

**VAT ON IMPORTED SERVICES: IMPLICATIONS
FOR THE COLLECTIVE INVESTMENT SCHEME
INDUSTRY IN THE ABSENCE OF PLACE OF
SUPPLY RULES IN SOUTH AFRICA**

by

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Abstract

Customs officials play an integral role in facilitating the movement of goods across the borders of South Africa. Customs duties and Value-Added Tax (VAT) are imposed on goods imported in order to protect the local market. Similarly, VAT is levied on the cross border supply of services. However, the efficient and effective collection of such VAT is an administrative burden for the revenue authorities. The recipient of imported services is responsible for the payment of VAT to the South African Revenue Service (SARS), as there is no border control that can perform the function of collecting agents in this respect. SARS is therefore dependent on the honesty of the recipient.

The South African VAT system is designed to levy VAT on the consumption of goods or services supplied. The difficulty is to determine where those goods or services are consumed. The VAT legislation in South Africa makes provision for specific value and time of supply rules, however, it does not make provision for specific place of supply rules. Certain sections of the VAT Act do indicate to an extent place of supply rules, but there is some uncertainty regarding this, especially with regard to the cross border supply of services.

Offshore investments, particularly investments in Collective Investment Schemes (CISs), have increased significantly over the years and South African investors have enjoyed good returns on such investments. However, determining which jurisdiction has the right to administer and levy the VAT does not seem to be efficient. Determining the place of consumption is therefore crucial, as it is not only the taxing of a supply where the consumption takes place, but also the risk of double taxation or non-taxation. Double taxation increases the cost of a supply, especially if it is irrecoverable.

The reason for VAT double taxation is considerably different when compared to income tax double taxation. For income tax purposes, countries use different rationales for taxing the same income (for example on either a residence basis or source basis). In contrast, the rationale underlying a consumption tax like VAT is to tax consumption.

The imposition of VAT by a state is justified if one can assume a supply to be consumed in that state. As a consequence, VAT double taxation may only arise if more than one state assumes a supply to be consumed in its territory (Ecker 2013:39).

The investment industry, more specifically the CIS industry, is crucial for South Africa, in the sense that it provides investors with the opportunity to invest in products that they would under normal circumstances not have access to and which are appropriately managed on their behalf. A substantial part of South Africa's wealth is in the hands of CIS managers¹. It is therefore vital that the treatment of such schemes, from a tax and VAT perspective, is correct.

The main purpose of this study is to analyse the South African VAT implications for offshore investment via the CIS industry in the absence of detailed place of supply rules; more specifically, where the fees charged, in respect of services rendered to manage these funds, are consumed. This is accomplished by analysing the South African VAT legislation in order to determine whether it succeeds in providing certainty regarding the place of supply of offshore investments, and whether there is a VAT on imported services exposure in the CIS industry. This analysis highlights the problems associated with the limited place of supply rules in South Africa.

Furthermore, this study also includes an analysis to establish whether place of supply rules exist in certain developed countries, with regard to offshore portfolio management services. These findings are compared to determine whether similar rules can be implemented in South Africa. Some foreign countries, like New Zealand, Canada and the member states of the European Union, do cater for specific place of supply rules and this is the reason for their selection.

This study concludes that the place of supply rules identified in the South African VAT legislation are not sufficient to determine whether offshore portfolio management services are deemed to take place (consumed) in South Africa, and accordingly be subject to VAT in South Africa.

The study further concludes that the place of supply rules recommended in the International VAT/GST Guidelines issued by the Organisation for Economic Co-

¹ As at 30 June 2015, the Association for Savings and Investment South Africa (ASISA) reported that R1.7 trillion is under management in the CIS industry. These statistics are released on the ASISA website and can be found at <http://asisa.org.za/tenakaDocuments/asisa-documents/ASISA-Statistics1-Holdings-30-June-2015.xlsx>

operation and Development (OECD) and place of supply rules established in certain member states² of the European Union indicate that portfolio management services should be taxed where the consumer is located. Should South Africa implement place of supply rules based on the European legislation and guidelines issued by the OECD, the problems associated with the absence of place of supply rules in South Africa can be resolved. This will ensure no competitive advantage gained for foreign or domestic service providers of portfolio management services.

² United Kingdom and Ireland

Abbreviations

ASISA	Association for Savings and Investment South Africa
CIS	Collective Investment Scheme
the Cisca	the Collective Investment Schemes Control Act (No 45 of 2002)
DTC	Davis Tax Committee
EU	European Union
FSB	Financial Services Board
GST	Goods and Services Tax
Income Tax Act	Income Tax Act No.58 of 1962 as amended
NAV	Net asset value
OECD	Organisation for Economic Cooperation and Development
SARS	South African Revenue Service
SAICA	South African Institute of Chartered Accountants
VAT	Value-Added Tax
the VAT Act	Value-Added Tax Act No.89 of 1991 as amended

Glossary

Commencement date	“means 30 September, 1991”(defined in section of the VAT Act).
Commissioner	“The Commissioner for the South African Revenue Service” (defined in section of the VAT Act).
Double taxation	“VAT double taxation exists if the same transaction is subject to taxation in more than one jurisdiction and if the

obligation to pay VAT is imposed on more than one person”
(Stensgaard, 2009:610).

Enterprise “An enterprise of activity which is carried on continuously or regularly by any person in, or partly in South Africa in the course or furtherance of which goods or services are supplied to any other person for consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club” (definition of an enterprise in paragraph (a) of section 1(1) of the VAT Act).

Imported services “A supply of services that is made by a supplier who is resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilised or consumed in the Republic otherwise than for the purpose of making taxable supplies” (as defined in section of the VAT Act).

Input Tax “VAT incurred by a vendor in respect of goods or services acquired from vendors provided that the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies or, where the goods or services are by acquired by the vendor partly for such purpose, to the extent (as determined in accordance with the provisions of section 17 of the VAT Act) that the goods or services concerned are acquired by the vendor for such purpose” (defined in section 1(1) of the VAT Act).

Non-Resident A person who is not a resident of the republic.

Recipient “A person to whom a supply is made” (as defined in section 1(1) of the VAT Act).

Republic	“The Republic of South Africa” (as defined in section 1(1) of the VAT Act).
Resident of the Republic	“Means a resident as defined in section 1 of the Income Tax Act. Provided that any other person or any company shall be deemed to be a resident of the Republic to the extent that such a person or company carries on any enterprise or other activity in South Africa and has a fixed or permanent place in South Africa which relates to such an enterprise or activity” (defined in section 1(1) of the VAT Act).
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 the definition of goods” (as defined in section 1(1) of the VAT Act)
Supplier	“In relation to any supply of goods or services, means the person supplying the goods or services” (as defined in section 1(1) of the VAT Act).
Taxable supply	The supply of goods or services on which VAT is chargeable (defined in section 1 of the VAT Act).
Vendor	“Any person who is or is required to be registered for VAT purposes in terms of the VAT Act” (as defined in section 1(1) of the VAT Act).

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Chapter 1: Introduction

1.1 Background

VAT in South Africa is administered through the Value Added Tax Act No 89 of 1991 (the VAT Act) and was introduced in South Africa on 30 September 1991. The South African VAT system is designed to levy VAT on the destination and consumption of goods or services supplied. VAT is therefore levied on the consumption of goods and services in South Africa and goods and services imported into South Africa. The place from which these goods or services are supplied is not taken into account.

Provisions in the VAT Act, governing VAT on imported services, were included from its commencement date. The purpose of imposing VAT on imported services was to manage the importation of services, to the extent that such services are utilised or consumed in South Africa for non-vatable purposes, in order to prevent a competitive advantage for foreign suppliers over the local market who would be incurring VAT. VAT on imported services is not payable if the services are acquired from a non-resident and are utilised and consumed in South Africa for the purpose of making taxable supplies, since the recipient can claim any VAT payable as an input tax deduction and is therefore in a “VAT neutral position”. Otherwise, a VAT exempt entity or a person who is not registered for VAT would be advantaged where services are acquired from a non-resident instead of a South African vendor who would be charging VAT (SAICA, 2006b).

VAT on imported services is therefore a cost to the recipient thereof, should it be used wholly or partly for non-vatable purposes (ie the person is not registered for VAT or is required to apportion its input VAT deductions between taxable and non-taxable supplies).

CISs provide investors with the opportunity to invest in products that they would under normal circumstances not have access to. In addition in order to diversify the portfolio of its investors, they have the option to invest in offshore markets. There is, however, the profit driven intention of the investor to try and structure their investments in such a manner so as to maximise returns, ie minimise the taxes it would have to pay over to the relevant taxing authorities. Accordingly, it may be more beneficial for the investor to invest in offshore markets.

The purpose of this study is to determine whether there is the risk that investment in a foreign CIS may cause a VAT on imported services liability for the local CIS or its investor. A key question is whether the services rendered from abroad are utilised or consumed in South Africa. The determination of the place of consumption has been subject to different interpretations. It is therefore imperative to establish where the supply takes place in order to ensure that VAT is charged appropriately. This indicates the importance for place of supply rules.

When difficulties arise as to who should be paying over the VAT, if any, to SARS it is necessary to search deeper and determine what the VAT Act, and other regulations that govern it, state. One should also look at the origins of VAT and how different countries treat such difficulties.

The growth of cross-border transactions signifies the importance of harmonising VAT principles internationally and also to ensure that clear place of supply rules, which do not contradict each other, are introduced in VAT jurisdictions (DTC, 2014).

Furthermore, it appears that there has been no research undertaken in respect of the risk for a local CIS or its investors to account for VAT on imported services. It is therefore necessary to determine whether there is a loss of revenue in respect of uncollected VAT in the financial services industry particularly relating to CISs.

1.2 Rational for the study

With the importation of goods, border patrols are responsible for the collection of VAT. However, with the importation of services it is difficult to trace all the imported services used in South Africa.

Before the VAT legislation was amended, effective from 1 April 2014, it was almost impossible to collect VAT from South African consumers of digital products (for example purchasing of electronic books). However, the change in the legislation obliged foreign suppliers of digital products to South African consumers in excess of R50 000 per annum, to register and charge South African customers VAT which in turn they would pay over to SARS.

It is, however, not only the supply of digital products from foreign suppliers that create VAT difficulties. To manage the cross-border supply of services is even more challenging when there is no distinguishable cash flow. Should a reverse VAT

charge (ie VAT on imported services payable by the importer as the exporter is not part of the South African VAT system) not be accounted for in respect of fees charged on investments made offshore, more specifically, investment in offshore CISs?

The South African VAT Act makes provision for time of supply rules in section 9 and value of supply rules in section 10. However, determining the place of supply in order to decide which country has the jurisdiction to tax cross border services is a major area of concern.

Numerous other countries have place of supply rules in place. This can lead to double taxation or non-taxation.

1.3 Problem statement

The main purpose of this study is to analyse the South African VAT implications for offshore investment in the CIS industry in the absence of detailed place of supply rules.

The absence of detailed place of supply rules in South Africa can lead to double taxation or even nil taxation as noted above. This is particularly relevant for the CIS industry where there is not always a clear transaction flow and identification of which country is the one where the services are consumed. This becomes more complex where the export country has defined place of supply rules which may differ from the rules applying in South Africa.

1.4 Research objective

The main objective of this research is to determine whether the South African VAT legislation makes provision to some extent, for place of supply rules, in order to determine whether there is a VAT on imported services exposure in the CIS industry.

As mentioned above, it appears that there is currently very little research in respect of the potential risk of VAT on imported services when investing in foreign CISs.

To address the research questions, the VAT structure currently in place in the European Union, New Zealand and Canada will be analysed and compared to the South African VAT structure, in order to determine where such services are

consumed and how the place of supply of services rules are currently applied in these countries

One will then be able to conclude as to whether there is a VAT on imported services exposure in the CIS industry, what the possible problems are that need to be considered and whether the current South African VAT system is sufficient to support the collection of such VAT without incurring VAT in the exporting country as well.

This dissertation therefore aims to provide answers to the following questions:

- Whether the South African VAT legislation makes sufficient provision for place of supply rules?
- Whether there is a risk of undeclared VAT on imported services in the CIS industry? and
- Whether the introduction and implementation of place of supply rules in the South African VAT system, specifically in respect of cross border services, are necessary?

1.5 Research design

The research will be an applied descriptive research, which is necessary to solve specific problems when describing the situation. The research will furthermore be extended to an exploratory research and will be qualitative in nature.

