

VALUE-ADDED TAX: ANALYSIS OF THE SUPPLY OF CROSS BORDER ELECTRONIC SERVICES

by

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Abstract

Developments in technology have created a global market place for consumers. Consumers have the option of purchasing goods in a physical store or an online store. Consumers are no longer limited to shopping at physical stores in their own jurisdiction and can shop online from the convenience of their home. Consumers can acquire goods and services from any country in the world. Online shopping provides consumers with a wide selection of goods and services that may not be available in their own jurisdiction. Consumers favour purchasing online since the goods and services acquired from foreign suppliers are usually offered at better prices (price excludes VAT/GST). This creates an unfair advantage for foreign suppliers over local suppliers.

The problem with selling a product to a consumer over the internet is that no physical product crosses through any physical border post. These products are not physical goods and are therefore referred to as services. Certain jurisdictions such as South Africa refer to these services as electronic services. Electronic services are remotely supplied by foreign suppliers to recipients resident in the Republic. Tax administrations lose revenue since there are no border posts acting as agent to collect VAT/GST and remitting the VAT/GST to the revenue authority. The foreign supplier would charge no VAT/GST on the supply and the consumer will fail to self-declare the VAT/GST to the revenue authority.

1 April 2014, National Treasury introduced electronic services which required foreign suppliers of electronic services to register as vendors in the Republic. However, the implementation was postponed to 1 June 2014 to allow foreign suppliers to update its business systems. In 2015, further amendments were made to the electronic services provisions. However, in 2015 the Davis Tax Committee issued the first interim report on VAT to the Minister of Finance which highlighted concerns about the uncertainty and inconsistency in the application of the electronic services provisions outlined in the Regulations.

This study aims to analyse the supply of cross border electronic services in the Republic. Any benefits and shortcomings will be assessed in a South African and international context. The VAT Act is based on the New Zealand GST Act. The GST Act will be analysed to identify areas of recommendation to improve the VAT Act, subject to the socio-economic conditions in South Africa. The BEPS Report and VAT/GST Guidelines will be analysed to identify how the South African electronic services provisions have been adapted for a developing country based on developed country principles.

Glossary

Business to Business (B2B) supplies	A supply of goods and services from one business consumer to another.
Business to Consumer (B2C) supplies	A supply of goods and services by a business consumer to a non-business consumer.
Consideration	In relation to the supply of goods or services to any person, includes any payment made or to be made (including any deposit on any returnable container and tax), whether in money or otherwise, or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person, but does not include any payment made by any person as a donation to any association not for gain: Provided that a deposit (other than a deposit on a returnable container), whether refundable or not, given in respect of a supply of goods or services shall not be considered as payment made for the supply unless and until the supplier applies the deposit as consideration for the supply or such deposit is forfeited.
Electronic commerce transaction (e-commerce)	Transactions between a buyer and seller through electronic means (over the internet) and usually supplied from a location remote to the consumers country of residence.
Electronic Services	Those electronic services prescribed by the Minister by Regulation (Electronic Services Regulations GN R.221 Government Gazette 37489 of 28 March 2014) in terms of the VAT Act.
Electronic Wallet (e-wallet)	The e-wallet acts as a virtual savings account. The e-wallet holder transfers funds from a bank account. The e-wallet is usually used to pay for regular subscription services such as e-newspapers.

Enterprise (applicable to FESE's)	<p>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:</p> <p>(aa) The recipient of those electronic services is a resident of the Republic;</p> <p>(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 94 of 1990);</p> <p>(cc) The recipient of those electronic services has a business address, residential address or postal address in the Republic:</p>
Export Country	<p>Any country other than the Republic and includes any place which is not situated in the Republic: Provided that the President may by notice in the Gazette determine that a specific country or territory shall from a date and to the extent indicated in the notice, be deemed not to be an export country.</p>
Goods	<p>Corporeal movable things, fixed property, any real right in any such thing or fixed property, and electricity, but excluding -</p> <p>(a) money;</p> <p>(b) any right under a mortgage bond or pledge of any such thing or fixed property; and</p> <p>(c) any stamp, form or card which has a money value and has been sold or issued by the state for the payment of any tax or duty levied under any Act of Parliament, except when subsequent to its original sale or issue it is disposed of or imported as a collector's piece or investment article</p>
Imported Services	<p>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 resident of the Republic to the extent that such services are utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies.</p>
Income Tax Act	<p>The Income Tax Act, No. 58 of 1962.</p>
Invoice	<p>A document notifying an obligation to make payment.</p>

Month	Any of the twelve portions into which any calendar year is divided.
Output Tax	In relation to any vendor, means the tax charged (under section 7(1)(a) of the VAT Act) in respect of the supply of goods and services by that vendor.
Republic	In the geographical sense, means the territory of the Republic of South Africa and includes the territorial waters, the contiguous zone and the continental shelf referred to respectively in sections 4, 5 and 8 of the Maritime Zones Act, No. 15 of 1994.
Resident of the Republic	A resident as defined in section 1 of the Income Tax Act: Provided that any other person or any other company shall be deemed to be a resident of the Republic to the extent that such person or company carries on in the Republic any enterprise or other activity and has a fixed or permanent place in the Republic relating to such enterprise or other activity.
Services	Anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods, money or any stamp, form or card contemplated in paragraph (c) of the definition of "goods".
South African Revenue Service	The South African Revenue Service established by section 2 of the South African Revenue Act, 1997.
Supplier	In relation to any supply of goods or services, means the person supplying the goods or services.
Supply	Includes performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of "supply" shall be construed accordingly.
Tax Administration Act	The Tax Administration Act, No. 28 of 2011.
VAT Registration Number	In relation to any vendor, means the number allocated to that vendor by the Commissioner in terms of section 24 of the Tax Administration Act.

Vendor	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.
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Abbreviations

BEPS	Base Erosion Profit Shifting
BEPS Report	OECD Addressing the Tax Challenges of the Digital Economy, BEPS Action 1 - 2015 Final Report
BGR	Binding General Ruling
DTC	Davis Tax Committee
DTC VAT Report	Davis Tax Committee first interim report (2015) on VAT to the Minister of Finance
ECB	European Central Bank
ECT Act	Electronic Communications and Transaction Act No. 25 of 2002
EU	European Union
FESE	Foreign Electronic Services Enterprise
FESE Guide	VAT Registration Guide for Foreign Suppliers of Electronic Services
GST	Goods and Services Tax
GST Act	New Zealand Goods and Services Tax Act No. 141 of 1985 (as amended)
GST Technical Report	GST/HST Technical Information Bulletin B-090 (Canada Revenue Agency)
ICT	Information and Communication Technology
IMSI	International mobile subscriber identity
IN6	Interpretation Note: No. 6 (Issue 2) (Date: 3 November 2015) (Resident – Place of effective

	management (companies), section 1(1) Income Tax Act No. 58 of 1962)
IP	Internet protocol
ITA	South African Income Tax Act No. 58 of 1962 (as amended)
IRD	Inland Revenue Department (New Zealand)
KPMG Survey	KPMG Global Online Consumer Report 2017. The Truth about Online Consumers.
MCC	Mobile Country Code
MLE	Multiple Location Entity
OECD	Organisation for Economic Cooperation and Development
PayPal Survey	PayPal Global Summary Report 2016: PayPal Cross Border Consumer Research
PN787	Public Notice 787
Regulations	Electronic Services Regulations GN R.221 Government Gazette 37489 of 28 March 2014
SARB	South African Reserve Bank
SARS	South African Revenue Service
SIM	Subscriber Identity Module
TAA	South African Tax Administration Act No. 28 of 2011 (as amended)
TLAB	Taxation Laws Amendment Bill, 2013 (Amendment to section 1 (paragraph (b)(vi) of the Enterprise definition and electronic services definition) and

	section 23(1A) of the Value-Added Tax Act, No. 89 of 1991)
TLAA	Taxation Laws Amendment Act No. 31 of 2013 (Amendment to section 1 (paragraph (b)(vi) of the Enterprise definition and electronic services definition) and section 23(1A) of the Value-Added Tax Act, No. 89 of 1991)
VAT	Value-Added Tax
VAT 404 Guide	VAT 404 Guide for Vendors
VAT Act	South African Value-Added Tax Act No. 89 of 1991 (as amended)
VAT/GST Guidelines	OECD International VAT/GST Guidelines (2017)
VRN	VAT Registration Number

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Chapter 1: Introduction and Background

1.1 Introduction

This dissertation analyses the supply of cross border electronic services provisions in the VAT Act. June 2014, National Treasury introduced electronic services provisions in the VAT Act. Subsequently, certain electronic services provisions have been identified for further amendments. In 2015, the DTC proposed in the DTC VAT Report that a further review of the electronic services provisions be performed with the aim to amend these provisions. In the Minister of Finance February 2017 budget speech it was proposed that the electronic services provisions be updated to broaden the scope of electronic services that are subject to VAT and to remove uncertainties and practical difficulties (National Treasury Budget Review, 2017:47). The electronic services provisions in the VAT Act will be explored to identify these uncertainties and practical difficulties and propose possible solutions.

1.2 Background

National Treasury introduced VAT in the Republic in terms of the VAT Act on 30 September 1991. The VAT Act is primarily based on the GST Act. VAT is an indirect tax levied on the domestic use of services or on the domestic consumption of goods (Olivier and Honiball, 2011:763). VAT is therefore a broad-based tax imposed on consumption.

VAT is a staged collection process. The business would impose VAT (output tax) on the supply of goods and services. VAT incurred on goods and services acquired by the business can be claimed as input tax deductions. Value is added at each stage the goods and services are supplied to different consumers. The objective of the value added stage process is to add value and levy VAT at each stage the goods and services are supplied until the consumer ultimately bears the burden of paying the VAT. The business merely acts as an agent by collecting VAT paid by the consumers and remitting the VAT to SARS (DTC VAT Report, 2015:11).

The South African VAT system works well in the context where goods and services are supplied within the Republic. However, difficulties arise where goods and services are supplied between multiple jurisdictions. Each jurisdiction will have its own VAT system and rules which could lead to double taxation or double non-taxation. The advancement in technology is changing the business landscape and is shifting business operations to a global stage. This intensifies the need for VAT rules in respect of goods and services supplied across multiple jurisdictions.

Suppliers of goods and services can conduct its business operations by way of e-commerce. Consumers in the Republic have the option of purchasing goods and services from local or foreign suppliers. When VAT is not imposed by the foreign supplier, the consumer will

favour the foreign supplier over the local supplier since the local supplier will not charge VAT on the supply. This gives the foreign supplier an unfair advantage. Therefore, local suppliers can't compete with foreign suppliers unless the jurisdiction of the local supplier has a reverse charge mechanism to collect VAT on imported services. However, the reverse charge mechanism has its shortcomings with respect to imported services.

Imported services means the 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 consumed in the Republic otherwise than for the purpose of making taxable supplies (VAT Act, 2017:s1). The jurisdiction with taxing rights is usually where the imported services are consumed (where the consumer is located at the time of consumption). The foreign supplier would supply the imported services and charge VAT at zero percent (based on the destination principle) in the foreign country. The recipient (South African consumer) would be subject to VAT at fourteen percent on imported services based on the reverse charge mechanism if consumed in the Republic otherwise than for the purpose of making taxable supplies (SARS Explanatory Memorandum on the TLAB, 2013:88). Therefore, the recipient is required to self-declare and remit the VAT to SARS.

The reverse charge mechanism is a self-assessment process whereby the consumer is required to self-declare VAT on the acquisition of imported services from non-resident suppliers. The consumer would declare VAT on the supply of imported services by completing a VAT 215 form and remit the VAT to SARS (VAT 404 Guide, 2017:108). The challenge with this method is that consumers do not remit the VAT to SARS. The challenge faced by SARS is that the cost of collecting VAT on imported services outweighs the revenue it can collect from these consumers. This relates specifically to B2C supplies which are usually low value item purchases made by a high volume of consumers. Therefore, valuable revenue is lost although the consumption of imported services is in the Republic. The low compliance level in respect of the self-assessment method led to National Treasury considering alternatives to collect VAT on imported services (SARS Explanatory Memorandum on the TLAB, 2013:90).

The VAT Act was amended and the FESE was specifically included as an Enterprise (VAT Act, 2017:s1). The FESE is required to register and account for VAT in the Republic when the total value of taxable supplies exceed fifty thousand rand in a period of twelve months (VAT Act, 2017:s23(1A)). The FESE is required to register as a vendor even though the supply of electronic services is from a place in an export country. The electronic services provisions came into effect on 1 June 2014.

The VAT Act does not contain explicit general place of supply rules as recommended in the VAT/GST Guidelines. Place of supply rules have been adopted by most jurisdictions. It identifies the jurisdiction which has the right to tax supplies (DTC VAT Report, 2015:9). As a result of no explicit place of supply rules in the VAT Act, it becomes a lengthy exercise to

determine whether a FESE carries on an Enterprise in the Republic under the general definition in terms of paragraph (a). The exercise provides no clear answers since the FESE conducts business operations outside the Republic with no business premises or employees in the Republic. The FESE has no physical presence in the Republic despite the existence of multiple South African consumers. Therefore, the specific inclusion of the FESE under paragraph (b)(vi) of the Enterprise definition clears the uncertainty.

The Regulations prescribes those services that are electronic services. Electronic services include educational services; games and games of chance; internet based auction services; miscellaneous services (e-book, audio visual content, still images, music); and subscription services. The electronic services provided in the Regulations are in a list format. Certain jurisdictions have moved away from a list to a category format which provides FESE's with more clarity when compared to a list (DTC VAT Report, 2015:36).

Other Jurisdictions (such as New Zealand) have preferred to implement remote services supplied by offshore suppliers where there is no necessary nexus between the place where the service is physically performed and the place where the consumer is resident. Remote services include both electronic services and non-electronic services where an electronic platform is used to supply the services from an export country to recipients in the jurisdiction where the consumer is resident. Therefore, both electronic services and remote services are supplied through electronic means.

The Regulations provide that electronic services are services supplied by means of any electronic agent, electronic communication or the internet for consideration. Electronic agent is defined in the ECT Act to mean a computer program or an electronic or other automated means used independently to initiate an action or respond to data messages or performances in whole or in part, in an automated transaction. Electronic communication is defined in the ECT Act to mean communication by means of data messages. Internet is defined in the ECT Act to mean the interconnected system of networks that connects computers around the world. Electronic services are services supplied in an automated transaction; communicated through data messages; and through an interconnected system of networks (ECT Act, 2002:s1). Therefore, services supplied to consumers for consideration through an electronic means and listed in the Regulations are considered to be electronic services.

Electronic services can be regarded as goods and services which are supplied to consumers through the use of electronic methods. Usually these goods and services are supplied to consumers in a physical form. Goods and services supplied through an electronic means transform the nature of the product from tangible property (hardcopy of a magazine) to an intangible property (electronic magazine). Therefore, the product is transformed to a digital product. The VAT Act does not regard the supply of a digital product as a supply of goods, but specifically refer to these supplies as the supply of electronic services.

The change in the nature of products creates further concerns. South Africa provides a list of electronic services in the Regulations. However, the Regulations provide a list of electronic services without adequate definitions or examples. No clear guidance is provided relating to the categories of electronic services provided in the Regulations. For example, the Regulations list subscription services with no clarity on the meaning of a subscription service and the items that fall under this category in the Regulations. The FESE is therefore required to rely on dictionary definitions to determine if it meets one of the subscription services listed in the Regulations. It may not be necessary to amend the Regulations. However, a guide will provide further clarity (DTC VAT report, 2015:94).

Electronic services are supplied from an export country. However, the consumer that uses and enjoys the benefit of the electronic services is located in the Republic. The FESE has no physical business (permanent establishment) situated in the Republic, nor does it store physical goods in a warehouse in the Republic. Furthermore, no employees are in the Republic at the time the electronic services are supplied to the consumer. The place of consumption is in the Republic. In terms of the destination principle outlined in the VAT/GST Guidelines, South Africa should have the taxing rights. Therefore, since South Africa has the taxing rights it is necessary to identify how to determine the location of the consumer (proxy).

National Treasury implemented proxies to determine the location of the consumer. The proxies introduced in the VAT Act are limited to three. It is required that at least two out of three proxies should be present for a FESE to be an Enterprise in the Republic. Other proxies were also considered but rejected. Jurisdictions such as New Zealand have included more proxies than South Africa. The inclusion of more proxies may widen the VAT base to include more FESE's and result in increased revenue for the South African government. However, this may also increase administrative costs for both SARS and the FESE.

The supply of cross border electronic services is expected to increase significantly as the digital economy changes over time. This places pressure on National Treasury to align the electronic services provisions with the changes in the digital economy. Funding public expenditure in the Republic has become increasingly difficult for the government. Simple and clarified electronic services provisions are required to ensure the correct VAT treatment for these transactions and the adequate collection of revenue for the South African government.

