South African Value-Added Tax: Place of supply rules for cross border supplies of services – a comparative analysis with Chapter 3 of the OECD's International VAT/GST Guidelines

by

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DECLARATION

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SUMMARY

The international norm is that Value-Added Tax (VAT) is a destination-based, consumption-type system that levies VAT on a supply in the destination of consumption. Some jurisdictions have explicit place of supply rules in their VAT legislation to determine the jurisdiction of consumption and consequently, the jurisdiction where the supply should be taxed. The South African VAT Act, does not contain such explicit place of supply rules, but has inferred place of supply rules interwoven into the various provisions.

Due to the increase in international trade, the OECD recognised that place of supply rules should be consistent between jurisdictions to ensure that unintentional non-taxation or double taxation does not occur. The OECD developed a set of recommended rules to determine the place of taxation for cross border supplies of services and intangibles which are described in Chapter 3 of the International VAT/GST Guidelines.

The purpose of this research study was to determine whether the inferred place of supply rules in the VAT Act and the aforementioned recommended rules in the OECD Guidelines are in harmony, and to make remediation recommendations where it found not to be in harmony. For purposes of this research paper, the outcome of the rules were considered in different scenarios of cross border supplies for the following types of services:

- massage services
- construction services
- consulting services
- subscription services to a web application

The research methodology followed was non-empirical research to identify and summarise the recommended rules in the OECD Guidelines and the inferred place of supply rules in the VAT Act. Furthermore, a comparative analysis was conducted by applying these rules to different scenarios of cross border supplies and comparing the results.

It was found that the outcome of the recommended rules in the OECD Guidelines and the inferred place of supply rules in the VAT Act are in harmony in respect of cross border supplies of massage services and construction services. The outcome were not in harmony in the following scenarios for consulting services and subscription services to web applications:

- Where a vendor (resident or non-resident supplier of consulting services or resident supplier of subscription services to a web application) supplies services to a non-resident customer who is in South Africa at the time that the services are rendered.
- Where a vendor (resident or non-resident supplier of consulting services or resident supplier of subscription services to a web application) supplies services to a resident customer, but the services are physically rendered outside South Africa.
- Where a non-resident non-vendor supplier supplies services to a resident customer and the services are utilised or consumed outside South Africa (in a foreign jurisdiction).

In order to ensure that unintentional non-taxation or double taxation does not occur where services are rendered between South Africa and foreign jurisdictions, the inferred place of supply rules in the VAT Act should be amended to render an outcome which is in harmony with the recommended rules in the OECD Guidelines. Recommendations were made on how the VAT Act can be amended to achieve such harmony.

OPSOMMING

Die internasionale norm is dat belasting op toegevoegde waarde (BTW) ‘n bestemmings-gebaseerde verbruiks-tipe stelsel is wat BTW hef op ‘n lewering in die jurisdiksie waar verebruik plaasvind. Sommige jurisdiksies het uitdruklike plek-van-lewering reëls in hul BTW wetgewing wat die jurisdiksie van verbruik, en gevolglik ook die jurisdiksie waar die lewering belas moet word identifiseer. Die Suid Afrikaanse BTW Wet bevat geen uitdruklike plek-van-lewering reëls nie, maar het wel geïmpliseerde plek-van-lewering reëls wat in verskeie bepalings vervat is.

Weens die toename in internasionale handel, het die OECD gemerk dat plek-van-lewering reëls tussen jurisdiksies konsekwent moet wees om te verseker dat onbedoelde geen-belasting of dubbel-belasting nie plaasvind nie. Die OECD het gevolglik ‘n stel voorgestelde reëls ontwikkel wat jurisdiksies in hul wetgewing kan implementeer om die plek te bepaal waar die lewering van oorgrens dienste of ontasbare goedere belas moet word en is vervat in Hoofstuk 3 van die OECD se riglyne-dokument.

Die doel van hierdie navorsingswerkstuk was om te bepaal of die geïmpliseerde plek-van-lewering reëls in die BTW Wet en die OECD se voorgestelde reëls in harmonie is, en om aanbevelings te maak in gevalle wat die uitkomste nie in harmonie is nie. Vir doeleindes van die navorsingswerkstuk is die uitkoms van die bogenoemde reëls in verskeie scenarios van oorgrens transaksies vir die volgende tipes dienste oorweeg:

- masserings dienste
- konstruksie dienste
- konsultasie dienste
- subskripsie dienste tot ‘n webtoepassing

Nie-empiriese navorsingsmetodologie was gevolg om die OECD se voorgestelde reëls, asook die geïmpliseerde plek-van-lewering reëls in die BTW Wet te identifiseer, op te som en te bespreek. ‘n Vergelykende analise is verder gedoen deur die reëls op ‘n verskeidenheid van oorgrens transaksies toe te pas en die resultate te vergelyk.

Daar is bevind dat die uitkoms van die OECD se voorgestelde reëls en die geïmpliseerde plek-van-lewering reëls in die BTW Wet ten opsigte van oorgrens masserings- en konstruksie dienste in harmonie is. Die uitkoms van die verskeie stelle reëls is egter in konflik

in die volgende oorgrens transaksies van konsultasie dienste asook subskripsie dienste tot ‘n webtoepassing:

- Waar ‘n BTW ondernemer (inwoner of nie-inwoner verskaffer van konsultasie dienste of inwoner verskaffer van subskripsie dienste tot ‘n webtoepassing) ‘n lewering maak aan ‘n nie-inwoner kliënt wat in Suid-Afrika is wanneer die dienste gelewer word.
- Waar ‘n BTW ondernemer (inwoner of nie-inwoner verskaffer van konsultasie dienste of inwoner verskaffer van subskripsie dienste tot ‘n webtoepassing) ‘n lewering maak aan ‘n inwoner kliënt, maar die dienste word fisies buite Suid-Afrika gelewer.
- Waar ‘n nie-inwoner nie-ondernemer verskaffer dienste aan ‘n inwoner kliënt lewer en die dienste word buite Suid-Afrika verbruik.

Om te versker dat dienste wat gelewer is tussen Suid-Afrika en ander jurisdiksies nie onbedoeld glad nie belas word, of dubbeld belas word nie, moet die geïmpliseerde plek-van-lewering reëls in die BTW Wet gewysig word om ‘n uitkoms te lewer wat in harmonie is met die OECD se voorgestelde reëls. Aanbevelings word gemaak hoe die BTW Wet gewysig kan word om sodanige harmonie te bereik.

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ABBREVIATIONS AND TERMINOLOGY

GST	Goods and Services Tax
GST Act	Goods and Services Tax Act, 1985
OECD	Organisation for Economic Cooperation and Development
SCA	Supreme Court of Appeal
the De Beers Case	Commissioner for SARS v De Beers Consolidated Mines (503/2011) [2012] ZASCA 103
the OECD Guidelines	International VAT/GST Guidelines
VAT	Value-Added Tax
VAT Act	Value-Added Tax Act, 89 of 1991

CHAPTER 1: INTRODUCTION

1.1. Background

According to the OECD (Organisation for Economic Co-Operation and Development) (2017:14), "the overarching purpose of Value-Added Tax is to impose a broad-based tax on consumption". Furthermore, international consensus exists that consumption must be taxed in accordance with the destination principle (OECD, 2017:16). In accordance with this international norm, South Africa has a destination-based, consumption-type VAT system (Botha, 2015:ii).

In terms of a consumption-type VAT system, VAT should be levied on final consumption, which, in principle, includes consumption by households as well as consumption by businesses involved in non-business activities (OECD, 2017:14). In terms of the destination principle, a supply should be taxed in the jurisdiction of consumption (OECD, 2017:15). It follows that the objective of VAT in terms of a destination-based, consumption-type VAT system is to tax final consumption in the place where the final consumption takes place.

In order to determine the place of consumption of a cross border supply of goods or services, some jurisdictions introduced explicit place of supply rules into their VAT systems. The place of supply rules have the objective to identify the place of consumption (Millar, 2008a:178). It follows that the place of supply, being the place where consumption takes place, is the place where the supply should be taxed. These place of supply rules are therefore also known as place of taxation rules, as it determines the jurisdiction where the supply should ultimately be taxed.

VAT is, however, in many instances levied before the time of consumption, at the time when the supply is made available for consumption (Millar, 2008a:178). Accordingly, place of supply rules are usually based on proxies that are aimed at determining where consumption is expected to take place (OECD, 2017: 41). These proxies stand in place of the supplier having to determine where the actual consumption takes place.

Where the place of supply rules introduced in different jurisdictions are not coordinated, there is a risk of unintended non-taxation or double taxation when cross border supplies are made between jurisdictions (OECD, 2017:10).

In accordance with the destination principle, goods moving across borders should be taxed in the jurisdiction of consumption (Schneider, 2000:10). This means imports should be taxed in the country of importation, and exports should be zero-rated so that there is no VAT on

the supply in the country from which the supply is exported (Schneider, 2000:10). Cross border supplies of physical goods are easy to regulate because the goods have to be cleared through customs when entering or exiting a jurisdiction (Steyn, 2010:233). Accordingly, the risk of unintended non-taxation or double taxation is low with cross border supplies of goods.

This is not the case with cross border supplies of services. Cross border supplies of services include, *inter alia*, services rendered by a supplier that is located in a different jurisdiction to the customer of the services, or where the services are physically rendered or consumed in a different jurisdiction to where the supplier or customer of the services is located. Since cross border supplies of services cannot be regulated by border controls, the risk of unintended non-taxation or double taxation is much higher. The focus of this research paper will be on this higher risk area.

Due to the recent increase in cross border trade, the OECD recognised that, in order to ensure that VAT systems interact consistently, jurisdictions would benefit from general agreed principles to determine the place where the supply should be taxed (OECD, 2017:10). As a result, the OECD developed the International VAT/GST Guidelines (the OECD Guidelines). The OECD Guidelines consist of a set of principles for the VAT treatment of cross border supplies of services and intangibles (OECD, 2017:11). Specifically, Chapter 3 of the OECD Guidelines contains a definition for the place of taxation of cross border supplies of services and intangibles made between businesses (business-to-business or B2B supply) as well as from a business to a final consumer (business-to-consumer or B2C supply) (OECD, 2017:12). Such definition consists of a set of recommended rules to determine the place of taxation for cross border supplies of services and intangibles for B2B and B2C supplies. The aim of the OECD Guidelines, which includes these recommended rules, are to serve as a reference point for jurisdictions when designing and implementing legislation in order to minimise the potential unintended non-taxation or double-taxation in cross border supplies of specifically services and intangibles (OECD, 2015c:2).

In South Africa's 2006 Budget Review it was stated that the VAT treatment of cross border supplies of services presents challenges to tax authorities worldwide and that the government seeks to provide greater clarity in this area (National Treasury, 2006:81). It was further submitted that due consideration will be given to the OECD Guidelines (National Treasury, 2006:81).

The Value-Added Tax Act, 89 of 1991 (VAT Act) does not contain any explicit place of supply rules, but does contain inferred place of supply rules. The inferred place of supply rules for

taxing cross border supplies of services can be found in the definitions of enterprise and imported services in section 1(1), read with the charging provisions in section 7(1) of the VAT Act. The zero-rating provisions contained in section 11(2) of the VAT Act contain further inferred place of supply rules for cross border supplies of services.

Various academics have indicated that the aforementioned inferred place of supply rules are not always sufficient to determine the place of supply and corresponding place of taxation for cross border supplies of services, or to establish whether a non-resident is required to register as a vendor in South Africa with certainty (Van Zyl, 2013c:255; Botha, 2015:58). Accordingly, it was recommended that South Africa implement explicit place of supply rules (Botha, 2015:61; Janse van Rensburg, 2011:78).

Similarly, the Davis Tax Committee (2015:10) recommended that South Africa implement explicit place of supply rules that are in line with the OECD's recommended rules and which are supported and complied with by other jurisdictions.

Despite these recommendations, as well as the statement in the 2006 Budget Review document, National Treasury has not implemented any explicit place of supply rules in the VAT Act, nor has there been any recent indication by National Treasury of an intention to implement explicit place of supply rules.

National Treasury did, however, amend the VAT Act with effect from 1 June 2014 by specifically including foreign suppliers of electronic services to South African customers (customer location determined in terms of a proxy) into the definition of enterprise (subparagraph (b)(vi) to the definition of enterprise in section 1(1) of the VAT Act). Due to this amendment, determining whether a foreign supplier of electronic services is required to register as a vendor in South Africa, and whether a cross border supply of electronic services by that foreign supplier is taxable in South Africa (if the place of supply is in South Africa), can be done with a degree of ease and certainty.

Even in the absence of explicit place of supply rules in the VAT Act, it is important that the inferred place of supply rules in the VAT Act are in harmony with international standards, such as the recommended rules in the OECD Guidelines, to promote international trade and prevent unintentional non-taxation or double taxation in cross border trade.

1.2. Problem statement

The main research problem identified is the uncertainty whether the inferred place of supply rules in the VAT Act are in harmony with the recommended rules to determine the place of

taxation for cross border supplies of services in Chapter 3 of the OECD Guidelines. To address the main research problem, the following secondary research problems are posed:

- What are the recommended rules to determine the place of taxation for cross border supplies of services in Chapter 3 of the OECD Guidelines?
- What are the inferred place of supply rules to determine the place of taxation for cross border supplies of services in the VAT Act?
- Is the outcome of the aforementioned inferred place of supply rules in the VAT Act in harmony with the outcome of the recommended rules in the OECD Guidelines in the various scenarios of cross border supplies? Where the outcome of the two sources is not in harmony in a specific scenario, what amendment(s) is (are) required to the VAT Act to obtain an outcome which is in harmony with the recommended rules in the OECD Guidelines?

1.3. Literature review

The relevant literature for each of the sub-problems is briefly discussed below.

1.3.1. OECD's recommended rules to determine the place of taxation for cross border supplies of services

Chapter 3 of the OECD Guidelines consists of the definition of the place of taxation for cross border supplies of services and intangibles for services rendered from a business to another business (B2B supplies) and services rendered by a business to a consumer that is not a business (B2C supplies) (OECD, 2017:12). Guideline 3.1 of the OECD Guidelines encapsulates the destination principle and determines that a cross border supply of services must be taxed according to the rules of the jurisdiction where consumption takes place (OECD, 2017:38).

The OECD recommends the use of specific proxies for B2B and B2C supplies respectively to determine the place of consumption and corresponding place of taxation for cross border supplies of services (OECD, 2017:38). These proxies are contained in the various recommended rules in the OECD Guidelines.

In terms of Guideline 3.2, the general rule for B2B supplies is that the jurisdiction in which the customer is located must have the taxing rights over the cross border supply of services (OECD, 2017:41). Guideline 3.3 provides that the customer's location can usually be determined in terms of the business agreement between the parties (OECD, 2017:42).

For B2C supplies, the OECD Guidelines distinguish between an on-the-spot supply, and any other supply that does not qualify as an on-the-spot supply. In terms of Guideline 3.5, the general rule for on-the-spot supplies is that the supply must be taxed in the place of performance (OECD, 2017:67).

The general rule for any B2C supplies other than on-the-spot supplies is that the supply must be taxed at the customer's location of usual residence in terms of Guideline 3.6 (OECD, 2017:69). This is generally where the customer regularly lives or has established a home (OECD, 2017:69).

The OECD (2017:79) acknowledges that the aforementioned general rules may not always give an appropriate result, and that the allocation of taxing rights by reference to a proxy other than the proxies in the general rules may be justified in certain instances (also known as specific rules).

Strict criteria are provided in Guideline 3.7 to determine whether such specific rule will be appropriate over the use of the general rule in a specific scenario, specifically that:

- the general rule should lead to an inappropriate result; and
- the specific rule should lead to a significantly better result,

where both these rules are considered against the following criteria:

- neutrality
- efficiency of compliance and administration
- certainty and simplicity
- effectiveness and fairness (OECD, 2017:79)

The OECD acknowledges that many jurisdictions have specific rules where services are rendered directly in connection with immovable property (OECD, 2017:84). Accordingly, Guideline 3.8 provides that where cross border supplies of services are made directly in connection with immovable property, the taxing rights may be allocated to the jurisdiction where the immovable property is located (OECD, 2017:84).

Even though not reduced to a Guideline, the OECD further acknowledges that where services and intangibles are rendered directly in connection with movable property, the location of the movable property may be the appropriate proxy for the place of consumption in such instance (OECD, 2017:86 & 87).

1.3.2. The VAT Act: Inferred place of supply rules to determine the place of taxation for cross border supplies of services

In order for a cross border supply of services to be taxable in South Africa, the supply must fall within one of the charging provisions contained in section 7(1) of the VAT Act (Steyn, 2010:236).

In terms of section 7(1) of the VAT Act, unless an exemption or exception applies, VAT is levied at the standard rate of 14% on

- the supply of services by a vendor in the course or furtherance of any enterprise carried on by him (section 7(1)(a) of the VAT Act); or
- the supply of imported services by any person (section 7(1)(c) of the VAT Act).

Section 7(1) of the VAT Act is subject to certain exceptions, such as the zero-rating provisions in section 11 of the VAT Act. Section 11(2) of the VAT Act provides that the supply of services that would have been taxable at the standard rate of 14% in terms of section 7(1), should be subject to VAT the zero-rate (rate of 0%) if that supply falls within one of the subsections of section 11(2) of the VAT Act.

Section 14(5)(b) of the VAT Act further provides that imported services will not be taxable in accordance with section 7(1)(c) of the VAT Act if that supply would have been subject to VAT at the zero-rate in accordance with section 11(2) of the VAT Act, if that same supply was rendered in South Africa.

It follows that the following provisions operate together to determine whether or not the consumption of a supply is considered to have taken place in South Africa and consequently whether that supply is subject to VAT in South Africa:

- The general taxing provision in section 7(1)(a) read with the definition of enterprise in section 1(1) of the VAT Act.
- The imported services provision in section 7(1)(c) read with the definition of imported services in section 1(1) of the VAT Act.
- The zero-rating provisions in section 11(2) of the VAT Act.

1.3.2.1. Cross border supply of services by resident or non-resident conducting an enterprise

In terms of section 7(1)(a) of the VAT Act, VAT must be levied in South Africa on all supplies of services made by a vendor in the course or furtherance of any enterprise carried on by that vendor.

In subparagraph (a) of the definition of enterprise in section 1(1) of the VAT Act, enterprise is defined as "any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit …"

A person may therefore be conducting an enterprise in South Africa if any activities are conducted inside or partly inside South Africa, on a continuous or regular basis (Fryer, 2014:95). Since the definition of enterprise includes any activity or enterprise conducted in or partly in the Republic, the definition of enterprise may also include a non-resident business or non-resident persons conducting activities partly in South Africa.

