the NML would become comprising both taxable and from VAT exempted transactions,[309] the control problems I have raised may have their solution. That *skattskyldighet* (Eng., tax liability) would be abolished form the proposed wording of Ch. 7 sec. 2 second para. of the SFL, so that the expression *skyldighet att betala* (Eng., liability for payment of) VAT instead would be used in the rule means an adaptation to the VAT Directive. However, the problem still remains with the rule opening for more activities being able to be registered to VAT for the same subject,[310] which I mean is non-EU conform (side issue E).

I note furthermore that the main question in my doctor's thesis (Forssén 2013) will not get a complete solution, only due to *skattskyldig* (Eng., tax liable) in Ch. 6 sec. 2 first sen. of the ML being replaced with *ekonomisk verksamhet* (Eng., economic activity) and *beskattningsbar person* (Eng., taxable person) in Ch. 4 sec. 16 first para. first sen.

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[306] See SOU 2020:31 Part 1 p. 88.
[307] See Forssén 2011, section 8.1.6. See also Forssén 2013, section 2.4 in the ending so-called coat regarding Forssén 2011 and Forssén 2013.
[308] See SOU 2020:31 Part 1 p. 132.
[309] See SOU 2020:31 Part 1 p. 21.
[310] See SOU 2020:31 Part 1 p. 270 rearding the suggested wording of Ch. 7 sec. 2 second para. of the. SFL.

of the NML.[311] The fundamental question is still whether a non-legal entity, like an *enkelt bolag* or *partrederi*, can constitute taxable person according to art. 9(1) first para. of the VAT Directive. The question of an alteration or clarification of such a meaning of the directive rule should be brought up on the EU level by Sweden together with Finland, wich I suggested in Forssén 2013 and also have repeated thereafter.[312]

The NML does neither give any solution to the problem I brought up as a side issue in Forssén 2013, namely that the general VAT rate of 25 per cent applies for a literary or artistic work which is created as a common work by a number of artists under the entreprise form *enkelt bolag*, whereas taxation would be made according to the reduced VAT rate of 6 per cent if they worked in a jointly owned limited company. The rule in the ML, Ch. 7 sec. 1 third para. no. 9 (previously no. 8), is only edited by the proposed Ch. 9 sec. 16 of the NML without any material alteration in the present respect.[313] In section 4.7 I have come back to that question also in this book.

[311] See SOU 2020:31 Part 1 p. 42.
[312] See Forssén 2013 p. 225 and Forssén 2019b p. 70. See also section 3.2.2 (regarding category V concerning the services).
[313] See SOU 2020:31 Part 1 p. 94.

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