1.3 The Digital Economy

1.3.1 Business sectors Impacted by the Digital Economy

All sectors of economies around the world are using ICT to be efficient, competitive and reach a global audience. ICT allows businesses to transact on a global scale and expand its

market reach. The public and private sectors have been impacted by the adoption of ICT. Its constant improvement and decline in the costs of acquiring such technology have contributed to the development of new products and services. ICT is changing business models and the way in which products and services are produced and delivered. This has led to the creation of new payment mechanisms such as digital currencies (BEPS Report, 2015:52).

The table outlines the impact of ICT on different sectors in the economy (Adapted from BEPS Report, 2015:53).

Sector	Impact
Retail	<ul style="list-style-type: none"> • Customers can place orders online • Customers can make payment online • Retailers can collect data and analyse data on customers: <ul style="list-style-type: none"> ○ to determine buying habits/bahaviour of customers; ○ ensure targeted advertising to customers; and ○ ensure customers receive personalised content • Retailers can manage logistics and supply stores efficiently
Transport and Logistics	<ul style="list-style-type: none"> • Means of transport (vehicles/ships/aircraft) and goods can be tracked across continents • Facilitates the development of new operational processes • Vehicle telemetry helps to maximise fuel efficiency, efficient use of transport network and support fleet maintenance activities
Financial Services	<ul style="list-style-type: none"> • Enable customers to manage their finances, perform transactions and access new products online • Data is collected from customers to improve insight into customers, products and customer spending • Easier to track indices and manage investment portfolios

<p>Manufacturing and Agriculture</p>	<p>Manufacturing</p> <ul style="list-style-type: none"> • Enhanced design, development, and the ability to monitor production processes in factories and control robotic systems <p>Agriculture</p> <ul style="list-style-type: none"> • Systems can monitor crops, animals, soil, and environmental quality • Routine processes and agricultural equipment can be managed through automated systems
<p>Education</p>	<ul style="list-style-type: none"> • Universities and educational institutions can provide courses remotely to students (distance learning) • Video conferencing, streaming, and online communication portals for students
<p>Healthcare</p>	<ul style="list-style-type: none"> • Patients can be diagnosed remotely without visiting a hospital • Hospitals can maintain electronic health records instead of physical documents which requires physical storage space • Pharmaceutical companies can advertise drugs and other treatment through electronic means more efficiently and target certain customers
<p>Broadcasting and Media</p>	<ul style="list-style-type: none"> • Enables participation in news media of non-traditional news sources • Expand user participation in media through user generated content and social networking • Collect and use information about the viewing habits and preferences of customers

1.3.2 The Global Online Marketplace for the Consumer

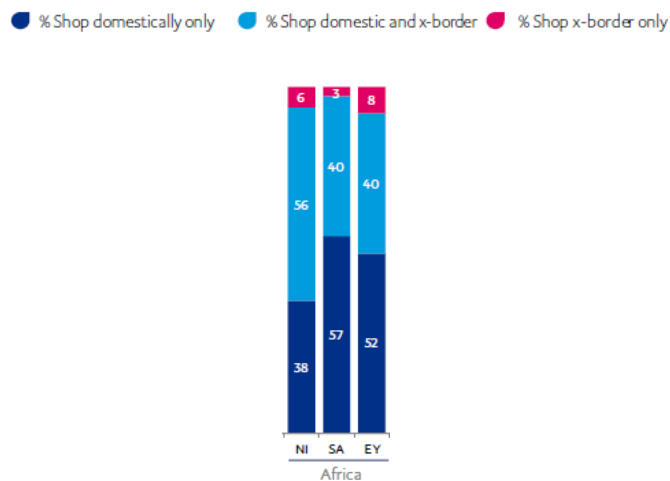
Advancement in technology has created a global electronic marketplace for a new generation of online shoppers. These online shoppers are no longer limited to visiting local stores during business hours. Online shopping can be done at any time and from any location in the world. Suppliers are now able to access markets in locations that were

previously unavailable since a physical store is no longer required for a consumer to purchase goods and services.

In 2016, PayPal conducted a global study through an online survey requesting twenty eight thousand individuals in thirty two countries (including South Africa) to provide information in respect of cross border online shopping. The PayPal Survey focused on how cross border e-commerce is evolving; how and why consumers shop across borders; and how consumers pay for cross border transactions (PayPal Survey, 2016:2).

The PayPal Survey found that in the past twelve months South African online shoppers purchased fifty seven percent locally, forty percent locally and cross border; and three percent cross border only. Similarly, other African countries such as Nigeria and Egypt online shoppers prefer purchasing goods locally and cross border. Sixty two percent of Nigeria online shoppers purchase locally and cross border whereas forty eight percent of Egypt online shoppers purchase locally and cross border (figure 1). The behaviour of African online shoppers leans towards a higher percentage of individuals that prefer purchasing cross border. The decision making drivers of online shoppers may provide further reasons for online shoppers in Africa preferring to purchase cross border (PayPal Survey, 2016:6).

Figure 1 (Online Shopping in Africa)

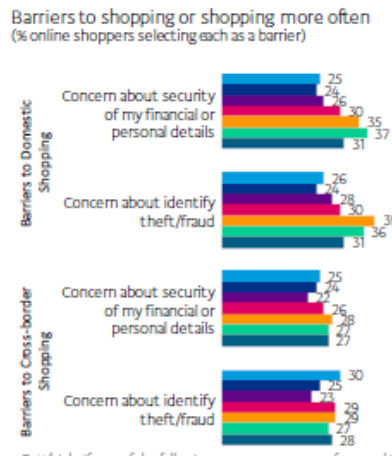


(Adapted from PayPal Survey, 2016:6)

The PayPal Survey found that the barriers that influence online shoppers in Africa against purchasing locally is the concern for sharing sensitive information such as financial or personal details and the risk of being victim to identity theft. The concern for these barriers are significantly less when compared to cross border purchases. Online shoppers in Africa seem to trust cross border suppliers more than local suppliers when it comes to the sharing of sensitive information (Figure 2) (PayPal Survey, 2016:19).

Figure 2 (Barriers to Shopping Online)

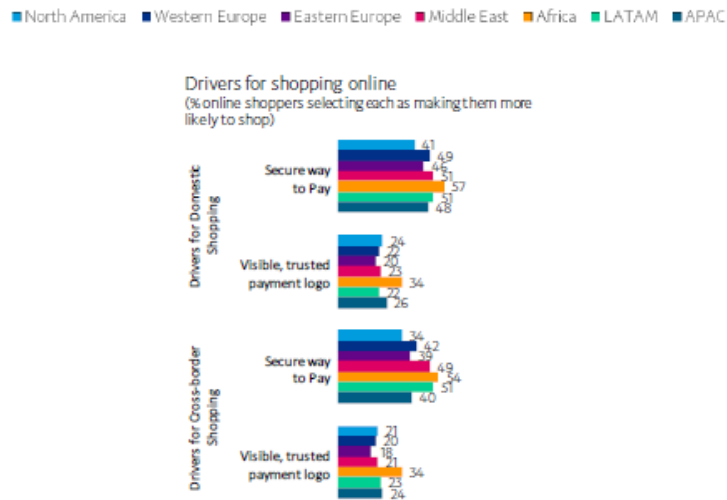
■ North America ■ Western Europe ■ Eastern Europe ■ Middle East ■ Africa ■ LATAM ■ APAC



(Adapted from PayPal Survey, 2016:19)

The PayPal Survey found that online shoppers in Africa slightly favour purchasing locally over cross border where suppliers have secure ways to pay. Where a trusted payment logo is visible, online shoppers are indifferent to shopping locally or cross border. Therefore, online shoppers in Africa are indifferent to purchasing locally and cross border as long as personal information is safe and a trusted payment method is used (Figure 3) (PayPal Survey, 2016:19).

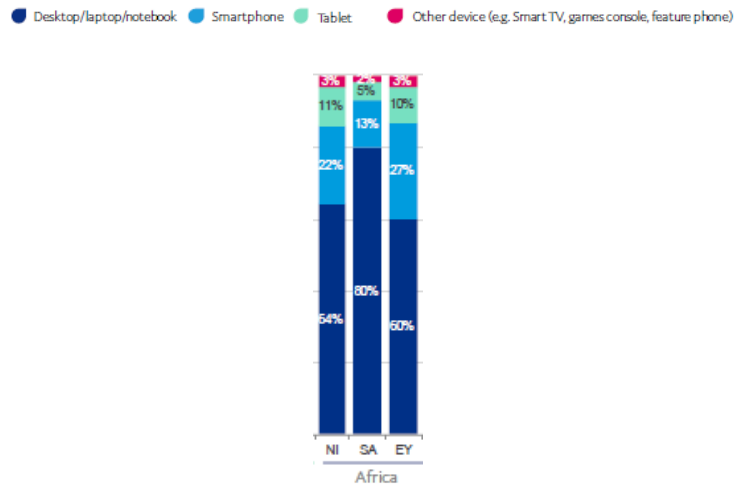
Figure 3 (Drivers for Shopping Online)



(Adapted from PayPal Survey, 2016:19)

Advancement in technology has made it possible for consumers to use mobile devices to shop online from any location in the world. The PayPal Survey found that eighty percent of cross border purchases in the past twelve months have been made by South African online shoppers via a desktop, laptop or notebook. South African online shoppers tend to favour the use of these devices over a smart phone (thirteen percent), tablet (five percent) and other devices (two percent). However, this trend could change over time should consumers gain more trust in the use of smart phones and tablets. On the contrary, Nigeria and Egypt online shoppers have a higher percentage use of smart phones and tablets to purchase cross border over South Africa. Consumers in Egypt and Nigeria may have more trust in the use of smart phones and tablets and feel safer using these devices over South African online shoppers (Figure 4) (PayPal Survey, 2016:8).

Figure 4 (Devices used for Shopping Online)



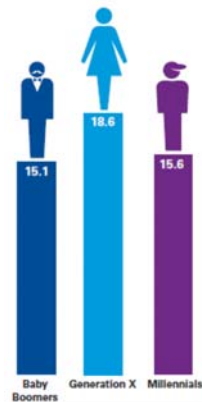
(Adapted from PayPal Survey, 2016:8)

Other drivers, in order of top reasons, identified in the PayPal Survey that influence online shoppers to purchase cross border include better prices; access to items not available in the online shopper’s own country; the ability to discover new and interesting products; websites in the foreign country have more variety; and shipping is more affordable (PayPal Survey, 2016:14). Therefore, online shoppers that purchase cross border prefer to acquire goods and services from other jurisdictions. However, the final decision for the consumer to purchase online is subject to factors such as security of sensitive information and whether a trusted payment method can be used.

In 2016, KPMG conducted a global study through an online survey requesting eighteen thousand four hundred and thirty individuals in fifty countries to provide information in respect of the behaviour and habits of online shoppers. The KPMG Survey categorised three types of shoppers in the online market place. These shoppers are referred to as Baby Boomers, Generation X and Millennials. Each group is categorised based on the period in which these individuals are born. Baby boomers are individuals born between 1946 and 1965. Generation X are born during the period 1966 to 1981. Millennials, which is the youngest group of individuals, are those individuals that were born between 1982 and 2001 (KPMG Survey, 2017:3).

The KPMG Survey found that Generation X are the most active group of online shoppers. Generation X made more online purchases in the past twelve months than both Millennials and Baby Boomers (Figure 5). This could be due to Generation X being more established in their careers. Therefore, the drivers influencing online shopping depends on the shopper’s stage of life and income level (KPMG Survey, 2017:4).

Figure 5 (Average Online Transactions per person per year)



(Adapted from KPMG Survey, 2017:4)

The KPMG survey found that Baby Boomers are the least active online shoppers in terms of the amount of online transactions per person in the past twelve months. However, Baby Boomers on average are prepared to spend more per online purchase than both Generation X and Millennials (Figure 6). However, as Millennials climb the corporate ladder and income levels increase, it is expected that both Baby Boomers and Generation X will be passed in both the amount of online transactions and amount of money spent for online purchases in a twelve month period (KPMG Survey, 2017:5).

Figure 6 (Average Amount Spent per Transaction)

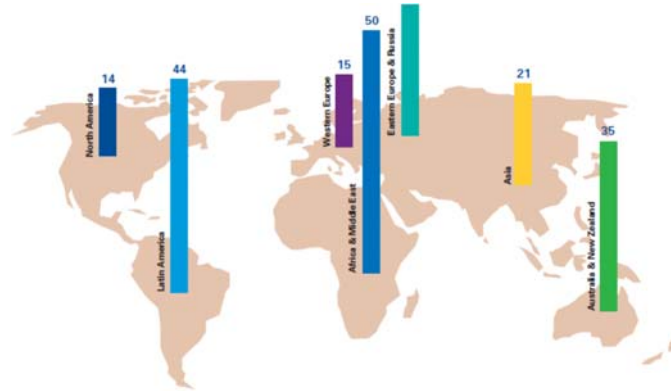


(Adapted from KPMG Survey, 2017:5)

The KPMG Survey found that the more geographically remote a region is the more likely online shoppers would purchase from other countries. New Zealand and Australia's percentage of online purchases from other regions is thirty five percent compared to regions such as North America (fourteen percent) and Western Europe (fifteen percent). The highest percentage of online purchases from other regions are Africa and the Middle East (fifty percent) (Figure 7) (KPMG Survey, 2017:9). This trend is expected to continue as

the African online shopping market improves and consumers gain more trust in the use of online shopping methods.

Figure 7 (Percentage of Online Purchases Imported from other Regions)



(Adapted from KPMG Survey, 2017:9)

ICT is shaping the way various sectors in the economies around the world (including South Africa) are conducting business. The economy in itself can no longer be separated or ring-fenced from ICT. Therefore, the economy is a digital economy. The digital economy has led to changes in current business models and the introduction of new business models. Tax challenges arise, as a result, which create BEPS concerns. Therefore, key features of the digital economy must be analysed to determine how these features raise tax challenges (BEPS Report, 2015:54).

1.4 Objective and Purpose of Research

The objective of this research is to critically analyse the applicability of the electronic services provisions adopted in the VAT Act. The electronic services provisions in the VAT Act are based on principles outlined in the VAT/GST Guidelines. These guidelines were created by the OECD for developed countries. However, meetings are held by the OECD with countries worldwide, particularly developing economies (such as South Africa), to contribute actively to the development of the VAT/GST Guidelines.

South Africa is a developing country that is applying VAT rules for a developed country. The aim of this study is to determine the suitability of the electronic services provisions applied in the Republic. This study will also focus on the areas where the VAT rules differ from those applied in a developed country and how these rules have been adapted to suit the South African VAT landscape.

The VAT Act is primarily based on the GST Act. The VAT Act was modelled on the VAT system introduced in New Zealand and adjusted to take into account the different socio-economic conditions pertaining to South Africa (VATCOM Report, 2015:2). In the DTC VAT

Report, the DTC assessed the VAT Act against the GST Act and recommended areas for amendment to the VAT Act. Therefore, numerous references were made by the DTC to the GST Act. Similarly, from a GST perspective, the May 2016 special report from Policy and Strategy, Inland Revenue New Zealand provides that the remote services provisions broadly follow the VAT/GST Guidelines and the electronic services provisions in the VAT Act (NZ GST on Cross-Border Supplies of Remote Services, 2016:6). This study will therefore investigate New Zealand's remote services rules from a developed country perspective.

The rapid changes in the digital economy will lead to South Africa having to assess and amend the VAT legislation to adequately deal with the correct treatment and collection of VAT on the supply of cross border electronic services. This study aims to identify and investigate the practical difficulties and interpretational uncertainties identified and propose effective solutions.

In order to achieve this objective, the academic research relevant to this study will include the following:

- Analysing the VAT/GST Guidelines and the application of these guidelines to the electronic services provisions in the Republic.
- Analysing the BEPS Report as it relates to the supply of electronic services in the Republic.
- Analysis of the Enterprise definition as it relates to the supply of cross border electronic services by the FESE to recipients in the Republic.
- Analysis of the place of consumption (proxies), jurisdiction with taxing rights and registration obligation for the FESE.
- The challenges relating to B2B and B2C supply of cross border electronic services in the Republic.
- Analysis of the FESE registration and compliance regime in the Republic based on the VAT/GST Guidelines.
- Overview of the GST Act in respect of the remote services provisions and recommend areas to improve the South African electronic services provisions.

1.5 Research Methods

The VAT/GST Guidelines will be used to analyse the VAT Act as it relates to electronic services and based on generally accepted international standards and principles.