Sub-paragraph (b) to the definition of enterprise in section 1(1) of the VAT Act contains further specific inclusions. Subparagraph (b)(vi) is specifically relevant for determining the place of taxation for cross border supplies of services, as it provides when a non-resident supplier of electronic services is conducting an enterprise in South Africa. Subparagraph (b) to the definition of enterprise specifically includes the supply of electronic services by a person from a place in an export country, where at least two of the following circumstances are present:

- The recipient of the electronic services is a resident of the Republic.
- Payment in respect of the electronic services originates from a South African registered bank account.
- The recipient of the electronic services has a business address, residential address or postal address in the Republic.

National Treasury (2013:89) submitted that the above two out of three requirement criteria are used as a proxy for customer location being in South Africa. The purpose of the above specific inclusion is thus to require a foreign supplier of electronic services to register as a vendor, and account for VAT in South Africa, if the location of the recipient of the electronic services is in South Africa (National Treasury, 2013:89). Accordingly, a foreign supplier of

electronic services is conducting an enterprise for South African VAT purposes to the extent that it is supplying electronic services to a South African customer (determined in accordance with the proxy as provided above).

In terms of section 7(1)(a) of the VAT Act, all supplies of services made by a vendor in the course or furtherance of an enterprise, irrespective of where the supplier is located, or where the supplies are made, could be subject to VAT in South Africa (Glyn Jones, 2006; Botha, 2015:31). The place of supply in terms of section 7(1)(a) of the VAT Act is therefore connected to the definition of enterprise (Steyn, 2010:239; Fryer, 2014:95). It follows that the carrying on of an enterprise by a vendor determines that the place of supply is in South Africa, which triggers the taxing right in South Africa, even if the supplier is a non-resident, or if the supply is made to a customer in a foreign jurisdiction.

Section 11(2) of the VAT Act, however, contains certain exceptions to the above.

1.3.2.2. Imported services

In terms of section 7(1)(c) of the VAT Act, the supply of imported services by any person is subject to VAT in South Africa. It follows that the place of supply of imported services (a cross border supply of services) is in South Africa.

In order for a supply of services to constitute imported services, the services must be rendered by a non-resident supplier to a resident customer, and the services must be utilised or consumed in South Africa, otherwise than for the purposes of making taxable supplies (definition of imported services in section 1(1) of the VAT Act).

The phrase ‘utilised or consumed’ is not defined in the VAT Act and uncertainty sometimes exists when determining whether a service is utilised or consumed in South Africa (Botha, 2015:22; Van Zyl, 2013b:80). Determining whether services are utilised or consumed for purposes of making taxable supplies is generally a question of fact (Badenhorst, 2013). These aspects will be further discussed in Chapter 3.

Imported services is not taxable in accordance with section 7(1)(c) of the VAT (the place of supply is not in South Africa), if the supply would have been subject to VAT at the zero-rate in terms of section 11(2) of the VAT Act, if that same supply was rendered in South Africa (section 14(5)(b) of the VAT Act).

1.3.2.3. Zero-rated services in section 11(2) of the VAT Act

The taxing provisions in section 7(1) of the VAT Act are subject to certain exceptions and exemptions, such as the zero-rating provisions in section 11(2) of the VAT Act.

It follows that where a cross border supply of services falls within the South African VAT net in terms of section 7(1) of the VAT Act, such cross border supply may not be taxable in South Africa due to the provisions of section 11(2) of the VAT Act. According to Millar (2008b:5), the purpose of zero-rating provisions (section 11(2) of the VAT Act in this instance) is to exclude a supply from the local VAT net, due to the fact that the supply is likely to be consumed outside the local jurisdiction (South Africa in this instance). It follows that if the place of supply of a service is in South Africa in accordance with any of the aforementioned inferred rules in section 7(1) of the VAT Act, section 11(2) of the VAT Act may remove that supply from the South African VAT net on the basis that the supply is likely to be consumed outside South Africa.

Specifically, the following services may be zero-rated in terms of section 11(2) of the VAT Act if all requirements are complied with:

- Services that are supplied directly in connection with immovable property situated outside South Africa (section 11(2)(f) of the VAT Act).
- Services that are supplied directly in connection with movable property situated outside South Africa at the time the services are rendered (section 11(2)(g) of the VAT Act).
- Services that are physically rendered outside South Africa, unless the services constitute ‘electronic services’ (section 11(2)(k) of the VAT Act).
- Services that are supplied to a non-resident, not being services that are rendered directly in connection with immovable or movable property situated in South Africa at the time the services are rendered, or services rendered while the customer or any other person is physically present in South Africa at the time that the services are rendered (section 11(2)(l) of the VAT Act).

Since these services are likely to be consumed outside South Africa, the place of supply of the services as listed above is not in South Africa. The zero-rating provisions in section 11(2) of the VAT Act, as listed above, thus contain various inferred place of supply rules, as the section provides when the place of supply of the services is not in South Africa.

1.3.3. A comparative analysis of the outcome of the recommended rules in the OECD Guidelines and the inferred place of supply rules in the VAT Act in the various scenarios of cross border supplies

The outcome of the recommended rules to determine the place of taxation for cross border supplies of services in the OECD Guidelines are compared with the outcome of the inferred place of supply rules in the VAT Act in various scenarios of cross border supplies. This comparative analysis is conducted by way of applying the aforementioned two sources to various scenarios of cross border supplies of services and comparing the results.

For purposes of the analysis, and in order to consider all of the relevant place of supply rules as discussed, various scenarios of cross border supplies are considered for each of the following four types of services:

- massage services
- construction services
- consulting services
- subscription services to a web application

1.4. Research rationale and objectives

International trade is important for a developing country such as South Africa. If the VAT Act is not in line with international standards such as the OECD Guidelines, foreign jurisdictions could refrain from doing business in South Africa in order to avoid the risk of double taxation. This would negatively impact international trade between South Africa and foreign jurisdictions.

Even though the VAT Act has been criticized for its absence of explicit place of supply rules, and the uncertainties caused as a result thereof, National Treasury has made no indication of an intention to introduce explicit place of supply rules in the VAT Act. In the absence of explicit place of supply rules, it is important that the inferred place of supply rules in the VAT Act are in harmony with international standards, such as the OECD Guidelines. This is to support international trade and minimise the risk of unintended non-taxation or double taxation.

The objectives of this research study are therefore to:

- summarise and discuss the recommended rules to determine the place of taxation for cross border supplies of services in chapter 3 of the OECD Guidelines;
- analyse the relevant provisions of the VAT Act relating to the taxation of cross border supplies of services and identify the inferred place of supply rules in the VAT Act; and
- perform a comparative analysis between the outcome of the aforementioned recommended rules in the OECD Guidelines and the inferred place of supply rules in the VAT Act in various scenarios of cross border supplies. This is done in order to determine whether the inferred place of supply rules in the VAT Act are in harmony with the recommended rules in the OECD Guidelines in the various scenarios of cross border supplies. Where the outcome of the two sources are not in harmony, the aim is to determine what amendments are required to the VAT Act to obtain an outcome which is in harmony with the recommended rules in the OECD Guidelines in the conflicting scenarios.

1.5. Research method

A non-empirical study (historical method) is followed in this research study and consists of a literature review of the following:

- A review of the OECD Guidelines, specifically Chapter 3 which contains recommended rules to determine the place of taxation for cross border supplies of services.
- An in-depth analysis of the relevant sections of the VAT Act to determine the place of taxation for cross border supplies of services and the application of these provisions in line with court judgments, academic articles, textbooks as well as other research studies conducted on the interpretation and application of the relevant sections.

The study also consists of a comparative analysis between the outcome of the aforementioned recommended rules in the OECD Guidelines and the inferred place of supply rules in the VAT Act in various scenarios of cross border supplies. The comparative analysis is conducted by way of tables, by applying both the aforementioned sources to the various scenarios of cross border supplies, for four different types of services, and comparing the results.

1.6. Chapters

This research study is presented in five chapters, which are described below.

Chapter 1: Introduction

The introduction to this chapter sets out the background to the study and the relevance thereof. This chapter also describes the main and sub-problems, research rationale and objectives, the research methodology and the scope of the study.

The purpose of this chapter is to provide the reader with a proper understanding of the background to the problem, what the study aims to achieve and how it will be achieved.

Chapter 2: Determining the place of taxation for cross border supplies of services in terms of Chapter 3 of the OECD Guidelines

In this chapter, the recommended rules to determine the place of taxation for cross border supplies of services as described in Chapter 3 of the OECD Guidelines are summarised and discussed.

Chapter 3: The inferred place of supply rules to determine the place of taxation for cross border supplies of services in the VAT Act

In this chapter, the taxing provisions in the VAT Act are analysed to identify the existing inferred place of supply rules for cross border supplies of services.

This is done in order to apply the inferred place of supply rules in the VAT Act and recommended rules in the OECD Guidelines to various scenarios of cross border supplies and perform a comparative analysis of these results.

Chapter 4: A comparative analysis of the outcome of the recommended rules in the OECD Guidelines and the inferred place of supply rules in the VAT Act

The recommended rules in the OECD Guidelines, as summarised in Chapter 2, are compared to the inferred place of supply rules in the VAT Act, as identified in Chapter 3. This is done by applying both the aforementioned sources to various scenarios of cross border supplies, for four different types of services, and comparing the results.

The comparison shows in which scenarios the outcome of the inferred place of supply rules in the VAT Act are in harmony with the outcome of the recommended rules in the OECD Guidelines, and in which scenarios they are not in conflict. In the scenarios that the

outcomes of the two sources are not in harmony, it is determined why the two sources are in conflict and recommendations are made, where possible, to obtain harmonious results between the two sources.

Chapter 5: Conclusion

This chapter summarises the results of the research conducted and considers whether the research objectives have been met in order to address the research question. This chapter also contains remediation recommendations with respect to the research question.

CHAPTER 2: RECOMMENDED RULES IN CHAPTER 3 OF THE OECD GUIDELINES

2.1. Background to the OECD Guidelines

VAT has spread from fewer than 10 countries in the 1960s to about 136 countries in 2006 (OECD, 2006:i) and 165 countries at the time of completion of the OECD Guidelines in 2015 (OECD, 2017:3). This global spread of VAT, along with the rapid growth in international trade resulted in an increase in interaction between the VAT and systems of different jurisdictions.

The OECD recognised that jurisdictions will benefit from internationally agreed standards that will ensure that the interaction between VAT systems are consistent, and facilitate rather than discourage international trade (OECD, 2017:3). Consequently, the OECD's Committee on Fiscal Affairs (CFA) launched a project in 2006 to develop the OECD Guidelines (OECD, 2017:3). The purpose of the OECD Guidelines at the time was to set a standard for countries when designing and administering their local VAT rules (OECD, 2017:3). The aim of the OECD Guidelines is thus not to prescribe what the legislation must be, but to identify objectives and suggest ways to achieve such objectives (OECD, 2017:11).

At the third OECD Global Forum on VAT held in November 2015, the OECD Guidelines were endorsed as a global standard for the VAT treatment of international trade in services and intangibles, and to serve as guidance when designing and implementing legislation (OECD, 2015c:2).

The OECD Guidelines were also incorporated in the Recommendation on the Application of Value Added Tax/Goods and Services Tax to the International Trade in Services and Intangibles, and adopted by the OECD Council in September 2016 (OECD, 2017:4).

The OECD Guidelines currently consist of four chapters. In Chapter 1 the core features of VAT are described (OECD, 2017:12). Chapter 2 addresses the fundamental principle of VAT, the neutrality of tax, which applies to cross border trade (OECD, 2017:12). Chapter 3 contains a definition of the place of taxation for cross border supplies of services and intangibles between B2B and B2C supplies (OECD, 2017:12). Chapter 4 addresses the mechanisms for supporting the OECD Guidelines in practice, including mutual co-operation, dispute minimisation and application in cases of evasion and avoidance (OECD, 2017:12).

This chapter considers and summarises the definition of the place of taxation for cross border supplies of services and intangibles between B2B and B2C as contained in Chapter 3 of the OECD Guidelines. Such definition of the place of taxation consists of recommended

rules to determine the place of taxation for cross border supplies of services and intangibles for B2B and B2C supplies. Since this research paper focuses on cross border supplies of services, further references will only be made to cross border supplies of services, and not to both services and intangibles.

An understanding of the core features of VAT, as contained in Chapter 1 of the OECD Guidelines, facilitates the consideration of the recommended rules in Chapter 3 of the OECD Guidelines.

2.2. An overview of the core features of VAT in Chapter 1 of the OECD Guidelines

The overarching purpose of VAT is to tax final consumption, which includes final consumption by households, as well as consumption by businesses that are involved in non-business activities (OECD, 2017:14).

Furthermore, the OECD recommends, in accordance with the international norm, that VAT should be levied in terms of the destination principle (OECD, 2017:16). In terms of the destination principle, exports should not to be subject to VAT in the country from which the supply is exported (either zero-rated or free of VAT) (OECD, 2017:16). Such export should be taxed in the country of importation, on the same basis and at the same rate, as domestic supplies in the country of importation (OECD, 2017:16).

In light of the core features of VAT as discussed above, the recommended rules in Chapter 3 of the OECD Guidelines to determine the place of taxation for cross border supplies of services are summarised below.

2.3. Guideline 3.1: The destination principle

The OECD embraces the destination principle as the basic rule for the application of VAT in international trade (Hellerman, 2016:608) in Guideline 3.1. This Guideline states that “For consumption tax purposes internationally traded services and intangibles should be taxed according to the rules of the jurisdiction of consumption” (OECD, 2017:38).

In order to identify the jurisdiction of consumption, the OECD acknowledges that VAT systems require mechanisms to link a supply of services to the jurisdiction of final consumption or expected final consumption (OECD, 2017:38). Accordingly, the OECD developed a set of recommended rules to determine the place of taxation for cross border supplies of services. These rules are aimed at determining the place of consumption.

The OECD developed separate rules to determine the place of taxation for B2B and B2C supplies. These rules are contained in Guidelines 3.2 to 3.8 of the OECD Guidelines and identify the recommended approaches and relevant proxies to assist in determining the ultimate place of taxation for cross border supplies of services.

2.4. Determining the place of taxation for cross border B2B supplies of services

A B2B supply constitutes a supply where both the supplier and the customer are businesses (OECD, 2017:41).

2.4.1. Guideline 3.2: The general rule for B2B supplies

In order to facilitate the implementation of the destination principle, the general rule to determine the place of taxation for B2B supplies in Guideline 3.2 provides that the jurisdiction in which the customer is located should have the taxing rights over the cross border supply of services (OECD, 2017:42).

It follows that a cross border B2B supply of services should be taxed in the jurisdiction where the customer's business is located. This rule is based on the assumption that the business that acquires the services from a foreign jurisdiction will acquire it for the purposes of its local business operations (OECD, 2017:42).

The location of the customer's business is however not always clear, especially where a business is established in more than one jurisdiction. Accordingly, Guidelines 3.3 and 3.4 provide guidance on how the customer's business location can be determined for the application of Guideline 3.2.

2.4.2. Guidelines 3.3 and 3.4: Determining the customer's business location

Guideline 3.3 is based on the expectation that the business agreement will reflect the nature of the supply and the identity of the parties to the supply (OECD, 2017:42).

In order to ascertain the customer's business location, Guideline 3.3 provides that the identity of the customer can normally be determined in terms of the business agreement (OECD, 2017:42).

A supply of services to a legal entity (business) with a single location (single location entity) must be distinguished from a supply of services to a legal entity with multiple locations (multiple location entity).

Applying the general rule for B2B supplies made to single location entities is relatively straightforward (OECD, 2017:44), on the assumption that the service will be used at that single business location. However, the general rule for B2B supplies made to multiple location entities is more complex since the service can be used at any of the multiple business locations.

Accordingly, Guideline 3.4 provides that where the customer has establishments in more than one jurisdiction, the jurisdiction(s) where the establishment(s) that is (are) using the services is (are) located should have the taxing rights (OECD, 2017:45).

The OECD (2017:45) proposes three possible approaches to identify which of the customer's establishments is regarded as using the service and where that establishment is located. These approaches are the following:

- The direct use approach, which focuses directly on the establishment that uses the service.
- The direct delivery approach, which focuses directly on the establishment where the service is delivered.
- The recharge method, which focuses on the establishment that uses the service as determined based on an internal recharge arrangement within the multiple location entity (OECD, 2017: 45).

Each of the three approaches' aim is to ensure that the supply of services made to a multiple location entity is taxed in the jurisdiction where the customer's establishment using the services is located. None of these approaches are prescribed, as each approach may have merits in specific circumstances.

An in depth discussion of these approaches falls outside the ambit of this study.

2.4.3. Summary: B2B supplies

Cross border B2B supplies of services must be taxed in the jurisdiction where the customer's business is located.

The customer's location should be determined in accordance with the business agreement concluded between the parties. Where the services are supplied to a multiple location entity, the OECD recommends an analysis in accordance with one of the three recommended approaches to determine the location of the entity using the services.

2.5. Determining the place of taxation for cross border B2C supplies of services

A B2C supply is a supply where the customer is not a business (OECD, 2017:41). In accordance with the destination principle, the primary objective of the recommended rule in the B2C context is to predict the place where final consumption of the services is likely to take place (OECD, 2017:64).

For B2C supplies, the OECD recommends two general rules to implement the destination principle when determining the place of taxation. The first general rule, which is summarised in Guideline 3.5, relates to on-the-spot supplies. The second general rule, which is summarised in Guideline 3.6, relates to all B2C supplies that are not covered by Guideline 3.5.

2.5.1. Guideline 3.5: The general rule for B2C on-the-spot supplies

The term on-the-spot supplies is in effect defined in the wording of the guideline.

The general rule to determine the place of taxation for on-the-spot supplies in the B2C context, in terms of Guideline 3.5, is

> …the jurisdiction in which the supply is physically performed has the taxing rights over business-to-consumer supplies of services that
>
> - are physically performed at a readily identifiable place; and
> - are ordinarily consumed at the same time as and at the same pace where they are physically performed; and
> - ordinarily require the physical presence of the person performing the supply and the person consuming the service at the same time and place where the supply of such a service is physically performed (OECD, 2017: 67).

The OECD (2017:67) lists the following examples of on-the-spot supplies: services physically performed on the recipient, such as hairdressing, massage, beauty therapy, physiotherapy, accommodation, restaurant and catering services, entry to a cinema, theatre performances, trade fairs, museums, exhibitions, parks and attendance at sports competition.

The aim of Guideline 3.5 is to tax services that are typically consumed at the place where they are performed, and not supplies that can be supplied from a remote location or can be consumed at a different time and place than the place of performance (OECD, 2017:67). Consumption of these services ordinarily requires the physical presence of both the person that is performing the supply (the supplier), and the person that is consuming it (the end consumer) (OECD, 2017:67). Hence, the taxing rights are allocated to the jurisdiction where

the person performing the supply is, which is the same location as where the final consumer is located at the time of final consumption (OECD, 2017:67).