According to McNabb (2010:96) most exploratory research is conducted for one of two purposes:

- (1) A preparatory examination of an issue in order to gain insights and ideas, or
- (2) information-gathering for immediate application to an administrative problem

The typical objective of these exploratory studies may be either to find an answer to a specific organisational question or to provide information upon which to base a decision. This research took the form of an exploratory research project.

McNabb (2010:96) is of the opinion that exploratory research is conducted to investigate an issue or topic in order to develop insight and ideas about its underlying nature. Topics are often a problem or issue that require additional

research study for problem resolution. Designing and conducting a small exploratory study, therefore, is often the first step in a more comprehensive or complex research project. Usually, the researcher has only a little or no prior knowledge about the issue or its components. It is further explained that the objective exploratory research design is to gain as much information as possible and that the purpose is to provide the researcher with greater insight into the study problem. According to Ramesh and Pandey, findings of the exploratory research are generally not conclusive and require further exploratory or conclusive research (2011:25).

An exploratory research study is therefore performed in order to collect information, and to use such information to gain a better understanding of the problem.

The reason for the chosen research method is because there is a specific research problem that needs to be solved and in order to conclude based on the findings, an analysis of the South African VAT system and other countries' VAT systems will need to be performed. Furthermore, exploratory research will be conducted because, in South Africa, no publications, rulings, interpretation notes or guidelines focusing on the VAT treatment of offshore portfolio management are available.

The method in which data will be collected for the research will be secondary data. In other words books, journal articles, dissertations, VAT legislation and guides in other countries.

The main research objective will be achieved by performing a literature review in order to understand the South African VAT system and concluding whether it is sufficient for the stated purpose. Furthermore, an understanding will be obtained by analysing other countries' VAT systems in order to compare it to the South African VAT system.

1.6 Delimitations

Only imported services related to the offshore investment in CISs will be discussed. Other forms of foreign investment are therefore not included in the scope of this research study.

The conclusion reached in this study is only suggestive, not conclusive. The conclusion as to whether there is a VAT on imported services exposure in the CIS industry is purely an opinion and cannot be interpreted as a fact.

Only certain readers may find this study beneficial, as this study is limited to the effect of VAT in the financial services industry, and more specifically the CIS industry.

Only countries with similar VAT systems were considered when performing an analysis between the different countries and their place of supply rules, in order to draw a comparison with the South African VAT structure, which could result in other developed countries' useful information not being used to draw a conclusion.

1.7 Assumptions

The assumption was made that no CIS or investor in South Africa declares VAT on imported services in respect of offshore foreign investment in a CIS.

It was assumed that sources used to obtain information (ie the internet, books and articles) are reliable and trustworthy, and that there is no reason to suspect that information is not correct.

It is further assumed that the reader has a general knowledge of VAT and its principles.

1.8 Chapter overview

This chapter provided the background, rationale and the research objectives of the study. Certain assumptions, delimitations, abbreviations and key terms used throughout the study were highlighted. Furthermore, benefits pertaining to the study were identified and the research method was explained.

Chapter 2 analyses Collective Investment Schemes (CIS) in South Africa and the regulation thereof. The chapter further analyses the concept of investing in a foreign CIS and how the fees charged on such investments are derived.

Chapter 3 analyses the imported services provisions of the South African VAT system in order to determine whether there is a VAT on imported services exposure in the instances where funds are invested offshore. The chapter further analyses the collection of VAT on imported services and the administrative difficulties experienced by revenue authorities.

Chapter 4 determines the necessity for place of supply rules in South Africa. The chapter further analyses the place of supply rules used in the European Union, New

Zealand and Canada. Two specific countries in the European Union were analysed, namely the United Kingdom and the Republic of Ireland. In addition, the international VAT/GST guidelines issued by the OECD are discussed and the recommended place of supply rules is highlighted.

Chapter 5 summarises the findings of the study and provides a conclusion. The chapter further provides recommendations, based on the findings that were made, and areas for future research are identified.

Chapter 2: Overview of Collective Investment Schemes

In chapter 1, the background on the research question and the research objective were discussed. Furthermore, assumptions that were made, along with certain delimitations to the study, were highlighted.

Chapter 2 introduces the concept of CISs in South Africa and the regulation thereof. Furthermore, domestic CISs with an exposure in foreign CISs will be discussed, with the focus on the fees charged on such investments.

2.1 Introduction

CISs are a very popular form of investment in South Africa. Accessibility for investors, good returns and diversification, which reduces the risk, contributes to their popularity. In South Africa, the first CIS (previously referred to as Unit Trusts) was launched in 1965.

Originally, CISs were created to give an “ordinary investor” the opportunity to invest in the stock exchange, without actually buying shares directly. Since then, the awareness of the benefits of investing in a CIS have grown, leading to an increase in the number of individual and institutional investors. The CIS industry has grown significantly and as at 30 June 2015, the Association for Savings and Investment South Africa (ASISA) reported that R1.7 trillion is under management in the CIS industry³. Therefore it is imperative that the CIS industry is regulated appropriately to ensure that investors are protected.

A CIS is made up of portfolios that comprise a pool of funds, contributed by investors, which are managed by a fund manager. A CIS is created in order to pool the money of individual investors. The fund manager, will use the funds of the investors to invest in the money market, properties, bonds, equity or other securities subject to the deed⁴. The concept behind this is to ensure that the investments are spread over a variety of products to spread the risk.

³ These statistics are released on the ASISA website and can be found at <http://asisa.org.za/tenakaDocuments/asisa-documents/ASISA-Statistics1-Holdings-30-June-2015.xlsx>

⁴ The term “deed” is defined in the Collective Investment Schemes Control Act 45 of 2002 (CISCA) as, *inter alia*, the document of incorporation whereby a collective investment scheme is established and in terms of which it is administered.

Each investor, dependant on the amount contributed, will receive a proportional stake in the portfolio which is referred to as “units” and which represents the portion of the investors’ interest in the various products of the portfolio. This is one of the fundamental benefits for investors, as they are able to access diversification in their investment. Costs of managing the portfolio are spread among investors. There are a variety of CISs available in South Africa, which are both rand and foreign currency based, to cater for the investor’s needs.

2.2 Collective Investment Schemes in South Africa

CISs in South Africa are regulated by the CIS Control Act 45 of 2002 (CISCA) and it sets out how CISs are to be regulated, administered, and supervised. CISCA further provides that CISs are permitted to market to the public and therefore the CIS industry is in turn regulated by the Financial Services Board (FSB) which was established to oversee the South African public interest in the non-banking financial services industry. The executive officer and the deputy executive officer of the FSB are respectively appointed as the registrar and deputy registrar of CISs⁵.

CISCA makes provision for licensing of an industry association which represents the interest of CISs in South Africa⁶. ASISA represents the majority of the country's asset managers, CIS management companies, linked investment service providers, multi-managers and life insurance companies⁷. ASISA is the body that is the spokesperson for the CIS industry whereby any policy, regulatory provisions and issues of concern can be expressed to the relevant parties.

The CISCA makes provision for 5 different types of CISs, as outlined hereunder:

- CIS in securities (it must be noted that the portfolio consists mainly of securities and includes all local and foreign funds registered with the FSB. Most collective investment schemes fall in this category)
- CIS in properties (consisting mostly of shares in property)
- CIS in participation bonds (consisting mainly of participation bonds)
- Declared CIS (any scheme the minister declares a CIS) and

⁵ Section 7 of the CISCA

⁶ Part III of the CISCA

⁷ asisa.org.za

- Foreign CIS (foreign schemes that solicit investments from South Africans, not registered with the FSB) (ASISA, not dated b, p.4).

The different types of CISs are governed by CISCAs, which provides a framework for the regulation of a CIS and sets out various restrictions that would apply to limit the assets that may be held in the underlying funds. Collective investment portfolios are the most accessible, flexible, protected, regulated and transparent long-term savings vehicles (ASISA, not dated c).

In terms of the CISCAs, a collective investment scheme is defined as follows:

“a scheme, in whatever form, including an open-ended investment company, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and in terms of which –

- (a) two or more investors contribute money or other assets to and hold a participatory interest in a portfolio of the scheme through shares, units or any other form of participatory interest; and
- (b) the investors share the risk and benefit of investment in proportion to their participatory interest in a portfolio of a scheme or on any other basis determined in

the deed but not a collective investment scheme authorised by any other Act;”

A ‘participatory interest’ is defined as:

“an interest, undivided share or share whether called a participatory interest, unit or by any other name, and whether the value of such interest, unit, undivided share or share remains constant or varies from time to time, which may be acquired by an investor in a portfolio”

An investor’s right in a CIS is represented by their participatory interest in the CIS. This participatory interest that the investor holds, represents the investor’s proportionate share in the portfolio of the CIS.

Section 93 of CISCAs states that amounts that may be deducted from a portfolio are, inter alia, auditor’s fees, bank charges, trustee and custodian fees and management

fees. In terms of the above sections of the CISCA, it can be interpreted that the investor is liable for the payment of such fees, as this may be deducted from the investor's portfolio of funds.

There are two distinct types of CIS investors:

- retail investors; and
- institutional investors.

A retail investor is usually an individual who invests for his or her own personal account, whereas an institutional investor is a financial institution such as a retirement fund that makes large investments on behalf of their clients (ASISA, not dated c).

CIS managers are required to disclose all fees and charges to their investors⁸. This is usually disclosed in the fund fact sheets issued by the management company as the total expense ratio (TER). The TER is the total costs deducted from the portfolio in respect of the management thereof, calculated as a percentage of the value of the portfolio.

As reflected on the ASISA website, funds of funds do have higher fees and charges than traditional collective investment portfolios (ASISA, not dated c). A fund of funds is described as a collective investment portfolio fund that invests in a range of other collective investment portfolios. These are either:

- funds within a management company's own range (internal fund of funds) or
- a selection of funds managed by various management companies (external fund of funds).

In the case of a traditional collective investment portfolio, one layer of fees and charges are payable i.e. an initial charge and an annual fee. With a fund of funds, an additional layer of fees is payable i.e. in addition to the initial fee and annual charges applicable to the fund of funds, the management costs of the underlying funds must be accounted for.

In the introduction to CIS, ASISA (ASISA, not dated b) explains that CISs are grouped into sectors to enable investors to compare the performance of portfolios

⁸ Section 3 of the CISCA

with similar objectives and benchmarks. One of the steps in the classification process for a CIS in securities is to categorise it according to its geographical investment location. This could be in domestic, worldwide, foreign or regional portfolios, as stated hereunder:

- Domestic CIS – Minimum of 70% of the funds must be invested in the South African Market
- Worldwide CIS – Minimum of 15% of the funds must be invested in the South African market and a minimum of 15% of the funds must be invested in the foreign market
- Foreign CIS – Minimum of 85% of the funds must be invested outside of the South African market
- Regional CIS – Minimum of 85% of the funds to be invested in a particular region (ASISA, not dated b).

Therefore, based on the above, most CISs in securities are significantly exposed to the offshore market. The fee charged by foreign service providers could potentially have a VAT implication for South African investors.

2.3 Foreign Collective Investment Schemes

Investing in a foreign CIS has many ramifications, as outlined by ASISA (ASISA, not dated a). Over the last decade, foreign investment has been encouraged in order for investors:

- to diversify the risk of the volatile South African market and
- to hedge against the depreciating rand and inflation.

However, with investing abroad, there are various aspects that the investor needs to take into account. Besides the range of funds available for selection, the fund structures and the costs involved in respect of fee layering between funds, there are also tax implications to be considered.

South African investors have the option to either invest in a locally registered CIS, with foreign exposure in its underlying assets or directly in a foreign collective investment scheme (FCIS), by using their R10 million foreign investment allowance⁹.

The CISCA provides that a FCIS cannot be marketed in South Africa without FSB approval. Local investors are not prohibited from directly investing in a FCIS that is not approved by the Financial Services Board (FSB); however any person who solicits investments in an unregistered FCIS is guilty of an offence and may be liable for conviction or a fine¹⁰.