The BEPS Report will be analysed and compared to the South African electronic services provisions to identify challenges in the digital economy and how South Africa can mitigate these challenges.

Data will be collected from the VAT Act and the GST Act. The data collected will be analysed as it relates to the supply of cross border electronic services.

Electronic and non-electronic methods will be used to collect, analyse and compare information. Non-electronic methods include researching hard copy text books. Electronic methods include internet search using words and phrases and searching relevant websites such as the OECD, SARS and IRD. Other information obtained through electronic means are reports (PayPal Survey and KPMG Survey) and articles written by industry experts.

The study will follow the theoretical and practical approach to explain how the South African VAT legislation copes with the increase in e-commerce and the supply of cross border electronic services.

Issues found during this study will be assessed, potential solutions proposed and recommendations. These recommendations may assist SARS to effectively administer the provisions relating to the supply of cross border electronic services and improve its revenue collection.

1.6 Limitation of scope

This dissertation is limited to the legislative and regulative framework of electronic services as at 31 August 2017. Draft Regulations were released soon after the 2018 budget speech on 21 February 2018. This study does not analyse the proposed amendments to the Regulations which are anticipated to be introduced in October 2018. This dissertation does not cover the use of intermediaries for the supply of electronic services.

1.7 Outline of Dissertation Chapters

Chapter 2 – This chapter will cover the standards and principles outlined in the VAT/GST Guidelines and identify the challenges in the digital economy outlined in the BEPS Report.

Chapter 3 – This chapter will focus on the supply of electronic services provisions in the Republic.

Chapter 4 – This chapter will focus on the supply of remote services provisions in New Zealand.

Chapter 5 – This chapter will provide conclusions and recommendations based on the analysis performed on the provisions in the VAT Act relating to the supply of cross border electronic services.

Chapter 2: OECD Guidelines on VAT Policy in the Digital Economy

2.1 Introduction

The VAT/GST Guidelines issued by the OECD provide internationally agreed upon principles and standards for the VAT/GST treatment of international transactions. The principles and standards aim to guide jurisdictions with the appropriate VAT/GST treatment for the supply of cross border services and intangibles. It seeks to minimise inconsistencies and reduce uncertainty and risk of double taxation and double non-taxation for the cross border supply of services and intangibles (VAT/GST Guidelines, 2017:3). This chapter will focus on the VAT/GST treatment for the supply of cross border services and intangibles as it relates to the supply of cross border electronic services.

The VAT/GST Guidelines are beneficial to jurisdictions since it provides internationally agreed upon standards. This assists policy makers in jurisdictions and provides a framework on which to develop and maintain VAT/GST systems that are harmonised and interact with each other that does not distort but facilitate international trade between jurisdictions. Subject to the economic climate of the jurisdiction, policy makers can develop VAT/GST laws based on the principles and standards outlined in the VAT/GST Guidelines (VAT/GST Guidelines, 2017:3).

The OECD released a report in February 2013 addressing Base Erosion and Profit Shifting. This was followed by the OECD and G20 countries (South Africa is a G20 member) adopting a fifteen point action plan addressing BEPS in September 2013. The fifteen action points focus on three core principles (BEPS Report, 2015:3).

To introduce coherent domestic rules that affects cross-border activities; reinforce substance requirements in existing international standards and improving transparency and certainty (BEPS Report, 2015:3). The BEPS Report addresses the tax challenges of the digital economy and aims to determine how a jurisdiction will ensure effective collection of VAT/GST with respect to the supply of cross-border electronic services.

The main features of the digital economy that generate BEPS concerns relate to the mobility of consumers and create considerable challenges in the context of the imposition of VAT/GST. The continuous improvement in technology allows businesses to conduct activities globally and centralise its infrastructure in a location situated in a jurisdiction which is far from the consumer's market jurisdiction. Sales are made to market jurisdictions remotely with minimal or even no staff in the jurisdiction of its consumers (BEPS Report, 2015:86).

Businesses with global operations are now able to acquire services from suppliers in other jurisdictions (B2B supplies). This has allowed businesses with exempt activities to avoid or minimise the VAT/GST paid on cross border supplies. Businesses can therefore structure its

global operations where no or low amounts of VAT/GST is incurred where remote services are acquired in the course of exempt business activities (BEPS Report, 2015:94).

Remotely supplied cross border services creates challenges for VAT/GST systems in jurisdictions where electronic services are acquired by non-business consumers (B2C supplies). Technology has allowed the average individual to shop online and acquire services from suppliers in any country in the world without the need for the foreign supplier to be present in the consumer's jurisdiction. This creates an uneven playing field for resident and non-resident businesses since jurisdictions are unable to implement VAT/GST legislation that enforce the collection of VAT/GST on remotely supplied electronic services and contradicts the neutrality principle (BEPS Report, 2015:120).

Jurisdictions apply two approaches when imposing VAT/GST on the supply of cross border electronic services. A jurisdiction would either allocate taxing rights to the jurisdiction of the supplier (origin principle) or the jurisdiction of the consumer (destination principle). The former approach would impose VAT/GST in the supplier's jurisdiction. Should the supplier's jurisdiction apply no VAT/GST or charge a lower VAT/GST rate than the consumer's jurisdiction, then no VAT/GST or a low amount of VAT/GST will be collected on the supply of electronic services. The latter approach will levy VAT/GST in the jurisdiction of consumption which aligns with the destination principle. However, there have been challenges with this approach and revenue authorities have considered two approaches to combat this issue. These have been highlighted by the OECD where the VAT/GST should be declared and remitted to the jurisdiction of consumption (BEPS Report, 2015:121).

The first approach is to request the consumer to self-assess and remit VAT/GST to the revenue authority. This method has a low success rate (especially in the Republic) since consumers do not self-assess and remit VAT/GST in this scenario (SARS Explanatory Memorandum on the TLAB, 2013:90). The second approach is for the foreign supplier to register, collect and remit the VAT/GST to the revenue authority in the jurisdiction where the consumer is resident. The latter method is recommended by the OECD since it complies with the two core principles of a good VAT system, namely the neutrality and destination principle (BEPS Report, 2015:122).

South Africa incorporated the imported services legislation in the VAT Act when VAT was introduced in 1991 and sought to capture electronic and non-electronic services coming into the Republic. However, the imported services legislation was not sufficient in capturing electronic services. This led to the introduction of the electronic services legislation in the VAT Act. Although the imported services are not effective in catching electronic services, it remains relevant for non-electronic services. The electronic services legislation requires the FESE to register as a Vendor. A low VAT registration threshold requirement of fifty thousand rand was introduced to ensure that FESE's supplying electronic services from an export

country to recipients in the Republic would have a compulsory obligation to register as a vendor in the Republic (SARS Explanatory Memorandum on the TLAB, 2013:89).

This chapter will cover the VAT challenges in the digital economy addressed in the BEPS Report. The VAT/GST Guidelines will be analysed which deals with the core features of a VAT/GST system and generally accepted principles of VAT/GST policy based on the Ottawa Taxation Framework Conditions. The BEPS Report and the VAT/GST Guidelines will be analysed in relation to the supply of cross border electronic services.

2.2 OECD VAT/GST Principles

The principles of efficiency; certainty and simplicity; effectiveness and fairness; and flexibility and neutrality served as the basis for the 1998 Ottawa Ministerial Conference. The principles aid governments as a framework for the development of a VAT/GST system. These principles were subsequently referred to as the Ottawa Taxation Framework Conditions (BEPS Report, 2015:20). The Ottawa Taxation Framework Conditions will be discussed since it serves as the basis for analysing the effectiveness of the cross border supply of electronic services provisions in the Republic.

The aim of the efficiency principle is to ensure that compliance costs for businesses are kept as low as possible. On the other hand, administration costs for revenue authorities of jurisdictions with VAT/GST rules should also be kept to a minimum (BEPS Report, 2015:20). The compliance costs for FESE's should be kept to a minimum when supplying cross border electronic services to recipients in the Republic. FESE's should be able to comply with the VAT/GST rules of the jurisdiction without requiring significant changes to its business system. Therefore, the FESE's standard business practice should require limited changes to remain VAT/GST compliant. Revenue authorities must ensure that the revenue collected should outweigh the cost of ensuring that FESE's are compliant with the VAT/GST rules of the jurisdiction.

The aim of the certainty and simplicity principle is to ensure that VAT/GST rules are clear and simple to understand for the taxpayer (business consumer and non-business consumer) including the FESE acting as agent and collecting VAT/GST on behalf of the revenue authority. When a VAT/GST system is simple the taxpayer (including FESE) will understand its obligations and entitlements (BEPS Report, 2015:20). The taxpayer (including FESE) should know when, where and how to apply the VAT/GST treatment on the supply of cross border electronic services.

The effectiveness and fairness principle aims to ensure that the right amount of VAT/GST is charged at the appropriate time. The value and time of supply should be accurately applied by the FESE whilst avoiding both double taxation and unintentional non-taxation. The FESE must ensure that the potential for evasion and avoidance should be minimised (BEPS Report, 2015:20).

The flexibility principle aims to ensure that a VAT/GST system is flexible and dynamic to keep up with technological and commercial developments. The VAT/GST system should therefore meet current revenue needs of governments while adapting to changing needs on an ongoing basis (BEPS Report, 2015:21).

The principle of neutrality aims to ensure that VAT/GST charged on the supply of electronic services are neutral and equitable. The VAT/GST rules applied in a jurisdiction should not favour one business to the next. Businesses should operate competitively and on an equal footing without prejudice to certain businesses (BEPS Report, 2015:20). Therefore, FESE's should not be disadvantaged or advantaged compared to domestic businesses in the jurisdiction with the taxing rights. The neutrality principle promotes the view that FESE's should not have the financial burden of incurring VAT/GST on the supply of electronic services that can't be recovered.

Neutrality, in respect of the supply of electronic services, is achieved through the application of the destination principle. The destination principle is designed to ensure that the supply of electronic services is taxed in the jurisdiction where final consumption occurs (VAT/GST Guidelines, 2017:38).

VAT/GST systems incorporate place of supply rules to implement the destination principle in both B2B and B2C supplies of electronic services. The place of supply rules should facilitate the ultimate objective of taxing final consumption and determine the jurisdiction with taxing rights.

2.3 B2B Supply of Electronic Services/Remote Services

The supply of electronic services between businesses are usually taxed in the jurisdiction where the business consumers are located (VAT/GST Guidelines, 2017:41). These electronic services are acquired and consumed for taxable business purposes. The business acquiring the electronic services in another jurisdiction will usually have an established business premises in that jurisdiction. The B2B place of supply rule applies to both a business consumer with a single location and multiple locations. The approach that is encouraged is to tax the supply of electronic services in the jurisdiction where the consumer's business premises is established which makes use of the electronic services. The location of the business consumer would therefore be the proxy since this is where the business premises will be situated.

The responsibility for charging, collecting and remitting VAT to the revenue authority is usually on the foreign supplier of electronic services, where the supplier and consumer is located in the same jurisdiction. However, it can become costly and an administrative burden for FESE's to comply with the VAT requirements in the jurisdiction of taxation where no business presence exists in the taxing jurisdiction.

A VAT/GST system is generally not designed to be a tax on B2B supplies of electronic services. The VAT/GST Guidelines recommend the revenue authority utilise the reverse charge mechanism to minimise the administrative burden for FESE's where the business consumer is entitled to a full input tax deduction on expenses incurred in the course of taxable business operations. The reverse charge mechanism shifts the liability to charge, collect and remit VAT from the FESE to the business consumer. However, the VAT/GST legislation in the jurisdiction of the business consumer may not require the reverse charge to be made since the output tax declared by the business consumer will be reduced by an equal input tax credit. Therefore, the result is nil VAT/GST collection by the revenue authority in the jurisdiction where the business consumer is located. Therefore, the B2B supply of electronic services does not create a BEPS concern for revenue authorities. However, BEPS concerns could arise with respect to the supply of electronic services made to exempt businesses.

Where a business consumer is engaged in exempt activities, no VAT/GST is levied on the exempt supplies made by the business consumer, while VAT/GST incurred by the business consumer on the associated expenses incurred in the course of business operations is not deductible.

When a business consumer acquires a cloud computing service from a FESE, the business consumer would be required to self-assess VAT/GST according to the rules of the jurisdiction in which it is located and claim an input tax deduction for this self-assessed VAT/GST. If the business consumer is an exempt business, it is still required to self-assess VAT/GST in the jurisdiction, but would be denied an input tax credit for the self-assessed VAT/GST. The exempt business consumer is therefore taxed in the jurisdiction of residence on the expenses incurred in the course of exempt business activities. However, some jurisdictions currently do not require the exempt business consumer to self-assess VAT/GST on the electronic services acquired from abroad. Hence, no VAT/GST is collected in the exempt business consumer's jurisdiction where the self-assessment method is not utilised.

The BEPS Report raised a concern relating to, for example, where cloud computing services are subject to VAT/GST in the jurisdiction where the supplier of electronic services is resident (established, located). The VAT/GST would accrue to the jurisdiction in which the supplier is established and not the jurisdiction of the exempt business consumer. The problem highlighted in the BEPS Report occurs when the supplier's jurisdiction has no VAT/GST or a VAT/GST rate lower than the rate in the jurisdiction of the exempt business consumer. In such cases, the exempt business consumer would pay no VAT/GST or an inappropriately low amount of VAT/GST when compared to the supplier's jurisdiction.

The above cases illustrate how an exempt business consumer could pay no or an inappropriately low amount of VAT/GST when acquiring electronic services. This further illustrates how local suppliers of competing electronic services could face potential

competitive pressures from FESE's. Local suppliers are required to collect and declare VAT/GST on the supply of electronic services to local business consumers. However, the business consumer could structure the business affairs in such a way that it acquires electronic services from a foreign supplier where no or an inappropriately low amount of VAT/GST is charged in terms of the foreign suppliers jurisdiction. This puts the business consumer and FESE in a favourable position since the business consumer would purchase the electronic services from the FESE over the local supplier.

The BEPS Report raised concerns in cases where electronic services are acquired by an MLE. It is common practice for multinational businesses to acquire electronic services centrally and realise economies of scale. Typically, the cost of acquiring such electronic services is initially borne by the business establishment that acquired it and is subsequently recharged under a recharge arrangement to the MLE establishments making use of the electronic services. The MLE establishments are charged for its share of the electronic services on the basis of the internal recharge arrangements. However, certain VAT/GST jurisdictions do not apply VAT/GST to transactions that occur between business establishments of one single legal entity. Therefore, where a business establishment of an MLE acquires electronic services, such as cloud computing services, for use by other business establishments in other jurisdictions, no additional VAT would apply on any internal recharges made within the MLE for the use of these services by other business establishments (BEPS Report, 2015:228).

On the contrary, the business establishment that acquired electronic services will be entitled to claim any VAT if incurred in the course of taxable business purposes. This means that the other business establishments using the cloud computing services are able to acquire its portion of services without incurring any VAT/GST. However, this is not a concern if all the establishments of the MLE consume the electronic services in the course of taxable business activities since it can claim the VAT/GST credit. The BEPS concern comes about where business establishments using cloud computing services are exempt or partially exempt businesses (i.e. entities applying VAT apportionment). These business establishments will need to account either for the reverse charge or be charged VAT which will not be recoverable.

For example, cloud computing services are provided to a bank which is an MLE. When the local bank of the MLE acquires such services directly from a local supplier it would incur VAT/GST on these services. The local bank would not be able to deduct this VAT/GST as it relates to the local bank's VAT/GST exempt activities. On the contrary, the local bank of the MLE could acquire the cloud computing services through another establishment of the same bank in another country and then reimburse the other establishment for the cost of acquiring these services on its behalf. This would allow the local bank to acquire the cloud computing services through the other business establishment where no VAT/GST is charged.

Further, where the acquiring establishment is located in a country without VAT/GST, the MLE could acquire these services for all its establishments around the world without incurring any VAT/GST at all by channelling its acquisitions through establishments in no VAT/GST jurisdictions. VAT-exempt businesses can make substantial VAT/GST savings by using such channelling structures.

2.4 B2C Supply of Electronic Services/Remote Services

The B2C rules should aim to ultimately tax the consumer in the jurisdiction where final consumption occurs. The goal is to ensure that the burden of VAT/GST does not fall on the business consumer. Rather, the VAT/GST burden should fall on the final non-business consumer making use of the electronic services. B2C supplies therefore aim to give taxing rights to the jurisdiction of final consumption placing the burden of VAT/GST on the final consumer. The general rule for determining the place of taxation is based on the final consumer's usual residence. Therefore, the final consumer's place of residence is presumed to be the place where the electronic services are consumed (VAT/GST Guidelines, 2017:69).