The OECD (2017:67) acknowledges that on-the-spot supplies can be acquired by businesses as well as by private consumers, and that jurisdictions can therefore adopt this same approach as a specific rule for B2B supplies (see discussion of Guideline 3.7 below).

2.5.2. Guideline 3.6: The general rule for B2C supplies not covered under Guideline 3.5

Guideline 3.6 is aimed at services that does not have an obvious connection with an identifiable place of physical performance (OECD; 2017:68). These are supplies that are neither ordinarily consumed at the place where they are physically performed, nor in the presence of the person performing the supply, nor of the person consuming it (OECD, 2017:68). According to the OECD (2017:68), this includes supplies that are likely to be consumed at a different time than the time of performance, or for which consumption or performance is ongoing.

The OECD (2017:69) lists the following as examples of services that are not covered by Guideline 3.5: consultancy, accountancy and legal services, financial and insurance services, telecommunication and broadcasting services, online supplies of software and software maintenance and online supplies of digital content (movies, television shows, music, digital data storage and online gaming).

For these types of services, the OECD recommend in Guideline 3.6 that “The jurisdiction in which the customer has its usual residence has the taxing rights over business to consumer suppliers of services other than those covered by Guideline 3.5” (OECD, 2017:69).

In terms of Guideline 3.6, the jurisdiction where the customer has his or her usual residence is a more appropriate proxy to determine the place of taxation for supplies other than on-the-spot supplies (OECD, 2017:68). This is on the basis that these types of services are ordinarily consumed in the jurisdiction where the customer has his or her usual residence (OECD, 2017:68).

The jurisdiction where the customer has his or her usual residence is where the customer regularly lives or has established a home, and cannot be the place where he or she is only temporary (OECD, 2017:69).

In order to determine the location of the customer's usual residence, the OECD recommends that the supplier use the information that is known, or can reasonably be known it at the time when the VAT treatment of the supply must be determined (2017:69). Hellerstein (2006:625) provided that indicia of the customer's usual residence could include information collected during the ordering process, such as the customer's country, address, bank details, credit card information, IP address, telephone number, trading history and language.

2.5.3. Summary: B2C supplies

The place of taxation for on-the-spot supplies is the place where those services are physically performed. For all other supplies (supplies that are not consumed on the spot), the place of taxation is the location of the recipient of the services, which is where the customer regularly lives or has established a home.

2.6. Specific rules for B2B and B2C supplies

The OECD (2017:79) recognises that the general rules to determine the place of taxation for cross border supplies of services as provided in Guidelines 3.2, 3.5 and 3.6 may not always give an appropriate result and that an alternative proxy may give a more appropriate result. Accordingly, the OECD Guidelines make provision for specific rules to be implemented in certain instances in order to correctly determine the location of use or consumption, and accordingly the place where the supply must be taxed in such instance.

The specific rules makes use of different proxies, for example the location of movable or immovable property, the actual location of the customer or the place of effective use and enjoyment (OECD, 2017:79).

2.6.1. Guideline 3.7: Application of specific rules

Guideline 3.7 provides that a proxy other than the customer's location can be used for B2B supplies when both the following conditions are met:

- The allocation of taxing rights with reference to the customer's location does not lead to an appropriate result when considering the following criteria:
  - neutrality
  - efficiency of compliance and administration
  - certainty and simplicity
  - effectiveness
  - fairness

- A proxy other than the customer's location would lead to significantly better results when considering the same criteria (OECD, 2017:78).

Similarly, the taxing rights for cross border B2C supplies of services may be allocated by a different proxy than the place of performance or the usual residence of the customer when both the aforementioned conditions are met (OECD, 2017:68).

It follows that a specific rule should only be used if the relevant general rule would not lead to an appropriate result, and the proposed specific rule would lead to a significantly better result, when both these rules are evaluated based on the aforementioned criteria (OECD, 2017:81).

The criteria as listed in Guideline 3.7 are discussed in Chapter 1 of the OECD Guidelines as follows:

- Neutrality: Taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations should be subject to similar levels of taxation.
- Efficiency: Compliance costs for businesses and administrative costs for the tax authorities should be minimised as far as possible.
- Certainty and simplicity: The tax rules should be clear and simple to understand so that taxpayers can anticipate the tax consequences in advance of a transaction, including knowing when, where, and how the tax is to be accounted.
- Effectiveness and fairness: Taxation should produce the right amount of tax at the right time. The potential for tax evasion and avoidance should be minimised while keeping counteracting measures proportionate to risks involved.
- Flexibility: The systems for taxation should be flexible and dynamic to ensure that they keep pace with technological and commercial developments (OECD, 2017: 18).

The OECD recommends (2017:80) that the use of the specific rules, which use different proxies than those set out in Guidelines 3.2, 3.5 and 3.6, be limited as far as possible. The reason for this being that a specific rules increases the risk of differences in interpretation and application between jurisdictions, thereby increasing the risk of unintended non-taxation or double taxation (OECD, 2017:80).

2.6.2. Guideline 3.8: Specific rule for supplies of services directly connected with immovable property

Guideline 3.8 provides that “For internationally traded supplies of services directly related with immovable property, the taxing rights may be allocated to the jurisdiction where the immovable property is located” (OECD, 2017:84).

It follows that both B2B and B2C supplies that are directly related to immovable property, may be taxed in the jurisdiction where that immovable property is located. This is if the relevant general rule does not render an appropriate result when tested against the criteria in Guideline 3.7, and the abovementioned specific rule renders significantly better results when tested against the same criteria.

2.6.3. Special considerations for supplies of services directly connected with tangible property

Even though not incorporated in a specific guideline, the OECD acknowledges that jurisdictions often make use of a special rule where services are directly related to tangible property situated in an export country (OECD, 2017:83). In such instances, jurisdictions often rely on the location of the tangible property to determine the place of taxation of the services related to the tangible property (OECD, 2017:86).

Since these services will generally be consumed in the jurisdiction where the property is located, the OECD acknowledge that the place of the tangible property may be an appropriate proxy for the place of final consumption or business use (OECD, 2017:87). The use of such a special rule, however, remains subject to the evaluation as provided in Guideline 3.7.

2.6.4. Summary: Specific rules

The use of a specific rule will only be appropriate if the general rule will not render appropriate results when tested against the criteria in Guideline 3.7, and the use of the specific rule will render significantly better results when tested against the same criteria. The OECD recommends that the use of specific rules must be limited.

Services that are directly related with immovable property, or tangible property situated in an export country, the services are expected to be consumed in the jurisdiction where the immovable property or tangible property is located. The application of these specific rules however remains subject to the conditions and criteria in Guideline 3.7.

2.7. Conclusion

In summary, the OECD recommends that the destination principle be adhered to by jurisdictions whereby cross border transactions are taxed in the jurisdiction where the supply is consumed. For purposes of determining the place of taxation for cross border supplies of services, the OECD provides general rules for B2B and B2C supplies respectively.

The general rules can be summarised as follows:

- A cross border B2B supply of services should be taxed in the jurisdiction where the customer's business is located.
- An on-the-spot B2C supply of services should be taxed in the jurisdiction where the supply is physically performed.
- A B2C supply that does not constitute an on-the-spot supply should be taxed in the jurisdiction where the customer has his or her usual residence.

If a general rules does not lead to an appropriate result in a specific scenario when tested against the criteria in Guideline 3.7, and a specific rule renders significantly better results in that same scenario when tested against the same criteria, the OECD recommends the use of that specific rule.

In the next chapter, the inferred place of supply rules in the VAT Act are identified and analysed. This is done in order to compare the outcome of the above recommended rules in the OECD Guidelines with the outcome of the inferred place of supply rules in the VAT Act in certain scenarios of cross border supplies of services.

CHAPTER 3: THE INFERRED PLACE OF SUPPLY RULES FOR SERVICES IN THE VAT ACT

3.1. Introduction

VAT was introduced in South Africa through the promulgation of the VAT Act in September 1991. The VAT Act was based on the principles of the New Zealand Goods and Services Tax (GST) system (Janse van Rensburg, 2011:17). The New Zealand Goods and Services Tax Act, 1985 (the GST Act) contains explicit place of supply rules which have not been included in the VAT Act. (Janse van Rensburg, 2011:17). This is arguably due to the lack of a need for place of supply rules at the time of promulgation of the VAT Act, since South Africa was largely isolated from the rest of the world at the time (Schneider, 2000:1).

South Africa's VAT system is a destination-based, consumption-type VAT system which is aimed at taxing domestic consumption, being goods and services that are consumed in South Africa (Janse van Rensburg, 2011:18). The supplier's location, or place where the goods or services are supplied from, should thus, in principle, not be taken into consideration (Janse van Rensburg, 2011:1).

In accordance with the destination principle, VAT should be levied on all local supplies of goods and services in South Africa, as well as on the importation of goods and services into South Africa (SARS, 2016:1). Exported goods and services should not be subject to VAT in South Africa (by zero-rating the export) (Schneider, 2000:55).

The VAT Act does not contain any explicit place of supply rules to determine the place of consumption and, ultimately, the place of taxation for cross border supplies of goods and services. Inferred place of supply rules to determine the place of consumption for cross border supplies of goods and services can, however, be deduced from the taxing provisions in the VAT Act.

In this chapter, the aforementioned inferred place of supply rules for services, which can be deduced from the taxing provisions in the VAT Act, and which specifically apply to cross border supplies of the following four types of services, are identified and discussed:

- consulting services
- massage services
- construction services
- subscription services to a web application

3.2. Determining the place of taxation for cross border supplies of services in terms of the VAT Act

When a cross border supply of services is made, it must be determined whether that supply is taxable in South Africa (consumption takes place or is expected to take place in South Africa), or in a foreign jurisdiction (consumption takes place or is expected to take place in a foreign jurisdiction).

A cross border supply of services is taxable in South Africa if it falls within one of the taxing provisions in section 7(1) of the VAT Act (Steyn, 2010:236). The taxing provisions in section 7(1) of the VAT Act provide that, unless an exemption or exception applies, VAT must be levied in South Africa at the standard rate

- on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him (subparagraph (a)); or
- on the supply of any imported services by any person ... (subparagraph (b)).

Section 7(1) of the VAT Act is subject to the exemptions and exceptions contained in the VAT Act. One such exception is section 11(2) of the VAT Act, which provides for services that would have been taxable at the standard rate in terms of section 7(1) of the VAT Act, to be subject to VAT at the zero-rate in certain instances.

Section 14(5)(b) of the VAT Act also provides that imported services will not be taxable in accordance with section 7(1)(c) of the VAT Act if that supply would have been subject to VAT at the zero-rate in accordance with section 11(2) of the VAT Act, if that same supply was rendered in South Africa.

The following zero-rating provisions may apply in respect of the cross border supplies of the four types of services as listed above:

- Services that are directly in connection with land, or any improvement thereto, situated in an export country (section 11(2)(f)).
- Services that are rendered directly in respect of movable property situated in an export country at the time the services are rendered (section 11(2)(g)).
- Services that are physically rendered elsewhere than in South Africa (section 11(2)(k)).

- Services that are supplied to a non-resident (section 11(2)(l)). This zero-rating is, however, subject to certain exceptions in which instances the cross border supply of services to a non-resident will not be subject to VAT at the zero-rate.

These exceptions are discussed in 3.6.5.

Fryer (2014:92) concluded that the taxing provisions in section 7(1) of the VAT Act, read with the zero-rating provisions in section 11(2) of the VAT Act, operate together to determine whether or not consumption of a cross border supply of services is considered to have taken place in South Africa and should consequently be taxed in South Africa. A detailed discussion of the inferred place of supply rules in these taxing provisions follows.

3.3. Inferred place of supply rule(s) in section 7(1)(a) of the VAT Act

3.3.1. Introduction

Section 7(1)(a) of the VAT Act provides that a vendor is required to levy and account for VAT on a supply of services made in the course and furtherance of any enterprise carried on by him, unless an exemption or exception applies.

The place of supply in terms of section 7(1)(a) of the VAT Act is connected to the definition of enterprise (Steyn, 2010:239; Fryer 2014:95). This is based on the fact that the supply of services made by a vendor in the course and furtherance of an enterprise is taxable in South Africa, regardless of where the supply is made (Glyn-Jones, 2006:8; Botha, 2015:31). It follows that the carrying on of an enterprise results in the place of supply being in South Africa, if the supply is made in the course and furtherance of the enterprise.

All supplies generally made in relation to, and for purposes of the normal activities of an enterprise, are made in the course of an enterprise (Botes, 2016:7-5). A supply is made in the furtherance of an enterprise if that supply will not normally be made during the carrying on of the enterprise, but is made for the benefit and advantage of the enterprise (Botes, 2016:7-5).

It follows that if a non-resident conducts an enterprise as defined, the place of supply of any cross border supply of services made in the course or furtherance of that non-resident's enterprise is in South Africa. This is the case even if the supply is made in, or from that non-resident supplier's foreign jurisdiction. Similarly, the place of supply of any cross border supply of services made in the course or furtherance of a resident's enterprise will be in South Africa, even if the supply is made to a non-resident, or physically rendered in a foreign jurisdiction.

However, even where the place of supply is in South Africa, the supply will only be taxed in South Africa in accordance with section 7(1)(a) of the VAT Act, if the supplier is a vendor.

Vendor is defined in section 1(1) of the VAT Act to include "any person who is or is required to be registered under this Act". Accordingly, vendor includes any person who is registered for VAT in South Africa, or a person who is required to be registered as a vendor in terms of the VAT Act, but has failed to do so.

In terms of section 23(1) of the VAT Act, every person who carries on any enterprise is required to register as a vendor if

- the total value of taxable supplies made by that person in the course of carrying on all enterprises has exceeded R1 million in the period of 12 months; or
- the total value of the taxable supplies in terms of a contractual obligation in writing to be made by that person in the period of 12 months will exceed R1 million.

Section 23(1A) of the VAT Act provides that, if that person is conducting an enterprise as defined in subparagraph (b)(vi) to the definition of enterprise (foreign person or business supplying electronic services to a South African customer), that person will be required to register as a vendor in South Africa if taxable supplies are made in excess of R50 000.

The link between registration as a vendor and the carrying on of an enterprise is clear. It follows that the definition of the term enterprise assists in determining the persons, activities and supplies that fall within the ambit of the South African VAT net.

3.3.2. Definition of enterprise

3.3.2.1. General test for enterprise – subparagraph (a)

Subparagraph (a) to the definition of enterprise in section 1(1) of the VAT Act contains the general test for determining whether a person (resident or non-resident) is conducting an enterprise. In terms of subparagraph (a) to the definition, enterprise means

> in the case of any vendor, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club.

In summary, enterprise in terms of the general test in subparagraph (a) require the following:

- an enterprise or activity
- carried on continuously or regularly
- in the Republic or partly in the Republic
- in the course or furtherance of which goods or services are supplied for consideration (not necessarily for profit)

The term and phrases ‘activity’, ‘continuously or regularly’ and ‘in the Republic, or partly in the Republic’, are not defined in the VAT Act, and are therefore subject to interpretation. Once it has been established that the person is conducting an ‘enterprise or activity’ ‘continuously or regularly’ ‘in the Republic or partly in the Republic’, determining whether goods or services are supplied by a person for consideration in the course or furtherance thereof is a question of fact and can be determined with relative ease and certainty.

SARS submitted (2013:10&11), in interpretation note 70, that

> The phrase ‘activity or enterprise’ provides the main context within which the other words used in the term ‘enterprise’ as defined in the VAT Act are to be interpreted, and essentially provides an activity based test. Further, it refers to the kind of activities which are carried out in a commercial context where goods or services are supplied for a consideration. Typically, this refers to a business or similar venture, conducted in an organised and business-like manner, where an element of risk taking is involved, and where the aim is to grow or make a profit or to ensure that the organization's activities are sustainable.

Botes (2016:1-enterprise 5) describes ‘continuous and regular’ as follows:

> According to SARS, 'continuously' is generally interpreted as ongoing, i.e. the duration of the activity has neither ceased in a permanent sense, nor has it been interrupted in a substantial way. The activity does not have to be carried on all the time, but there must be logical progression of the relevant steps needed to bring the activity to conclusion. The term ‘regular’ refers to an activity which takes place repeatedly, i.e. when an activity is repeated at reasonably fixed intervals, taking into consideration the type of supply and the time taken to complete the activities associated with making the supply.

It follows that SARS requires that business activities must be conducted repeatedly over a period of time for purposes of the definition of enterprise.

Furthermore, these business activities must be conducted in, or partly in South Africa for a person to be conducting an enterprise. A resident’s business will usually have a physical presence in South Africa and its activities will be conducted in South Africa, even when cross border supplies of services are made. In the absence of a definition for the phrase ‘in the

Republic or partly in the Republic', it is however not always certain whether the nature and scale of a non-resident's business activities in South Africa will constitute the carrying on of an enterprise partly in South Africa (Glyn-Jones, 2006:8).

The words 'partly in the Republic' imply that the non-resident's activities does not necessarily have to be conducted exclusively in South Africa (De Koker & Kruger, 2016:3-25). A non-resident person or business that is carrying on some South African based activities can therefore fall within the definition of enterprise, even though it mainly conducts non-South African based activities (De Koker & Kruger, 2016:3-25).

In this regard, Silver & Beneke (2016:para 3.7) have submitted that determining whether a business is conducting an enterprise in, or partly in South Africa is a matter of degree. It is arguable that the more business activities that are conducted in South Africa, the bigger the chances are that the activities will constitute an enterprise being conducted in, or partly in, South Africa (Silver & Beneke, 2016:para 3.7).

It follows that a resident or non-resident that is conducting business activities in South Africa from time to time, and supplies goods or services for consideration in the course or furtherance thereof, is likely to fall within the general definition of enterprise in subparagraph (a). As a result, the place of supply of all cross border supplies of services made by the resident or non-resident in the course or furtherance of its enterprise is in South Africa, regardless of where such supply is made in accordance with section 7(1)(a) of the VAT Act.

3.3.2.2. Specific inclusions in the definition of enterprise – subparagraph (b)

Subparagraph (b) to the definition of enterprise specifically includes the activities conducted by certain types of entities. Subparagraph (b)(vi) is specifically relevant for purposes of this study as it determines when a person supplying electronic services from a foreign location (foreign electronic services provider) is conducting an enterprise in South Africa. Foreign electronic services providers usually do not have a physical presence or actual business activities in South Africa (Botha, 2015:33) and therefore do not fall within the general definition of enterprise in subparagraph (a).