ASISA informs that there are a wide range of foreign investments to choose from (ASISA, not dated a). The most commonly found in foreign schemes and funds, offered in South Africa, include the following:

- Unit trust funds or collective investment schemes
- Open ended investment companies and
- Société d'Investissement collectif à capital variable

Unit trust funds or collective investment schemes

The following extract from ASISA provides more information on a FCIS. “FCIS portfolios are similar to that of local CIS portfolios in terms of structure and management. Your money is pooled with that of other investors who have similar investment objectives. Experienced investment managers invest this pool of money in a wide range of international shares, bonds and other financial instruments. The total value of the pool of invested money is split into equal portions called units.” (ASISA, not dated a)

Open ended investment companies

ASISA also states, furthermore, that up until May 1997 only two types of investment vehicles were available in the United Kingdom, namely collective investment portfolios and investment trusts. However, from that date forward another type of investment fund, called an Open Ended Investment Company (OEIC), was introduced. Although they are similar in nature to collective investment portfolios,

⁹ In the 2015 budget speech, Finance Minister Pravin Gordhan, announced that the annual foreign investment allowance for individuals will increase from R4 million to R10 million per person in terms of exchange control.

¹⁰ Section 65 of the CISCA

participation rights of investors are obtained by the purchase of shares in the company. This differs to CIS portfolios where investors purchase units in a portfolio. “As new investors enter the scheme, new shares are issued – hence the reference to “open-ended”. The company has no predefined termination date, it can continually issue or buy back its own shares and therefore has a variable share capital”. (ASISA, not dated a)

d'Investissement Collectif à Capital Variable (SICAVs)

SICAVS are similar to OEICs, “except that these schemes are typically registered in French speaking countries such as Luxembourg and France. They are also open-ended investment companies and are required to fulfil certain conditions as prescribed by the European Directive on UCITS” (ASISA, not dated a).

For the purposes of this dissertation only investment in a foreign CIS will be considered, as these are very similar to South African CISs as described above.

2.4 Fees charged in a CIS

The various parties, besides the investor, included in a CIS are the fund manager and the trustee or custodian. The manager is the link between the various investors and is usually responsible for the administration, marketing and sales of CIS.

To be able to fulfil these functions the CIS is charged a fee. Such fees, among other, are, in terms of the CISCA, a permissible deduction from the portfolio of a CIS¹¹.

Since these fees are deducted from the portfolio, and therefore reduce the value of the underlying portfolio, it could be interpreted that the investors are indirectly paying for these charges.

¹¹ Section 93 of the CISCA

Chapter 3: VAT in South Africa

In the previous chapter the reader was introduced to the concept of CISs in South Africa and the regulation thereof. Investments made in foreign CISs and the respective fees payable by the investor were also highlighted.

In this chapter, the imported services provisions of the South African VAT system will be analysed in order to determine whether there is a VAT on imported services exposure in the instances where funds are invested offshore. The chapter further analyses the collection of VAT on imported services and the administrative difficulties experienced by revenue authorities.

3.1 Introduction

“The South African VAT system is concerned with three basic concepts:

- Time of supply (parties must account for VAT on a particular supply in the particular tax period within which the tax point falls)
- Value of supply (in order to calculate VAT in respect of that value) and
- Place of supply (the place at or jurisdiction in which a particular supply will be taxable for VAT purposes)” (Steyn 2010:233).

When establishing the jurisdiction in which the place of supply arises, there are two conflicting views when it comes to defining the territorial scope of VAT:

- The origin principle - an activity is taxed in the jurisdiction of the country where it originates or where it is created; and
- The destination principle – an activity is taxed at the destination where it is consumed or received (Steyn 2010:238).

The South African VAT is destination based, which means that only the consumption of goods and services in South Africa is taxed.

Steyn (2010:240) states that, generally, it is not difficult to establish the place of supply or consumption of physical goods, for this is usually where the goods are delivered or made available to the customer. He further maintains that a problem arises, though, where intangible services are traded across borders.

It might be true that the VAT Act implies that VAT should be levied at the place of consumption. But without clear place of supply rules, the legislation is open to interpretation. Furthermore, the concept of 'place of consumption' is difficult to define without proper guidelines in the legislation. The concept may refer to the place where the final consumer actually uses or consumes the service. This leaves us with a further question of where exactly a service truly is consumed (Steyn 2010:240).

VAT is therefore paid on the supply of goods or services in South Africa as well as on the importation of goods into South Africa. The importation of services is only subject to VAT where the services are imported for private, exempt or other non-taxable purposes¹².

3.2 Place of supply impact in the Collective Investment Scheme Industry

For VAT purposes South Africa does not have place of supply rules and the taxation of supplies made, is consumption based. VAT is therefore levied on the supply of goods or services where they are consumed.

Because of the way in which foreign investments in CISs are managed, it is difficult to determine where those services are consumed, specifically for VAT purposes. CISs in South Africa have portfolios in place, which entitle local investors' funds to be invested in foreign portfolios. The funds managed in South Africa are managed by a South African management company, which charges a management fee for such services rendered. VAT is levied appropriately on such supplies and the investor's portfolio is reduced by the total amount (fee plus VAT). The difficulty, however, arises when the local investors funds are invested offshore and foreign asset managers charge a management fee', which is also deducted from the investor's portfolio.

The foreign asset manager services will typically comprise of administration of the foreign investments, for example investing of funds transferred by the South African CIS, the withdrawal of funds, calculation of investment returns, preparation and submission of regular investment statements, acquisition and/or disposal of investments, and transferring funds into and from investment portfolios. The administration services are rendered by the foreign asset manager physically in that

¹² Section 12.3.1 of the VAT 404 guide for vendors

country', where the portfolio is located, and by staff outside South Africa. The underlying investments in respect of which the services are rendered, are also located outside South Africa, and the investments are acquired or disposed of outside South Africa (Badenhorst, 2007).

It could be argued that the services are consumed where the funds are physically located and where the service is actually rendered. However, an alternative argument could potentially be, based on views expressed by SARS and relevant case law, that the services are actually consumed where the investor is situated.

Since the South African VAT Act does not make provision for specific place of supply rules, it is difficult to determine whether South Africa has the jurisdiction to tax such supplies. However, certain sections of the VAT Act (ie the enterprise, imported services and zero rating provisions) do indicate to some extent where the supply is deemed to take place.

The purpose of this study is to analyse the South African VAT implications for offshore portfolio management fees charged in the absence of place of supply rules. In order to determine the potential VAT consequences in the CIS industry, the provisions of the South African VAT Act need to be analysed, in particular, those provisions dealing with the concept of what an enterprise and imported services.

3.3 An Analysis of the current South African VAT legislation

3.3.1. Definition of an enterprise for VAT purposes

In terms of section 23 of the VAT Act, where a person carries on any enterprise and the total value of his or her taxable supplies exceeds or is likely, in terms of a contractual obligation in writing, to exceed R1 million in a 12-month period, he or she will have a liability to register as a vendor for VAT purposes.

Section 1(1) of the VAT Act defines the term "enterprise" to mean an enterprise or activity which is carried on continuously or regularly by a person in the Republic or partly in the Republic in the course or furtherance of which goods or services are supplied to another person for a consideration, whether or not for profit.

The definition does not require a fixed place of business in South Africa, but that a person or company will be regarded to be carrying on an enterprise if goods or

services are supplied in the course of activities conducted continuously or regularly, in or partly in South Africa (Niemand, de Swardt & Wiid, 2011:35). The fact that a foreign supplier does not have a permanent establishment in South Africa therefore does not necessarily mean that the supplier is not conducting an enterprise in South Africa and hence the supplier might still be required to register as a vendor for VAT purposes (De Wet & Du Plessis, 2000: 263).

To establish whether the foreign asset managers carries on an “enterprise”, one needs to consider the following elements of the definition, as defined in section 1(1) of the VAT Act, namely:

- enterprise or activity;
- carried on continuously or regularly;
- person;
- in the Republic or partly in the Republic;
- supply of goods and services; and
- to any other person for a consideration.

An enterprise or activity

In giving meaning to the words “enterprise” or “activity”, both their ordinary meaning and the context in which they appear should be considered.

The word “enterprise” is defined in the Oxford Online Dictionary (not dated) as “a project or undertaking; a business”.

The word “activity” is defined in the Oxford Online Dictionary (not dated) as: “The condition in which things are happening or being done”.

The terms therefore do not refer to any passive pursuits - in both terms there is a sense of something active being carried on.

Applying the above analysis, asset management/administration services undertaken by foreign asset managers would amount to an undertaking actively pursued, with the result that the said activities can therefore be said to be an “enterprise or activity” for VAT purposes.

Carried on continuously or regularly

The VAT Act does not define the terms “continuously or regularly” and there are no reported South African cases dealing with these terms. Reference may be made to the New Zealand legislation (as persuasive authority), due to the similarity of the New Zealand VAT legislation to South African VAT legislation, in order to gain insight into these concepts.

In Case N27 (1991) 13 NZTC, the New Zealand Taxation Review Authority have interpreted the word “continuously” to mean that the “activity has not ceased in a permanent sense or has not been interrupted in a significant way”. “Regularly” on the other hand, is defined in the same case as *“steadiness or uniformity of action, or occurrence of action, so that it recurs or is repeated at fairly fixed times, or at generally uniform intervals, to be of a habitual nature and character”*.

The New Zealand authorities have further held in Allen Yacht Charters Limited V CIR (1994) 16 NZTC, that the words “continuously or regularly” indicate that an “activity might either be carried on all the time, ie continuously, or it must be carried on at reasonably short intervals, ie regularly. An activity that is intermittent or occasional does not qualify”.

The fact that asset management/administration services are provided on an on-going basis will therefore constitute a continuous or regular activity.

Person

The term “person” is defined in section 1(1) of the VAT Act to include, inter alia, any company. The term “company” in section 1(1) of the VAT Act refers to the definition of “company” in the Income Tax Act which is defined to include, inter alia, any company incorporated under the law of any country other than the Republic.

Since the foreign asset managers will be incorporated in a foreign jurisdiction, it will qualify as a person for purposes of the VAT Act.

Supply of goods or services

The term “services” is defined in section 1(1) of the VAT Act to mean, inter alia, anything done or to be done. The wide ambit of this phrase means nearly every supply which is not a supply of goods is a supply of services. Thus, the supply of asset management/administration services would constitute a supply of a service.

Consideration

The term “consideration” is defined in section 1(1) of the VAT Act and implies any kind of quid pro quo received in return for the supply of goods or services. The foreign asset managers will receive consideration (ie management fee) for the services that it renders.

In or partly in the Republic

The difficult question that must be answered is where the foreign asset managers’ activities will take place. As discussed, the South African VAT legislation does not contain place of supply rules. However, it would appear in the context of the enterprise definition, that the place of supply of these services are where the foreign asset managers are located. On this basis, it could be seen that foreign asset managers are carrying on the activities outside South Africa.

Based on the above, foreign asset managers would not need to register for VAT in South Africa, since its activities can be seen as carried on outside of South Africa. This was also the case for foreign suppliers of electronic services before the government changed legislation.

Recent amendments to the VAT legislation gave effect to the government’s proposal that all foreign businesses supplying digital goods and services in South Africa will be required to register for VAT. According to Moodaley and Moonsamy (2014), “Government indicated that the proposal is in line with international trends such as regulations adopted by the European Union requiring such suppliers to register for VAT in the country where the consumer resides. All persons supplying electronic services from a place outside of South Africa will be required to register as VAT vendors where they make supplies of electronic services to South African customers who are either tax resident in South Africa, or where payment for the services by such customers originates from South African banking accounts.”

Therefore, should similar legislative changes be made in respect of the supply of foreign asset management/administration services, foreign asset managers could be liable to register for VAT in South Africa if it can be seen that such services are provided to the South African customers.

Nevertheless, s7(1)(c) of the VAT Act provides for VAT to be levied in respect of the supply of any “imported services”. The next section looks at whether the supply of services by non-vendor foreign asset managers falls within the definition of “imported services”.

3.3.2. Imported services

Section 7(1)(c) of the VAT Act specifically imposes VAT on the supply of any imported services by any person on or after the commencement date. The person liable for the payment of such VAT is, in terms of subsection (2), the recipient of the imported service.

A “recipient” is defined, in relation to any supply of goods or services, as the person to whom the supply is made¹³.

A “person” is also defined and includes a company, any body of persons and any trust fund¹⁴.

A “trust fund” is defined as “any fund, consisting of cash and other assets, the administration and control of which is entrusted to any person acting in a fiduciary capacity by any person, whether under a deed of trust or by agreement...¹⁵”

Imported services is defined in the VAT Act¹⁶ to mean “a supply of services that is made by a supplier who is a resident or carries on business outside the Republic, to a recipient who is a resident of the Republic to the extent that such services are utilised or consumed in the Republic otherwise than for the purpose of making taxable supplies”.