The usual residence of a consumer in a B2C transaction is located in the jurisdiction where the consumer regularly lives or has an established home. B2C consumers that are temporarily in a jurisdiction are usually not considered to have usual residence in such jurisdictions. Therefore, FESE's are required to rely on the information that it obtains from transacting with the consumer when determining the VAT/GST treatment of the B2C supply of electronic services. The information (address, bank details, telephone number, internet protocol address) the consumer provides to determine the location of the consumer is dependent on the FESE's business model (for example, e-commerce or cloud computing), the nature of the supply, value of the supply and the FESE's delivery model. Revenue authorities are required to provide guidance for FESE's to determine the location of the consumer and will need to take into account the laws and practice generally prevailing including the protection of consumer's personal information (VAT/GST Guidelines, 2017:70).

Charging, collection and remittance of VAT/GST are traditionally the responsibility of suppliers. These requirements are straightforward in the context where the supplier and consumer are located in the same jurisdiction of taxation. However, FESE's are often based in a jurisdiction that is not located in the jurisdiction of taxation. It can become complex and burdensome for FESE's to comply with the VAT/GST requirements in the jurisdiction of taxation since no business presence exists in the taxing jurisdiction (VAT/GST Guidelines, 2017:70).

In the B2B context, the reverse charge mechanism is utilised where the responsibility to remit VAT/GST to the revenue authority shifts from the supplier to the business consumer. The reverse charge method is appropriate where the business consumer is a partially exempt entity and is not entitled to claim the full input tax credit. This method will not be

appropriate in the case where the business consumer is entitled to claim the full input tax credit for the expense incurred in the course of taxable business activities since the output tax matches the input tax credit and would result in no VAT/GST collection for the revenue authority. However, the reverse charge method is not practical in the case of B2C supply of electronic services (VAT/GST Guidelines, 2017:71).

The reverse charge method will not be appropriate for the supply of electronic services by business consumers to non-business consumers (B2C). The reason is that non-business consumers do not self-assess and remit the VAT to the revenue authority. It is commonly found that these jurisdictions experience low levels of compliance unless non-business consumers face strict sanctions by the revenue authority for non-compliance. In addition, the cost of administering the process to collect the VAT/GST from non-business consumers outweighs the VAT/GST the revenue authority can collect from non-business consumers when making use of the reverse charge method (VAT/GST Guidelines, 2017:71).

The most effective and efficient method for the collection of VAT/GST in the context of B2C supply of electronic services is for the FESE to register and account for VAT/GST in the place of taxation. Implementing a FESE registration method for the collection of VAT/GST on the supply of electronic services requires the jurisdiction of taxation to consider establishing a simplified registration and compliance system. Compliance levels for the collection of VAT/GST by FESE's are likely to be considerably better in jurisdictions that limit the requirements to what is strictly necessary for the adequate collection of VAT/GST. FESE's are often reluctant to conduct business in jurisdictions that require traditional full VAT/GST registration and reporting obligations. Further, FESE's that do register in terms of the traditional VAT/GST registration requirements may find it challenging to comply with these requirements. Therefore, these FESE's will become non-compliant in jurisdictions where interest and penalties may be levied. However, the OECD recommends that less strict compliance rules should apply to FESE's. Relaxed VAT/GST compliance rules should create a fair playing field for FESE's and reduce the compliance and cost burden. Therefore, the aim is to create a separate VAT/GST registration process for FESE's and limit certain rights such as input tax recovery and the obligations of full reporting. The simplification of the VAT/GST compliance process for the FESE ensures an effective solution to secure VAT/GST revenues on B2C supplies of electronic services while complying with the application of the neutrality principle and destination principle (VAT/GST Guidelines, 2017:72).

2.5 Simplified Registration and Compliance Regime

Based on the OECD standards and principles, currently the most reliable method for the collection of VAT/GST in respect of B2C supply of electronic services is for the FESE to register and account for VAT/GST in the destination jurisdiction of the consumer. However, the destination jurisdiction should establish a simplified registration and compliance regime. The main features of a simplified registration and compliance regime for FESE's focus on

registration, input tax recovery (refunds), VAT/GST returns, payments, record keeping, invoicing, availability of information and the use of third party service providers (VAT/GST Guidelines, 2017:73).

Simplified registration procedures implemented by the revenue authority with taxing rights should limit the information requested from the foreign supplier. At a minimum, the information should include the name of business; trading name; name of contact person responsible for dealing with revenue authority; postal and/or registered address of the business and its contact person; telephone number of contact person; email address of contact person; website's URL of foreign supplier through which business is conducted in the taxing jurisdiction; and national tax identification number (if such a number is issued to the supplier in the supplier's jurisdiction to conduct business in that jurisdiction)(VAT/GST Guidelines, 2017:73).

Revenue authorities are taking steps to exploit the use of technology to support the administration of a simplified VAT/GST regime. The best method for foreign suppliers to engage with the revenue authority is by electronic means. The revenue authority should implement an online VAT/GST registration on its website home page and available in a language of the jurisdictions major trading partners (VAT/GST Guidelines, 2017:74). The registration and compliance regime should be simplified for the foreign supplier since it is taking on further administrative responsibilities and costs in addition to that required by its own jurisdiction.

The following chapter will analyse the electronic services rules in the VAT Act relating to the supply of electronic services based on the VAT/GST Guidelines and the challenges according to the BEPS Report. The VAT/GST Guidelines have been developed for developed countries. The analysis will evaluate how adequate or suitable these rules are for a developing country such as South Africa.

Chapter 3: SUPPLY OF ELECTRONIC SERVICES IN THE REPUBLIC

3.1 Introduction

VAT is usually levied and paid in the country where the goods and services are consumed (destination principle). The consumer should ultimately bear the burden of paying VAT and the vendor is required to collect the VAT received from the consumer and pay the VAT over to SARS. However, complications arise in the application of this principle to e-commerce. For example, when physical goods are imported into the Republic the border post acts as a collecting agent on behalf of SARS. However, when electronic services are acquired from FESE's by South African consumers over the internet, there is no collecting agent acting on behalf of SARS (National Treasury Budget Review, 2013:59).

SARS would rely on the consumer to declare and pay over the VAT on the supply of electronic services. Where the business consumer is a vendor and use the electronic services for private or exempt purposes, it is required to account for VAT on imported services when furnishing SARS with the VAT 201 (B2B transactions). If a non-business consumer that is not a vendor use the electronic services for private purposes, VAT must be accounted for on imported services using form 215 and paid over to SARS (B2C transactions). However, non-business consumers do not declare the VAT on imported services which could be attributed to the consumer perceiving the remittance of VAT as voluntary which is impossible to enforce by SARS (SARS Explanatory Memorandum on the TLAB, 2013:89).

National Treasury released the 2013 budget review on 27 February 2013 which proposed that FESE's supplying electronic services to consumers in the Republic should register as vendors (National Treasury Budget Review, 2013:59). The FESE is required to impose VAT on the supply of electronic services to recipients in the Republic; collect VAT on behalf of SARS; and remit VAT to SARS. The imported services provisions in the VAT Act, which is a self-assessment method (reverse charge mechanism) of collecting VAT for SARS, proved to be an ineffective collection method. The non-collection of VAT is mainly by non-business consumers that do not submit VAT 215 forms and do not pay the VAT to SARS. SARS placed too much reliance on the reverse charge mechanism for collecting VAT from non-business consumers (SARS Explanatory Memorandum on the TLAB, 2013:89).

Internationally the self-assessment method results in low levels of compliance and revenue collection for tax administrations. Enforcing VAT collection of small amounts from a large group of non-business consumers involves considerable costs that outweigh the revenue collected. Therefore, the reverse charge method is not an appropriate solution for collecting VAT on B2C transactions. Research performed by the OECD and other countries indicate that the most effective and efficient method for the collection of VAT on B2C transactions is

for the foreign supplier to register and account for VAT in the jurisdiction of taxation (VAT/GST Guidelines, 2017:71).

The implementation of the requirement for FESE's to register as vendors in the Republic will ensure that VAT is collected by the FESE and remitted to SARS. This method ensures that revenue is collected from all consumers of electronic services that would not have been collected via the self-assessment method. The e-commerce market in the Republic becomes an even playing field for both domestic and foreign suppliers of electronic services (neutrality principle)(VAT/GST Guidelines, 2017:71).

The 2013 budget review was later that year followed by the Explanatory Memorandum on the TLAB 2013 issued by National Treasury on 24 October 2013 which confirmed the proposal that requires a FESE to register as a vendor in the Republic. National Treasury provided that the FESE has no physical presence in the Republic. However, the FESE supplies electronic services to consumers in the Republic (SARS Explanatory Memorandum on the TLAB, 2013:89).

The VAT Act was amended and promulgated in terms of the TLAA. Paragraph (b)(vi) was inserted in the Enterprise definition of the VAT Act which included a FESE. The definition of electronic services was also inserted in the VAT Act which referred to the Regulations, that prescribed by the Minister, the types of electronic services. Section 23(1A) was inserted in the VAT Act which placed a compulsory VAT registration obligation on FESE's where the total value of taxable supplies made by the FESE exceeds fifty thousand rand at the end of any month. These amendments was scheduled to come into effect on, 1 April 2014. However, the implementation of the electronic services provisions was postponed by a further two months to 1 June 2014. The postponement allowed the FESE's to update its business systems. In 2015, an amendment was promulgated in the VAT Act. An additional proxy was inserted under paragraph (b)(vi) of the Enterprise definition. The proxy was used to determine if the consumer is resident in the Republic with reference to its residential, business and postal address.

This chapter will cover the electronic services provisions in the VAT Act including the types of electronic services prescribed by the Minister in the Regulations. The Enterprise definition will be analysed as it relates to the specific inclusion of FESE's. The proxies will be analysed to determine whether these are adequate for identifying the consumer's place of consumption and ultimately the place of taxation. The Regulations will be analysed to determine whether the list of electronic services is a sufficient means to identify the nature of the electronic services, taking into account advancements in technology. The FESE registration and compliance regime will be assessed based on the OECD principles in VAT/GST Guidelines.

3.2 The Supply of Electronic Services

Services listed in the Regulations are electronic services supplied by means of an electronic agent, electronic communication or the internet for consideration. The purpose of the Regulations is to prescribe those services that are electronic services. The electronic services listed in the Regulations consist of educational services; games and games of chance; internet-based auction services; miscellaneous services; and subscription services. The list of electronic services are limited to five groups with a brief summary of each. The OECD recommends the principle of certainty and simplicity. As a developing country, the electronic services listed in this format may be adequate at this point since the types of electronic services are not complex and easy to understand. However, there are disadvantages to this approach.

The qualifying electronic services provided in the Regulations are not clearly defined for the FESE to apply the correct VAT treatment and avoid uncertainty. The electronic services are not further defined in the Regulations nor the VAT Act and the FESE is required to rely on the general meaning for the different type of electronic services. The time and costs incurred by the FESE to research the meaning of an electronic service can become a tedious and complex exercise. This goes against the OECD principle of efficiency. Issuing a SARS guide or interpretation note will assist FESE's in understanding the different types of electronic services. The guide should clearly define terms and provide examples of the different types of electronic services.

There are three approaches used by jurisdictions when distinguishing between different types of electronic services. The first approach to be addressed is applied in the Republic which is in the form of a list of electronic services. This approach is straightforward and easy to apply since the electronic services in the list are limited. However, the list must be revised regularly to keep up with changes in the digital economy and to comply with the OECD principle of flexibility.

Certain jurisdictions also provide for a list of services that are specifically excluded as electronic services. The EU have provided for exclusions of certain services as electronic services. These exclusions include telecommunications services; accommodation booked online; advertising services in newspapers; and posters and television. The Regulations provide no guidance on exclusions. Should the list of electronic services not specifically exclude a type of service, the FESE is required to determine whether or not the electronic service forms part of the list of electronic services. This may become a complex and tedious exercise for the FESE which could have been avoided if provided with a list of specific exclusions (DTC VAT Report, 2015:92).

The DTC raised a concern with regard to online advertising since it is not specifically mentioned in the Regulations. Therefore, online advertising may fall outside the ambit of

electronic services. However, by further analyses of the supply of still images under miscellaneous services, online advertising may be covered in the Regulations as a supply of electronic services. The Regulations may not necessarily require amendment, but a guide or interpretation note may provide clarity on the inclusion or exclusion of online advertising and other electronic services not specifically mentioned in the Regulations (DTC VAT Report, 2015:92).

The second approach is where jurisdictions, such as New Zealand, do not distinguish between electronic services (digital) and non-electronic services (non-digital). This approach will not be suitable in the Republic since the remote services covered in the New Zealand provisions are too broad and will be too complex for taxpayers and FESE's. Refer to chapter 4.1 for the analysis of the supply of remote services.

Jurisdictions, such as Canada, have adopted the approach of moving from an exhaustive list of electronic services to categories of electronic services (DTC VAT Report, 2015:35). When utilising categories, the type of electronic services that can be included in the scope of electronic services widens. This assists with addressing concerns that relate to services that change and develop with technological advancements that would not necessarily be included by the approach using a list of electronic services. This format provides clear definitions and examples of the different types of electronic services which makes it easier to understand for the taxpayer and FESE.

South Africa must consider moving from a list to categories of electronic services. It will be necessary to provide a SARS guide or interpretation note that set out general criteria and examples to identify a supply of electronic services (DTC VAT Report, 2015:95). In addition, the SARS guide or interpretation note should provide those services that are specifically excluded as electronic services. These exclusions are usually the supply of services where the use of an electronic medium is an incidental part of the supply or already covered under the current VAT rules.

The Canadian GST Technical Report provides criteria that may assist with distinguishing between a supply of electronic services and a supply of services where the electronic means used in performing the service is incidental to the supply as a whole (GST Technical Report, 2002:2).

A supply of electronic services could generally mean:

- The right in or right to use a product for private or business purposes;
- The product has already been created or developed, or is already in existence.
- The product is developed for a specific consumer, but the supplier retains ownership of the product.
- A right to make a copy of a digitized product is provided.

(GST Technical Report, 2002:2)

For example, a FESE of software provides a South African consumer with online technical support. Applying this to the criteria, where the supply of the right to use existing technical information online and the interaction between the consumer and technician is incidental, the supply is an electronic service. On the contrary, when a major part of the supply is providing support by the technician, the work performed for the consumer is specific to the needs of the consumer, subject to the technical support being incidental. This will be a supply of a service.

No clear definitions of electronic services are currently provided in the Regulations. The FESE is required to seek expert advice where a SARS guide or interpretation note could provide further guidance. Alternatively, a move to categories of electronic services could provide better guidance for the FESE than a list of electronic services. Categories with clear definitions and examples will provide clarity for FESE's.

3.3 Carrying on an Enterprise in the Republic

The VAT Act provides that VAT shall be levied and paid on the supply by any vendor of goods and services supplied in the course or furtherance of any Enterprise (VAT Act, 2017:s7(1)(a)). The Enterprise must be carried on in or partly in the Republic (VAT Act, 2017:s1). Generally a person would not be regarded as carrying on an Enterprise in the Republic unless it has a physical presence (permanent establishment) in the Republic (Botes, 2015:27).

The general application of the Enterprise definition with respect to activities carried on partly in the Republic is an area of uncertainty for a FESE. The supply of electronic services is from a place in an export country. However, the place of consumption is in the Republic. The FESE has no permanent establishment, no branch and no employees in the Republic at the time of supplying electronic services to the recipients. Therefore, the FESE may not register as a vendor under the general definition of Enterprise in the VAT Act since it does not meet all the criteria of an Enterprise.

3.4 Foreign Supplier Carrying on an Enterprise in the Republic

The VAT Act was amended to specifically include a FESE under paragraph (b)(vi) of the Enterprise definition. The inclusion clarified any uncertainty and doubt previously raised. A FESE carries on an Enterprise when the supply of electronic services is made by a person from a place in an export country, where at least two of the following circumstances are present:

- (i) The recipient of the electronic services is a resident of the Republic;
- (ii) Any payment to the FESE in respect of the electronic services originates from a bank registered or authorised in terms of the Banks Act, No. 94 of 1990; and

- (iii) The recipient of the electronic services has a business address, residential address or postal address in the Republic.

(VAT Act, 2017:s1)

3.4.1 Supply by a person from an export country

A supply includes performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, irrespective of where the supply is effected and any derivative of supply (VAT Act, 2017:s1). A supply generally occurs between parties (buyer and seller) when there is an exchange of goods and services for consideration. When a consumer purchases a digital product from the FESE, the consumer pays an amount of money in exchange for the digital product. The FESE therefore supplies electronic services to the consumer.