In terms of subparagraph (b)(vi) to the definition of enterprise in section 1(1) of the VAT Act, enterprise includes

> the supply of electronic services by a person from a place in an export country, where at least two of the following circumstances are present:
>
> (a) the recipient of the electronic services is a resident of the Republic;

(b) any payment to that person in respect of such electronic services originates from a bank registered or authorized in terms of the Banks Act, 1990; and
(c) the recipient of those electronic services has a business address, residential address or postal address in the Republic.

Electronic services are defined in section 1(1) of the VAT Act to mean those services prescribed by regulation in terms of this Act. National Treasury published the regulation listing various electronic services on 28 March 2014 (Government Gazette No 37489, Notice R221). The services are divided into categories, including education, games, internet-based auction services, miscellaneous services including e-books, audio visual content, still images and music and subscription services (Louw & Botha, 2014). It includes the provision of these services by means of electronic agent, electronic communication, or the internet (Louw & Botha, 2014). There are, however, some uncertainties in respect of the definition of electronic services, specifically whether certain services fall within the ambit of the definition (Lamprecht, 2014).

During the annual budget speech on 22 February 2017, the Minister of Finance at the time, Mr Pravin Gordan, announced that National Treasury proposed to update the electronic services regulations (National Treasury, 2017:47). In terms of the proposal, the scope of electronic services will be broadened, as well as uncertainties and practical difficulties will be removed (National Treasury, 2017:47).

A person is conducting an enterprise in terms of subparagraph (b)(vi) if it is supplying electronic services from a foreign location and two out of the three requirements listed above are complied with.

National Treasury (2013:89) submitted that the two out of three requirement criterion is used as a proxy for customer location in South Africa. It follows that a foreign electronic services provider is conducting an enterprise if the recipient of those electronic services is located in South Africa (determined in accordance with the proxy).

Accordingly, the place of supply of cross border supplies of services made by a foreign electronic services provider in the course and furtherance of its enterprise (being the supply of the electronic services to South African customers) is in South Africa. Since the place of supply is linked to the place of the enterprise, and the place of the enterprise is linked to the customer location, it can be deduced that the place of supply for a cross border supply of electronic services by a foreign electronic services provider is the customer location.

3.3.3. Summary

In terms of the inferred place of supply rule in section 7(1)(a), read with the definition of enterprise in section 1(1) of the VAT Act, the place of supply of any services that are supplied in the course or furtherance of an enterprise, is in South Africa. It follows that, where a resident or non-resident meets the requirements of the definition of enterprise, the place of supply of any services supplied in the course or furtherance of its enterprise (including cross border supplies of services), is in South Africa, irrespective of where the supply was made. If the place of supply of services is in South Africa, the supply will only be taxed in South Africa in accordance with section 7(1)(a) of the VAT Act if the supplier is a registered vendor.

Subparagraph (b)(vi) to the definition of enterprise specifically includes foreign supplies of electronic services to South African customers (determined in terms of the provided proxy). Since the place of the enterprise in terms of subparagraph (b)(vi) is dependent on the customer location, it can be deduced that the place of supply for a cross border supply of electronic services by a foreign electronic services provider is the customer location.

3.4. Inferred place of supply rule(s) in section 7(1)(c) of the VAT Act

3.4.1. Introduction

If a cross border supply of services is not taxable in accordance with section 7(1)(a) of the VAT Act, the supply may be taxable in South Africa in accordance with section 7(1)(c) of the VAT Act.

The liability to account and pay for the VAT on imported services is on the recipient of the services in accordance with section 7(2) of the VAT Act.

In terms of section 7(1)(c) of the VAT Act, the supply of imported services is subject to VAT in South Africa. It follows that the place of supply of imported services is in South Africa.

3.4.2. Definition of imported services

Imported services, as defined in section 1(1) of the VAT Act, mean

> a supply of services that is made by a supplier who is not a resident or carries on a business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilised or consumed in the Republic otherwise than for the purpose of making taxable supplies.

The cross border supply of services by a non-resident to a South African resident thus constitutes imported services to the extent that those services are utilised or consumed in South Africa, otherwise than for purposes of making taxable supplies.

The phrase 'utilised or consumed' is not defined in the VAT Act, and is therefore subject to interpretation. Van Zyl (2013c:255) submitted that the meaning of the phrase 'utilised or consumed' is not clear and that it could either mean

- where the service is physically rendered;
- where the recipient of the service resides or conducts business; or
- where the benefit of the service is enjoyed.

Since these could all be different jurisdictions, it is important to understand what is meant with the place where the service is 'utilised or consumed' in order to determine, with certainty, the jurisdiction in which the supply should be taxed (the place of supply).

The meaning of the phrase 'utilised or consumed' was considered by the Supreme Court Appeal (SCA) in the case of Commissioner for SARS v De Beers Consolidated Mines (503/2011) [2012] ZASCA 103 (the De Beers Case). The SCA had to determine whether the services acquired by the South African entity from a foreign services supplier comprised imported services as defined.

De Beers obtained legal and financial advice from an independent financial advisory company incorporated in London to consider the fairness of a consortium offer received in South Africa. SARS was of the view that these services constituted imported services as defined in section 1(1) of the VAT Act. The court had to determine whether the advice (services) acquired by De Beers from the London company constituted imported services as defined and accordingly, whether those services were subject to VAT in terms of section 7(1)(c).

The court found that a practical approach should be followed to determine whether the services were utilised or consumed in South Africa (CSARS v De Beers Consolidated Mines [2012] ZASCA 103, par 37; Van Zyl, 2013c:260). The court found that in the given circumstances, five substantive meetings were held to consider the fairness of the offer of which only two were held in London and three in South Africa (CSARS v De Beers Consolidated Mines [2012] ZASCA 103, par 37; Van Zyl, 2013c:260). Furthermore, the court found that De Beers' head office is situated in South Africa and the transaction in question, for which the advice was obtained, was approved, executed, and implemented in South

Africa, in terms of South African legislation (CSARS v De Beers Consolidated Mines [2012] ZASCA 103, par 37; Van Zyl, 2013c, 260). The court held that the fact that some of the meetings took place outside South Africa does not justify the conclusion that the services were utilised or consumed outside South Africa (CSARS v De Beers Consolidated Mines [2012] ZASCA 103, par 37). The court found that the compelling conclusion, based on the facts, was that the services were consumed in South Africa (CSARS v De Beers Consolidated Mines [2012] ZASCA 103, par 37).

Badenhorst (2013:48) considered the court's findings and submitted that even though a vendor may benefit from a supply of services in South Africa, the ultimate benefit should not determine the VAT status of the supply. He further submitted that the place where the services is actually consumed should determine the VAT status of the supply.

Determining the place of supply in section 7(1)(c), read with the definition of imported services in section 1(1) of the VAT Act, is thus linked to the place where the supply is actually utilised or consumed, and not dependent on any proxy to predict where the supply is expected to be consumed. It follows that the place of supply in terms of section 7(1)(c) of the VAT Act consists of an actual consumption test.

According to Silver & Beneke (2016: para 6.3), determining whether services are utilised or consumed where they are physically rendered or where the recipient of the services conducts business, depends on the nature of the services and the status of the recipient. Some services are, by their very nature, utilised and consumed at the place where they are physically rendered, in the presence of the person rendering the services (De Koker & Kruger, 2016:8-19). De Koker & Kruger (2016, 8-19) are of the view that in these instances, the location where the supply is made should be taken as the proxy for where the services are utilised or consumed.

Where the services are not consumed at the time and place where they are physically rendered, the court's proposed practical approach in terms of the De Beers case must be followed to determine whether services are utilised or consumed in South Africa.

The place of supply of imported services is in South Africa. Services constitute imported services if the services are rendered by a non-resident to a resident and the services are utilised or consumed in South Africa, other than for purposes of making taxable supplies. It follows that the place of supply of a cross border supply of services made by a non-resident is in South Africa if the services are utilised or consumed in South Africa by the recipient, other than for purposes of making taxable supplies.

In terms of the last phrase of the definition of imported services, the services must be utilised or consumed in South Africa 'otherwise than for the purpose of making taxable supplies'. Botes (2016:1-imported services 1) submitted that the aim of subjecting imported services to VAT in accordance with section 7(1)(c) is to ensure that the VAT consequences for imported services are the same as for services that are acquired from a local vendor, which are taxable in terms of section 7(1)(a) of the VAT Act.

A vendor who incurred VAT in terms of section 7(1)(a) of the VAT Act is, however, entitled to an input tax deduction in respect of the VAT incurred if the services are acquired for purposes of making taxable supplies in terms of section 16(3) of the VAT Act.

It follows that the reason for excluding services acquired for purposes of making taxable supplies from the definition of imported services is that the vendor should, in principle, be entitled to deduct the VAT as input tax if it is incurred for purposes of making taxable supplies (Botes, 2016:1-imported services 1). Since such input tax deduction would be made in the same tax period that the vendor would be required to account for VAT on the imported services, this would result in a net VAT effect of zero for the tax period.The inclusion of the phrase 'otherwise than for the purpose of making taxable supplies' in the definition of imported services therefore does not have any impact on the place of supply in these instances, but was merely included for administrative reasons.

It follows that the place of supply of a cross border supply of services by a non-resident to a resident is in South Africa if the services are utilised or consumed in South Africa, even if the imported services are acquired for purposes of making taxable supplies. VAT will, however, not be payable in accordance with section 7(1)(c) of the VAT Act if the services are imported for purposes of making taxable supplies.

3.4.3. Exemptions from section 7(1)(c) of the VAT Act

Section 14(5)(a) of the VAT Act provides that a supply will not be taxable in terms of section 7(1)(c) of the VAT Act if it is already taxable in terms of section 7(1)(a) of the VAT Act. This is to prevent that the imported services are double taxed in South Africa in terms of both sections 7(1)(a) and 7(1)(c) of the VAT Act.

Section 14(5)(b) of the VAT Act further provides that where a supply of services (the imported services) would have been zero-rated in terms of section 11(2) of the VAT Act if that supply was rendered in South Africa, no VAT should be payable on the imported services in terms of section 7(1)(c) of the VAT Act.

Accordingly, in order to determine whether a supply should be taxed in terms of section 7(1)(c) of the VAT Act or not, it must be determined whether that same supply of services would have been taxable at the zero-rate in terms of section 11(2) of the VAT Act if it was rendered in South Africa. If it is found that the supply would have been subject to VAT at the zero-rate in terms of section 11(2) of the VAT Act if it was rendered in South Africa, the supply is not taxable in South Africa in accordance with section 7(1)(c) of the VAT Act. It follows that the place of supply and corresponding place of taxation of such supply is not in South Africa in terms of section 14(5)(b) read with the zero-rating provisions in section 11(2) of the VAT Act.

Imported services are thus subject to the same zero-rating provisions, and corresponding place of supply rules, as contained in section 11(2) of the VAT Act. However, in respect of imported services, the supply will not be taxed in terms of section 7(1)(c) read with section 14(5)(b) of the VAT Act. These zero-rating provisions and corresponding place of supply rules are discussed under 3.5 below.

3.4.4. Summary

Imported services are taxable in South Africa in accordance with section 7(1)(c) of the VAT Act. Imported services are defined to include the services rendered by a non-resident or a business carried on outside South Africa to a resident and that resident is utilising or consuming the services in South Africa, otherwise than for purposes of making taxable supplies. It follows that the place of supply of imported services is in South Africa if the services are utilised or consumed in South Africa, which constitutes an actual consumption test. No VAT will, however, be payable in South Africa on the imported services in accordance with section 7(1)(c) of the VAT Act, if the services were acquired for purposes of making taxable supplies.

Furthermore, the supply will not be taxable in terms of section 7(1)(c) of the VAT Act if the supply would have been subject to VAT at the zero-rate if the supply was rendered in South Africa (section 14(5)(b) of the VAT Act). Imported services are thus subject to the same place of supply rules as contained in section 11(2), which is discussed below.

3.5. Inferred place of supply rule(s) in section 11(2) of the VAT Act

3.5.1. Introduction

In terms of section 7(1)(a) of the VAT Act, read with the definition of enterprise, the place of supply of services rendered by a vendor in the course or furtherance of an enterprise is in

South Africa, irrespective of where the supply is made. As a result, the place of supply of a service that is potentially consumed outside South Africa, may be in South Africa, and taxable in South Africa at the standard rate of 14% in accordance with section 7(1)(a) of the VAT Act. This is in conflict with the destination principle, which is aimed at only taxing domestic consumption.

Section 7(1)(a) of the VAT Act is, however, subject to certain exemptions and exceptions. One such exception is contained in section 11(2) of the VAT Act. Section 11(2) of the VAT Act provides that a supply that is subject to VAT at standard rate in terms of section 7(1), will be charged with tax at the zero-rate if the supply falls within the ambit of any of the subsections to section 11(2) of the VAT Act. This is on the basis that the supply is likely to be consumed in a jurisdiction other than South Africa.

The zero-rating provisions thus contain further place of supply rules as they provide when consumption of a supply is not, or is likely not to take place in South Africa, and that the place of supply is, or is likely to be in another jurisdiction (Davis Tax Commission, 2015:67). It follows that such supply should not be taxed in South Africa, but in the foreign jurisdiction where consumption is likely to take place.

As discussed above, section 14(5)(b) of the VAT Act also provides that a supply of imported services that is taxable in accordance with section 7(1)(c) of the VAT Act, will not be taxed in terms of the section if that same supply would have been subject to VAT at the zero-rate in terms of section 11(2) of the VAT Act if that same supply was rendered in South Africa.

It follows that, since the zero-rating provisions in section 11(2) of the VAT Act override the normal taxing provisions in section 7(1) of the VAT Act, the place of supply rules in section 11(2) similarly override the place of supply rules in section 7(1) of the VAT Act.

The place of supply rules in the zero-rating provisions are dependent on proxies to determine where the consumption is expected to take place. These proxies bear some relationship to the expected place of consumption of the supply.

As discussed in the introduction in 3.1 above, the VAT Act is based on the GST Act of New Zealand. The list of services that are zero-rated in South Africa closely follows the New Zealand model and uses a similar range of proxies (Millar, 2008a:201). It follows that the proxies used in the zero-rating provisions in the VAT Act follow the same principles and assumptions as the proxies used in the GST Act.

The zero-rating provisions that are relevant for purposes of this study will be discussed in more detail below, specifically, sections 11(2)(f), (g), (k) and (l) of the VAT Act and the relevant proxies used in these provisions.

3.5.2. Services directly in connection with land, or any improvement thereto – section 11(2)(f) of the VAT Act

Section 11(2)(f) of the VAT Act provides that any services that are rendered directly in connection with land, or to improve the land, which is situated in an export country, will be subject to VAT at the zero-rate. This zero-rating applies even if the recipient of the services is a resident of South Africa, or the services are physically rendered in South Africa (Botes, 2016:11-29).

Section 11(2)(f) of the VAT Act is based on section 11A(1)(e) of the GST Act, which provides that services that are supplied directly in connection with land situated outside New Zealand may be zero-rated (Millar, 2008a:193). The proxy used for the place of consumption of the services in this instance is the location of the land (Millar, 2008a:193).

It follows that the proxy used to determine the place of consumption, and therefore the place of supply, in terms of section 11(2)(f) of the VAT Act where services are rendered directly in connection with land or any improvement thereto, is the location of the land.

3.5.3. Services supplied directly in respect of movable property – section 11(2)(g) of the VAT Act

In terms of section 11(2)(g)(i) of the VAT Act, a supply of services may be zero-rated where the supply is made directly in connection with movable property situated in an export country at the time that the services is rendered.

These services may be zero-rated, even where the recipient of the services is situated in South Africa at the time that the services are rendered (Botes, 2016:11-30).

Section 11(2)(g)(i) is based on section 11A(1)(f) and 11A(a)(h) and (i) of the GST Act, which provides that services may be zero-rated if supplied directly in connection with goods situated outside New Zealand when the services are performed (Millar, 2008a:193). The proxy used for the place of consumption in this instance is the location of the goods (Millar, 2008a:193).

It follows that the proxy used to determine the place of consumption, and therefore the place of supply, in terms of section 11(2)(g)(i) of the VAT Act where services are supplied directly in connection with movable property situated outside South Africa, is the location of the movable property.

3.5.4. Services physically rendered outside South Africa – section 11(2)(k) of the VAT Act

Section 11(2)(k) provides that where services are physically rendered by a vendor outside the Republic, those services may be subject to VAT at the zero-rate.

Section 11(2)(k) is based on section 11A(1)(j) and 11A(1B) of the GST Act of New Zealand, that provides that services may be zero rated if physically performed outside New Zealand (Millar, 2008a:194). The proxy used for the place of consumption in this instance is the place of receipt of performance (Millar, 2008a:194).

It follows that the proxy used to determine the place of consumption, and therefore the place of supply, in terms of section 11(2)(k) of the VAT Act for services physically rendered outside South Africa, is the place of receipt of performance.

The GST Act, however, contains a condition for the application of this zero-rating provision. The zero-rating only applies if the nature of the services is such that they can only be physically received at the time and place where they are physically performed (Millar, 2008a:194). This condition has not been included in the VAT Act.

Section 11(2)(k), however, does not apply in respect of electronic services supplied by a registered foreign electronic services provider. This is on the basis that the services of a foreign electronic services provider will always be physically rendered in a foreign location (Botes, 2016:11-25).

3.5.5. Services rendered to a non-resident – Section 11(2)(l) of the VAT Act

Section 11(2)(l) of the VAT Act provides that the supply of services to a person who is not a resident of South Africa will be subject to VAT at the zero-rate. The zero-rating will however not apply if the services are rendered directly

- in connection with land or any improvement thereto situated inside South Africa (subsection (i) to section 11(2)(l) of the VAT Act);

- in connection with movable property situated inside South Africa at the time the services are rendered (subsection (ii) to section 11(2)(l) of the VAT Act); or
- if the person to whom the services are rendered is situated in South Africa at the time the services are rendered (subsection (iii) to section 11(2)(l) of the VAT Act).

Section 11(2)(l) of the VAT Act is based on section 11A(1)(k) of the GST Act, which provides that services may be zero-rated if supplied to a non-resident person who is outside New Zealand at the time of performance, if the services are neither

- rendered directly in connection with land in New Zealand; nor
- rendered directly in connection with goods in New Zealand at the time the services are performed (Millar, 2008a:194).

Millar (2008a:194) submitted that the proxy used to determine the place of consumption in this instance is the location of the recipient's residence, plus

- the location of the land;
- the location of the goods; or
- the place of use or enjoyment, respectively.

In accordance with the above, the proxy used to determine the place of consumption, and therefore the place of supply, in terms of section 11(2)(l) of the VAT Act, where services are rendered to a non-resident, is the location of the residency of the recipient of the services. The exceptions to the rule (overriding proxies) are contained in subparagraphs (i) to (iii).