Should all of the requirements of imported services be met, VAT will be levied at 14% and is payable by the recipient of such services, unless one of the exemptions in section 14 of the VAT Act applies.

Exemptions on the VAT levied on imported services

Section 14(5)(b) of the VAT Act provides that VAT will not be charged on imported services where:

¹³ Defined in section 1(1) of the VAT Act

¹⁴ Defined in section 1(1) of the VAT Act

¹⁵ Defined in section 1(1) of the VAT Act

¹⁶ Defined in section 1(1) of the VAT Act

- the supply, if it was made in the Republic, would be charged with VAT at a rate of zero percent, applicable in terms of section 11 of the VAT Act ,or would be exempt from tax in terms of section 12 of the VAT Act.

Therefore where VAT is leviable on the supply of imported services by a person, an exemption applies if the supply is zero rated, or exempt if it was made in the Republic.

Asset management services, if provided in the Republic by a vendor, constitute taxable and not zero rated supplies. Section 11(2)(k) of the VAT Act, however, provides that services may be zero rated if physically rendered elsewhere than in the Republic.

In the case of *ITC1812* (2006), the taxpayer argued that 'imported services' that were physically performed by the supplier of the services outside South Africa were zero rated under section 11(2)(k) where they were rendered by non-vendors.

The facts of this case were that the vendor was a major life insurance company and its main activity was the provision of life insurance to both local and international recipients. The vendor made use of various overseas consultants and other suppliers of services, eg business advisors and computer services. The vendor contended that where the aforementioned services had been physically rendered outside South Africa, no VAT was payable as the VAT Act allowed for the zero rating thereof. Therefore, the vendor was of the view that it met the requirements of section 14(5)(b), and hence, VAT was incorrectly levied by SARS in terms of section 7(1)(c).

Judge Wayglay (2005), however, found in favour of SARS and held, inter alia, that the pre- requisite for the application of section 14(5)(b), was that the supply must be one which 'if made in the Republic' would have qualified for zero-rating or exemption under section 11 or section 12 of the VAT Act. In the court's view, section 14(5)(b) required one to ascertain whether the same service, if made in South Africa by a registered vendor, would qualify for zero rating or exemption. Since the supplies were made by non-vendors in this case, they did not qualify for zero rating.

In the Metropolitan Life Case [(2008) 70 SATC 162], there was also a dispute as to whether the zero-rating of s11(2)(k) could be applied, or whether s14(5)(b) of the VAT Act was applicable whereby the service could not be zero-rated. The Company

is a life insurance company that provides life insurance to both local and international clients. It was held that both these sections could possibly be applied to this situation, but that one must look at the intention of the legislature and whether VAT at 14 per cent needed to be applied. The reasoning behind this is that the provision of life insurance is an exempt supply and therefore not in the making of taxable supplies. Therefore the zero-rating could not be applied. This case shows that legislation can be interpreted in different ways, one whereby one can charge VAT at 0%, and another where the rate of 14% needs to be applied.

Therefore, the exemption would not apply and it needs to be determined whether the requirements of the imported services definition are met.

The definition of imported services therefore requires the following:

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

Supply of services by a non-resident

In order for the first requirement of the imported services definition to be met, it needs to be determined whether there is a supply of services by a non-resident.

Services is defined in the VAT Act¹⁷ to mean “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 the supply of goods, money or any stamp, form or card contemplated in paragraph (c) of the definition of ‘goods’”. The definition of services is very wide, and would therefore include nearly every form of supply which is not a supply of goods.

CIS management companies are required to disclose all fees and charges to their investors¹⁸. This is usually disclosed in the fund fact sheets. It is submitted that such fees charged include the portfolio management services rendered by offshore asset managers.

¹⁷ Supra

¹⁸ Section 3 of the CISCA

Therefore, based on the above, a service is provided by a non-resident.

Supply to a recipient who is a resident

In order for the second requirement of the imported services definition to be met, it needs to be determined whether the services provided by the foreign asset manager are supplied to a recipient who is a resident of the Republic.

This requirement requires an understanding of whether the services are rendered to the offshore portfolio in which the funds are invested, the local portfolio or the underlying investor of the fund. Therefore, what needs to be determined is who is contractually or legally liable for the payment of such fees, and therefore who is the actual recipient of such services.

Section 1(1) of the VAT Act further defines resident of the republic to mean “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”.

As mentioned in chapter 2, an investor’s right in a CIS is represented by their participatory interest in the CIS. This participatory interest that the investor holds, represents the investor’s proportionate share in the portfolio of the CIS.

Section 71 of the CISCA provides, inter alia, that money or other assets received from an investor, and an asset of a portfolio, are regarded as being trust property, and a manager, trustee or custodian must deal with such money, or other asset in terms of the Act and the deed and in the best interest of the investor.

For VAT purposes, the local CIS portfolio would constitute a fund, consisting of cash or assets, the administration of which is entrusted to the trustees under a deed of trust and would therefore be a “trust” as defined, and also a “person”.

The treatment of the CIS portfolio as a trust is also consistent with the income tax treatment of a CIS. For income tax purposes, a portfolio of a CIS (excluding a

portfolio of a CIS in property) is taxed on a flow – through basis in certain instances (ie the investor is taxed)¹⁹.

Since the CIS is established as a trust, and the assets of the CIS portfolio are held in trust for the beneficiaries ie the investors, the investors would be liable for the costs and fees incurred in managing their assets (rather than the CIS itself). If the trust is a conduit, it could be said that the assets are therefore held on behalf of the investors; income is earned on behalf of the investors and the expenses are incurred on behalf of the investors.

Section 93 of the CISCA states that amounts that may be deducted from a portfolio are, inter alia, auditor's fees, bank charges, trustee and custodian fees and management fees. Therefore, the management company is entitled to deduct a management fee directly from the portfolio.

Furthermore, Section 93 could be interpreted to mean, either

- that the CIS portfolio, as a separate “person”, bears the liability for the payment of the fees and costs, or that
- From a cash flow point of view, the CIS portfolio may deduct certain costs and fees from the investor's investment but that the investors are in fact liable for the costs and expenses.

In terms of the latter (second) argument, since the money and assets in the portfolio are held as trust property on behalf of the investors, the costs of managing the investment could be seen to be the liability of the investor. However, since the monies are pooled collectively and certain of the fees and costs are deducted from the pooled funds, this section provides for the physical collection of the fees or costs from the pooled or collective funds, as well as for disclosure of any deductions which are made from the pooled funds, to the investor.

From my review of various Trust Deeds²⁰, it provides for various disclosures of fees and notifications of increases of fees, to the investor, from which it could be implied that the investor and the asset manager have contracted in respect of the asset management fees. The fact that, where there is a shortfall in the Income Account of

¹⁹ Section 25BA of the Income Tax Act, 58 of 1962

²⁰ The term “deed” is defined in the CISCA as, inter alia, the document of incorporation whereby a collective investment scheme is established and in terms of which it is administered.

the portfolio, the fee is effectively extracted from the capital account – resulting in the investor’s capital being reduced – could also indicate that the investor bears the liability for the fee.

The Trust Deed can have a different interpretation to the one set out above. It can be interpreted that it rather suggest that there is only one contractual relationship, that being between the trust and the manager, albeit that the beneficiaries are informed of the costs associated with the investments which are to be managed in their best interest by the trustees.

Since the asset manager is appointed as such under the Trust Deed, the alternative argument must be raised as to whether the asset managers’ charge is, in fact, a charge to the trust ie the contractual obligation to pay the managers fees lies with the trustee, and the investor, having had disclosure of the fees and charges to be deducted from his investment, agrees to a net return on his investment, calculated after deduction of these fees and charges. In other words, the investor accepts that certain fees and charges required in order to manage the investment and run the portfolio, will be deducted from his investment. Therefore, the trust bears the liability for the management fees and the trust would be the person to whom the supply of the management services is made.

Therefore, based on the above, the recipient of such services could either be the FCIS or South African investor who is a resident of the Republic. Where the services are utilised or consumed, may assist in determining who the actual recipient of the services are.

Utilised or consumed in the Republic otherwise than for making taxable supplies

The last requirement of the definition is however dependent on how or where the investors utilise or consume the services provided by the foreign asset manager. The existence of this last requirement indicates that VAT is payable on imported services to the extent that the services are:

- used for the purpose of not making taxable supplies; and
- utilised or consumed in South Africa.

Services that are imported into South Africa can therefore potentially fall into one of three categories, ie services imported wholly for non-vatable purposes (100%

“imported services”); services imported partially for non-vatable purposes (“imported services” to the extent used for non-vatable purposes); and services imported wholly for vatable purposes (no “imported services”).

Should the investors conduct “exempt” activities as defined in the VAT Act²¹ or not be registered for VAT, the services provided by the foreign asset manager would be used for purposes other than making taxable supplies.

As mentioned in chapter 2, investors in CISs include, *inter alia*, an individual (who invests for his or her own personal account) or an institutional investor (for example a retirement fund that makes large investments on behalf of their clients).

In terms of section 12(a), read with section 2 of the VAT Act, the following activities would be deemed to be “financial services” and would constitute exempt activities:

- “The exchange of currency (whether effected by the exchange of bank notes or coin, by crediting or debiting accounts, or otherwise);
- the issue, payment, collection or transfer of ownership of a cheque or letter of credit;
- the issue, allotment, drawing, acceptance, endorsement or transfer of ownership of a debt security;
- the issue, allotment or transfer of ownership of an equity security or a participatory security;
- the provision by any person of credit under an agreement by which money or money's worth is provided by that person to another person who agrees to pay in the future a sum or sums exceeding in the aggregate the amount of such money or money's worth;
- the provision, or transfer of ownership, of a long-term insurance policy or the provision of reinsurance in respect of any such policy: Provided that such an activity shall not be deemed to be a financial service to the extent that it includes the management of a superannuation scheme;
- the provision, or transfer of ownership, of an interest in a superannuation scheme;
- the buying or selling of any derivative or the granting of an option: Provided that where a supply of the underlying goods or services takes place, that supply shall be deemed to be a separate supply of goods or services at the open market value

²¹ Defined in section 1(1) of the VAT Act

thereof: Provided further that the open market value of those goods or services shall not be deemed to be consideration for a financial service as contemplated in this paragraph”.

A “superannuation scheme” is defined as a scheme whereby provision is made for the payment or granting of benefits by a benefit fund, pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund, as defined in section 1 of the Income Tax Act.

An institutional investor would generally be a life insurance company or pension, provident or retirement annuity fund. Such institutional investors would therefore, as a general rule, conduct “exempt” activities as defined in the VAT Act. The services provided by the foreign asset manager would therefore be “imported services” to the extent that they are utilised or consumed for purposes or making exempt or private supplies.

Therefore, where investors are individuals or retirement funds, for example, they will make non taxable supplies. However, such investors will only be liable to pay over VAT on imported services to the extent that the services provided by the foreign asset manager are utilised or consumed in South Africa.

Neither of the terms “utilised or consumed” are defined in the VAT Act, therefore the interpretation thereof is often significantly beset with difficulty.

In terms of the Oxford Online Dictionary (not dated), the word “utilised” can mean “to make practical use of, use effectively”. The word consume can mean “use up, eat or drink, destroy”. These definitions, even though they are useful to determine what utilise and consume means, do not indicate where consumption takes place in respect of services, or where they are utilised.

There is no place of consumption or place of use rules for the application of imported services (as there are available for, example, zero rated services). In Vat Case No 144 (2005), Judge Waglay concluded that: “The definition of ‘imported services’ excludes any supply for use or consumption by a South African recipient in making taxable supplies. This exclusion arises because a recipient of a service who has acquired the service for making taxable supplies will in any event be entitled to claim the attributable VAT as an input credit and offset it against the output tax. The effect

of imposing VAT would therefore be neutral. If, however, the recipient of the service in South Africa does not make taxable supplies he cannot charge VAT and would therefore have no output tax against which the VAT payable for the service could be offset. In order to negate the advantage that a recipient of services will obtain, where the services are VAT free because the services were obtained from a non-resident supplier, VAT is levied on the local recipient of “imported services” in terms of s7(1)(c).”