The general VAT rules provide that VAT is imposed on the supply of goods and services made in the Republic or partly in the Republic (VAT Act, 2017:s1). If a South African business supplies electronic services in the Republic it will be subject to VAT at the standard rate. However, the FESE supplies electronic services from an export country. The inclusion under paragraph (b)(vi) of the Enterprise definition confirms that a FESE shall charge VAT on the supply of electronic services even though its from a place in an export country.

Before the specific inclusion of the FESE in the Enterprise definition, VAT was self-declared by the recipient under the imported services rules. In terms of the imported services provisions, the FESE had to be a non-resident of the Republic or carry on business outside the Republic (VAT Act, 2017:s1). However, in terms of the specific inclusion in the enterprise definition, the FESE is not required to be a non-resident supplier of electronic services. The FESE merely has to supply goods and services from a place in an export country. Therefore, any supply of electronic services from a place outside the Republic will lead to the FESE carrying on an Enterprise in the Republic.

FESE's supply electronic services to consumers in the Republic. To determine the place of consumption it is necessary to determine the location of the consumer (proxy). The Enterprise definition includes three proxies.

3.4.2 The recipient of the electronic services is a resident of the Republic

The first proxy requires that a recipient is resident of the Republic. A resident of the Republic means a resident as defined in the ITA. Any person or company shall be deemed to be a resident of the Republic to the extent that such person or company carries on in the Republic any Enterprise or activity and has a fixed or permanent place in the Republic relating to such Enterprise or activity (VAT Act, 2017:s1).

The ITA provides that a resident of the Republic is a natural person who is ordinarily resident in the Republic or not ordinarily resident in the Republic, but is physically present in the

Republic, subject to the natural person exceeding a certain number of days in the Republic (ITA, 2017:s1). The two tests that are applied to determine whether a natural person is a resident of the Republic are referred to as the ordinarily resident and physical presence test.

Ordinarily resident is not defined in the VAT Act nor the ITA. However, the courts have provided some clarity on the meaning of ordinarily resident. A natural person is ordinarily resident when their usual or principle home is in the Republic (Commissioner for Inland Revenue v Kuttel, 1992). In the formulation of this principle the court adopted the approach by Schreiner JA (Cohen v Commissioner for Inland Revenue, 1946). The court considered whether a person can be ordinarily resident in more than one country. The court deliberated that a natural person can be resident in more than one country at a time. However, the natural person can only be ordinarily resident in one and ordinarily should be interpreted as the country of most fixed or settled residence. Therefore, ordinary residence is the country to which the individual would naturally and as a matter of course return from his/her wanderings (return to real home). Further, this means that the natural person can't be ordinarily resident in more than one country at a time.

Natural persons (recipients of the Republic) enter into e-commerce transactions with FESE's. These non-business consumers would acquire electronic services for private purposes. The FESE obtains information from the recipient in the process of purchasing the electronic services which assists in identifying the location of the consumer. However, the details provided by the recipient may be the jurisdiction in which the recipient was present at the time of acquisition, but not the place where the recipient is resident.

Practically, it is challenging for the FESE to determine whether the recipient will remain in the Republic at the time of purchase, but use or enjoy the electronic services in another country. For example, a resident may purchase an online course in the Republic. The resident travels to Dubai for a holiday of two months. When purchasing the online course in the Republic, the resident had not started the online course. However, during the holiday in Dubai, the consumer (resident of the Republic) completed the online course where the use and enjoyment of the online course occurred. These consumers (temporary or transitory visitors) are not considered to have ordinary residence in a country it visits for only temporary periods (as a tourist or attending a conference or seminar) (VAT/GST Guidelines, 2017:69).

Electronic services may also be acquired in the Republic by a resident for use and enjoyment by another person out of the Republic. For example, a father acquires a subscription to a business electronic magazine ("e-zine") in the Republic for the son based in London. The son is a registered student of the masters in business administration course at Oxford University. The father is resident in the Republic at the time of purchase. However, the son has the use and enjoyment of the business e-zine in London.

The objective of the first proxy is to identify the place of consumption based on where the recipient is ordinarily resident. The jurisdiction in which the recipient is resident will be the deemed location of the consumer (place of consumption). Regardless of the location of the consumer at the time of consumption, the jurisdiction with taxing rights is based on the location where the recipient is resident. Therefore, should the recipient temporarily leave the country for a holiday in Dubai or acquire the electronic services for use and enjoyment by another person in another country, the jurisdiction with taxing rights remain the jurisdiction where the recipient that acquired the goods and services is ordinarily resident.

The OECD recommends that the foreign supplier must rely on information it gathers from the consumer in the process of supplying electronic services. The evidence available is dependant on the business model of the foreign supplier. In addition, type, value of supply and the delivery model will determine the information available for the foreign supplier. Gathering information from consumers where the transaction involves limited interaction with the consumer can be challenging. Jurisdictions must therefore provide clear guidelines to determine where the consumer is ordinarily resident (VAT/GST Guidelines, 2017:69).

Guideline 3.6 in the VAT/GST Guidelines provides that the country in which the consumer is ordinarily resident has the taxing rights for B2C transactions where there is no connection between the place of performance and the place of consumption (VAT/GST Guidelines, 2017:69). This proxy assumes that the consumer will ordinarily use and enjoy the electronic services in the country of usual residence. This method provides a clear connection to an identifiable place. It ensures that the electronic services acquired by the consumer is taxed at the same VAT/GST rate as domestic supplies. Therefore, consumers have no advantage to buy from low or no tax jurisdictions. This approach is easier for foreign suppliers to apply provided that a simplified registration and compliance regime exists (VAT/GST Guidelines, 2017:66).

In the case of persons other than natural persons, the ITA provides that a resident of the Republic is a person which is incorporated, established or formed in the Republic or which has its place of effective management in the Republic. A legal entity that is incorporated, established, formed or has its place of effective management in the Republic is referred to as a resident of the Republic (ITA, 2017:s1). A legal entity from a foreign country may also be a resident of the Republic if it has a permanent establishment (physical presence) in the Republic. The legal entity would be required to register for both Income Tax and VAT. However, a foreign branch carrying on activities in the Republic in the course or furtherance of an Enterprise is required to register as a vendor regardless of the fact that it does not have a permanent establishment in the Republic.

Identifying whether a recipient of electronic services is resident of the Republic can be determined when the legal entity is VAT registered since the recipient is required to register when Enterprise activities are carried on in the Republic. Establishing the recipients

residence in the Republic based on its place of effective management can be challenging for the FESE since it is not a defined term in the ITA and must be ascribed its ordinary meaning (IN6, 2015:4). In principle, the company's (recipient) place of effective management is where key management and commercial decisions necessary for the conduct of the business as a whole are in substance made (IN6, 2015:4). This entails identifying those persons in the recipient company that make the key decisions and determining the place where these decisions are in substance actually made. This will be a burdensome exercise for the FESE. Therefore, it is easier for the FESE to identify where the recipient company is resident based on the place where the recipient company is incorporated, established or formed compared to its place of effective management.

Guideline 3.2 of the VAT/GST Guidelines provides that for B2B transactions, the country with taxing rights is where the consumer is located (VAT/GST Guidelines, 2017:41). Generally the business consumer will acquire electronic services for the purpose of its business operations in the country it is established and has permanent residence. Therefore, this is an appropriate proxy and achieves the neutrality principle since this is where the business consumer will consume the electronic services (VAT/GST Guidelines, 2017:42). In principle, this will apply where the foreign supplier supplies electronic services to a business consumer in a single location (VAT/GST Guidelines, 2017:44).

Where the business consumer has establishments in multiple countries, an analysis must be performed to determine which country has taxing rights (VAT/GST Guidelines, 2017:45). These business consumers are commonly referred to as MLE's. Guideline 3.4 of the VAT/GST Guidelines provides that the country with the taxing rights is where the business consumer that uses the electronic services is located.

The BEPS report raised concerns in respect of the supply of electronic services to MLE's. The common practice of MLE's are to structure its business operations and acquire services to realise economies of scale. Generally, one business establishment will acquire the services and recharge to another business establishment that uses the services. The business that acquired the service will pay the VAT and claim an input tax credit. However, the problem arises when the amount is recharged to the other business establishment which conducts exempt activities. The input tax should not have been claimed by the business establishment that acquired the service (BEPS Report, 2015:83).

The place or location where the recipient natural person or legal entity of the electronic services is resident can be ascertained. However, the FESE is reliant on the recipient to provide adequate information to identify where the recipient is resident. The information will indicate the place of consumption and ultimately the jurisdiction with taxing rights. The main concern in respect of B2B transactions is that the FESE will supply the recipient (MLE) with electronic services where it is resident, but the use and enjoyment will be in another jurisdiction which may contradict the neutrality and destination principles of the OECD.

3.4.3 Any payment to the FESE in respect of the electronically supplied services originates from a bank registered or authorised in terms of the Bank Act

The second proxy requires that a FESE should receive payment originating from a bank registered or authorised in terms of the Bank Act. Authorisation and registration of banks are regulated under the Banks Act, No. 94 of 1990. When payment is made by a recipient to the FESE from a bank in the Republic, the FESE will meet the requirement for this proxy. However, there are various ways in which a recipient of electronic services can make payment to a FESE. Payment for the supply of electronic services is no longer limited to the conventional payment methods.

Online shoppers are becoming more sensitive to the use of personal data and expect it to be protected (BEPS Report, 2015:46). Guidance provided by tax authorities must take into account the protection of personal privacy while maintaining flexibility for businesses (VAT/GST Guidelines, 2017:70).

Online shoppers are moving away from sharing financial information over the internet and are constantly looking for new ways to safeguard sensitive financial information. Alternative payment methods should be analysed by tax administrations to align electronic services rules to these changes. These payment methods are further explored.

Online shoppers have various payment methods available when purchasing products online. The more common methods for purchasing products online are payment by debit and credit card. When these payment methods are used, the FESE's would generally require the online shopper to provide their banking details before payment is pushed and approved by the FESE. The FESE would identify whether the payment is made from a bank account in the Republic. This will indicate the jurisdiction which has the taxing rights and the FESE will charge VAT on the purchase accordingly. However, online shoppers have become aware of the increased risk in internet fraud and are hesitant to provide bank account and credit card details online. These online shoppers prefer using alternative methods where bank account and credit card account details are not required to purchase goods and services online.

An e-wallet is the alternative method of payment that does not require the online shopper to provide bank account details to the FESE. Consumers would transfer money from a bank account to an e-wallet and no bank account details are stored on the e-wallet account. The e-wallet acts as a virtual savings account. This is a convenient method for the consumer that makes regular online purchases of e-magazines or e-newspapers where the amount charged is taken from the e-wallet (Valentine, 2016). This method of payment does not allow the FESE to identify whether payment is made from a bank account in the Republic. The tax administration can consider making the jurisdiction in which the e-wallet was created a proxy.

Virtual credit cards are used as a method of payment for online shoppers who do not want to use their credit cards for online purchases. The consumer is required to set up the virtual credit card and transfer money to it from a bank account. An advantage of the virtual credit card is that it may even be possible to top up the virtual credit card with cash at a till point in a store. The consumer would therefore not require a bank account. The tax administration can consider making the jurisdiction in which the virtual credit card was created a proxy (Valentine, 2016).

Prepaid cards are another alternative method of payment which is safer than the credit card and the virtual credit card. There are certain pharmacies that sell these prepaid cards. All that is required is to visit the store, pay for the prepaid card and load a certain amount of money on the card. The consumer can use this card to make purchases online and will not be required to provide any bank account or credit card details other than the details of the prepaid card. The FESE that receives payment via this method may have details from the prepaid card holder, but none relating to bank account details. Therefore, when the consumer purchases goods and services from the online store, the FESE will not be able to identify whether payment is made from a South African bank account since no bank account details are provided by the online shopper. The prepaid card number should include an area code which will identify where the prepaid card was acquired and can be considered as a proxy (Valentine, 2016).

Prepaid vouchers are commonly used as a method of payment by iPhone users. Prepaid vouchers (iTune) are found in most stores around South Africa. The consumer can visit a store and pay for the vouchers which are preloaded with an amount for use to purchase iTunes on the online store. The online shopper will select the song and pay by redeeming the iTune voucher. The FESE would receive payment and will not have the consumers bank details since the song was purchased using an iTune voucher. If the FESE can obtain the location where the prepaid voucher was purchased it may use the place where the prepaid voucher was purchased as a proxy for determining the location of payment (Valentine, 2016).

Merchant accounts (PayPal) are widely used as a method of payment by online shoppers. The online shopper is required to open an account with PayPal and link a debit or credit card to the account. The online shopper would visit the online store to make a purchase and PayPal would be one of the methods to make payment. The consumer would pay using PayPal and since bank or credit card details are linked to the consumers PayPal account the FESE can determine if payment is made from a South African bank account. However, it is possible to make payment from the PayPal account without linking bank account details. People can send or donate money to the PayPal account holder and payment can be made directly from the PayPal account (Valentine, 2016). The FESE would not have any bank

account details. The FESE would rely on the location of the PayPal account holder (where the PayPal account was created) as a proxy to determine the location of payment.

Online store credit can be given to online shoppers who write product reviews or purchase items online and is rewarded with credit to an online account. Amazon Mechanical Turk is an internet marketplace where individuals perform reviews of certain products and are rewarded with payments or gift cards to an Amazon account. The online shopper would use the payment or gift card to purchase goods and services online (Valentine, 2016). The location in which the individual created the Amazon account should be used as a proxy to determine the location of the consumer.

Crypto currency (virtual currency) such as Bitcoin is a method of payment supported by certain online stores. Virtual currency are digital units of exchange that are not backed by government-issued legal tender (BEPS Report, 2015:43). The popularity of Bitcoin has increased over the past few years and more online stores are providing this option as a method of payment for online shoppers. Crypto currency is similar to an e-wallet where the individual will make payment from the bank account and store the cash as crypto currency. The individual would visit an online store and purchase items from the catalogue and pay using crypto currency (Valentine, 2016). Again, the FESE would not have bank account details of the consumer. In this case, the proxy would be the location where the crypto currency account holder created the account which is used to pay for the goods and services.

3.4.4 The recipient of electronic services has a business address, residential address or postal address in the Republic

The third and final proxy, in terms of the Enterprise definition, is that the recipient of the electronic services must have a business address, residential address or postal address in the Republic. B2C and B2B transactions usually require the consumer or the business consumer to create an account with the FESE when acquiring electronic services over the internet. In the process of creating an account, the FESE would usually request information from the consumer. The non-business consumer would provide a residential or postal address whereas the business consumer would provide a physical business address or postal address (VAT/GST Guidelines, 2017:70). It is relatively easy for the FESE to obtain the address details from the consumer when conducting standard business. This information will assist the FESE in identifying the location of the consumer. The FESE may also obtain the incorrect business address, residential address or postal address from the consumer which can impact the place of consumption. The collection and remittance of VAT will be to the incorrect jurisdiction and result in a loss of revenue for SARS.

SARS will not be negatively impacted if the recipient of electronic services are business consumers that only make taxable supplies since the full input VAT can be claimed.

However, where the business consumer makes both taxable and exempt supplies, it can only partially claim the input VAT. The partially exempt business consumer may also have operations in a country which has a lower VAT rate. It will want to reduce its business cost by providing the details for the country with the lower VAT rate. In addition, non-business consumers are not entitled to claim any input VAT. Therefore, SARS will not collect VAT on the supply of electronic services made to partially exempt businesses and non-business consumers when the incorrect information is provided that impacted the place of consumption not being in the Republic.

SARS can recover VAT from the recipient of the supply in consequence of any fraudulent action or any misrepresentation by the recipient which made the vendor (FESE) incorrectly apply a rate of zero percent or treated as exempt from tax. SARS may raise an assessment upon the recipient for the amount of tax payable, together with any interest and penalty that has become payable in terms of chapter 12, 15, or 16 of the TAA (VAT Act, 2017:s61).

Improvements in ICT is changing how businesses operate and the way in which electronic services are supplied to consumers and paid by consumers (BEPS Report, 2015:52). The digital economy is changing and the proxies used to identify the location of the recipient consumer in the Republic must be assessed to determine if it is adequate.

The inclusion of additional proxies will broaden the scope of FESE's that are obliged to register as vendors in the Republic. However, this may lead to a situation where the proxies contradict each other and provides evidence for residence of the consumer in more than one jurisdiction. The VAT Act will require further amendments to provide clarity for FESE's in this scenario.

The use of three proxies may limit the FESE's obligation to register as vendors. However, it reduces the complexity of having contradictory evidence where the recipient provides information that indicates residence in more than one jurisdiction. On the other hand, majority of the information relating to the proxies and proposed proxies identified is provided by the consumers to the FESE when conducting standard business. Refer to chapter 4.3.2 for further analysis on the inclusion of additional proxies in the VAT Act.