The overriding proxies when determining the place of consumption, and therefore the place of supply for section 11(2)(l) (that is where services are rendered to a non-resident), can be summarised as follows:

- Where services are rendered directly in connection with land or any improvement thereto, the location of the land.
- Where services are rendered directly in connection with movable property, the location of the movable property.
- Where the non-resident recipient (or his agent or employee) is physically in South Africa at the time the services are rendered, the physical location of that recipient (or his agent or employee) at the time the services are rendered.

3.5.6. Summary

The zero-rating provisions in section 11(2) contain various place of supply rules based on proxies, which are aimed at determining the place where consumption of the cross border supply of services is, or is expected to take place, and ultimately, where that supply should be taxed. These place of supply rules have been summarised in 3.6.2 to 3.6.5 above.

Section 11(2) of the VAT Act thus cause a cross border supply of services that would have been taxed at the standard rate in terms of section 7(1)(a) of the VAT Act to be taxed at the zero-rate. Similarly, a supply of imported services that would have been taxed in accordance with section 7(1)(c) will not be taxable under the section if that same supply would have been subject to VAT at the zero-rate in accordance with section 11(2) if that supply were rendered in South Africa (section 14(5)(b) of the VAT Act). This is on the basis that these supplies are not, or are not likely to be consumed in South Africa.

3.6. Conclusion

The South African VAT system is a destination-based, consumption-type VAT system and is accordingly aimed at taxing domestic consumption. It follows that when a cross border supply of services is made, that supply should be taxed in South Africa if consumption takes place in South Africa.

South Africa has inferred place of supply rules to determine the place of consumption, which ultimately determine where the supply should be taxed. These inferred place of supply rules are incorporated in, *inter alia*, section 7(1)(a) read with the definition of enterprise, section 7(1)(c) read with the definition of imported services, and the zero-rating provisions contained in section 11(2) of the VAT Act.

In terms of the aforementioned inferred rules, the place of supply of a cross border supply of services is in South Africa if

- the services are supplied in the course or furtherance of an enterprise (section 7(1)(a) of the VAT Act); or
- the services constitute imported services (section 7(1)(c) of the VAT Act).

However, a supply of imported services will not be taxed in terms of section 7(1)(c) of the VAT Act if the same supply would have been taxable at the zero-rate in terms of section 11(2) of the VAT Act if the supply was made in South Africa (section 14(5)(b) of the VAT Act).

Furthermore, a supply that would have been taxed in South Africa at the standard rate in terms of section 7(1)(a), will be subject to VAT at the zero-rate if the supply falls within one of the zero-rating provisions in section 11(2) of the VAT Act.

Section 11(2) of the VAT Act contains further overriding place of supply rules, which are based on proxies to predict where consumption of that supply is expected to take place.

In the next chapter, the inferred place of supply rules for cross border supplies of services in the VAT Act, as discussed above, will be compared to the recommended rules in Chapter 3 of the OECD Guidelines. This is done to determine whether the aforementioned inferred place of supply rules in the VAT Act are in harmony with the recommended rules in the OECD Guidelines. The comparison will be conducted by way of applying both the aforementioned inferred rules and the OECD's recommended rules to the same scenarios for the four different types of services as listed under 1.1 comparing the results.

CHAPTER 4: A COMPARATIVE ANALYSIS OF THE OUTCOME OF THE RECOMMENDED RULES IN THE OECD GUIDELINES AND THE INFERRED PLACE OF SUPPLY RULES IN THE VAT ACT

4.1. Introduction

In Chapter 2, the OECD's recommended rules to determine the place of taxation for cross border supplies of services were summarised and discussed. In Chapter 3, the inferred place of supply rules in the VAT Act were identified and discussed.

In this chapter, a comparative analysis is conducted between the aforementioned two sources. This is done by applying the recommended rules in the OECD Guidelines and the inferred place of supply rules in the VAT Act to different scenarios of cross border supplies. A comparison of the results for each specific scenario will indicate whether the outcome of the inferred place of supply rules in the VAT Act are in harmony with the outcome of the recommended rules in the OECD Guidelines in the various scenarios of cross border supplies.

If the same results are obtained for a scenario, no unintentional non-taxation or double taxation should occur in that specific scenario. This is on the assumption that the foreign jurisdiction(s) relating to the cross border supply implemented rules similar to that of the OECD's recommended rules. In the case of conflicting results, there is a risk that unintentional non-taxation or double taxation may occur where a cross border supply of services is made in that scenario.

Where none of the inferred place of supply rules in the VAT Act are applicable in respect of a specific scenario, the place of supply and corresponding place of taxation is not in South Africa in that scenario. In such a case, the assumption is that it is the legislature's intention that the supply should not be taxed in South Africa in that instance (intentional non-taxation).

4.2. Comparative analysis

4.2.1. Differences between the two sources

It is evident from Chapter 2 and Chapter 3 that the nature of the recommended rules in the OECD Guidelines is distinguishable from the nature of the inferred place of supply rules in the VAT Act. This should be taken into consideration for purposes of conducting the comparative analysis.

Firstly, the recommended rules in the OECD Guidelines have an allocation function, as it allocates the taxing right to a specific jurisdiction. In contrast, the inferred place of supply

rules in the VAT Act have limited allocation rights. This is because they determine whether the place of supply (and consequent place of taxation) is in South Africa or not. They do not allocate the taxing right to any other foreign jurisdiction in the instance where the place of supply and consequent place of taxation is not in South Africa.

Furthermore, the recommended rules in the OECD Guidelines distinguish between a B2B and a B2C supply. It follows that the status of the customer of the supply (being a business or a consumer) determines which recommended rule in terms of the OECD Guidelines are applicable in respect of the specific supply. This is not the case with the inferred place of supply rules in the VAT Act. The relevant inferred place of supply rule in terms of the VAT Act will firstly depend on whether the supplier is a vendor or a non-vendor. It follows that the VAT vendor status of the supplier determines which place of supply rule is, at the offset, applicable in respect of the specific supply. If the supply is made by a non-vendor supplier, the relevant inferred place of supply rule should only be applied if the supplier is a non-resident and the customer is a resident (in accordance with definition of imported services in section 1(1) of the VAT Act).

4.2.2. Process followed

As discussed above, the status of the customer of the supply (whether business or consumer) determines which of the OECD's recommended rules are applicable in a specific scenario. On the contrary, the status of the customer has no impact on the applicable inferred place of supply rule in terms of the VAT Act. For purposes of the VAT Act, the VAT vendor status of the supplier determines which inferred place of supply rule should be applied at the offset. The VAT vendor status of the supplier however does not affect the applicable recommended rule in terms of the OECD Guidelines.

Accordingly, for purposes of the analysis and for determining the place of taxation in terms of the recommended rules in the OECD Guidelines for each scenario, a distinction is made between a supply made to a business and a supply made to a consumer. For purposes of determining the place of supply and consequent place of taxation in terms of the VAT Act in the same scenarios, a distinction is made between a supply made by a vendor and a supply made by a non-vendor.

A further factor that affects the applicable rules in terms of both the OECD Guidelines and VAT Act is the nature of the type of services that are supplied. For purposes of the analysis, and in order to consider the application of all the relevant rules as discussed in Chapters 2 and 3, the following four types of services are considered:

- massage services
- construction services
- consulting services
- subscription services to a web application

The main factors that may affect the outcomes in respect of the analysis are:

- the location of the supplier's business;
- the location of the customer's business or the customer's usual residence;
- depending on the type of services that are supplied:
    - for on-the-spot-supplies, such as massage services, the location where the services are physically rendered;
    - for services rendered directly in connection with immovable or movable property, such as construction services, the location of the immovable or movable property; or
    - for other services that can be used or implemented in a different jurisdiction from where the supplier and the customer is located, such as consulting services and subscription services to a web application (electronic services), the place of use of the supply.

It follows that there are six different possible scenarios of cross border supplies that are considered for each of the four types of services. The scenarios will vary depending on the factors as listed above.

Other factors that may also affect the place of supply and consequent place of taxation in terms of the VAT Act in these scenarios are the place where the services are physically rendered, or, where the supply is rendered by a vendor to a non-resident customer, the location of the customer at the time that the services are rendered. Where applicable, these additional factors are also taken into consideration as part of the analysis.

For purposes of the analysis the place of taxation will be determined in each of the six scenarios for the four types of services in accordance with the recommended rules in the OECD Guidelines. Similarly, the place of supply and consequent place of taxation will be determined in these same scenarios, in accordance with the inferred place of supply rules in the VAT Act. The results in each of the scenarios are compared to determine whether the outcome of the inferred place of supply rules in the VAT Act are in harmony with the outcome of the recommended rules in the OECD Guidelines in the respective scenarios for each

specific type of service. It follows that if the results found in respect of the OECD Guidelines and the VAT Act corresponds, the inferred place of supply rules in the VAT Act are in harmony with the recommended rules in the OECD Guidelines. Where the results found in respect of the OECD Guidelines and the VAT Act do not correspond, the inferred place of supply rules in the VAT Act are not in harmony with the recommended rules in the OECD Guidelines and there is a risk of unintentional non-taxation or double taxation in those specific scenarios.

The comparison is conducted by way of tables, which are attached as Annexure A. The application of the recommended rules in the OECD Guidelines and the application of the inferred place of supply rules in the VAT Act are considered in separate tables for each of the four types of services.

In the first table for each of the four types of services, the place of taxation is determined in each of the six scenarios for both B2B and B2C supplies, in accordance with the recommended rules in the OECD Guidelines. In the first application column for B2B and B2C supplies respectively, the place of taxation is determined in terms of the applicable rule in the OECD Guidelines. In the second set of application columns, it is concluded whether the place of taxation will accordingly be in South Africa in terms of the recommended rules in the OECD Guidelines, or not. This is done in order to compare the results for the OECD Guidelines with the results for the VAT Act.

In the second table for each of the four types of services, it is determined whether or not the place of supply (and consequent place of taxation) is in South Africa in terms of the inferred place of supply rules in the VAT Act in each of the six scenarios. In the first application column, it is determined whether the place of supply (and consequent place of taxation) is in South Africa in the specific scenario if the supplier is a vendor. In the second application column, it is determined whether the place of supply (and consequent place of taxation) is in South Africa in the scenario if the supplier is not a vendor. The relevant inferred place of supply rule in an instance where the supplier is a non-vendor is only applicable if the supplier is a non-resident and the customer is a resident.

The third table for each of the four types of services summarises the results for both the OECD Guidelines and the VAT Act in the six different scenarios. Where the results are found to be in conflict, the area will be greyed out in these summary table.

The results in terms of the six scenarios for each of the four different types of services in accordance with the analyses in the various tables in Annexure A are discussed below.

4.3. Massage services

4.3.1. Nature of massage services

Due to the nature of massage services, both the supplier of the services and the customer are required to be present at the same place, at the time that the services are rendered. Furthermore, due to the nature of the services, they are consumed at the same time that the services are physically rendered. This type of service is commonly known as on-the-spot supplies.

4.3.2. Application of relevant rules

4.3.2.1. OECD

The application of the recommended rules in the OECD Guidelines for the different scenarios of cross border supplies of massage services are considered in Table 4.1.1 of Annexure A.

In terms of the recommended general rule for B2B supplies in Guideline 3.2, the supply must be taxed in the location of the customer's business. The recommended general rules for B2C supplies, however, distinguish between an on-the-spot supply, such as massage services, and any other supply that does not constitute an on-the-spot supply. An on-the-spot supply such as massage services must be taxed in the location where the services are physically performed in terms of Guideline 3.5.

As noted in 2.5.1 the OECD acknowledges that jurisdictions may implement a specific rule similar to Guideline 3.5 for on-the-spot supplies made in the B2B context, on the basis that businesses also acquired on-the-spot supplies. Accordingly, the analysis in Table 4.1.1 of Annexure A is conducted based on the assumption that the foreign jurisdiction adopted a specific rule for B2B on-the-spot supplies, based on the location where the services are physically performed.

The specific rule will only be applicable if the analysis as set out in Guideline 3.7 is applied and it is found that the recommended general rule for B2B supplies renders an inappropriate result when tested against the provided criteria in Guideline 3.7. The specific rule must also render significantly better results when tested against the same criteria.

4.3.2.2. VAT Act

The application of the inferred place of supply rules in the VAT Act for the different scenarios of cross border supplies of massage services are considered in Table 4.1.2 of Annexure A.

4.3.3. Findings

In terms of the analysis for the various scenarios of cross border supplies of massage services, the outcome of the recommended rules in the OECD Guidelines and the inferred place of supply rules in the VAT Act correspond in all instances as is evident from Table 4.1.3. This is on the assumption that the foreign jurisdiction that implemented the OECD's recommended rules adopted a specific rule for on-the-spot supplies in the B2B context based on the location where the services are physically performed.

It is submitted that the analysis should render the same results for any other type of on-the-spot supply.

4.3.4. Summary

The outcome of the inferred place of supply rules in the VAT Act are in harmony with the outcome of the recommended rules in the OECD Guidelines in respect of on-the-spot supplies such as massage services. This is on the assumption that the foreign jurisdiction that implemented the OECD's recommended rules adopted a specific rule based on the location where the services are physically performed for B2B on-the-spot supplies.

4.4. Construction services

4.4.1. Nature of construction services

Construction services are services that are physically provided in connection with land or immovable property to, for example, erect, maintain, change or improve the physical status of the land or immovable property. It follows that the only place where the construction services can be consumed is the location where the land or immovable property is situated. This principle similarly applies to any other services that are rendered directly in connection with land, immovable property or any improvement thereto, including architecture services, plumbing services, or conveyancing services in respect of the transfer of ownership of property.

On this same basis, where services are rendered directly in connection with movable property, such as services rendered to repair, improve or alter the movable property, the services are most likely to be consumed at the place where the movable property is situated at the time.

De Koker & Kruger (2016:5-31) submitted that the phrase 'directly in connection with' requires a relationship of more than remote degree, so that the cause and effect must be

close and uninterrupted. According to De Koker & Kruger (2016:5-31), the link between the services and the subject matter (being the immovable or movable property) must be direct in the sense that it must be close, and not remote.

4.4.2. Application of relevant rules

4.4.2.1. OECD

The application of the recommended rules in the OECD Guidelines for the different scenarios of cross border supplies of construction services is considered in Table 4.2.1 of Annexure A.

The OECD (2017:60 & 61) acknowledges that in certain instances, for both B2B and B2C supplies, where the services are rendered directly in connection with immovable or movable property, a rule based on a proxy which is linked to the location of the customer's business or usual residence will not render appropriate results. A rule based on a proxy linked to the location of the immovable property, or movable property at the time that the services are rendered, may render a more appropriate result in these instances.

Accordingly, the analysis in Table 4.2.1 of Annexure A is conducted on the basis that the foreign jurisdiction adopted a specific rule in accordance with OECD Guideline 3.8. In terms of the specific rule, where are services rendered directly in connection with immovable property, the supply should be taxed in the location of the immovable property. The specific rule will only be applicable if the analysis as set out in Guideline 3.7 is conducted, and it is found that the general recommended rules for B2B and B2C supplies in Guidelines 3.2 and 3.6 render inappropriate results when tested against the provided criteria in Guideline 3.7 in the specific scenario. In addition, the specific rule based on the location of the immovable or movable property must render significantly better results when tested against the same criteria in the specific scenario.

4.4.2.2. VAT Act

The application of the inferred place of supply rules in the VAT Act for the different scenarios of cross border supplies of construction services are considered in Table 4.2.2 of Annexure A.

4.4.3. Findings

In terms of the analysis of the various scenarios of cross border supplies of construction services, the outcome of the recommended rules in the OECD Guidelines and the outcome

of the inferred place of supply rules in the VAT Act correspond in all scenarios as is evident in Table 4.2.3. This is on the assumption that the foreign jurisdiction adopted a specific rule for supplies rendered directly in connection with immovable property for both B2B and B2C supplies, which is based on the location of the immovable property.

It is submitted that the analysis should render the same results for any other type of cross border services rendered directly in connection with immovable property.

If the foreign jurisdiction adopts a similar specific rule linked to a proxy based on the location of the movable property for supplies rendered directly in connection with movable property for both B2B and B2C supplies, it is submitted that the same results should be obtained for the cross border supply of services rendered directly in connection with movable property.

4.4.4. Summary

Services can be rendered directly in connection with immovable or movable property situated in a different jurisdiction to where the supplier or customer is located.

The outcome of the inferred place of supply rules in the VAT Act are in harmony with the outcome of the recommended rules in the OECD Guidelines in respect of services rendered directly in connection with immovable property such as construction services. This is based on the assumption that the foreign jurisdiction adopted a specific rule for B2B and B2C services rendered directly in connection with immovable property, based on the location of the immovable property.

The same results should be obtained for services rendered directly in connection with movable property if the foreign jurisdiction adopts a specific rule for B2B and B2C supplies based on the location of the movable property.

4.5. Consulting services

4.5.1. Nature of consulting services

Consulting services can be rendered without the supplier and customer ever having to meet in person, or having to be in the same location at the same time, by communicating through electronic media or other forms of telecommunication. For example, a meeting can be conducted between a consulting firm in one jurisdiction (the supplier) and a customer in a different jurisdiction via teleconference or any other form of electronic media. Either the advice may be provided verbally during the meeting or the supplier may subsequently provide the customer with written advice. Furthermore, the customer may have obtained the

advice for purposes of a matter or implementation in a third and different jurisdiction from the supplier and customer's jurisdictions. For example, a customer situated in South Africa, could obtain advice from a Kenyan supplier in respect of a legal matter or transaction instituted or implemented in Namibia.

4.5.2. Application of relevant rules

4.5.2.1. OECD

The application of the recommended rules in the OECD Guidelines for the different scenarios of cross border supplies of consulting services are considered in Table 4.3.1 of Annexure A.

4.5.2.2. VAT Act

The application of the inferred place of supply rules in the VAT Act for the different scenarios of cross border supplies of consulting services are considered in Table 4.3.2 of Annexure A.

4.5.3. Findings

In the analysis for the various scenarios of cross border supplies of consulting services, the outcome of the recommended rules in the OECD Guidelines and the VAT Act correspond in all scenarios with the exception of the following specific scenarios as is evident from Table 4.3.3:

1. Where a vendor (resident or non-resident) supplies consulting services to a non-resident customer, but the non-resident customer is physically in South Africa when the consulting services are rendered (scenarios 3.1, 3.2 and 3.6).
2. Where a vendor (resident or non-resident) supplies consulting services to a resident customer, but the consulting services are physically rendered outside South Africa (scenarios 3.3, 3.4 and 3.5).
3. Where a non-resident non-vendor supplies consulting services to a resident customer, but the consulting services are utilised or consumed outside South Africa (scenario 3.5).