The South African Institute of Chartered Accountants (SAICA) made a submission to SARS on 31 July 2007 on the meaning of ‘consumption and utilisation’ (SAICA, 2007). In this submission, a distinction was drawn between a personal service – where the real beneficiary is an individual or company and services where the real beneficiary is an identifiable asset. In the latter case, they took the view that the services are utilised where the asset is situated. In the case of offshore portfolio management services, it was submitted that the services are provided in respect of assets and are therefore consumed where the assets are situated. Per enquiry with SAICA, SARS have not responded to these submissions. A ruling issued by SARS (discussed below), however, indicates that SARS would hold otherwise.

SARS’ interpretation was expressed in General Written Ruling No 442, issued by SARS on 24 March 2005 and amended on 31 March 2006, which was subsequently withdrawn on 1 August 2009.

General ruling number 442

Imported services – Foreign bank charges to RSA residents

Scenario

“A South African resident invests monies abroad and incurs fees, charges and/or commissions from the foreign financial institution or foreign agent on his investment.

Question

Is the South African resident liable to declare and pay VAT to SARS on the importation of services in terms of section 7(1)(c)?

Answer

Yes. No consumption takes place in the country where the account is held. Consumption takes place in the RSA and the SA resident is liable for VAT on imported services in terms of section 7(1)(c). Accordingly, the SA resident will have to declare and pay VAT in South Africa in terms of section 14(1)".

Based on a submission made by SAICA to SARS, SARS amended this specific ruling in 2006. The amended ruling issued was completely the opposite and it reads as follows:

Scenario

"A South African resident invests monies abroad and incurs fees, charges and/or commissions from the foreign financial institution or foreign agent on his investment.

Question

Is the South African resident liable to declare and pay VAT to SARS on the importation of services in terms of section 7(1)(c)?

Answer

The fees, charges and/or commissions incurred by the South African resident in a foreign country are as a result of investment made abroad. The services received by the South African resident are consumed in the foreign country and are therefore not imported. Consequently, there is no VAT liability for the South African resident in terms of section 7(1)(c)" (SAICA, 2006)

SARS subsequently stated that, in their view, this conclusion was an error and therefore amended it. In the submission by SAICA it was their view that "there could have been no error in law, as section 7(1)(c) read together with section 14 of the VAT Act, clearly sets out the charging statute for levying VAT in terms of an imported service. The VAT ruling issued by SARS was intended to provide clarity to taxpayers in an attempt to shed light on a particular piece of legislation. We are of the opinion that SARS' change in approach to VAT Ruling 442 is unsubstantiated and not based on a change in legislation or judicial commentary. SARS' recent amendments to VAT

Ruling 442 now place an onus on potentially thousands of non-VAT vendors to submit voluntary forms and payments relating to imported services in respect of similar expenses incurred.

A substantial number of South African individuals hold funds offshore, be it in a bank account, through financial products, or through financial instruments. Such funds are often administered by a non-resident institution that charges a fee for providing these services. This could take the form of an annual management fee or monthly service charges. In light of SARS' amended VAT Ruling 442, there would now be an onus on those individual investors to make a voluntary declaration and subsequent payment of VAT on imported services in respect of the aforementioned expenses being incurred.” (SAICA, 2006)

It could be argued that SARS may have “accidentally” included, to a certain extent, place of supply in its initial ruling, and then “corrected” it to delete any trace of possible place of supply rules as part of the legislation.

Subsequently, all general rulings were withdrawn, however, it appears that SARS would still be of the same view, given a similar set of facts.

The Explanatory Memorandum on the 1998 Taxation Laws Amendment Bill stated: “When VAT was introduced; the intention was to levy VAT on consumption in the Republic. To achieve this, those supplies where consumption does not take place in the Republic and the benefit of services is not enjoyed in the Republic, are not subjected to VAT...”

Van Zyl (2013:261) suggests that the only inference that can be drawn from this passage is that the service must have been physically delivered outside the Republic and that the benefit of the service must be experienced outside the Republic to escape South African VAT altogether. Consequently, Van Zyl (2013) maintains, the place where the service is physically rendered is irrelevant in so far as it can be established that the benefit of the service can be experienced in the Republic.

The above indicates that consumption in the Republic can be interpreted to mean that, should the benefit of services provided be enjoyed in the Republic, such services are consumed in the Republic. This is supported by two cases in particular, which are discussed briefly below.

In a recent VAT case in the matter of *ABD CC v SARS*,²² held in the Cape Town tax court, despite the fact that this case was to determine whether certain zero rating provisions applied, it was confirmed that the VAT system in South Africa is a destination based tax that imposes tax on services consumed in South Africa regardless of where the services are supplied.

The facts of the case were that the vendor had agreements in place with foreign tour operators in which the vendor would arrange tours in South Africa. The foreign tour operators, in turn, sold tour packages to their customers, who were foreign tourists wishing to visit South Africa. Both the foreign tour operators and all their customers were non-residents for VAT purposes. At the time the appellant entered into the agreement for the tour package with a foreign tour operator, neither the foreign tour operator, nor its customers were in South Africa. However, when the local services were rendered, the customers were in South Africa. The vendor contended that VAT should be accounted for at the zero rate in respect of the services provided to the foreign tour operators (Bell, 2015).

Le Grange, however found in favour of SARS and held, *inter alia*, that the supply of the services could not be zero-rated because, in the court's view, at the time that the services were physically rendered and consumed, the tourists were in South Africa (ie the benefit of the service was enjoyed in South Africa).

In the case of *De Beers v SARS*²³, the taxpayer argued that services were not imported as they were consumed outside of South Africa. The facts of the case were that shareholders made a proposal to De Beers Consolidated Mines Limited (De Beers) in terms of which a new company would be established to become the holding company of De Beers. In order to advise the board on whether the offer was fair and reasonable, De Beers acquired the services of financial advisers based in London to assist with the proposed transaction.

The question was whether the supplies by the foreign advisers were consumed in South Africa. The court's view was that irrespective of where the meetings with the advisors were held, De Beers was a South African company with its head office in Johannesburg, and that was where the independent committee of directors had met

²² VAT 969 (2015)

²³ *Commissioner for SARS v De Beers* (503/2011) (2012)

and resolved to acquire the services of the foreign advisers. Consequently, it was held that the services were consumed in South Africa.

It therefore appears that the courts will not be persuaded about the place of consumption of services by only considering the place where the physical activities related to the service take place, but will also consider the place where the benefits received by the recipient from this service are consumed.

This view is further supported in the Explanatory Memorandum to the 2015 Draft Taxation laws Amendment Bill, whereby SARS stated, in respect of the zero rating of vocational training, that “although the training occurs in South Africa, the services are only consumed once the employee utilises the newly acquired skills at the employer’s place of business outside South Africa”.

In the case of the local investors investing abroad, the foreign asset manager charges a fee for the management/administration of the client’s portfolio offshore. Based on the above case law, in order to determine where the services provided are consumed, one needs to establish the place where the benefits of those services are consumed and not only where the services are physically rendered. The fact that the services provided by the foreign asset manager are physically performed outside South Africa and that the funds and investments in respect of which the services are performed are located outside South Africa, would not necessarily mean that the services are not utilised or consumed in South Africa.

Potentially one could distinguish between services which by their nature are immediately consumed, or which can only be consumed in the place where the services are physically provided and services which provide a longer term benefit and which are potentially consumed in the place in which the investor resides or where its head office is.

New Zealand GST Guidelines for Recipients of Imported Services provide that, GST on imported services applies only to services that cannot be regarded as being wholly consumed outside New Zealand. In most circumstances, services are physically performed at the time and place at which they are physically received. However, services which are intangible in nature and are performed offshore, cannot be regarded as necessarily wholly consumed offshore (NZIR 2004:11). The following example was given:

Example 11: Zero-rating under the reverse charge

A GST-registered New Zealand life insurance company sends an employee to Sydney to obtain a legal opinion from an Australian law firm in relation to a proposed transaction and pays for the employee's accommodation in a Sydney hotel. The life insurance company makes predominantly exempt supplies of services.

The life insurance company is charged \$1 million for the legal services, which it pays on receipt of the services. An invoice is provided after payment is made. The life insurance company is charged \$500 for the accommodation services, which the employee pays for using a business credit card. The life insurance company is not an associated person of either the law firm or hotel.

In this situation:

- The legal and the hotel services are supplied by a non-resident supplier to a resident recipient.
- The legal and hotel services are acquired by a person who makes predominantly (more than 95 percent) exempt supplies.
- The supply of the legal and hotel services would be a taxable supply if it were made in New Zealand by a registered person in the course or furtherance of the person's taxable activity.

The supplies are subject to the reverse charge. However, the supply of imported services may be zero-rated if the services are physically performed outside New Zealand and the nature of those services is such that they can be physically received only at the time and place at which the services are physically performed.

Although it is arguable whether the supply of legal services is "physically received" when the employee receives the opinion, the nature of the legal services means that they could be physically received other than at the time and place at which they are physically performed. The New Zealand life insurer can receive the opinion at any time and place (including New Zealand). The supply of legal services cannot,

therefore, be zero-rated and is subject to GST at 12.5% under the reverse charge, requiring the New Zealand life insurer to return \$125,000.....

The hotel accommodation services, on the other hand, can only ever be physically received where they are performed. Therefore these services can be zero-rated and the New Zealand life insurer is not required to return GST on the supply.

The New Zealand legislation (and interpretation thereof) can have persuasive value in South Africa given that the South African VAT legislation is partly based on the New Zealand legislation.

The following guidelines could be drawn from the above discussion and analysis:

- The South African VAT system is destination- based and aims to tax the consumer
- Services could be said to be utilised or consumed offshore, where such services can only be physically received at the place where they are physically performed
- If not, it would be necessary to look not only at the place where those services are rendered, but also where the benefit of those services is received.

In the submission made by SAICA to SARS (SAICA, 2007) referred to above in respect of where services are utilised and consumed, SAICA was of the view that:

- For services where the real beneficiary is an individual or company, the services are utilised and consumed where the individual or company is situated at the time that the services are supplied
- For services where the real beneficiary is an identifiable asset, the services are utilised or consumed where the asset is situated at the time that the services is supplied.

Therefore, for legal services, it was submitted that the place of consumption and utilisation is where the recipient is located, since the real beneficiary was the recipient of the service. However, for offshore portfolio management fees for the management of offshore cash the place of consumption and utilisation was where the funds are physically located, since the service is directly linked to a specific asset and the real beneficiaries are the asset.

The above argument submitted by SAICA could be used to support the view that portfolio management services are utilised or consumed overseas, where the assets are located. However, this argument by SAICA can be substantiated in the case of services rendered to a physical or tangible asset, but is more difficult to substantiate where the assets in question are not tangible in nature, but consist of units in an offshore CIS.

Van Zyl (2013:265) states that in the absence of practical evidence, proxies will have to be applied to determine whether the benefit of the services rendered is experienced in the Republic. He also maintains that the VAT Act does not provide for these proxies. Nor, because of the maxim that the courts express the law and do not make it, they cannot be required to create these proxies at random. Nevertheless, it is generally accepted that, in the exercise of their judicial function, judges do and can legitimately make law.

Therefore, given the ruling referred to above, together with recent case law, without detailed VAT place of supply rules in South Africa, there is the risk that SARS may be of the opinion that it can be said that the benefit for the services rendered by the foreign asset manager, is received in South Africa and that the foreign asset manager's management services are therefore utilised and consumed in South Africa.

3.4 Collection of VAT on imported services

If it is determined that local investors should declare VAT on imported services, one needs to determine whether the collection of such VAT is possible with the current structures in place.

The collection of VAT on imported services is governed by section 14 of the VAT Act. Section 14(1) provides that where tax is payable in terms of section 7(1)(c) in respect of the supply of imported services the recipient shall within 30 days of the time of supply, furnish SARS with a return and calculate the tax payable on the value of the imported services at the rate of tax in force on the date of supply of the imported services and pay such tax to SARS. The VAT 404 Guide for vendors (SARS 2014) provides that for vendors, VAT on imported services must be declared in field 12 of the VAT201 return and paid together with any other VAT which may be

due for the tax period concerned. Non-vendors must complete and submit form VAT215 together with the payment within 30 days of importing the services.

OECD (2014:34) reflects that the reverse charge mechanism has a number of advantages.