3.5 VAT Registration and Compliance

The VAT/GST Guidelines provides that the most reliable method for the collection of VAT/GST in respect of B2C supplies of electronic services is for the FESE to register and account for VAT/GST in the destination jurisdiction of the consumer. This requires the destination jurisdiction to establish a simplified registration and compliance process which includes the use of technology to support the VAT registration; filing of VAT returns; and collection of VAT. The simplified registration and compliance process for FESE's focus on registration; input tax recovery (refunds); VAT/GST returns; payments; record keeping;

invoicing; availability of information; and the use of third party service providers (VAT/GST Guidelines, 2017:73).

3.5.1 FESE registration and other compliance procedures in the Republic

SARS issued the FESE Guide on 18 September 2015. The FESE Guide explains the procedures to complete the VAT 101 application registration form and the VAT201 VAT vendor declaration. The guide further provides the procedures to file the VAT201 and make payment of VAT to SARS.

The FESE is required to download the VAT101 registration application form from the SARS website (www.sars.gov.za). The information requested by SARS on the VAT101 application form is limited to that which is absolutely necessary for the successful registration and administration of the FESE's VAT affairs in the Republic. The form should be completed, signed and emailed with supporting documents to the SARS email address at eCommerceRegistration@sars.gov.za. SARS will notify the FESE of the successful or unsuccessful VAT registration by email. The VAT registration process is reasonably simple and easy for the FESE (FESE Guide, 2015:2).

3.5.2 Claiming of input tax credits (refunds) by the FESE in the Republic

The output VAT charged to consumers on the supply of electronic services will be reduced by input VAT incurred on expenses incurred in the course of taxable business activities. Where the FESE is in a VAT refund position, the amount will be due and payable by SARS to the FESE (VAT Act, 2017:s16).

3.5.3 Completion and e-filing of VAT returns by the FESE in the Republic

The filing of VAT returns in multiple jurisdictions is a complex process that often results in considerable compliance burdens for FESE's. However, as discussed, revenue authorities could request FESE's to file simplified VAT returns. The VAT returns should be less detailed than that required for local businesses since FESE's are not entitled to claim input tax credits. A simplified approach should be able to strike a balance between the FESE's need for simplicity and the revenue authorities' need to verify whether tax obligations have been correctly fulfilled (VAT/GST Guidelines, 2017:74).

The information on the VAT return for a FESE could be confined to the supplier's registration identification number; tax period; currency (exchange rate); taxable amount at the standard rate; taxable amount at reduced rate; and total tax amount payable. Revenue authorities should provide an option to file VAT returns electronically in a simple and commonly used format to facilitate compliance (VAT/GST Guidelines, 2017:74).

The FESE should register as an e-filer on the SARS website after the successful VAT registration. Registration as an e-filer enables the FESE to request a VAT return; disclose VAT

for the supply of electronic services on the VAT return; e-file the VAT return; and make payment via a foreign bank account to SARS.

Vendors are required to file monthly VAT returns where the total value of the taxable supplies exceeds thirty million rand in a twelve month period (VAT Act, 2017:s27(3)). The FESE is required to register as a vendor at the end of any month where the total value of the taxable supplies exceeds fifty thousand rand (VAT Act, 2017:s23(1A)). The FESE is therefore required to register as soon as its supplies reach fifty thousand rand. This has created uncertainty whether the twelve month period must be applied to a FESE and the category for filing the VAT return. No reference is made in section 27 of the VAT Act to the filing period for a FESE. The FESE's therefore either file bi-monthly or monthly returns based on the instruction given by SARS.

In terms of OECD guidelines, FESE's should be allowed a simplified registration and compliance VAT regime. This means that FESE's should be entitled to file bi-monthly VAT returns unless the total value of the taxable supplies exceed thirty million rand in a twelve month period which will reduce the compliance costs and administrative burden for the FESE. This contradicts the efficiency and neutrality principles since taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation. The FESE requirements contradict the OECD guidelines. Therefore, the FESE should be allowed to e-file bi-monthly VAT returns until it meets the requirements for e-filing monthly VAT returns. New Zealand makes provision for the filing of quarterly returns. Filing quarterly returns will further reduce the compliance costs for FESE's and the administration costs for SARS. Therefore, complying with the OECD principle of efficiency.

VAT returns must be filed and paid to SARS by the last business day of the month following the end of the FESE's tax period. The VAT return is pre-populated with the trading name, VAT registration number, and tax period and payment reference number. The VAT return should include the FESE's VAT representative information such as first name, surname, capacity, business telephone number or cell phone number and email address. Completing the output and input tax sections of the VAT returns for a FESE can be complex since the VAT legislation in the Republic can become complex.

The output tax section of the VAT return includes fields from one to fourteen. Fields one to four request information relating to standard rate supplies (excluding capital goods); standard rate supplies (only capital goods); zero-rated supplies (only exported goods); and exempt and non-supplies. The output tax section should be simplified to include field one and four. The other fields are excessive and create confusion for the FESE that is unfamiliar with the VAT Act.

The input tax section includes fields fourteen to twenty. Fields fourteen to fifteen (A) request information relating to capital goods supplied; capital goods imported; other goods

supplied (not capital goods); and other goods imported (not capital goods). Similarly, the input tax section should be simplified to include field fifteen. The other fields are superfluous and unnecessary. Refer to chapter 4.4.2 for a further discussion on the fields in the VAT return.

Electronic payment methods are recommended for FESE's. This allows the FESE to remit the tax due electronically. The acceptance of payment from FESE's to revenue authorities is recommended to be in the currencies of their main trading partners (VAT/GST Guidelines, 2017:75).

The bank from which payment is made can be a bank registered in a foreign country or registered in the Republic. This implies that payment can be made with a foreign bank account or South African bank account. VAT payments can be made electronically by the FESE to settle VAT liabilities.

3.5.4 Record keeping by the FESE

The OECD recommends that revenue authorities allow the use of electronic record keeping systems. Information maintained by the foreign supplier should be limited to what is required to satisfy the revenue authority that the VAT/GST charged for the supply of electronic services are accounted for correctly. The foreign supplier should rely as much as possible on the information that is available in the course of its standard business activities. Revenue authorities should be able to request the information from the foreign supplier which should provide the information within reasonable time (VAT/GST Guidelines, 2017:75).

The TAA places a requirement on the FESE to keep records, books of account or documents. This requirement to keep records refers to FESE's that have registered as a vendor and e-filed the VAT returns. The TAA further provides the type of format for records maintained by the FESE. The FESE is required to keep and maintain documents in an electronic form prescribed by the Commissioner by Public Notice. The FESE must maintain records in the correct form to allow SARS to conduct an inspection of the documents. SARS can request the documents for an examination, audit or investigation under the TAA.

The FESE must comply with PN 787 when records are kept in electronic format. PN787 provides that the FESE must physically store electronic records in the Republic. An exception is provided for FESE's where a senior SARS official can authorise the retention of records outside the Republic. Therefore, the electronic system must be accessible from the FESE's address in the Republic. However, this creates a problem for the FESE. The FESE will, in most cases, not have physical presence in the Republic since electronic services are supplied from an export country to recipients in the Republic. The FESE does usually make use of VAT compliance firms in the Republic to retain proper records and comply with PN787. However, the FESE is not required to appoint a VAT representative from a place in the Republic to

retain proper records. Therefore, the FESE risks non-compliance when no tax compliance firm is used in the Republic. On the contrary, should a tax compliance firm be used in the Republic, the FESE will incur additional costs for this service which goes against the OECD principle of efficiency.

South Africa has a working relationship with the OECD (not a member of OECD). The South African VAT policy should strive to align with OECD principles. However, the requirement to retain documents in the Republic or request approval from a senior SARS official conflicts with the OECD principles.

PN787 requires that the FESE should store documents in an acceptable form which is easily and readily available for SARS. The FESE should retain documents in an electronic format by using recognised software and in an acceptable format. SARS is requesting FESE's to alter their system to ensure that information is provided in an acceptable format which creates difficulties for FESE's. This contradicts with the OECD guidelines, especially simplicity and efficiency of compliance and administration. Based on the OECD recommendations for a simplified compliance regime, the Commissioner should issue a BGR setting out the storage of documents in an electronic format for the FESE in a location outside the Republic. SARS should be able to request the documents from the FESE which can be provided to SARS within a reasonable period (to be determined by SARS).

3.5.5 Tax invoice

BGR28 provides that a FESE must issue a tax invoice for the supply of electronic services and as a minimum include the name of FESE; VAT registration number of FESE; name of recipient; address (physical, postal or email address) of recipient; individual serialised number; date of issue; description of electronic services; consideration of supply in any currency; and exchange rate used. The tax invoice satisfies the requirements for an input tax deduction in the case where a recipient incurs the expense in the course or furtherance of taxable business activities. The exchange rate that must be used to determine the VAT charged on the electronic services is the rate published by SARB, Bloomberg or ECB. The applicable exchange rate to be used is the daily rate on the date the time of supply occurs; daily exchange rate on the last day of the month preceding the time of supply; or the monthly average rate for the month preceding the month during which the time of supply occurs. The FESE may advertise or quote the price of an electronic service exclusive of VAT on condition the website of the FESE includes a statement that prices advertised or quoted is exclusive of VAT (BGR (VAT) No. 28 (issue 2), 2016:3).

The FESE would supply electronic services to both vendor and non-vendor recipients. The category of the recipient should not impact the documentary requirements for the FESE. Where a distinction is made between vendor and non-vendor recipients, it would result in

added complexity for the FESE since it may need to configure two sets of records/invoices depending on the category of the recipient.

The VAT Act provides that the Commissioner may direct that a tax invoice not be issued. The Commissioner must be satisfied about the existence or availability of sufficient documentary records and the impracticability of requiring a tax invoice to be issued. Where a FESE supplies electronic services to a non-vendor or vendor conducting exempt activities, it would not claim an input tax deduction. Therefore, a tax invoice is not required to be issued unless the FESE maintains sufficient records in support of the supply. FESE's may encounter system capability problems to ensure that the documents issued disclose the information required for a valid tax invoice. This may also come at a cost to the FESE which contradicts the OECD principle of efficiency. SARS should consider limiting the information to be disclosed on the invoice by excluding the VAT registration number of the FESE, the address of the recipient, individual serialised number and the exchange rate used. The FESE will have adequate information should SARS request information not disclosed on the invoice. Refer to 5.4.2 for further details relating to issuing an electronic receipt to consumer by the FESE.

3.5.6 Availability of Information

Revenue authorities should strive to make information available online that is necessary for the foreign supplier to register and comply with the simplified registration and compliance regime in the languages of their major trading partners. Information must be updated regularly and made available by the revenue authority that will assist the foreign supplier in making the correct VAT/GST determinations such as information on VAT/GST rates and categories of electronic services. SARS have made many sources available on its website which can be referred to by FESE's for guidance on the VAT treatment of electronic services and the types of electronic services.

The FESE Guide provides information on the VAT registration process; completion of the VAT registration documents; submission of the VAT return; completion of the VAT return; calculation of output tax; calculation of input tax; and payment method.

BGR28 provides clarification of the information that must be contained on a tax invoice, credit note and debit note, exchange rates that must be applied in order to determine the tax charged and advertised or quoted prices disclosed on the website of the FESE.

VAT 404 Guide provides general information for all vendors including FESE's. The Regulations provides information on electronic services and, more specifically, a list on the types of electronic services.

3.5.7 The use of third party service providers

The use of third party service providers is recommended to facilitate FESE's with VAT compliance and act on behalf of the FESE in carrying out certain procedures including submitting VAT returns. This would assist small and medium businesses that are faced with VAT compliance obligations in multiple locations. SARS allows a FESE to use an agent to assist with the VAT registration process, the completion and submission of VAT returns and payment of VAT liabilities. The use of an agent will assist the FESE to understand the VAT rules in the Republic, as it relates to FESE's, and minimise the risk of non-compliance.

Chapter 4: SUPPLY OF REMOTE SERVICES IN NEW ZEALAND

4.1 Introduction

In 1985, New Zealand introduced the GST Act. Similar to VAT, GST is a broad based tax on consumption of goods and services (NZ GST on Cross-Border Supplies of Remote Services, 2016:6). In principle, the aim of GST is to ultimately tax the final consumer of the goods and services. Advancements in technology have shifted the global economy to a digital global economy. New Zealand consumers are acquiring more goods and services from foreign suppliers. New Zealand has forgone around one hundred and eighty million New Zealand dollars of GST on cross-border services, intangibles and goods per year. The estimated growth per year on the supply of cross border services is ten percent (NZ GST Cross-Border Services, Intangibles and Goods, 2015:5). Since 1985, the supply of digital products has significantly increased and created a gap in New Zealand's revenue base since no GST is levied on the supply of these cross border remote services (NZ GST on Cross-Border Supplies of Remote Services, 2016:6).

New Zealand suppliers are placed in an uncompetitive position with foreign suppliers. New Zealand suppliers impose and remit GST to the revenue authority, whereas the foreign supplier imposes no GST. This distorts consumers purchasing decisions. The consumer will prefer purchasing goods and services from the foreign supplier where no GST is charged and the cost of the product is lower than a New Zealand supplier (NZ GST on Cross-Border Supplies of Remote Services, 2016:6).

The August 2015 discussion document on cross-border services, intangibles and goods provided proposals to introduce rules that would place New Zealand and foreign suppliers on an equal playing field. The discussion document requested submissions from tax experts on proposed rules for imposing GST on the supply of cross border services and intangibles. The proposals provided that services and intangibles supplied by a foreign supplier to a New Zealand consumer will be treated as being performed in New Zealand on which GST is levied. Foreign suppliers are required to register and remit GST to New Zealand Inland Revenue when it exceeds sixty thousand New Zealand dollars in a twelve month period. Further, it proposed that the services definition has a wider meaning to include both digital and non-digital services (this study only focuses on digital services) (NZ GST Cross-Border Services, Intangibles and Goods, 2015:2).

The release of the May 2016 special report from Policy and Strategy, Inland Revenue confirmed the proposed amendments to the GST Act. The amendments follow the VAT/GST Guidelines and also similar rules applied in the EU Member States, Norway, South Korea, Japan, Switzerland and South Africa (NZ GST on Cross-Border Supplies of Remote Services, 2016:6). The May 2016 special report was followed by publishing the new rules in the July 2017 Tax Information Bulletin. The GST Act was amended in terms of the Taxation

(Residential Land Withholding Tax, GST on Online Services, and Student Loans) Act 2016. From 1 October 2016, foreign suppliers are required to impose GST on the supply of remote services to consumers in New Zealand (NZ GST on Cross-Border Supplies of Remote Services, 2016:1).

This chapter will cover the remote services provisions and how it differs or is similar to the electronic services provisions in the Republic. A foreign supplier carries on a taxable activity in New Zealand when supplying remote services to recipients in New Zealand. The place of supply rules will be analysed in terms of B2B and B2C supply of remote services. The meaning of resident for a natural person and non-natural person will be analysed to determine the residence of New Zealand consumers. The proxies will be analysed to determine whether these are adequate for identifying the New Zealand consumer's residence, place of consumption and ultimately the place of taxation. GST registration and compliance.

4.1 The Supply of Cross Border Remote Services

The general rule of the GST Act provides that GST is imposed where services are physically performed in New Zealand. Therefore, the supply of services which are physically performed outside New Zealand by a foreign supplier is not subject to GST. No GST is levied even when services are physically performed to a New Zealand resident that is outside New Zealand.

The implementation of the new rules in the GST Act provides that GST will be charged on remote services supplied by foreign suppliers to recipients in New Zealand. Remote services means a service that, at the time of performance of the service, has no necessary connection between the place where the service is physically performed and the location of the recipient of the services (GST Act, 2017:s2). The foreign supplier physically supplies the services from a country other than New Zealand. However, the recipient of the services is in New Zealand. The VAT/GST Guidelines distinguishes remote services from on-the-spot services.

On-the-spot services attribute the place of supply to the country where the services are physically performed and consumed. Therefore, the place of consumption is the country in which the services are physically performed. These include services such as theatre performances, accommodation services, restaurant services and catering services. On-the-spot services are taxed according to the general GST provisions. Therefore, GST is levied on services physically performed in New Zealand and no GST is levied on services physically performed outside New Zealand (NZ GST Cross-Border Services, Intangibles and Goods, 2015:15).

Remote services are referred to as services that attribute the place of consumption to the country where the consumer is resident. The place of supply is deemed to be in the country where the consumer is resident regardless of the actual place of supply. Therefore, the

place where the services are physically performed has no necessary connection to the location where the recipient is resident. Remote services emphasise that the location of the supplier is not a reasonable indicator for the place of consumption. Remote services include both digital (online supply of movies, music and software) and non-digital services (consulting, legal and insurance services) (NZ GST Cross-Border Services, Intangibles and Goods, 2015:16).