In the abovementioned scenarios, the OECD's recommended general rules in Guidelines 3.2 and 3.6 render an outcome which is in conflict with the outcome of the inferred place of supply rules in the VAT Act. The recommended general rules in terms of Guidelines 3.2 and 3.6 is based on a proxy linked to the location of the customer's business or usual residence. These general rules thus do not take into account the location of the customer at the time

that the services are rendered, the place where the services are physically performed, or the place where the services are utilised or consumed. It follows that if a supply is rendered to a non-resident customer, the supply should be taxed in the foreign location of that non-resident customer's business or usual residence in terms of the recommended rules in the OECD Guidelines. Accordingly, if the supply is made to a South African resident customer, the supply should be taxed in South Africa, and if the supply is made to a non-resident customer, the supply should be taxed in that non-resident's foreign jurisdiction in terms of OECD Guidelines 3.2 and 3.6.

Conflicting scenarios in 1

In scenarios 3.1, 3.2 and 3.6, the OECD's recommended general rules in Guidelines 3.2 and 3.6 are in conflict with the inferred place of supply rule in proviso (iii) to section 11(2)(l) of the VAT Act.

When a supply is made to a non-resident, the proxy used to determine the place of supply (and consequent place of taxation) in terms of the inferred place of supply rule in section 11(2)(l) of the VAT Act is, similar to OECD Guidelines 3.2 and 3.6, based on the location of the customer's residence. The provisos to section 11(2)(l) of the VAT Act however contains further overriding place of supply rules. Specifically, the inferred place of supply rule in section 11(2)(l)(iii) of the VAT Act is based on a proxy linked to the physical location of the non-resident customer at the time that the services are rendered. It follows that the place of supply of consulting services rendered by a vendor to a non-resident customer, who is in South Africa at the time that the services are rendered, is in South Africa in terms of section 11(2)(l)(iii) of the VAT Act. Accordingly, in such an instance, the outcome of the OECD's recommended general rules in Guidelines 3.2 and 3.6 are in conflict with the outcome of the aforementioned inferred place of supply rule in section 11(2)(l)(iii)the VAT Act.

Conflicting scenarios in 2

In scenarios 3.3, 3.4 and 3.5, the OECD's recommended general rules in Guidelines 3.2 and 3.6 are in conflict with the inferred place of supply rule in section 11(2)(k) of the VAT Act.

The place of supply (and consequent place of taxation) in section 11(2)(k) of the VAT Act is based on a proxy linked to the location where the services are physically rendered. It follows that, if a supply is made by a vendor to a resident customer and the services are physically rendered in a different location than the location of the customer's business or usual

residence (being South Africa in this instance), the place of taxation as determined in terms of Guidelines 3.2 and 3.6 of the OECD Guidelines will be in conflict with the aforementioned inferred place of supply rule in section 11(2)(k) of the VAT Act.

Conflicting scenario in 3

In scenario 3.5, the OECD's recommended general rules in Guidelines 3.2 and 3.6 are in conflict with the inferred place of supply rule in section 7(1)(c) read with the definition of imported services in section 1(1) of the VAT Act.

The place of supply (and consequent place of taxation) in accordance with this inferred place of supply rule is the location where actual consumption of the services took place. It follows that in a scenario where the services are rendered by a non-resident supplier to a resident customer, and the location where the services are actually utilised or consumed is not the same location as the location of the customer's business or usual residence, the place of taxation determined in terms of Guideline 3.5 in the OECD Guidelines is in conflict with the aforementioned inferred place of supply rule in the VAT Act.

It is submitted that the analysis should render the same results for any other type of services similar to that of consulting services.

Remediation recommendations are made in 4.7, to bring the inferred place of supply rules in the VAT Act in harmony with the OECD's recommended rules in the conflicting scenarios as described above.

4.5.4. Summary

The inferred place of supply rules in the VAT Act are not in harmony with the recommended rules in the OECD Guidelines in respect of cross border supplies of consulting services in all scenarios. The scenarios where the outcome of the inferred place of supply rules in the VAT Act are in conflict with the outcome of the recommended rules in the OECD Guidelines are summarised and discussed in 4.4.3 above.

4.6. Subscription services to a web application

4.6.1. Nature of subscription services to a web application

The nature of the supply of subscription services to a web application is such that a supplier in one jurisdiction can supply the subscription services to a web application to a customer in any foreign jurisdiction, without the parties ever having any direct contact. The customer can merely subscribe to the relevant web application via the internet. Even though the recipient

is usually required to enter personal information as part of signing up for the subscription services, the recipient may enter any information without the supplier being able to verify such information, since there is no direct contact between the supplier and the customer. Furthermore, the customer may use the web application while he is in a different jurisdiction to the location of his residence, or the location where he subscribed to the web application.

The scenario as set out above will be similar for most other forms of electronic services rendered by means of an electronic agent, electronic communication or the internet.

4.6.2. Application of relevant rules

4.6.2.1. OECD

The application of the recommended rules in the OECD Guidelines for the different scenarios of cross border supplies of subscription services to a web application are considered in Table 4.4.1 of Annexure A.

4.6.2.2. VAT Act

The application of the inferred place of supply rules in the VAT Act for the different scenarios of cross border supplies of subscription services to a web application are considered in Table 4.4.2 of Annexure A.

4.6.3. Findings

In terms of the analysis for the various scenarios of cross border supplies of subscription services to a web application, the outcome of the recommended rules in the OECD Guidelines and the VAT Act correspond in all scenarios with the exception of the following scenarios as is evident from Table 4.4.3:

1. Where a vendor (only resident) supplies subscription services to a web application to a non-resident customer, but the non-resident customer is physically in South Africa when the subscription services are rendered (scenarios 4.1, 4.2).
2. Where a vendor (only resident) supplies subscription services to a web application to a resident customer, but the subscription services are physically rendered outside South Africa (scenario 4.3).
3. Where a non-resident non-vendor supplies subscription services to a web application to a South African resident, but the subscription services are not utilised or consumed in South Africa (scenario 4.5).

In the abovementioned scenarios, the OECD's recommended general rules in Guidelines 3.2 and 3.6 render an outcome which is in conflict with the outcome of the respective inferred place of supply rules in the VAT Act. The place of taxation in terms of the recommended general rules in Guidelines 3.2 and 3.6 are based on a proxy which is linked to the location of the customer's business or usual residence.

Conflicting scenarios in 1

In scenarios 4.1 and 4.2, the outcome of the OECD's recommended general rules in Guidelines 3.2 and 3.6 are in conflict with the outcome of the inferred place of supply rule in section 11(2)(l)(iii) of the VAT Act. The reason for this conflict is that the inferred place of supply rule in section 11(2)(l)(iii) of the VAT Act is based on a proxy which is linked to the physical location of the non-resident customer at the time that the services are rendered. This was discussed in more detail in 4.4.3 above for consulting services.

For subscription services to a web application, the conflict only occurs if the supply is made by a resident vendor, and not if the supply is made by a non-resident vendor. The reason for this is that a supply of electronic services (which includes subscription services to a web application) by a non-resident supplier only falls within the ambit of enterprise, and accordingly within the South African VAT net, if the supply is made to a South African resident customer. The customer's residency is determined in accordance with the 2 out of 3 proxy discussed in Chapter 3 of this research paper. On the assumption that a non-resident customer will neither have a South African address nor pay for the services from a South African bank account, the supply is not made to a South African resident and accordingly, does not form part of a South African enterprise. It follows that such supply of electronic services made by the non-resident supplier to a non-resident customer should (intentionally) not have any tax consequences in South Africa.

The conflicting scenario in 4.1, which requires the non-resident customer to be physically present in South Africa when the services are rendered, is unlikely to occur since the non-resident customer will most likely be physically present outside South Africa, at the location where the services are used.

The conflicting scenario in 4.2, which requires the non-resident customer to be physically present inside South Africa when the services are rendered, however, is likely to occur since the non-resident customer will most likely be physically present in South Africa, being the location where the services are used.

Conflicting scenario in 2

In scenario 4.3, the outcome of the OECD's recommended general rules in Guidelines 3.2 and 3.6 are in conflict with the outcome of the place of supply rule in section 11(2)(k) of the VAT Act. The reason for this conflict is that the inferred place of supply rule in section 11(2)(k) of the VAT Act is based on a proxy which is linked to the location where the services are physically performed. This was discussed in more detail in 4.4.3 above for consulting services.

For subscription services to a web application, the conflict only occurs if the supply is made by a resident vendor. This is in terms of the introduction to section 11(2) of the VAT Act which specifically provides that section 11(2)(k) of the VAT Act does not apply in an instance where the supply is made by a registered foreign electronic services provider. It follows that the inferred place of supply rule in section 11(2)(k) of the VAT Act is not applicable in this instance, and can therefore not render results which are in conflict with the OECD's recommended rules.

Conflicting scenario in 3

In scenario 4.5, the outcome of the OECD's recommended general rules in Guidelines 3.2 and 3.6 are in conflict with the outcome of the inferred place of supply rule in section 7(1)(c) read with the definition of imported services in section 1(1) of the VAT Act. The reason for this conflict is that the place of supply (and consequent place of taxation) in terms of the inferred place of supply rule in section 7(1)(c) read with the definition of imported services in section 1(1) of the VAT Act is the location where the services are utilised or consumed. This was discussed in more detail in 4.4.3 above for consulting services.

It is submitted that the analysis should render the same results for any other type of electronic services as defined in section 1(1) of the VAT Act.

Remediation recommendations are made in 4.7 to bring the inferred place of supply rules in the VAT Act in harmony with the recommended rules in the OECD Guidelines in the scenarios of cross border supplies where a conflict was identified.

4.6.4. Summary

The outcome of the inferred place of supply rules in the VAT Act are not in harmony with the outcome of the recommended rules in the OECD Guidelines in respect of cross border supplies of subscription services to a web application in all scenarios. The scenarios where

the place of supply rules in the VAT Act are in conflict with the recommended rules in the OECD Guidelines have been summarised and discussed in 4.5.3 above.

4.7. Remediation recommendations

Recommendations are made below on how the VAT Act can be amended in order to ensure that the inferred place of supply rules in the VAT Act renders an outcome which is in harmony with the OECD's recommended rules in the scenarios of cross border supplies where conflicts were identified.

4.7.1. Place of supply rule in section 11(2)(l)(iii) of the VAT Act

In order to ensure that the outcome of the inferred place of supply rule in section 11(2)(l)(iii) of the VAT Act in line with the outcome of the OECD's recommended general rules in Guidelines 3.2 and 3.6 in the scenarios where conflicts were identified, the relevant place of supply rule in the VAT Act should similarly use a proxy based on the location of the customer's business or usual residence. The place of supply rule in the VAT Act should thus not take into account the location of the customer at the time that the services are rendered. This can be achieved by removing subparagraph (iii) of section 11(2)(l) of the VAT Act.

By removing subparagraph (iii) of section 11(2)(l) of the VAT Act, the inferred place of supply rule in section 11(2)(l) of the VAT Act is linked to the location of the non-resident customer's place of residence. This is in harmony with the OECD's recommended general rules in Guidelines 3.2 and 3.6.

However, as is evident from scenarios 1.2 and 1.6, subparagraph (iii) of section 11(2)(l) of the VAT Act ensures that the place of supply in terms of the VAT Act is in harmony with the OECD's recommended general rule in Guideline 3.5 for on-the-spot supplies. Subparagraph (iii) to section 11(2)(l) should therefore remain in place for purposes of on-the-spot supplies.

Accordingly, it is recommended that the wording of section 11(2)(l)(iii) be amended as follows, in order to ensure that subparagraph (iii) of section 11(2)(l) only applies in respect of on-the-spot supplies (additional wording to be included is indicated in italics):

> …to the said person or any other person, other than in circumstances contemplated in subparagraph (ii) (bb), if the said person or such other person is in the Republic at the time the services are rendered, *and the said person or such other person is required to be in the Republic in order for the services to be rendered*.

It is submitted that the above proposed amendment to section 11(2)(l)(iii) will ensure that the outcome of the inferred place of supply rule in section 11(2)(l)(iii) of the VAT Act is in harmony with the OECD's recommended general rules in Guidelines 3.2 and 3.6, as well as in Guideline 3.5.

4.7.2. Place of supply rule in section 11(2)(k) of the VAT Act

In order to bring the outcome of the inferred place of supply rule in section 11(2)(k) of the VAT Act in line with the outcome of the OECD's recommended general rules in Guidelines 3.2 and 3.6, the place of supply rule in the VAT Act should similarly use a proxy based on the location of the recipient's business or usual residence. Such proxy based on the location of the customer's residence has already indirectly been implemented in the inferred place of supply rules in sections 7(1)(a) and 11(2)(l) of the VAT Act. Accordingly, the place of supply rule in terms of section 11(2)(k) of the VAT Act should be deleted from the VAT Act.

However, as is evident from scenario 1.1, 1.3 and 1.5, the place of supply rule in section 11(2)(k) of the VAT Act ensures that the outcome of the inferred place of supply rules in the VAT Act is in line with the outcome of OECD's recommended general rule in Guideline 3.5, which applies in respect of on-the-spot supplies. Section 11(2)(k) of the VAT Act should therefore remain in place for purposes of on-the-spot supplies.

Accordingly, it is recommended that the wording of section 11(2)(k) of the VAT Act be amended as follows in order to ensure that it only applies in respect of on-the-spot supplies (additional wording to be included is indicated in italics):

> …the services are physically rendered elsewhere than in the Republic or to a customs controlled area enterprise or an SEZ operator in a customs controlled area, *in an instance where the recipient is required to be outside the Republic in order for the services to be rendered*; or …

It is submitted that such an amendment to section 11(2)(k) of the VAT Act will ensure that the outcome of the inferred place of supply rule in section 11(2)(k) of the VAT Act is in harmony with the OECD's recommended general rules in Guidelines 3.2 and 3.6, as well as in Guideline 3.5.

The limiting of the scope of section 11(2)(k) of the VAT Act to apply only in respect of on-the-spot supplies is in line with the application of the similar zero-rating provision in section 11A(1)(j) and 11A(1B) of the New Zealand GST Act. In terms of the GST Act, the relevant zero-rating provision similarly only applies if the nature of the services is such that they can

only be physically received at the time and place where they are physically performed (Millar, 2008a:194).

4.7.3. Place of supply rule in section 7(1)(c) read with the definition of imported services in section 1(1) of the VAT Act

In order to ensure that the outcome of the inferred place of supply rule in section 7(1)(c), read with the definition of imported services in section 1(1) of the VAT Act is in harmony with the outcome of the OECD's recommended general rules in Guidelines 3.2 and 3.5, the place of supply rule in the VAT Act should be amended to similarly use a proxy based on the location of the customer's business or usual residence. The place of supply rule should thus not take into account where the services are actually utilised or consumed.

The place of supply rule in section 7(1)(c) read with the definition of imported services in section 1(1) of the VAT Act only applies in respect of supplies made by a non-resident non-vendor supplier to a South African resident customer. It follows that, if the place of supply rule is based on a proxy that is linked to the location of the customer residence, the place of supply will always be South Africa, regardless of where the supply is utilised or consumed, or where the services are physically rendered.

The OECD's recommended rule in Guideline 3.5, however, provides that on-the-spot supplies should be taxed in the location where the services are physically performed. Such amended place of supply rule based on the location of the customer's residence will therefore be in conflict with the OECD's recommended general rule in Guideline 3.5 where an on-the-spot supply is made in a different location to South Africa. In order to ensure that the outcome of such amended place of supply rule based on a proxy linked to the location of the customer's residence is in line with the outcome of the OECD's recommended general rule in Guideline 3.5, the amended place of supply rule should not apply in respect of on-the-spot supplies which are supplied outside South Africa.

In order to achieve the above, it is recommended that the phrase 'to the extent that such services are utilised or consumed in the Republic' should be removed from the definition of imported services, and that imported services be defined to mean (additional wording to be included is indicated in italics)

> a supply of services that is made by a supplier who is not a resident or carries on a business outside the Republic to a recipient who is a resident of the Republic, otherwise than for the purpose of making taxable supplies, *provided*

that the recipient is not required to be physically present outside the Republic in order for the services to be rendered.

In terms of the recommended amendment to the definition of imported services, the place of supply is based on a proxy linked to the location of the customer's residence (being the South African resident in this instance). The proviso to the definition ensures that the proposed definition of imported services does not apply in respect of on-the-spot-supplies that are physically conducted outside South Africa. It follows that the place of supply (and corresponding place of taxation) of an on-the-spot supply conducted outside South Africa will not be in South Africa in terms of the amended place of supply rule. This is in line with the OECD's recommended general rule for on-the-spot supplies in Guideline 3.5.

It is submitted that the proposed amendment to the definition of imported services in section 1(1) of the VAT Act will ensure that the outcome of the inferred place of supply rule in section 7(1)(c) of the VAT Act will be in harmony with the outcome of the OECD's recommended general rules in Guidelines 3.2 and 3.6, as well as in Guideline 3.5.

Furthermore, the amendment will ensure that the place of supply in terms of section 7(1)(c) of the VAT Act can be determined with certainty, and will no longer be dependent on the interpretation of the phrase 'utilised or consumed in South Africa'.

4.8. Conclusion

Based on the analyses as conducted in the tables in Annexure A, it was found that the outcome of the inferred place of supply rules in the VAT Act are in harmony with the outcome of the recommended rules in the OECD Guidelines for cross border supplies of massage services and construction services. This is based on the assumption that the following specific rules were implemented by the foreign jurisdiction:

- For B2B on-the-spot supplies, the supply should be taxed in the location where the services are physically performed.
- For B2B and B2C supplies rendered directly in connection with immovable property, the supply should be taxed in the location where the immovable property is situated.

In respect of consulting services and subscription services to a web application, the outcome of the inferred place of supply rules in the VAT Act are not in harmony with the outcome of the recommended rules in the OECD Guidelines in all scenarios. The conflicting scenarios were identified and discussed in 4.4.3 and 4.5.3 above.

Remediation recommendations were made in 4.7 on how the VAT Act can be amended in order to bring the inferred place of supply rules in the VAT Act in harmony with the recommended rules in the OECD Guidelines.

In the next chapter it will be considered whether the proposed remediation recommendations should be implemented in South African VAT legislation.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

The main objective of this study was to determine whether the inferred place of supply rules in the VAT Act are in harmony with the recommended rules to determine the place of taxation for cross border supplies of services in Chapter 3 of the OECD Guidelines. Secondary objectives were identified to address the main objective.

In order to achieve the main and secondary objectives, the recommended rules in the OECD Guidelines were summarised and discussed in Chapter 2. In Chapter 3, the inferred place of supply rules in the VAT Act were identified and discussed. A comparative analysis between the outcome of the recommended rules in the OECD Guidelines and the inferred place of supply rules in the VAT Act in various scenarios of cross border supplies were conducted in Chapter 4. Accordingly, the scenarios where the outcome of the recommended rules in the OECD Guidelines and the inferred place of supply rules in the VAT Act were in conflict were identified, as well as the reason for the conflict between the two sources in the specific scenarios. Recommendations were made on how the VAT Act can be amended to obtain an outcome which is in harmony with the outcome of the recommended rules in the OECD Guidelines.