- Firstly, the tax authority in the jurisdiction of business use can verify and ensure compliance since that authority has personal jurisdiction over the customer.
- Secondly, the compliance burden is largely shifted from the supplier to the customer and is minimised since the customer has full access to the details of the supply.
- Thirdly, the administrative costs for the tax authority are also lower because the supplier is not required to comply with tax obligations in the customer's jurisdiction (e.g. VAT identification, audits, which would otherwise have to be administered, and translation and language barriers). Finally, it reduces the revenue risks associated with the collection of tax by non-resident suppliers, whether or not that supplier's customers are entitled to deduct the input tax.

The enforcement from SARS on non-vendors to declare and pay VAT on imported services is nearly impossible to monitor. Bardopoulos (2013:26) suggests that the broadened scope and obligation placed on non-registered consumers to account for output tax on imported services are generally not enforced, as the administrative costs are both unrealistic and impractical, especially in the CIS industry where foreign fees charged are calculated on a daily basis and investors are unaware of the actual amount of fees being paid on such investments.

In addition, since this declaration is a voluntary self-assessment by a non-vendor, it is open for abuse and is reliant on the honesty of the public. According to Steyn (2010:242), self-assessment is considered an ineffective method of taxation and especially of taxing private individuals, mainly because of compliance problems. So far, the required payment by the non-vendor consumer cannot be controlled by tax authorities since no form of documentation for the purposes of this type of tax in South Africa exists.

The growth in international supplies of services and intangibles has led to increased complexity for tax administrations as well as for businesses. The intangible nature of

many services is such that the comparative simplicity for goods (exports relieved, imports taxed) cannot be replicated with respect to services and intangibles. It is, therefore, important that tax administrations make it clear to both businesses and to staff responsible for carrying out compliance checks and audits what the rules are in their own jurisdiction and that they should be applied according to the facts of each individual supply as stated by the OECD (2014:33).

The analyses of the VAT legislation in South Africa and the potential risk of a VAT on imported services exposure in the CIS industry, highlights the necessity for place of supply rules in South Africa. It is therefore necessary to analyse the place of supply rules in other countries to consider whether they are helpful in arriving at an equitable solution.

Chapter 4: Place of supply

The objective of this study was to analyse the potential VAT implications of the CIS industry in the light of lack of place of supply rules. In the previous chapter, the imported services and zero rating provisions of the South African VAT system were analysed in order to determine whether there is a VAT on imported services exposure in the instances where funds are invested offshore. It was determined that without detailed VAT place of supply rules in South Africa, there is the risk that SARS may be of the opinion that it can be said that the benefit for the services rendered by the foreign asset manager, is received in South Africa and that the foreign asset manager's services are therefore utilised and consumed in South Africa. The chapter further analyses the collection of VAT on imported services and the administrative difficulties experienced by revenue authorities.

This chapter analyses the necessity for place of supply rules in South Africa. The chapter further analyses whether place of supply rules exist in certain developed countries, with regard to offshore portfolio management services. The European Union, New Zealand and Canada do cater for specific place of supply rules and this is the reason for their selection. Two countries in the European Union were specifically analysed, namely the United Kingdom and the Republic of Ireland. In addition, the international VAT/GST guidelines issued by the OECD are discussed and the recommended place of supply rules is highlighted.

4.1 Introduction

The determination of where services are utilised or consumed is very difficult, especially in regard to portfolios managed offshore. The absence of place of supply rules in South Africa could mean that these types of transactions are not taxed.

According to Lang (2015:196), in a domestic transaction the place of supply rules do not have a fundamental role. In such cases, VAT normally applies, unless the supply is zero-rated or exempt. However, in a cross-border supply, in order to determine where to account for any VAT it is of importance to determine where the transaction occurs for VAT purposes. The fundamental policy issue in relation to the international application of the VAT is whether the levy should be imposed by the jurisdiction of the origin, or by the jurisdiction of destination. Conceptually, VAT double taxation (or non-taxation) should not exist because VAT is a tax on final

consumption and therefore should be levied only where a supply is (most-likely) consumed. Thus, theoretically in the VAT world there is no sharing of taxing rights. Each transaction has to be identified as occurring in one and only one jurisdiction.

To determine the place of supply can create interpretational issues. It is therefore imperative to establish where the supply takes place in order to ensure that VAT is charged appropriately. This indicates the importance for place of supply rules.

South African VAT is based on the Goods and Services Tax (GST) in New Zealand. However, the VAT Act in South Africa does not make provision for place of supply rules. The VAT system in South Africa is destination based that imposes tax on goods and services consumed in the country regardless of where the goods were produced or services supplied.

However, the spread of VAT has resulted in a greater interaction between VAT systems. Although the destination principle has been widely accepted as the basis for applying VAT to international trade, its implementation is nevertheless diverse across jurisdictions and due to the different perceptions of where a supply is most likely consumed, the diverging place of taxation rules result in situations of double (non-) taxation (Lang 2015:197).

According to Schenk and Oldman (2010:187), for most countries with VAT, international trade is a significant component of their economies. A country with a VAT system must define the jurisdictional reach of the tax. That is, the tax must be imposed on production within the country (an origin principle VAT), on domestic consumption (a destination principle VAT), or some combination of the two. Almost every country with VAT relies on the destination principle to define the jurisdictional limits of the tax.

Furthermore, Steyn (2010:240) suggests that in order to determine whether VAT will be chargeable in South Africa, it is important to determine where “consumption” is deemed to take place.

The introduction of place of supply rules in South Africa is necessary to determine whether a supply should be taxed in South Africa. The implementation thereof would definitely assist with the current complications that arise when taxing cross border

services in the correct jurisdiction. In addition potential double or non-taxation may also be avoided when implementing such rules.

According to Ecker (2013), VAT on double taxation and non-taxation in respect of cross-border transactions should not exist. However, should this occur, it conflicts with the fundamental principles of tax. VAT double taxation or non-taxation should not exist, since VAT is a tax on final consumption. In practice, countries have different rules and views with regard to the place of consumption, because, as maintained by Ecker (2013:30), if they concur at the place of consumption, they may still apply diverging place of taxation rules for efficiency, simplicity, practicality or other considerations. He further states that if it does occur, VAT double or non-taxation is in conflict with the basic conceptual principles of VAT, especially the principle of neutrality. Double or non-taxation may result in similar goods or services bearing a different tax burden. The consequence may be distortion of competition.

According to Schneider, many countries introduced place of supply rules to enhance legislative certainty, to avoid double taxation and to increase equity of the overall VAT and tax system (2009:1).

Lang stated that VAT could be imposed on supplies by a registered person within the territory of the taxing country (territorial VAT system), or on all supplies by a registered person (worldwide VAT system), and that most countries impose a territorial VAT system (2015:197).

In territorial VAT systems, such as the European VAT model, supplies are divided into various categories in which different place of supply rules are established for each category, in order to determine which jurisdiction has the taxing right for each transaction. The aim of this is to establish a single place of supply rule for each transaction in order to avoid double- or non-taxation. The worldwide VAT system would allocate taxing rights based on the supplier's place of residence. These types of supplies are restricted to supplies deemed to occur in the country, which is achieved by not taxing cross-border supplies of goods or services which are considered not to be carried out in the country. The worldwide VAT system is enforced in South Africa and New Zealand (Lang, 2015:198).

4.2 Necessity for place of supply rules in South Africa

According to Schneider (2000), South Africa is one of the few countries operating a VAT system without specific place of supply rules. South Africa's VAT system is based on New Zealand's system. However, the New Zealand place of supply rules, albeit relatively simple, have not been introduced into the South African VAT legislation. However, Canada's VAT system which is also based on the New Zealand system, has adopted place of supply rules.

Following from the above, the primary reason to implement place of supply rules should be to assist the current legislative uncertainty experienced when interpreting the South African VAT provisions in respect of cross border transactions. Due to the resource constraints experienced by SARS, any amendments to the current VAT system should be done in such a manner that it rather lessens the resource problem, than to add to the administrative burden of SARS. However, in the absence of place of supply rules, South Africa relies on provisions to the VAT Act such as "imported services" to determine the place of supply of a transaction. As discussed in chapter 2, the imported services provisions are open for interpretation and abuse in the absence of specific place of supply rules.

The necessity for place of supply rules was emphasised by the Davis Tax Committee (DTC) in the "first interim report on VAT to the minister of finance".

The Davis Tax Committee stated that explicit place of supply rules have been adopted in most jurisdictions so as to precisely identify the place in which supplies are to be taxed and accounted for. Given the magnitude of cross-border trade, generally accepted place of supply rules are necessary to prevent double taxation. The Organisation for Economic Co-operation and Development (OECD) has recently issued *International VAT Guidelines* that seek to promote common place of supply rules. While the South African VAT Act includes what may be referred to as "specific rules", it does not contain the explicit general place of supply rules advocated in the OECD Guidelines. The adoption of internationally accepted explicit place of supply rules that are understood by both South African and foreign suppliers will enhance understanding of where VAT must be accounted for on cross-border supplies.

It is accordingly recommended that the VAT Act be amended to ensure the inclusion of clearly stated "place of supply rules", specifically rules that are in harmony with the

OECD Guidelines and which are supported and adhered to by other VAT jurisdictions (DTC, 2014:8).

Furthermore, it is stated that VAT is not intended to be a tax on value which has been added at each stage of the production and distribution of the relevant goods and services; rather, it can be viewed as a consumption tax because the final consumer ultimately bears the burden (DTC, 2014:11).

According to DTC (2014:32), an issue that continues to attract significant interest is the question as to the place (jurisdiction) where VAT should be imposed and accounted for. Clear and decisive “place of supply rules” (also referred to as place of taxation rules) have become increasingly important due to globalisation and may be directly attributed to the proliferation of cross-border transactions. “Place of supply rules” provide assistance in determining whether a supply is regarded as being made within a jurisdiction. And given the escalation of cross-border transactions it is becoming increasingly important not simply to harmonise VAT principles internationally, but also to ensure that clear and unambiguous place of supply rules, which are not in contravention of each other, are introduced in VAT jurisdictions. Place of supply rules assist in determining where a supply should be subject to tax in terms of the OECD endorsed destination principle (DTC, 2014:33).

As mentioned above, “while the South African VAT legislation may contain specific place of supply rules within certain / specific sections of the VAT Act, the legislation lacks general place of supply rules. South Africa does follow the OECD principle of “destination based” taxation which should, therefore, imply taxation where the customer is located. However clear guidelines are sometimes required to assist in determining unequivocally the “place of supply” in order to ascertain whether the supply is subject to South African VAT” (DTC, 2014:78).

According to DTC (2014:79), while the SA VAT Act includes what may be referred to as, “specific rules”, as set out in the OECD guidelines on place of taxation, it is recommended that the SA VAT Act adopt what may be referred to as a “Main Rule” in respect of place of taxation. The VAT Act should, therefore, be amended to ensure the inclusion of clearly stated “place of supply rules”; specifically, rules that are in harmony with the Guidelines and which are, as previously discussed, supported and adhered to by other VAT jurisdictions.

4.3 Place of supply rules in developed countries

Millar (2008:214) suggests that countries using the European model introduced place of supply rules and consider the “place of effective use and enjoyment”, whereas countries under the New Zealand-type model have no specific rules. The only consideration is the location of the initiator of the supply. The initiator would be the person that controls the start of the supply. If the person (the initiator) cannot be identified, the role would be assigned to the person who pays for the service. If this person cannot be identified, the initiator would be the person who contracts for the supply.

When it comes to services supplied across the border, the place of taxation rules differ to the movement of goods across the border, therefore other methods are established to predict where consumption takes place. Millar (2008) indicated various proxies utilised to determine the place of consumption:

- “the location, residence, or place of business of the supplier
- the location, residence, or place of business of the recipient
- the location of the subject matter of the supply
- the place of performance of the supply and
- the location of something else to which the supply relates”.

The South African VAT system is similar to the European Union VAT system. Since the European Union has implemented recommended changes set out by the OECD, the guideline supplied by the OECD on VAT place of supply rules will be analysed. Other VAT systems identified to be similar to the South African VAT system is the systems implemented in New Zealand and Canada, in which the place of supply rules will also be considered.

4.3.1 European Union Place of Supply Rules

On 1 January 2010 the new rules for the place of supply of services were introduced. The aim of these new rules was to levy VAT where actual consumption takes place. Two main rules were introduced, which applied to B2B supplies of services (Art. 44 EC VAT Directive) and B2C supplies of services (Art. 45 EC VAT Directive) (van Arendonk and van der Paardt 2012:42).

Depending on the nature of the transaction, different rules, to determine the place of taxation, will apply. Generally, VAT in the European Union is a broad based consumption tax, in which goods and services are taxed on consumption in the community.