The GST Act does not distinguish remote services between digital and non-digital services. The benefit to this approach is that categories or lists of digital services are not required. This avoids the regular updating of digital services lists or categories and the complexities of understanding the difference between digital and non-digital services. A further benefit is that remote services cater for business models that supply new services created through developments in technology (OECD principle of flexibility)(NZ GST Cross-Border Services, Intangibles and Goods, 2015:19).

On the other hand, the remote services definition is too broad. Foreign suppliers and consumers may find it difficult to understand. In the case of the South African VAT system, remote services will not be suitable since the disadvantages highlighted above may be exacerbated even further for a developing country.

4.2 Carrying on a Taxable Activity in New Zealand

GST shall be charged on the supply of goods and services by a registered person in the course or furtherance of a taxable activity carried on by that person (GST Act, 2017:s8). To impose GST on the supply of goods and services, a person must be a registered person. However, to be GST registered the person is required to carry on a taxable activity in New Zealand. Therefore, the requirement to register is dependent on the foreign supplier supplying goods and services as a taxable activity in New Zealand.

The Enterprise definition, in terms of the VAT Act, refers to activities carried on in or partly in the Republic whereas the GST Act excludes this from the taxable activity definition. The GST Act includes place of supply rules to determine if the supply is deemed to be supplied or is actually supplied in New Zealand. Goods and services shall be deemed to be supplied in New Zealand if the supplier is resident in New Zealand, and shall be deemed to be supplied outside New Zealand if the supplier is a non-resident (GST Act, 2017:s8).

The foreign supplier is a non-resident since it supplies goods and services from an export country. Therefore, the foreign supplier is deemed to supply goods and services from a place outside New Zealand. The foreign supplier is not carrying on a taxable activity in New Zealand and is not required to register. However, the implementation of the remote services rules places a GST registration obligation on the foreign supplier to register for GST in New Zealand when supplying remote services to New Zealand consumers.

4.3 Foreign Supplier Carrying on a Taxable Activity in New Zealand

Goods and services are treated as being supplied in New Zealand if the supplier is a non-resident and is supplied to a person resident in New Zealand (GST Act, 2017:s8). This excludes services that are physically performed in New Zealand by a person who is in New Zealand at the time the services are performed since these goods and services are covered under the general GST rules. However, the new rules provide for foreign suppliers that supply remote services to consumers in New Zealand (NZ GST on Cross-Border Supplies of Remote Services, 2016:2). The foreign supplier is therefore required to ascertain whether the consumers are residents of New Zealand.

4.3.1 B2B and B2C place of supply rules for remote services

The foreign supplier has to identify where the consumer is tax resident. In addition to determining where the consumer is tax resident, the foreign supplier must determine whether the supply of remote services are made to business or non-business consumers. New Zealand Inland Revenue considered whether GST must be collected on the supply of remote services for both B2B and B2C transactions or B2C only (NZ GST Cross-Border Services, Intangibles and Goods, 2015:20).

South Africa imposes VAT on the supply of electronic services on both B2B and B2C transactions (NZ GST Cross-Border Services, Intangibles and Goods, 2015:20). Therefore, the VAT Act does not distinguish between B2B and B2C supply of electronic services. FESE's impose VAT on the supply of electronic services to business and non-business consumers. The FESE declares and pays the VAT over to SARS. However, the disadvantage of this approach is that the business consumer claims the input tax and SARS collects no VAT. This creates an administrative burden for both the FESE and SARS. An advantage of this approach is that it reduces compliance costs for foreign suppliers since it is not required to distinguish between business and non-business consumers (NZ GST Cross-Border Services, Intangibles and Goods, 2015:20).

National treasury must consider amending the VAT Act to remove the requirement for FESE's to charge VAT on the supply of cross border electronic services to VAT registered businesses in the Republic. The New Zealand remote services provisions incorporates the requirement that where the supply is made to a GST registered business which does not provide its GST registration number or business number, the supply is deemed to be made to a consumer that is not GST registered. Therefore, a B2B supply is deemed to be treated as a B2C supply where the GST registered business does not provide the foreign supplier with the relevant business information. This ensures neutrality, since a non-GST registered New Zealand business will pay GST on the supply of goods and services when acquiring goods and services in New Zealand and will not claim an input tax deduction (NZ GST Cross-Border Services, Intangibles and Goods, 2015:2). Similarly, the South African non-VAT registered business consumer will not claim an input tax credit.

However, FESE's may find it difficult to obtain the VAT number of the FESE which could lead to VAT registered businesses incorrectly paying VAT on B2B transactions. In this case, the GST Act provides further guidance. The foreign supplier may find it impractical to obtain business information from the GST registered business. The remote services rules provide that New Zealand Inland Revenue may prescribe or agree on an alternative method to determine if the supply is made to a GST registered business. Factors to assist New Zealand Inland Revenue includes analysing the nature of the supply; the value of the supply; and the terms and conditions of the services. This may create a further administrative and compliance cost burden for the foreign supplier since it would make use of a tax expert in New Zealand to request guidance from New Zealand Inland Revenue (NZ GST Cross-Border Services, Intangibles and Goods, 2015:3).

Countries in Europe favour the imposition of VAT/GST on B2C transactions only which are in line with the VAT/GST Guidelines (NZ GST Cross-Border Services, Intangibles and Goods, 2015:20). There are advantages and disadvantages for imposing GST on B2C transactions only. Figure 4.1 outlines the summary of these advantages and disadvantages.

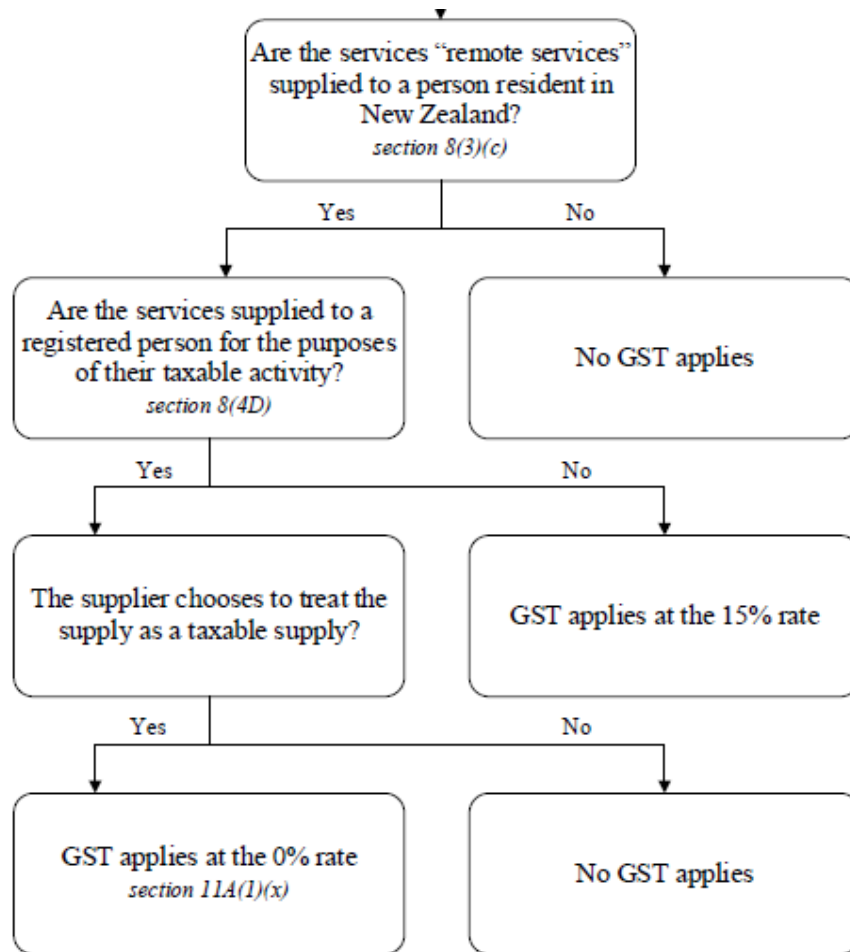
*Figure 4.1 Advantages and disadvantages in applying the rules only to B2C transactions
(Adapted from NZ GST Cross-Border Services, Intangibles and Goods, 2015:20)*

Advantages	Disadvantages
If remote services are supplied to businesses registered for GST, it can claim an input tax credit if the expense is incurred in the course of performing its taxable business activities. This means that the revenue authority collects no revenue.	Excluding B2B transactions would mean that foreign suppliers must determine if the supply is to a business or non-business consumer. This could be a challenge for the foreign supplier and result in more compliance costs for the foreign supplier. The difficulty can be minimised since the foreign supplier will have access to the customers transaction history and IRD number.
Tax invoice requirements can be relaxed since non-business consumers will not be allowed to claim an input tax credit. This will lower compliance costs for foreign suppliers.	Revenue could be foregone if non-business consumers represented themselves as business consumers and were able to avoid GST. The risk of this can be minimised by requesting the consumer to provide an IRD number.
Avoids the risk of foreign suppliers charging and collecting GST on B2B transactions	

<p>which are not paid to Inland Revenue. In addition, this avoids business consumers claiming an input tax credit for GST not collected by IRD which will lead to a loss in revenue.</p>	
<p>Business consumers that acquire high value remote services from foreign suppliers pay higher amounts of GST. Avoids the timing and cash flow disadvantage for business consumers where input tax can be claimed.</p>	
<p>The EU has applied the foreign supplier registration system since 2013. This system only requires GST to be charged on B2C transactions. Foreign suppliers systems would be set up for this. Foreign suppliers would therefore be more familiar with this system which will reduce administration costs.</p>	

The objective of the GST system and the remote services rules is to impose GST on B2C transactions. Foreign suppliers of remote services must treat its supplies as being made to a non-business consumer unless the recipient informs the foreign supplier that it is a GST registered business. In the case of B2B supplies, where the foreign supplier supplies remote services to GST registered businesses, the foreign supplier may either treat the supply as being made outside New Zealand or as being made in New Zealand. B2B supplies treated as being made outside New Zealand will attract no GST. Whereas B2B supplies treated as being made in New Zealand will attract GST at zero percent (NZ GST on Cross-Border Supplies of Remote Services, 2016:14). Figure 4.2 outlines the summary of the B2B and B2C rules for the supply of remote services.

Figure 4.2 Place of supply rules for services – B2B and B2C (Adapted from NZ GST on Cross-Border Supplies of Remote Services, 2016:9)



The analysis performed on the application of GST on B2B and B2C transactions or B2C transactions only (in New Zealand) provides guidance which can, in principle, be applied in the South African context without distinguishing between B2B and B2C transactions. SARS can minimise its compliance costs and the administration burden of VAT collected from FESE's by incorporating the rule that the business consumer will not be charged VAT if its VAT registration number is provided to the FESE. This also leads to the relaxing of invoicing and tax return requirements which will further reduce compliance and administration costs for the FESE and SARS.

In the case of partially exempt business consumers where the VAT registration number is provided to the FESE and VAT not charged, the imported services provisions shall apply. The liability to declare the VAT will be with the partially exempt business. Consumers may also provide incorrect information to the FESE. The implication of this is that VAT will not be collected and remitted to SARS. If the business consumer supplies incorrect information (i.e.

VAT registration number of the another customer) to the FESE in respect of the supply of electronic services which is a fraudulent action or misrepresentation resulting in the incorrect VAT treatment applied, the business consumer shall be held liable for the VAT (VAT Act, 2017:s61). The FESE may incorporate a validation check during the online purchase process and confirm the VAT registration number to the name of the business consumer before supplying the the electronic services. However, configuring the online system to run a validation check before the online purchase is complete will come at a cost to the FESE.

Based on the analysis, it was found that New Zealand imposes GST on B2C transactions, subject to certain exceptions which deemed B2B transactions to be B2C transactions. The next step is to analyse the proxies used in New Zealand to determine where the consumer is resident.

4.3.2 [The use of proxies to identify where the consumer is resident](#)

The foreign supplier of remote services is required to identify if the recipient is a New Zealand tax resident and a GST registered business. GST will be imposed on the supply of remote services to New Zealand residents. Residency for a natural person is determined by considering whether a person is more than 183 days in New Zealand for a twelve month period or has a permanent place of abode in New Zealand (NZ GST Cross-Border Services, Intangibles and Goods, 2015:27).

A person other than a natural person is resident when incorporated in New Zealand; where control by company directors is exercised in New Zealand; the centre of management is in New Zealand; or the head office is in New Zealand (NZ GST Cross-Border Services, Intangibles and Goods, 2015:27).

The GST Act includes proxies to assist the foreign supplier in this process. The aim of proxies are to assist the foreign supplier in identifying the residence of the consumer by using information it collects from consumers when conducting standard business (NZ GST Cross-Border Services, Intangibles and Goods, 2015:28). This reduces the administrative and compliance costs for the foreign supplier.

A supplier must treat the recipient of the supply as a person resident in New Zealand if two of the following items are non-contradictory and support the conclusion that the person is resident in New Zealand:

- (i) The persons billing address.
- (ii) The internet protocol address of the device used by the person or another geolocation method.
- (iii) The persons bank details, including the account the person uses for payment or the billing address held by the bank.

- (iv) The mobile country code of the international mobile subscriber identity stored on the subscriber identity module card used by the person.
- (v) The location of the person's fixed land line through which the service is supplied to them.
- (vi) Other commercially relevant information.

(GST Act, 2017:s8B)

The proxies are quite broad which gives the foreign supplier enough scope to determine the residence of the consumer. The foreign supplier can continue conducting standard business without making adjustments to its systems. Information obtained by the foreign supplier when supplying remote services to consumers in New Zealand will be sufficient. Should the five proxies provide contradictory evidence, the foreign supplier can rely on the sixth proxy and make use of other commercially relevant information.

The foreign supplier may come across conflicting evidence where the recipient is resident in a country other than New Zealand. If the supplier has two additional non-contradictory items that support residence in a country other than New Zealand, the supplier must choose the evidence that is more reliable to determine a recipient's residence (GST Act, 2017:s8B). Therefore, the foreign supplier is required to rely on the evidence that indicates where the consumer is more likely to be resident and levy GST accordingly (NZ GST on Cross-Border Supplies of Remote Services, 2016:13). This method ensures that the foreign supplier does not strain its current resources to collect additional information from the consumer and incur further unnecessary costs. The foreign supplier merely analyses the information it collects from the consumer and relies on the best evidence in support of the consumer's country of residence.

In the case where the foreign supplier does not have commercially reliable evidence to adequately support the residence of the consumer, the remote services rules provide another layer of flexibility for the foreign supplier. If the supplier is unable to establish a recipient's residence by two non-contradictory items, New Zealand Inland Revenue may prescribe the use of another method to determine a recipient's residence or may agree with the supplier on the use of another method (NZ GST on Cross-Border Supplies of Remote Services, 2016:14).

New Zealand Inland Revenue will use a number of factors. These factors include determining if the supply is made in respect of low value and high volume items. Other factors considered is if the supply is a once off transaction; is the supply made on an ongoing basis; and the information that is commercially available to the supplier (NZ GST on Cross-Border Supplies of Remote Services, 2016:14).

This approach provides additional flexibility for the foreign supplier, but also at a cost. The foreign supplier may use services of tax experts in New Zealand to approach IRD for guidance on an alternative proxy. However, it is unlikely that the foreign supplier would make use of this provision since the proxies provided in the GST Act are sufficient to determine the residence of the consumer. The foreign supplier can obtain other commercially relevant information from the standard business operations (GST on Cross-Border Supplies of Remote Services, 2016:2). It is therefore unlikely that the IRD will be bombarded with requests from foreign suppliers to assist with determining the residence of the consumer.

The proxies identified in the GST Act (GST on Cross-Border Supplies of Remote Services, 2016:13) that are not included in the VAT Act was analysed as follows:

1. The consumers billing address	The customer can manipulate billing address details to avoid paying VAT (SARS Explanatory Memorandum on the TLAB, 2013:89). Therefore, this would not be an appropriate proxy in the Republic. The third proxy currently in the Enterprise definition of the VAT Act is sufficient to determine the address of the consumer. Adding the billing address to the third proxy would be superfluous. However, if the consumers billing address is used to assess the trading history of the consumer then it will be a better means of determining the location of the consumer (refer to point five).
2. The consumers IP address of device used or another geolocation method	IP address does not always provide the exact location of the consumer. The location can be disguised to indicate a different location (SARS Explanatory Memorandum on the TLAB, 2013:89). This would not be appropriate as a proxy in the Republic.
3. The MCC of the IMSI stored on the SIM card used by the person	The consumer is presumed to receive the electronic services in the country where it is acquired when using a mobile network. The MCC will indicate the country location. This is a reasonable method to determine the location since a consumer will acquire a SIM card from a service provider if in a country for a long period of time.