This chapter summarises the results of the research conducted and considers whether the research objectives have been met in order to address the research question. It also contains recommendations with respect to the research question.

5.2. Achievement of research objectives and conclusions reached

Each of the research objectives has been addressed and the conclusions reached are discussed below.

5.2.1. What are the recommended rules to determine the place of taxation for cross border supplies of services in chapter 3 of the OECD Guidelines?

In Chapter 2, the recommended rules to determine the place of taxation for cross border supplies of services as set out in Chapter 3 of the OECD Guidelines were summarized and discussed.

The recommended rules in the OECD Guidelines are as follows:

- For B2B supplies, Guideline 3.2 provides that the supply must be taxed at the location of the customer's business.
- For B2C on-the-spot supplies, Guideline 3.5 provides that the supply must be taxed at the location where the services are physically rendered.
- For B2C supplies that do not constitute on-the-spot supplies, Guideline 3.6 provides that the supply must be taxed at the location of the customer's usual residence.

These rules are known as the general rules. The OECD, however, acknowledge that these general rules do not render appropriate results in all scenarios of cross border supplies and that specific rules may be required in certain instances.

Guideline 3.7 provides a framework to determine whether a specific rule is required in a scenario instead of the general rules in Guidelines 3.2, 3.5 and 3.6. Specifically, the general rule should lead to an inappropriate result when considered against the criteria provided in Guideline 3.7 in a specific scenario, and the specific rule should lead to a significantly better result when considered against the same criteria, for that same scenario.

Since businesses may also acquire on-the-spot supplies, the OECD acknowledges that a specific rule for B2B on-the-spot supplies based on the same proxy used for B2C on-the-spot supplies in Guideline 3.5 may be implemented (OECD, 2017:68).

Furthermore, in Guideline 3.8, the OECD acknowledges that where services are rendered directly in connection with immovable property, the use of a specific rule based on a proxy linked to the location where the immovable property is situated may render a more appropriate result than the general rules for both B2B and B2C supplies (2017:60). This is also the case with services rendered directly in connection with movable property (OECD, 2017:60 & 61).

Accordingly, in principle, the general rules to determine the place of taxation for cross border supplies of services in Guidelines 3.2, 3.5 and 3.6 should be applied. There are, however, certain scenarios where a specific rule will be more appropriate and in such a scenario, the specific rule should be applied if the criteria in Guideline 3.7 are complied with.

5.2.2. What are the inferred place of supply rules to determine the place of taxation for cross border supplies of services in the VAT Act?

The inferred place of supply rules in the VAT Act were identified and discussed in Chapter 3. In order to determine whether a cross border supply falls within the South African VAT net or not, the inferred place of supply rules that must be considered at the offset can be summarised as follows:

- The place of supply of any cross border supply of services supplied in the course or furtherance of an enterprise, which is conducted by either a resident or non-resident supplier, is in South Africa (section 7(1)(a) of the VAT Act).
- The place of supply of any cross border supply of services rendered by a non-resident supplier to a resident customer is in South Africa if the services are utilised or consumed in South Africa otherwise than for purposes of making taxable supplies (section 7(1)(c) read with the definition of imported services in section 1(1) of the VAT Act).

Section 11(2) of the VAT Act, however, contains further inferred place of supply rules that override the inferred place of supply rules in section 7(1) of the VAT Act, and can be summarised as follows:

- Where services are rendered directly in connection with land, or an improvement thereto, the place of supply is the location of the land (section 11(2)(f) of the VAT Act).
- Where services are rendered directly in connection with movable property, the place of supply is the location of the movable property (section 11(2)(g) of the VAT Act).
- Where services are physically rendered outside South Africa, the place of supply is the location where the services are physically rendered (section 11(2)(k) of the VAT Act).
- Where services are rendered to a non-resident, the place of supply is the location of that non-resident customer's residence (section 11(2)(l) of the VAT Act), unless
    - the services are rendered directly in connection with land or any improvement thereto. In such instance the place of supply is the location of the land (section 11(2)(l)(i) of the VAT Act);
    - the services are rendered directly in connection with movable property. In such instance the place of supply is the location of the movable property (section 11(2)(l)(ii) of the VAT Act); or

- the customer (or his agent or employee) of the services is in South Africa at the time that the services are rendered. In such instance the place of supply is the location of the customer at the time the services are rendered (being South Africa) (section 11(2)(l)(iii) of the VAT Act).

If the place of supply of a cross border supply of services is in South Africa in terms of the inferred place of supply rules in sections 7(1)(a) or 7(1)(c) of the VAT Act, the place of taxation of that supply is in South Africa. However, if the place of supply is found not to be in South Africa in terms of section 11(2) of the VAT Act, a supply that would have been taxable in terms of section 7(1)(a) of the VAT Act will be subject to VAT at the zero-rate. A supply that would have been taxable under section 7(1)(c) of the VAT Act will no longer be taxed in South Africa if that same supply, if rendered in South Africa, would have been subject to VAT at the zero-rate in terms of section 11(2) of the VAT Act (section 14(5)(b) of the VAT Act).

5.2.3. Is the outcome of the aforementioned inferred place of supply rules in the VAT Act in harmony with the outcome of the recommended rules in the OECD Guidelines in the various scenarios of cross border supplies? Where the two sources are not in harmony, what amendments are required to the VAT Act to ensure that it is in harmony with the OECD Guidelines?

In Chapter 4, a comparative analysis was conducted by way of applying both the OECD's recommended rules and the inferred place of supply rules in the VAT Act to the various scenarios of cross border supplies and comparing the results in each of the scenarios. The comparative analysis was conducted by way of tables, with six different scenarios of cross border supplies for four different types of services, being massage services, construction services, consulting services and subscription services to a web application. This was done in order to determine whether the outcome of the recommended rules in the OECD Guidelines are in harmony with the outcome of the inferred place of supply rules in the VAT Act in respect of the each of the specific scenarios.

As is evident from the analysis in Chapter 4, the outcome of the recommended rules in the OECD Guidelines are in harmony with the outcome of the inferred place of supply rules in the VAT Act in all of the considered scenarios for massage services and construction services. These findings were based on the assumption that the foreign jurisdiction implemented the following specific rules:

- For B2B on-the-spot supplies, the supply must be taxed at the location where the services are physically performed.
- For B2B and B2C supplies rendered directly in connection with immovable property, the supply must be taxed at the location where the immovable property is situated.

For consulting services and subscription services to a web application, the outcome of the recommended rules in the OECD Guidelines and the inferred place of supply rules in the VAT Act were in harmony in all scenarios except for the following scenarios where it rendered conflicting results:

- Where a vendor (resident or non-resident supplier of consulting services or resident supplier of subscription services to a web application) makes a supply to a non-resident customer who is in South Africa at the time that the services are rendered. In this scenario, the place of supply rule in section 11(2)(l)(iii) of the VAT Act is in conflict with the OECD's recommended rules in Guidelines 3.2 and 3.6.
- Where a vendor (resident or non-resident supplier of consulting services or resident supplier of subscription services to a web application) makes a supply of services to a resident customer, but the services are physically rendered outside South Africa. In this scenario, the place of supply rule in section 11(2)(k) of the VAT Act is in conflict with the OECD's recommended rules in Guidelines 3.2 and 3.6.
- Where a non-resident non-vendor supplier renders services to a resident customer and the services are utilised or consumed outside South Africa (in a foreign jurisdiction). In this scenario, the place of supply rule in section 7(1)(c) read with the definition of imported services in section 1(1) of the VAT Act is in conflict with the OECD's recommended rules in Guidelines 3.2 and 3.6.

Chapters 4.7 and 5.3 contain recommendations on how to amend the VAT Act in order to bring it in harmony with the recommended rules in the OECD Guidelines in these scenarios where conflicts were identified.

5.3. Recommendations

Where the inferred place of supply rule in the VAT Act renders an outcome which is in conflict with the recommended rules in the OECD Guidelines in a specific scenario, there is a risk of unintentional non-taxation or double taxation. This is on the basis that the cross border supply of services is made between South Africa and a foreign jurisdiction that implemented rules in its VAT legislation to determine the place of taxation in accordance with the OECD's

recommended rules. This will negatively impact international trade between South Africa and other foreign jurisdictions.

It is therefore recommended that the inferred place of supply rules in the VAT Act be amended to be in harmony with the recommended rules in the OECD Guidelines in all scenarios. This can be achieved by amending the relevant sections in the VAT Act as follows in respect of the conflicting scenarios as identified in 5.2.3 (additional wording to be included in the relevant sections are indicated in italics):

- In order to bring the place of supply rule in section 11(2)(l)(iii) of the VAT Act in harmony with the OECD's recommended rules in Guidelines 3.2, and 3.6, while ensuring that such amended rule is not in conflict with the OECD's recommended rule in Guideline 3.5, it is recommended that section 11(2)(l)(iii) of the VAT Act be amended to only apply in respect of on-the-spot supplies. This can be achieved by amending section 11(2)(l)(iii) of the VAT Act as follows:

  > …to the said person or any other person, other than in circumstances contemplated in subparagraph (ii) (bb), if the said person or such other person is in the Republic at the time the services are rendered, *and the said person or such other person is required to be in the Republic in order for the services to be rendered*.

- Similarly, in order to bring the place of supply rule in section 11(2)(k) of the VAT Act in harmony with the OECD's recommended rules in Guidelines 3.2 and 3.6, while ensuring that such amended rule is not in conflict with the recommended rule in OECD Guideline 3.5, it is recommended that section 11(2)(k) of the VAT Act is amended to apply only in respect of on-the-spot-supplies. This can be achieved by amending section 11(2)(k) as follows:

  > …the services are physically rendered elsewhere than in the Republic or to a customs controlled area enterprise or an SEZ operator in a customs controlled area, *in an instance where the recipient is required to be outside the Republic in order for the services to be rendered*; or …

- In order to bring the place of supply rule in section 7(1)(c) read with the definition of imported services in section 1(1) of the VAT Act in harmony with the recommended rule in OECD Guidelines 3.2 and 3.6, while ensuring that such amended rule is not

in conflict with the recommended rule in OECD Guideline 3.5, it is recommended that the place of supply is based on a proxy linked to customer location. Furthermore, it must not apply in respect of an on-the-spot supply that takes place outside South Africa. This can be achieved by amending the definition of imported services. Specifically, the phrase 'to the extent that such services are utilised or consumed in the Republic' must be removed from the definition so that imported services is defined to mean

> a supply of services that is made by a supplier who is not a resident or carries on a business outside the Republic to a recipient who is a resident of the Republic, otherwise than for the purpose of making taxable supplies, *provided that the recipient is not required to be outside the Republic in order for the services to be rendered*.

It is submitted that the recommended amendments to the VAT Act will ensure that the inferred place of supply rules in the VAT Act will render an outcome which is in harmony with the outcome of the recommended rules in the OECD Guidelines in the various scenarios of cross border supplies. Furthermore, these proposed amendments do not require significant amendments to the general principles in, and the application of, the VAT Act.

5.4. Conclusion

For a developing country such as South Africa, it is important that South Africa's VAT legislation is in harmony with international standards such as the OECD Guidelines, in order to stimulate rather than discourage international trade.

In the specific scenarios where it was found that the outcome of the inferred place of supply rules in the VAT Act are not in harmony with the outcome of the recommended rules in the OECD Guidelines, it is recommended that the VAT Act be amended as proposed. These amendments will bring the inferred place of supply rules in the VAT Act in harmony with the recommended rules in the OECD Guidelines and ensure that unintended non-taxation or double taxation does not occur in these scenarios.

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ANNEXURE A: TABLES

For purposes of the analysis in the tables in 4.1.1 to 4.4.3 below, the following abbreviations are used:

Abbreviation	Term/phrase
F	Foreign
POS	Place of supply
POT	Place of taxation
SA	South Africa

4.1. Massage services

4.1.1. Application of the OECD's recommended rules

	Location of supplier's business	Location of customer's business or usual residence	Place where supply is physically performed	Supply is made from business to business (B2B supply)		Supply is made from business to consumer (B2C supply)		Notes
				Where is the POT in terms of the OECD Guidelines?	Is the POT in SA in terms of the OECD Guidelines?	Where is the POT in terms of the OECD Guidelines?	Is the POT in SA in terms of the OECD Guidelines?	
1.1	SA	F	F	F*	No	F**	No	*B2B supply: POT is the location of the customer's business (Guideline 3.2). This general rule renders an appropriate result in terms of the analysis in Guideline 3.7 – thus no specific rule is applicable. **B2C supply: Supply constitutes an on-the-spot supply. POT is the location where the services are physically performed (Guideline 3.5).
1.2	SA	F	SA	SA*	Yes	SA**	Yes	*B2B supply: POT is the location of the customer's business (Guideline 3.2). However, this general rule renders an inappropriate result in this scenario and a specific rule based on the location where the services are physically performed renders a more appropriate result in terms of the analysis in Guideline 3.7. POT is thus the location where the services are physically performed in terms of the specific rule for B2B on-the-spot supplies. Assumption: The foreign jurisdiction implemented a specific rule for B2B on-the-spot supplies. **B2C supply: Refer to scenario 1.1.
1.3	SA	SA	F	F*	No	F**	No	*B2B supply: Refer to scenario 1.2. **B2C supply: Refer to scenario 1.1.
1.4	F	SA	SA	SA*	Yes	SA**	Yes	*B2B supply: Refer to scenario 1.1. **B2C supply: Refer to scenario 1.1.
1.5	F	SA	F	F*	No	F**	No	*B2B supply: Refer to scenario 1.2. **B2C supply: Refer to scenario 1.1.
1.6	F	F	SA	SA*	Yes	SA**	Yes	*B2B supply: Refer to scenario 1.2. **B2C supply: Refer to scenario 1.1.

4.1.2. Application of the place of supply rules in the VAT Act

	Location of supplier's business	Location of customer's business or usual residence	Place where supply is physically performed	Supplier is a vendor	Supplier is not a vendor	Notes
				Is the POS in SA in terms of VAT Act?	Is the POS in SA in terms of VAT Act?	
1.1	SA	F	F	No*	N/A**	*Vendor supplier: Services are supplied as part of the vendor's enterprise - POS is in SA (section 7(1)(a)). However, the supply is physically rendered outside SA - POS is thus not in SA (section 11(2)(k)). **Non-vendor supplier: Supply does not constitute imported services (which requires non-resident supplier and a resident customer). Accordingly, inferred POS rule in section 7(1)(c) is not applicable.
1.2	SA	F	SA	Yes*	N/A**	*Vendor supplier: Services are supplied as part of the vendor's enterprise - POS is in SA (section 7(1)(a)). Services are rendered to non-resident, but cannot be zero-rated since the customer is required to be in SA at the time that the services are rendered (section 11(2)(l)(iii)). **Non-vendor supplier: Refer to scenario 1.1.
1.3	SA	SA	F	No*	N/A**	*Vendor supplier: Refer to scenario 1.1. **Non-vendor supplier: Refer to scenario 1.1.
1.4	F	SA	SA	Yes*	Yes**	*Vendor supplier: Services are supplied as part of the vendor's enterprise - POS is in SA (section 7(1)(a)). **Non-vendor supplier: Supply constitute imported services: non-resident supplier, resident customer and supply is utilised or consumed in SA. POS is in SA (section 7(1)(c)).
1.5	F	SA	F	No*	No**	*Vendor supplier: Refer to scenario 1.1. **Non-vendor supplier: Supplier is a non-resident and customer is a resident. However, supply is not utilised or consumed in SA. Accordingly, POS not in SA in terms of section 7(1)(c).
1.6	F	F	SA	Yes*	N/A**	*Vendor supplier: Refer to scenario 1.2. **Non-vendor supplier: Refer to scenario 1.1.

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4.1.3. Summary of findings in terms of the OECD Guidelines and the VAT Act

	Location of supplier's business	Location of customer's business or usual residence	Place where supply is physically performed	Is the POT in SA in terms of OECD Guidelines?		Is the POS and consequent POT in SA in terms of VAT Act?	
				Supply is made from business to business (B2B supply)	Supply is made from business to final consumer (B2C supply)	Supplier is a vendor	Supplier is not a vendor
1.1	SA	F	F	No	No	No	N/A
1.2	SA	F	SA	Yes	Yes	Yes	N/A
1.3	SA	SA	F	No	No	No	N/A
1.4	F	SA	SA	Yes	Yes	Yes	Yes
1.5	F	SA	F	No	No	No	No
1.6	F	F	SA	Yes	Yes	Yes	N/A

4.2. Construction services

4.2.1. Application of the OECD's recommended rules

	Location of supplier's business	Location of customer's business or usual residence	Location of immovable property	Supply is made from business to business (B2B supply)		Supply is made from business to consumer (B2C supply)		Notes
				Where is the POT in terms of the OECD Guidelines?	Is the POT in SA in terms of the OECD Guidelines?	Where is the POT in terms of the OECD Guidelines?	Is the POT in SA in terms of the OECD Guidelines?	
2.1	SA	F	F	F*	No	F**	No	*B2B supply: POT is the location of the customer's business (Guideline 3.2). This general rule renders an appropriate result in terms of analysis in Guideline 3.7 – no specific rule applicable. **B2C supply: Supply does not constitute an on-the-spot supply. POT is the location of the customer's usual residence (Guideline 3.6). The general rule renders an appropriate result in terms of the analysis in Guideline 3.7 – thus no specific rule applicable.
2.2	SA	F	SA	SA*	Yes	SA**	Yes	*B2B supply: POT is the location of the customer's business (Guideline 3.2). However, the general rule renders an inappropriate result in this scenario and a specific rule based on the location of the immovable property renders a more appropriate result in terms of analysis in Guideline 3.7. POT is thus location where immovable property is situated. Assumption: Foreign jurisdiction implemented a specific rule for B2B supplies rendered directly in connection with immovable property. **B2C supply: Supply does not constitute an on-the-spot supply. POT is the location of the customer's usual residence (Guideline 3.6). However, the general rule based on the location of the customer's usual residence renders an inappropriate result in this scenario, and a specific rule based on the location of the immovable property renders a more appropriate result in terms of the analysis in Guideline 3.7. POT is thus the location where the immovable property is situated. Assumption: Foreign jurisdiction implemented a specific rule for B2C supply rendered directly in connection with immovable property.
2.3	SA	SA	F	F*	No	F**	No	*B2B supply: Refer to scenario 2.2. **B2C supply: Refer to scenario 2.2.
2.4	F	SA	SA	SA*	Yes	SA**	Yes	*B2B supply: Refer to scenario 2.1. **B2C supply: Refer to scenario 2.1.
2.5	F	SA	F	F*	No	F**	No	*B2B supply: Refer to scenario 2.2. **B2C supply: Refer to scenario 2.2.
2.6	F	F	SA	SA*	Yes	SA**	Yes	*B2B supply: Refer to scenario 2.2. **B2C supply: Refer to scenario 2.2.