“The place of taxation is determined by where the services are supplied. This depends not only on the nature of the service supplied but also on the status of the customer receiving the service. A distinction must be made between a taxable person acting as such (a business acting in its business capacity) and a non-taxable person (a private individual who is the final consumer)” (European Commission, not dated).

In terms of the VAT Directive there are currently two different general place of supply rules in respect of the supply of services, business-to-business (B2B) services and business-to-consumer (B2C) services.

Based on Article 44 of the VAT directive, B2B services are generally taxable in the country where the recipient of the services is established (Lang, 2015:202) or where he has a fixed establishment to which the services are provided. Concerning B2C, general services are taxable in the country where the supplier of the services is established or where he has a fixed establishment from which the services are provided.

The member states of the European Union follow the VAT harmonization rules. This means that a certain set of place of supply rules are set which provides guidance to these states. However, the countries can decide to a certain degree, how they want to implement and apply these rules.

The European Union consists of 28 member states, which comprise the following:

Austria	Belgium	Bulgaria	Cyprus
Croatia	Czech Republic	Denmark	Estonia
Finland	France	Germany	Greece
Hungary	Ireland	Italy	Latvia
Lithuania	Luxembourg	Malta	Netherlands
Poland	Portugal	Romania	Slovakia
Slovenia	Spain	Sweden	United Kingdom

The application and rules for all the member states differs, therefore it is difficult to determine one set of place of supply rules for the EU. Below is a brief discussion on the general place of supply rules of the United Kingdom (UK) and Ireland.

4.3.2 United Kingdom Place of Supply Rules

Section 7 of the UK VAT Act of 1994, makes provision for specific place of supply rules (unless the service is an exemption listed in Schedule 4 of this Act – discussed in more detail below). Section 7(10) states that:

“A supply of services shall be treated as made-

- in the United Kingdom if the supplier belongs in the United Kingdom; and
- in another country (and not in the United Kingdom) if the supplier belongs in that other country.”

Therefore Her Majesty’s Revenue and Customs (HMRC) provides that “for VAT purposes, the country where a supply is deemed to be made is called the ‘place of supply’ and is the place where it is liable for VAT, if any. These rules are necessary to ensure that VAT, where payable, is paid in the correct country only, and to avoid the possibility of double or non-taxation. Where the place of supply of a service is in another Member State of the EC (European Community), that supply is outside the scope of UK VAT and is liable to the VAT rules in that Member State and in no other country. If the place of supply of a service is outside the EC, that supply is described as outside the scope of VAT altogether and is therefore not liable to VAT in any Member State” (HMRC Manual VATPOSS01200, not dated).

There are two general rules for the place of supply of services, one for business to business (B2B) and one for business to consumer (B2C) supplies. There are also special place of supply rules for certain services.

B2B and B2C Supplies

For place of supply of services purposes, a supply is a B2B supply when the customer has business activities. This includes supplies made to customers with both business and non-business activities. Therefore, it is important to determine whether the customer has any form of business activity, no matter whether the supply is for business or non-business purposes.

For place of supply of services purposes B2C supplies means supplies to:

- a private individual
- a charity, government department or other body which has no business activities, or
- a 'person' who receives a supply of services wholly for private purposes.

In practice, this means that a B2B supply also includes supplies to organisations that have a mixture of business and non-business activities, such as charities and government departments, even if the services are being acquired entirely for the purposes of the non-business activities. Conversely, a B2C supply can be made, not just to private individuals, but also to organisations that have entirely non-business activities. In theory, a B2C supply can also be made to a normal business customer if it will be used for private purposes, although such circumstances are rare (Wild, 2012).

The general rule in order to determine the place of supply of services for B2B supplies is that the supply is made where the customer belongs. The B2C general rule for supplies of services is that the supply is made where the supplier belongs (HMRC Notice 741A, 2010).

Place of belonging

The place of belonging is governed by section 9 of the UK VAT Act. It is important to determine the place where the supplier and the customer belong, as this determines the place of supply, should the general rules as discussed above apply. UK VAT law refers to 'belonging' whereas EC VAT law refers to 'establishment'. These two terms have the same meaning for VAT purposes.

For B2C supply, to determine where the private individual belongs, is relatively straightforward and section 9(3) of the UK VAT Act sets out, according to Wild (2012), if the supply of services is made to an individual and received by him other than for the purposes of any business carried on by him, he shall be treated as belonging in whatever country he has his usual place of residence. This would typically include where they have setup a home and are in full-time employment

However, B2B supplies can be more complicated. The HMRC sets out that the supplier or customer belongs in the UK for the purposes of either making or receiving supplies of services should they have:

- “a business establishment or fixed establishment in the UK and nowhere else
- a business establishment in the UK and fixed establishments in other countries, but the UK establishment is most directly connected with making or receiving the supplies in question
- a fixed establishment in the UK and a business establishment and/or fixed establishments overseas, but the UK establishment is most directly connected with making or receiving the supplies in question, or
- no business or fixed establishment anywhere, but your usual place of residence is the UK” (HMRC Notice 741A, 2010).

Nature of the service

However, before determining whether the general rules for B2C or B2B applies, one must identify the nature of the service. Place of supply rules differ for certain services supplied, and the nature of the service must be considered against such rules.

In certain instances, in respect of B2C services supplied, the place of supply can be where the customer is located. Such services are governed by Schedule 4A paragraph 16 of the UK VAT Act, and provide that:

“A supply consisting of the provision to a person (“the recipient”) who—

- is not a taxable person, and
- belongs in a country which is not a member State (other than the Isle of Man), of services to which this paragraph applies is to be treated as made in the country in which the recipient belongs.

This paragraph further provides a list of such services, which includes *inter alia*, “banking, financial and insurance services (including reinsurance), other than the provision of safe deposit facilities”.

The HMRC Notice 741A provides a list of the following examples of banking, financial and insurance services:

- “Granting of mortgages and loans; selling debts.

- The storage of gold bullion or gold coins by a bank or a dealer in gold who is a subsidiary of a bank.
- The sale of securities as principal.
- The sale of unallocated precious metals (gold, silver, platinum, palladium, rhodium, ruthenium, osmium and iridium) or of unallocated precious metal coins (Goods are unallocated if they remain an unidentifiable part of a larger stock of goods held by the supplier)
- Debt collection services.
- Portfolio management services.
- The provision of insurance or reinsurance.
- The supply of financial futures and financial options.
- Trustee services.
- Commodity brokers' services of arranging transactions in futures and options.

Therefore, if a UK supplier makes B2C supplies of any of the services above (ie includes portfolio management services) to a customer who belongs outside the EC, such services are supplied in the customer's country and are outside the scope of UK VAT. The common feature of services covered by this section is that their place of performance can be indeterminate or variable and they are easily undertaken in a different place to where a supplier has established a business(HMRC Notice 741A: 2010).

The above supports the fact that the UK VAT system is destination based and set up to tax services in the place where it consumed.

4.3.3 Ireland Place of Supply Rules

In terms of the Irish VAT guide (Irish VAT guide, 2014), the general place of supply rules, similar to the UK place of supply rules, is dependent on whether the recipient is a business or consumer.

In respect of B2B supplies, the place where the business receiving the services is established as the place of taxation. The location can either be where the customer has established their business, where the fixed establishment is located, or should the place of business or fixed establishment be absent, the place where he or she has a permanent address or usual place of residence.

Therefore, suppliers situated in Ireland will not charge VAT when supplying services to a business customer established outside Ireland. Similarly, businesses receiving services from a supplier outside of Ireland will not be charged VAT. However, the recipient will be required to account for Irish VAT.

Alternatively, the Irish VAT guide states that the place of taxation for B2C supplies is where the supplier is established, unless subject to the use and enjoyment provisions.

The specific use and enjoyment rules are there to prevent double taxation, non-taxation or distortions of competition and better reflect the place where the actual service is received, which in turn is the place of taxation (Irish VAT guide, 2014).

Section 35(5) of the Irish VAT Act states that “Where, in the case of a supply of services that consists of the provision to a non-taxable person of financial services (including banking services and financial fund management services but not including the provision of safe deposit facilities) or insurance services (including reinsurance), the place of supply of the services would, apart from this subsection, be a place outside the Community but the services are in effect used and enjoyed in the State, the place of supply is nevertheless taken to be the State for the purposes of this Act”.

Therefore, fund management services received from abroad by a non-taxable person would be taxable in Ireland, since such services would be seen to be “used and enjoyed” in Ireland.

[4.3.4 New Zealand Place of Supply Rules](#)

GST, governed by the Goods and Services Tax Act No.141 of 1985 (GST Act) in New Zealand is based on the UK VAT system and was introduced on 1 October 1986. It is generally regarded as a “successful tax”, which is evident by the adoption of a GST type regime after studying the New Zealand experience by many countries, including South Africa, Canada and Australia (McKenzie, 2015).

New Zealand’s GST system is regarded as a consumption tax model. However, regardless of New Zealand’s broad-based GST system, GST does not always apply to cross-border services and intangibles consumed in New Zealand. This is contrary

to the destination principle and means that these services are not taxed in any country (NZIR, 2015).

The GST Act provides that a supply of a service is deemed to be made in New Zealand if the supplier:

- is resident in New Zealand; or
- is a resident outside New Zealand but the services are physically performed in New Zealand (McKenzie, 2015).

However, the GST Act makes specific provisions in terms of its “imported services” rules where a supply made by a non-resident is deemed to be made in New Zealand, albeit not physically performed in New Zealand.

According to Millar (2008:196), in contrast with the European model, under which the reverse charge mechanism is merely a compliance provision, under the New Zealand model, the reverse charge rules are essential elements of the place of taxation regime. Millar further maintains that the reverse charge rules complete the place of taxation rules by making New Zealand the place of taxation in some situations where a supply of services would otherwise have been considered to be made outside New Zealand but will be consumed in New Zealand.

Section 8(4B) of the GST Act provides that a supply of services is “treated as being made in New Zealand if:

- a) the services are supplied by a non-resident to a resident; and
- b) the recipient of the supply—
 - (i) estimates at the time of acquisition that the percentage intended use of the services is less than 95% or
 - (ii) determines at the end of an adjustment period that the percentage actual use of the services is less than 95% and
- c) the supply would be a taxable supply if made in New Zealand by a registered person in the course or furtherance of a taxable activity carried on by the registered person.”

However, the GST on imported services applies only to services that cannot be regarded as being wholly consumed outside New Zealand. In most circumstances, services are physically performed at the time and place at which they are physically

received. However, services which are intangible in nature and are performed offshore, cannot be regarded as necessarily wholly consumed offshore (NZIR, 2004:11).

4.3.5 Canada Place of Supply rules

In 1989, Canada announced that VAT, referred to as GST in Canada, would be introduced on 1 January 1991. This would be similar to other VAT systems implemented in many other countries (Butcher, 2009).

Butcher (2009:291) further states that once it has been determined that a supply has taken place, it becomes necessary to determine the place of supply. If the supply is made in Canada, it may be subject to GST if the supply is a taxable supply. If the supply is made outside of Canada, the supply is outside the scope of GST rules, unless the supply of goods or services were imported or deemed imported by the recipient.

According to Rendahl (2009:291), the rules concerning the place of supply in Canada have a large scope with an objective of ensuring taxation in Canada if the service is fully or partly carried out in Canada

Section 142 of the Canadian Excise and Tax Act (ETA) provides for rules in order to determine whether supplies are deemed to be made in Canada or outside Canada. (CRA, 2004).

Separate place of supply rules may apply depending on the nature of the supply (i.e., tangible personal property, real property, intangible personal property or services) (CRA, 2004).

Section 142(1) of the ETA provides that should services be performed wholly or in part in Canada, such services are deemed to be made in Canada. Alternatively, Section 142(2) provides that should services be performed wholly outside Canada, such services are deemed to be made outside Canada (CRA, 2004).

In addition, an intangible is not considered supplied outside Canada unless it may not be used in Canada, or it relates to a service to be performed wholly outside Canada (Butcher, 2009:102).

Factors that indicate that the service is at least partly performed in Canada are:

- The supply involves a person performing the service and this person is situated in Canada at the time that the activity is carried out
- The service is supplied and activities related to the performance of this service are carried out in Canada (Rendahl 2009:287)

Therefore to determine where services are supplied, the legislation and the rules in governing the place of a supply must be considered. An evaluation must be performed in order to determine whether the service is made in Canada or not, especially whether a service is wholly or partly performed in Canada (Rendahl, 2009).