	However, a frequent traveller may have multiple SIM cards which is used when travelling. This will provide mixed results.
4. The location of the consumers's fixed land line through which the service is supplied to them.	The consumer is expected to actually be located in the country where the fixed line is used to purchase the electronic services. The FESE will be able to rely on the location of the consumers fixed line.
5. The trading history of consumer.	<p>The customers trading history can provide information relating to:</p> <ul style="list-style-type: none"> • Billing or delivery address. • The products that are purchased if it is linked to a geographic location. • Information may be obtained from a third party such as a payment service provider. • If the supply is made in respect of low value or high volume items. • If the supply is a once off transaction. • Is the supply made on an ongoing basis. <p>The trading history of the consumer is available to the FESE and can be used as support when determining the location of the consumer.</p>

The Enterprise definition of the VAT Act has three proxies to determine the residence of the consumer in the Republic. When two out of three proxies are met then the location of the consumer is identified. It is proposed that a fourth proxy be introduced to the VAT Act that is used in conjunction with the three proxies. The fourth proxy should state that the FESE can use other commercially relevant information to determine the residence of the consumer. Other commercially relevant information should be clarified in a SARS guide.

Other commercially relevant information shall include point three, four, and five as discussed above. The use of other commercially relevant information may give the FESE mixed results. To avoid this the FESE should focus on the most reliable evidence at its disposal. For example, if another jurisdiction is clearly closely connected with the supply of electronic services and the results are inconclusive with respect to the Republic then that other jurisdiction shall be the consumers country of residence.

The digital economy is constantly changing with advancements in technology and other information would become more reliable to determine the residence of the consumer. The inclusion of an additional proxy will ensure that the South African VAT system is flexible and dynamic to keep up with technological developments which aligns with the OECD principle of flexibility.

4.4 GST Registration and Compliance

Foreign suppliers are required to register for GST on the supply of remote services if it exceeds or is expected to exceed sixty thousand New Zealand dollars in a twelve month period. The GST registration form and information to register for GST is located on the New Zealand Inland Revenue Website (www.ird.govt.nz).

4.4.1 Tax invoice

Foreign suppliers are not required to return GST on supplies to New Zealand GST-registered businesses and will therefore not be required to provide tax invoices to consumers (GST on Cross-Border Supplies of Remote Services, 2016:2). This will reduce the compliance cost for the foreign supplier since its systems will not require configuration updates to amend system generated invoices.

In the case of South Africa, FESE's will charge VAT on the supply of electronic services to business consumers. The business consumer will be entitled to an input tax credit. Therefore, a VAT neutral position for SARS. FESE's will reduce its compliance costs if tax invoicing requirements are relaxed. Refer to chapter 3.5.5 for the discussion on tax invoice requirements in the Republic.

4.4.2 Tax period and filing GST returns

Foreign suppliers are required to file quarterly tax returns (quarterly tax periods) to New Zealand Inland Revenue (GST Act, 2017:s15(6)). The electronic services provisions requires FESE's to submit monthly or bi-monthly VAT returns to SARS. The OECD encourages a simplified VAT compliance process for FESE's and to ensure neutrality. A quarterly tax period must be considered since SARS will reduce its administration costs and FESE's will lower its compliance costs.

The foreign supplier can file GST returns when it intends to return GST only or return GST and claim GST on New Zealand expenses. A simplified pay only GST return is available for foreign suppliers that intend only to return GST. The fields on the GST return have been simplified to include the supplies to New Zealand consumers and the amount of GST required to be returned. This ensures a simple GST registration and compliance system for the foreign supplier which is in line with the OECD principles. Foreign suppliers that return GST and claims GST will be required to file a full GST return. Applying this to the South African VAT return will improve and simplify the VAT compliance process for SARS and the FESE. The South African VAT return fields must be relaxed and considered for amendment.

The VAT return must be revised and certain fields removed to include only relevant fields that pertain to the FESE. Refer to chapter 3.5.3 for a detailed discussion on this from a South African VAT perspective.

The GST returns can be filed online using the New Zealand Inland Revenue's myIR. GST payments options are on myIR such as Western Union and OrbitRemit. Links and instructions are provided on how to make payments. In addition, information on how to file GST returns online and make payments once the foreign suppliers apply to register for New Zealand GST is available on the New Zealand Inland Revenue website (GST on Cross-Border Supplies of Remote Services, 2016:5).

4.4.3 Record keeping

A GST registered business is required to hold records in New Zealand. The business must apply to New Zealand Inland Revenue for authorisation to keep records at a place outside New Zealand (GST on Cross-Border Supplies of Remote Services, 2016:29). The GST Act provides for an automatic exception for foreign suppliers of remote services (GST Act, 2017:s75(3F)). The foreign supplier can therefore store records outside New Zealand. This will also reduce the compliance and administration costs for the foreign supplier. In the case of South Africa, FESE's must store records in the Republic. It is proposed that South Africa follow suit. Refer to chapter 3.5.4 for the discussion on record keeping in the Republic.

Chapter 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

Based on the analyses of the electronic services provisions in the Republic, it was found that there are specific areas within the VAT Act that requires improvement. These areas have been categorised as follows:

- B2B versus B2C supply of electronic services
- Proxies to identify consumers country of residence
- Simplified VAT registration and compliance
- List versus categories of electronic services

5.2 B2B versus B2C Supply of Electronic Services

The VAT Act does not distinguish between B2B and B2C supply of cross border electronic services. Currently, VAT is imposed on the supply of electronic services by FESE's to both business and non-business consumers. SARS is in a VAT neutral position in respect of B2B transactions. This comes at an administrative burden and cost to both the FESE and SARS.

New Zealand has incorporated a provision which deems the supply of remote services to be a B2C transaction if the business consumer does not provide its IDR number. This was considered as a recommendation in the Republic. The advantage of applying this recommendation is that it will reduce the administrative burden and cost for the FESE and SARS. The recipient business will also not have to pay VAT to the FESE and claim the input tax in its VAT return.

The inclusion in the VAT Act of a proviso to the Enterprise definition should be considered. This inclusion may increase the complexity of the electronic services provisions. It is recommended that a proviso be included under paragraph (b)(vi) of the Enterprise definition in the VAT Act. The proviso should state that if the recipient business provides the FESE its VAT registration number, VAT will not be charged on the supply of electronic services. This will therefore qualify as a B2B supply. This will be aligned with the guidance provided by the OECD since, in principle, VAT is a tax imposed on the final consumer and not on businesses.

The disadvantage of applying the above recommendation is that VAT will not be charged on the supply of electronic services to recipients that have partially exempt businesses and will result in a loss for SARS. To counter this issue, the imported services provisions shall apply. The recipient business shall be liable for the VAT. Therefore, the recipient business will be required to include the VAT in its VAT return as an imported service.

The current approach of applying VAT on B2B and B2C transactions is an easier and less complex system to follow in the Republic. However, the closer South Africa aligns its

electronic services provisions to the OECD guidelines, the lower the risk of double taxation and double non-taxation since many countries around the world apply these OECD guidelines in its local VAT/GST law. Foreign suppliers in those countries will be familiar with these principles. Its business systems will be set up in a similar manner to deal with the South African VAT requirements. As a developing country, South Africa should apply the OECD principles as much as possible, but be cognisant and adjust for its socio-economic circumstances.

5.3 Proxies to Identify Consumers Country of Residence

The VAT Act currently includes three proxies. To align with the OECD principles it is recommended to maintain the three proxies, but implement a fourth proxy. The GST Act includes the proxy for other commercially relevant information. Advancements in technology has changed and is changing business models. The balance between keeping the VAT Act less complex and amending the VAT Act to remain relevant must be considered in this case (OECD flexibility principle).

The VAT/GST Guidelines provides that foreign suppliers must obtain information from the client when performing normal business activities. The introduction of an additional proxy will assist FESE's when there is conflicting evidence to determine the usual residence of the consumer. The FESE must place reliance on the evidence that more closely reflects where the consumer is likely to have its usual place of residence. SARS will increase its tax base since more FESE's will be required to register, collect and remit VAT to SARS.

The following can be used as a fourth proxy in support of other commercially relevant information:

- The MCC of the IMSI stored on the SIM card used by the consumer.
- The location of the consumers's fixed land line through which the service is supplied.
- The trading history of consumer such as information relating to billing address; delivery address; products that are purchased if it is linked to a geographic location; third party information from a payment service provider; if the supply is made in respect of low value or high volume items; if the supply is a once off transaction; and is the supply made on an ongoing basis.

Consumers are finding ways to pay for electronic services other than by using bank accounts registered in the Republic. It is recommended that the second proxy be amended to include the following as a means to determine the residence of the consumer:

- Where an e-wallet is used as a method of payment, the jurisdiction in which the e-wallet is created.
- Where a virtual credit card is used as a method of payment, the jurisdiction in which the virtual credit card is created.

- Where a prepaid card is used as a method of payment, the jurisdiction where the prepaid card is acquired.
- Where a prepaid voucher is used as a method of payment, the jurisdiction where the prepaid voucher is acquired.
- Where a merchant account is used and money donated to the recipient and used for payment, the jurisdiction where the account holder created the account.
- Where the recipient receives online store credit which is used as a method of payment, the jurisdiction where the individual creates the account.
- Where crypto currency is used as a method of payment, the jurisdiction in which crypto currency is used to pay for the electronic services.

The proposed amendment to the second proxy and the inclusion of a fourth proxy in the VAT Act can increase the amount of FESE's registered for VAT in the Republic and serve as another means of determining the residence of the consumer. It is possible that the FESE will get mixed results when using the fourth proxy. Where the consumer is resident in more than one jurisdiction the evidence available to the FESE that indicates the the jurisdiction where the supply is most closely connected should be identified. This information can be obtained by the FESE in the normal course of business. In addition, SARS must issue a guide or interpretation note on electronic services which outline what is considered as other commercially relevant information.

5.4 Simplified VAT/GST Registration and Compliance

5.4.1 Storage of documents outside the Republic

The OECD recommends that revenue authorities allow the use of electronic record keeping systems. Information maintained by the foreign supplier should be limited to what is required to satisfy the revenue authority that the VAT/GST charged for the supply of electronic services are accounted for correctly. Revenue authorities should be able to request the information from the foreign supplier which should provide the information within reasonable time (VAT/GST Guidelines, 2017:75).

The GST Act provides that a GST registered business is required to hold records in New Zealand. The GST Act provides for an automatic exception for foreign suppliers of remote services (GST Act, 2017:s75(3F)). Foreign suppliers can therefore maintain records outside New Zealand.

FESE's are required to maintain records within the Republic. It is proposed that the VAT Act is aligned with the OECD guidelines and ensure that a simplified compliance regime is followed by the FESE. It is recommended that an exception is made for FESE's to maintain records outside the Republic and the information must be made available to SARS within a reasonable time.

5.4.2 Invoicing requirements

It is proposed that SARS reduce the strict invoicing requirements for B2C supplies by FESE's since consumers of B2C supplies of electronic services will not be entitled to an input tax credit. In addition, based on the recommendation under 5.2, business consumers must provide its VAT number to FESE's and avoid being subject to VAT. The business consumer will therefore not be entitled to an input tax credit if VAT registered. Recipients that have partially exempt businesses should provide the FESE with its VAT registration number. The partially exempt business will be required to declare the VAT in its VAT return under the imported services provisions of the VAT Act.

The GST Act provides that foreign suppliers are not required to provide tax invoices to consumers since no GST is collected on the supply of remote services to New Zealand GST-registered businesses (GST on Cross-Border Supplies of Remote Services, 2016:2).

In the case of non-business consumers, it is proposed that the VAT Act be amended which provides that FESE's are not required to issue tax invoices to non-business consumers in the Republic since they are not registered for VAT and will not be entitled to an input tax credit. Invoices should be issued in a format other than for VAT purposes, such as electronic receipts (email).

In the case of business consumers (except for partially exempt businesses) it is proposed that an electronic receipt is issued by the FESE. The recommendation under 5.2 ensures that B2B supplies are not subject to VAT. The business consumer will also not be entitled to an input tax deduction.

The information on the invoice should therefore be limited to the information required to administer the VAT regime in the Republic. SARS should consider limiting the information to an electronic receipt (email) which includes the name of FESE, order number, order date, item description, consideration, statement that amount includes VAT and/or VAT amount. It is proposed that the VAT registration number of the FESE; the address of the recipient; and the exchange rate not be disclosed on the electronic receipt.

The non-business and business consumer (excluding partially exempt business) may want to determine if it is correctly charged with VAT by confirming if the FESE is VAT registered in the Republic. The electronic receipt (email) will include the contact information of the FESE if the VAT registration information of the FESE wants to be confirmed by the consumer. The FESE should maintain information if SARS requests information not disclosed on the electronic receipt.

5.4.3 Tax period, tax return and tax filing

The New Zealand filing requirements gives the foreign supplier two options. The foreign supplier can file GST returns when it intends to return GST only or return GST and claim GST

on New Zealand expenses. A simplified pay only GST return is available for foreign suppliers that intend only to return GST. The fields on the GST return have been simplified to include the supplies to New Zealand consumers and the amount of GST required to be returned. Foreign suppliers that return GST and claims GST will be required to file a full GST return. (GST on Cross-Border Supplies of Remote Services, 2016:5). Foreign suppliers are required to file quarterly tax returns (quarterly tax periods) to New Zealand Inland Revenue (GST Act, 2017:s15(6)).

The current South African filing requirements for FESE's are administratively heavy which is not in alignment with the OECD guidelines. The tax returns include all the fields that are required for a South African business. FESE's do not require all the fields on the VAT return. Further, FESE's are required to file monthly/bi-monthly VAT returns. It is proposed that the South African VAT return fields are limited to the least amount of information required to administer the collection of VAT in respect of the cross border supply of electronic services by the FESE. The VAT return must only request VAT on supplies to South African consumers, VAT on supplies from South African suppliers, and the amount of VAT due. It is further proposed that the tax period and filing of tax returns is changed to quarterly tax periods. This reduces administrative and compliance costs for the FESE and SARS. This will also ensure the application of OECD principles.

5.5 List versus Categories of Electronic Services

Jurisdictions make use of various methods to distinguish between the types of electronic services. New Zealand, does not distinguish between electronic services (digital) and non-electronic services (non-digital). GST is levied on the supply of remote services where there is no necessary connection between the place where the FESE physically performs the service and where the recipient is resident. The approach adopted by South Africa is to provide a list of electronic services. Jurisdictions, such as Canada, have opted to move from an exhaustive list of electronic services to categories of electronic services.

A list of electronic services must be updated regularly to take into account developments in commerce and e-commerce. The list can become quite long and exclude electronic services not specifically mentioned which should be taken into account. When utilising electronic services categories, the type of electronic services that can be included in the scope of electronic services widens. This assists with addressing concerns that relate to services that change and develop with technological advancements that would not necessarily be included by the approach using a list of electronic services.

The Regulations provide a list of electronic services without adequate definitions or examples and no clear guidance is provided on the VAT treatment of electronic services. It is proposed that the list maintains its current structure. However, SARS must issue a guide or interpretation note which clearly define terms and provide examples of the different types

of electronic services. The SARS guide or interpretation note should also list services that are specifically excluded as electronic services where there is uncertainty regarding certain services. This approach would be more suitable for a developing country such as South Africa since the guide will support the list of electronic services which will make it clear and easy to understand for the taxpayer and FESE's.

Alternatively, a move to categories of electronic services could provide better guidance for the FESE than a list of electronic services. Categories with clear definitions and examples will provide clarity for FESE's. However, categories may be too broad and difficult to understand and will require more guidance.

5.6 Conclusion

The research performed in this paper identified areas in the electronic services provisions that require certain improvements to efficiently manage the levying and remittance of VAT to SARS in respect of the supply of cross border electronic services by FESE's to recipients of the Republic.

The interpretational and compliance recommendations identified in this study highlight areas that require further analysis to determine whether amendments are required and will be feasible to propose for implementation by the Minister of Finance. The balance between cost of administration and revenue collection should be analysed to determine whether these proposed amendments will improve the electronic services provisions. The VAT Act should aim to align with the OECD guidelines as much as possible to prevent double taxation and double non-taxation and adjusting for socio-economic conditions in the Republic. This will also reduce the administrative burden and cost for both SARS and the FESE.

In conclusion, the OECD guidelines was created by developed countries for developed countries. Based on this study, South Africa does apply the principles set out in the VAT/GST Guidelines. However, certain aspects are adapted specifically for the South African economy. It was found that certain areas are overly administrative for the FESE and SARS. These areas have been highlighted above and recommendations proposed taking into account the socio-economic conditions in the Republic.

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