4.2.2. Application of the place of supply rules in the VAT Act

	Location of supplier's business	Location of customer's business or usual residence	Location of immovable property	Supplier is a vendor	Supplier is not a vendor	Notes
				Is the POS in SA in terms of VAT Act?	Is the POS in SA in terms of VAT Act?	
2.1	SA	F	F	No*	N/A**	*Vendor supplier: Services are supplied as part of the vendor's enterprise - POS is in SA (section 7(1)(a)). However, the supply is rendered directly in connection with immovable property situated outside SA – therefore POS is not in SA (section 11(2)(f)). **Non-vendor supplier: Supply does not constitute imported services (which requires a non-resident supplier and a resident customer). Accordingly, the inferred POS rule in section 7(1)(c) is not applicable.
2.2	SA	F	SA	Yes*	N/A**	*Vendor supplier: Services are supplied as part of the vendor's enterprise - POS is in SA (section 7(1)(a)). The services are rendered to a non-resident, but cannot be zero-rated since services are rendered directly in connection with immovable property in SA (section 11(2)(l)(i)). **Non-vendor supplier: Refer to scenario 2.1.
2.3	SA	SA	F	No*	N/A**	*Vendor supplier: Refer to scenario 2.1. **Non-vendor supplier: Refer to scenario 2.1.
2.4	F	SA	SA	Yes*	Yes**	*Vendor supplier: Services are supplied as part of the vendor's enterprise - POS is in SA (section 7(1)(a)). **Non-vendor supplier: Supply constitutes imported services: Supplier is a non-resident, customer is a resident and supply is utilised and consumed in SA. POS is in SA (section 7(1)(c)).
2.5	F	SA	F	No*	No**	*Vendor supplier: Refer to scenario 2.1. **Non-vendor supplier: Supplier is a non-resident and customer is a resident. However, supply is not utilised or consumed in SA. Accordingly POS is not in SA in terms of section 7(1)(c).
2.6	F	F	SA	Yes*	N/A**	*Vendor supplier: Refer to scenario 2.2. **Non-vendor supplier: Refer to scenario 2.1.

4.2.3. Summary of findings in terms of OECD Guidelines and VAT Act

	Location of supplier's business	Location of customer's business or usual residence	Location of immovable property	Is the POS in SA in terms of OECD Guidelines?		Is the POS and consequent POT in SA in terms of VAT Act?	
				Supply is made from business to business (B2B supply)	Supply is made from business to final consumer (B2C supply)	Supplier is vendor	Supplier is not a vendor
2.1	SA	F	F	No	No	No	N/A
2.2	SA	F	SA	Yes	Yes	Yes	N/A
2.3	SA	SA	F	No	No	No	N/A
2.4	F	SA	SA	Yes	Yes	Yes	Yes
2.5	F	SA	F	No	No	No	No
2.6	F	F	SA	Yes	Yes	Yes	N/A

4.3. Consulting services

4.3.1. Application of the OECD's recommended rules

	Location of supplier's business	Location of customer's business or usual residence	Place where supply is used	Supply is made from business to business (B2B supply)		Supply is made from business to consumer (B2C supply)		Notes
				Where is the POT in terms of OECD Guidelines?	Is the POT in SA in terms of OECD Guidelines?	Where is the POT in terms of OECD Guidelines?	Is the POT in SA in terms of OECD Guidelines?	
3.1	SA	F	F	F*	No	F**	No	*B2B supply: POT is the customer's business location (OECD Guideline 3.2). **B2C supply: Consulting services are not an on-the-spot supply. POT is the location of the customer's usual residence (OECD Guideline 3.6).
3.2	SA	F	SA	F*	No	F**	No	*B2B supply: Refer to scenario 3.1. **B2C supply: Refer to scenario 3.1.
3.3	SA	SA	F	SA*	Yes	SA**	Yes	*B2B supply: Refer to scenario 3.1. **B2C supply: Refer to scenario 3.1.
3.4	F	SA	SA	SA*	Yes	SA**	Yes	*B2B supply: Refer to scenario 3.1. **B2C supply: Refer to scenario 3.1.
3.5	F	SA	F	SA*	Yes	SA**	Yes	*B2B supply: Refer to scenario 3.1. **B2C supply: Refer to scenario 3.1.
3.6	F	F	SA	F*	No	F**	No	*B2B supply: Refer to scenario 3.1. **B2C supply: Refer to scenario 3.1.

4.3.2. Application of the inferred place of supply rules in the VAT Act

	Location of supplier's business	Location of customer's business or usual residence	Place where supply is used	Supplier is a vendor Is the POS in SA in terms of VAT Act?	Supplier is not a vendor Is the POS in SA in terms of VAT Act?	Notes
3.1	SA	F	F	No* Yes* - if customer is in SA when the services are rendered.	N/A**	*Vendor supplier: Services are supplied as part of the vendor's enterprise - POS is in SA (section 7(1)(a)). However, supply is made to non-resident – therefore POS is not in SA if none of the exceptions to section 11(2)(l) are applicable (section 11(2)(l)). Alternatively – POS is not in SA if the services are physically rendered outside SA (section 11(2)(k)). If the non-resident is in SA at the time that the services are rendered – POS is in SA (section 11(2)(l)(iii)). **Non-vendor supplier: Supply does not constitute imported services (which require a non-resident supplier and a resident customer). Inferred POS rule in section 7(1)(c) is not applicable.
3.2	SA	F	SA	No* Yes* – refer to scenario 3.1.	N/A**	*Vendor supplier: Refer to scenario 3.1. **Non-vendor supplier: Refer to scenario 3.1.
3.3	SA	SA	F	Yes* No* - if the services are physically rendered outside SA.	N/A**	*Vendor supplier: Services are supplied as part of the vendor's enterprise - POS is in SA (section 7(1)(a)). If the supply is physically rendered outside SA – POS is not in SA (section 11(2)(k)). **Non-vendor supplier: Refer to scenario 3.1.
3.4	F	SA	SA	Yes* No* – refer to scenario 3.3.	Yes**	*Vendor supplier: Refer to scenario 3.3. **Non-vendor supplier: Supply constitutes imported services (supplier is a non-resident, customer is a resident, and supply is utilised or consumed in SA). POS in SA (section 7(1)(c)).
3.5	F	SA	F	Yes* No* – refer to scenario 3.3.	No**	*Vendor supplier: Refer to scenario 3.3. **Non-vendor supplier: Supplier is a non-resident and customer is a resident. Supply is, however, not utilised or consumed in SA. Accordingly, the place of supply is not in SA in terms of section 7(1)(c).
3.6.	F	F	SA	No* Yes* – refer to scenario 3.1	N/A**	*Refer to scenario 3.1. **Refer to scenario 3.1.

4.3.3. Summary of findings in terms of OECD Guidelines and the VAT Act

	Location of supplier's business	Location of customer's business or usual residence	Place where supply is used	Is the POS in SA in terms of OECD Guidelines?		Is the POS and consequent POT in SA in terms of VAT Act?	
				Supply is made from business to business (B2B supply)	Supply is made from business to final consumer (B2C supply)	Supplier is vendor	Supplier is not a vendor
3.1	SA	F	F	No	No	No Yes - if the customer is in SA when the services are rendered.	N/A
3.2	SA	F	SA	No	No	No Yes – refer to scenario 3.1.	N/A
3.3	SA	SA	F	Yes	Yes	Yes No - if the services are physically rendered outside SA.	N/A
3.4	F	SA	SA	Yes	Yes	Yes No – refer to scenario 3.3.	Yes
3.5	F	SA	F	Yes	Yes	Yes No - refer to scenario 3.3.	No
3.6	F	F	SA	No	No	No Yes – refer to scenario 3.1.	N/A

4.4. Subscription services to a web application

4.4.1. Application of the OECD's recommended rules

	Location of supplier's business	Location of customer's business or usual residence	Place where supply is used	Supply is made from business to business (B2B supply)		Supply is made from business to consumer (B2C supply)		Notes
				Where is the POT in terms of the OECD Guide-lines?	Is the POT in SA in terms of the OECD Guide-lines?	Where is the POT in terms of the OECD Guide-lines?	Is the POT in SA in terms of the OECD Guide-lines?	
4.1	SA	F	F	F*	No	F**	No	*B2B supply: POT is the location of the customer's business (Guideline 3.2). **B2C supply: Supply does not constitute an on-the-spot supply. POT is the location of the customer's usual residence (Guideline 3.6).
4.2	SA	F	SA	F*	No	F**	No	*B2B supply: Refer to scenario 4.1. **B2C supply: Refer to scenario 4.1.
4.3	SA	SA	F	SA*	Yes	SA**	Yes	*B2B supply: Refer to scenario 4.1. **B2C supply: Refer to scenario 4.1.
4.4	F	SA	SA	SA*	Yes	SA**	Yes	*B2B supply: Refer to scenario 4.1. **B2C supply: Refer to scenario 4.1.
4.5	F	SA	F	SA*	Yes	SA**	Yes	*B2B supply: Refer to scenario 4.1. **B2C supply: Refer to scenario 4.1.
4.6	F	F	SA	F*	No	F**	No	*B2B supply: Refer to scenario 4.1. **B2C supply: Refer to scenario 4.1.

4.4.2. Application of the place of supply rules in the VAT Act

	Location of supplier's business	Location of customer's business or usual residence	Place where supply is used	Supplier is a vendor Is the POS in SA in terms of VAT Act?	Supplier is not a vendor Is the POS in SA in terms of the VAT Act?	Notes
4.1	SA	F	F	No* Yes* - if the customer is in SA when the services are rendered.	N/A**	*Vendor supplier: Services are supplied as part of the vendor's enterprise - POS is in SA (section 7(1)(a)). However supply is made to a non-resident – POS is not in SA if none of the exceptions to section 11(2)(l) are applicable (section 11(2)(l)). Alternatively, POS is not in SA if the services are physically rendered outside SA (section 11(2)(k)). If the non-resident customer was in SA at the time that the services are rendered – POS is in SA (section 11(2)(l)(iii)). **Non-vendor supplier: Supply does not constitute imported services (which require a non-resident supplier and a resident customer). Inferred POS rule in section 7(1)(c) is not applicable.
4.2	SA	F	SA	No* Yes* – refer to scenario 4.1.	N/A**	*Vendor supplier: Refer to scenario 4.1. **Non-vendor supplier: Refer to scenario 4.1.
4.3	SA	SA	F	Yes* No* - if the services are physically rendered outside SA.	N/A**	*Vendor supplier: Services are supplied as part of the vendor's enterprise - POS is in SA (section 7(1)(a)). If the supply is physically rendered outside SA – POS is not in SA (section 11(2)(k)). **Non-vendor supplier: Refer to scenario 4.1.
4.4	F	SA	SA	Yes* .	Yes**	*Vendor supplier: Foreign electronic services provider and the supply is part of SA enterprise - POS in SA in terms of section 7(1)(a). Cannot zero-rate in terms of section 11(2)(k) since section 11(2)(k) does not apply to supplies made by foreign electronic service providers (section 11(2)). **Non-vendor supplier: Supply constitute imported services (supplier is a non-resident, customer is a resident, and supply is utilised or consumed in SA). POS is in SA (section 7(1)(c)).
4.5	F	SA	F	Yes*	No**	*Vendor supplier: Refer to scenario 4.4. **Non-vendor supplier: Supplier is a non-resident and customer is a resident. Supply is, however, not utilised or consumed in SA. Accordingly place of supply not in SA in terms of section 7(1)(c).
4.6	F	F	SA	N/A*	N/A**	*Vendor supplier: Foreign electronic service provider does not conduct enterprise in terms of subparagraph (b)(vi) to definition of enterprise since not SA customer. Assumption that, if customer is a non-resident, customer will not have SA address nor make payment from SA bank account. **Non-vendor supplier: Refer to scenario 4.1.

4.4.3. Summary of findings in terms of the OECD Guidelines and the VAT Act

	Location of supplier's business	Location of customer's business usual residence	Place where supply is used	Is the POS in SA in terms of OECD Guidelines?		Is the POS and consequent POT in SA in terms of VAT Act?	
				Supply is made from business to business (B2B supply)	Supply is made from business to final consumer (B2C supply)	Supplier is vendor	Supplier is not a vendor
4.1	SA	F	F	No	No	No Yes - if the customer is in SA when the services are rendered. However unlikely scenario since the services are used outside SA – therefore assumption that customer is also outside SA.	N/A
4.2	SA	F	SA	No	No	No Yes - if the customer is in SA when the services are rendered. Likely that this scenario will occur since the services are used in SA – therefore assumption that customer is also in SA.	N/A
4.3	SA	SA	F	Yes	Yes	Yes No - if services are physically rendered outside SA.	N/A
4.4	F	SA	SA	Yes	Yes	Yes	Yes
4.5	F	SA	F	Yes	Yes	Yes	No
4.6	F	F	SA	No	No	N/A	N/A

ANNEXURE B: EXTRACTS FROM THE VALUE-ADDED TAX ACT, 89 of 1991

Section 1. **Definitions.**

(1) In this Act, unless the context otherwise indicates –

'enterprise' means –

(a) in the case of any vendor, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club;

(b) without limiting the applicability of paragraph (*a*) in respect of any activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing or professional concern—

(vi) the supply of electronic services by a person from a place in an export country, where at least two of the following circumstances are present:

(*aa*) The recipient of those electronic services is a resident of the Republic;

(bb) any payment to that person in respect of such electronic services originates from a bank registered or authorised in terms of the Banks Act, 1990 (Act No. 94 of 1990);

(*cc*) the recipient of those electronic services has a business address, residential address or postal address in the Republic

'imported services' means a supply of services that is made by a supplier who is resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilised or consumed in the Republic otherwise than for the purpose of making taxable supplies.

'vendor' means any person who is or is required to be registered under this Act: Provided that where the Commissioner has under section 23 or 50A determined the date from which a person is a vendor that person shall be deemed to be a vendor from that date.

Section 7. **Imposition of value-added tax.**

(1) Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax—

(*a*) on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;

(*b*) on the importation of any goods into the Republic by any person on or after the commencement date; and

(*c*) on the supply of any imported services by any person on or after the commencement date,

calculated at the rate of 14 per cent on the value of the supply concerned or the importation, as the case may be.

(2) Except as otherwise provided in this Act, the tax payable in terms of paragraph (*a*) of subsection (1) shall be paid by the vendor referred to in that paragraph, the tax payable in terms of paragraph (*b*) of that subsection shall be paid by the person referred to in that paragraph and the tax payable in terms of paragraph (*c*) of that subsection shall be paid by the recipient of the imported services.

Section 11. **Zero rating.**

(2) Where, but for this section, a supply of services, other than services contemplated in section 11 (2) (*k*) that are electronic services, would be charged with tax at the rate referred to in section 7 (1), such supply of services shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where—

(f) the services are supplied directly in connection with land, or any improvement thereto, situated in any export country; or

(*g*) the services are supplied directly in respect of—

(i) movable property situated in any export country at the time the services are rendered; or

(ii) goods temporarily admitted into the Republic from an export country which are exempt from tax on importation under Items 470 and 480 of paragraph 8 of Schedule 1; or

(iii) goods in respect of which the provisions of paragraph (*b*) or (*c*) of the definition of "exported" in section 1 apply; or

(iv) the repair, maintenance, cleaning or reconditioning of a foreign-going ship or foreign-going aircraft; or

(*k*) the services are physically rendered elsewhere than in the Republic or to a customs controlled area enterprise or an SEZ operator in a customs controlled area; or

(*l*) the services are supplied to a person who is not a resident of the Republic, not being services which are supplied directly—

(i) in connection with land or any improvement thereto situated inside the Republic; or

(ii) in connection with movable property (excluding debt securities, equity securities or participatory securities) situated inside the Republic at the time the services are rendered, except movable property which—

(*aa*) is exported to the said person subsequent to the supply of such services; or

(*bb*) forms part of a supply by the said person to a registered vendor and such services are supplied to the said person for purposes of such supply to the registered vendor; or

(iii) to the said person or any other person, other than in circumstances contemplated in subparagraph (ii) (*bb*), if the said person or such other person is in the Republic at the time the services are rendered,

and not being services which are the acceptance by any person of an obligation to refrain from carrying on any enterprise, to the extent that the carrying on of that enterprise would have occurred within the Republic.

Section 14. **Collection of value-added tax on imported services, determination of value thereof and exemptions from tax**

(1) Where tax is payable in terms of section 7(1)(*c*) in respect of the supply of imported services the recipient shall within 30 days of the date referred to in subsection (2)—

(*a*) furnish the Commissioner with a return; and

(*b*) calculate the tax payable on the value of the imported services at the rate of tax in force on the date of supply of the imported services and pay such tax to the Commissioner:

Provided that where the recipient is a vendor, that vendor must calculate the tax payable on the value of the imported services at the rate of tax in force on the date of supply of the imported services and must furnish the Commissioner with a return reflecting the information required for the purposes of the calculation of the tax in terms of section 14 and pay such tax to the Commissioner in accordance with section 28.

(5) The tax chargeable in terms of section 7 (1) (*c*) shall not be payable in respect of—

(*a*) a supply which is chargeable with tax in terms of section 7 (1) (*a*) at the rate provided in section 7;

(*b*) a supply which, if made in the Republic, would be charged with tax at the rate of zero per cent applicable in terms of section 11 or would be exempt from tax in terms of section 12;

(*c*) a supply of an educational service by an educational institution established in an export country which is regulated by an educational authority in that export country; or

(*d*) a supply by a person of services as contemplated in terms of proviso (iii) (*aa*) to the definition of “enterprise” in section 1;

(*e*) a supply of services of which the value in respect of that supply does not exceed R100 per invoice.

Section 23. **Registration of persons making supplies in the course of enterprises**

(1) Every person who, on or after the commencement date, carries on any enterprise and is not registered, becomes liable to be registered—

(*a*) at the end of any month where the total value of taxable supplies made by that person in the period of 12 months ending at the end of that month in the course of carrying on all enterprises has exceeded R1 million;

(*b*) at the commencement of any month where the total value of the taxable supplies in terms of a contractual obligation in writing to be made by that person in the period of 12 months reckoned from the commencement of the said month will exceed the above-mentioned amount

(1A) Every person who carries on any enterprise as contemplated in paragraph (*b*) (vi) of the definition of "enterprise" in section 1 and is not registered becomes liable to be registered at the end of any month where the total value of taxable supplies made by that person has exceeded R50 000.