However, the deeming provisions provided above is not conclusive in order to determine where a supply is made. “Depending on the facts, situations can arise whereby a supply appears not to be deemed to be made in or outside Canada, or a supply appears to be deemed to be made both in and outside Canada. There are also situations not described by either subsection 142(1) or 142(2). In these situations, to determine whether subsections 142(1) or 142(2) apply to deem a supply to be made in (or outside) Canada, the Canada Revenue Authority (CRA) will look to the facts of the case presented and the application of general legal principles. Some of the factors that can be considered when making the determination include:

- where the contract was concluded (i.e., contract terms)
- the residence status of the recipient and the supplier
- the registration status of the recipient and the supplier (if a non-resident) and
- the actions of the parties” (CRA 2004:8).

In cases where a non-resident performed a service in Canada, such services are deemed to be made outside Canada, unless:

- the supply is made in the course of a business carried on in Canada
- at the time the supply is made, the person is registered for GST purposes or
- the supply is the supply of an admission in respect of a place of amusement, a seminar an activity or an event where the non-resident person did not acquire the admission from another person

Therefore, should a supply made by a non-resident be deemed to be made outside Canada, the supply would not be subject to GST (ie the recipient is not liable to pay tax and the supplier is not liable to collect tax) (CRA, 2004).

According to Butcher, where the conditions set out above with regard to the applications of the non-resident rule are not met, the deeming provisions set out in section 142 must be considered in order to site a supply of service inside or outside Canada for GST purposes (Butcher, 2009).

4.3.6 Summary

The general place of service rule in the European Union is different for B2B and B2C supplies. With regards to B2B, the services are generally taxable in the country where the recipient of the services is established or where he has a fixed establishment where the services are provided. Concerning B2C, general services are taxable in the country where the supplier of the services is established or where he has a fixed establishment from which the services are provided.

Similarly in the UK, for B2B and B2C supplies, the place of supply is the place where the customer and supplier belong respectively. However, the place of supply for portfolio management services rendered in respect of B2C supplies is where the customer belongs. Therefore, irrespective whether portfolio management services are rendered to a consumer or business, the place of supply is where they belong.

The general place of supply rules in Ireland, similar to the UK place of supply rules, is dependent on whether the recipient is a business or consumer. However, the place of supply is subject to specific use and enjoyment provisions. Furthermore, it was determined that fund management services received from abroad by a non-taxable person would be taxable in Ireland, since such services would be seen to be “used and enjoyed” in Ireland. The “use” and “enjoyment” provisions could be seen to be very similar to the “utilised” and “consumed” provisions set out in the South African VAT Act.

New Zealand deems the place of supply of services to be in New Zealand, if the supplier is a resident of New Zealand, or if not, the services are physically performed in New Zealand. However, the “imported services” provision deems a supply made by a non-resident to be made in New Zealand, even though not physically performed in New Zealand. The place of supply rules gathered from the New Zealand GST is

not clear enough to indicate where the supply of offshore fund management services is deemed to take place. However, should such services be determined to not being wholly consumed outside New Zealand, GST on imported services will apply.

In Canada, the place of supply of services is deemed to be made in Canada, should such services be performed wholly or partially in Canada.

From the above, it is clear that the place of supply of services in various countries differ. The major difference was that some countries deem the place of supply as being where the customer is located, and others deem the place of supply to be where the services are performed.

4.4 OECD International VAT/GST Guidelines

The purpose of the International VAT/GST guideline issued by the OECD is to “set forth a number of principles for the VAT-treatment of the most common types of international transactions, focusing on trade in services and intangibles, with the aim of reducing the uncertainty and risks of double taxation and unintended non-taxation that result from inconsistencies in the application of VAT in a cross-border context” (OECD, 2014:4). The purpose of the guideline is therefore not to impose VAT rules or legislation.

The supply of cross-border services is growing substantially and many businesses and individuals acquire such services. However, the difficulty arises when different tax systems are implemented. The OECD has a long history in being successful with the “developing practical solutions to international tax issues” (OECD, 2003:3). Many countries are not members of the OECD, such as South Africa. The consequence of this is that these countries follow its own set of rules, which makes international trade from a tax perspective difficult. However, South Africa does follow the OECD principles, even though South Africa is not a member of the OECD, only having observer status.

Without detailed place of supply rules, it is difficult to determine the place of consumption. According to the OECD, it is proposed that the place of consumption (ie place of taxation) should be the customer’s place of residence or establishment. Many believe that such place of supply rules would remove the current complications

in respect of the “utilised” and “consumed” terms set out in the South African VAT Act.

The purpose of VAT, when introduced, was to impose a broad-based tax on consumption, which is a tax on final consumption by households. According to the OECD, the generally accepted tax principles of a tax policy applicable to consumption tax are as follows:

- “Neutrality: Taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation.
- Efficiency: Compliance costs for businesses and administrative costs for the tax authorities should be minimised as far as possible.
- Certainty and simplicity: The tax rules should be clear and simple to understand, so that taxpayers can anticipate the tax consequences in advance of a transaction, including knowing when, where, and how the tax is to be accounted.
- Effectiveness and fairness: Taxation should produce the right amount of tax at the right time. The potential for tax evasion and avoidance should be minimised while keeping counteracting measures proportionate to risks involved.
- Flexibility: The systems for taxation should be flexible and dynamic to ensure that they keep pace with technological and commercial development” (OECD 2014:6).

Although these principles guided the OECD in developing the International VAT/GST guide, neutrality is designated as the core principle of a VAT design (OECD, 2014).

The OECD is of the view that domestic or foreign businesses should not be advantaged or disadvantaged in a jurisdiction that has the taxing right. VAT systems should be set up in such a manner to be fair and not result in a competitive advantage to domestic or foreign businesses, which will interfere with international trade and limit the consumer’s choice. According to the OECD, this is achieved by applying the destination principle (OECD, 2014).

The implementation of the destination principle relating to cross-border services is more complex than with the international trade in goods. The nature of services supplied across the border cannot be monitored by border controls as with goods. In

order to determine the jurisdiction which has the taxing right for the international supplies of services, these guidelines have been developed to reflect the destination principle while, according to (the) OECD (2014:23), ensuring that:

- “international neutrality is maintained
- compliance by businesses involved in these supplies is kept as simple as possible
- clarity and certainty are provided for both business and tax administrations
- the costs involved in complying with the tax and administering it are minimal, and
- barriers to evasion and avoidance are sufficiently robust”

Similar to the South African VAT Act, the guideline states that internationally traded services should be taxed according to the jurisdiction, where consumed. “The destination principle is generally implemented by allocating the taxing rights over internationally traded supplies to the jurisdiction where business use is deemed to occur, as this facilitates the ultimate goal of ensuring that tax is paid and revenue accrues to the jurisdiction where the supply to the final consumer occurs. This ensures that services and intangibles supplied across borders are taxed according to the rules of the customer’s jurisdiction irrespective of the jurisdiction from where they are supplied. It also ensures a level playing field for suppliers so that businesses acquiring such services are driven by economic, rather than tax considerations” (OECD, 2014:24).

The guideline determines the place of taxation for cross-border supplies of services and intangibles. “This proxy is referred to in these guidelines as the “Main Rule”. According to the Main Rule, the jurisdiction where the customer is located has the taxing rights over services or intangibles supplied across international borders” (OECD, 2014:25).

The guideline further provides that the place of taxation is not affected by the provision of services by a third party business or to where the payment flows. The place of taxation remains where the customer is located. “Accordingly, the Main Rule should be applied in such a way that the supplier makes a supply free of VAT to a foreign customer even if the third party business is located in the same jurisdiction as the supplier” (OECD, 2014:25).

“Accordingly, the supplier makes the supply to the customer identified in the relevant business agreement and the place of taxation is that customer’s location. As long as there is no evasion or avoidance, the supplier is therefore entitled to make a supply free of VAT to a foreign customer even if that supply is paid by a third party business located in the same jurisdiction as the supplier” (OECD, 2014:32).

Therefore the principals set out by the OECD confirms that VAT should be levied where consumptions takes place, ie where the consumer is located.

Chapter 5: Conclusion

5.1 Introduction

As mentioned in the problem statement, the main purpose of this study was to analyse the South African VAT implications for offshore investment in the CIS industry in the absence of detailed place of supply rules.

Although it was noted that certain arguments which could be raised to support the fact that foreign portfolio fees are utilised and consumed where they are rendered, in the absence of specific place of supply rules in South Africa, and given recent case law, there is a risk that SARS may be of the opinion that foreign asset management services are utilised and consumed where the benefit is received by the local investor ie in South Africa.

The most common reasons for VAT double taxation (and in the inverse case double non-taxation) are therefore, as stated by Ecker (2013:40):

- the use of different rules to determine the place of taxation
- different interpretation of (otherwise similar) place of taxation rules, order of these rules, or a different interpretation of the surrounding key proxies and concepts for determining the place of taxation and
- different characterization of a supply (even if similar rules are in place to determine the place of taxation) due to different interpretation of the underlying facts.

Therefore, this study also considered the introduction of place of supply rules in South Africa. By means of achieving this, various VAT systems and legislations of other countries were analysed to determine whether the implementation of such rules will be possible in South Africa.

It was noted that even though some countries have similar types of VAT systems, their VAT legislation differs and different sets of place of supply rules exist. The implementation of place of supply rules in the South African VAT Act should not be a major challenge. Instead of amending the various sections to the VAT Act, general place of supply rules would most likely be the most efficient and easiest option. Interpretation notes and guidelines issued by SARS can deal with specific transactions and the interpretation thereof subsequently.

The primary reason to implement place of supply rules should be to alleviate the current legislative uncertainty experienced when interpreting the South African VAT provisions in respect of cross border transactions. Due to the resource constraints experienced by SARS, any amendments to the current VAT system should be done in such a manner as to rather lessen the resource problem than to add to the administrative burden of SARS. However, in the absence of place of supply rules, South Africa relies on provisions of the VAT Act, such as “imported services” to determine the place of supply of a transaction. As discussed in chapter 2, the imported services provisions are open for interpretation and abuse in the absence of specific place of supply rules.

The purpose of this chapter is to provide a summary of what the main findings were, and to make recommendations to resolve the research question.

5.2 Findings of the study

In chapter 2, CISs in South Africa and the regulation thereof, were analysed. The concept of investing in a foreign CIS and the fees charged on such investments, were reviewed. It was determined that a CIS essentially consists of portfolios that comprise of a pool of funds contributed by investors. Furthermore, each investor, dependant on the amount contributed, will receive a proportional stake in the portfolio, which is referred to as “units” and which represents the portion of the investors’ interest in the funds of the portfolio.

Furthermore, CISs are charged a fee for the management of the portfolio, that are, in terms of the Cisca, a permissible deduction from the portfolio of a CIS. Since these fees are deducted from the portfolio, and therefore reduce the value of the underlying portfolio, it could be interpreted that the investors are indirectly paying for these fees charged.

CISs in South Africa have portfolios in place, which entitle local investors funds to be invested in foreign portfolios. The funds managed in South Africa are managed by a South African management company, which charges a management fee for such services rendered. VAT is levied appropriately on such supplies and the investor’s portfolio is reduced by such amount. The difficulty, however, arises when the local investors funds are invested offshore and foreign asset managers charge a

management fee which is also deducted from the investor's portfolio. The question therefore arises, whether such a fee is consumed in South Africa?

In chapter 3, the imported services provisions of the South African VAT system were analysed, in order to determine whether there is a VAT on imported services exposure in the instances where funds are invested offshore.

It was concluded that without detailed VAT place of supply rules in South Africa, it could be argued that the services are consumed where the funds are physically located, and where the service is actually rendered. However, an alternative argument could potentially be, based on views expressed by SARS and relevant case law, that the services are actually consumed where the investors are situated and that the benefit for the services rendered by the foreign service provider, is received in South Africa, and that the management services are therefore utilised and consumed in South Africa.

However, if South Africa incorporated place of supply rules in its VAT legislation, the concerns raised above would possibly be avoided.

In Chapter 4, the necessity for place of supply rules was emphasised by referring to the "First interim report on VAT", issued by the Davis Tax Committee. Furthermore, the place of supply rules used in other countries was analysed.

In the European Union, the general place of service rule is different for B2B and B2C supplies. With regards to B2B, the services are generally taxable in the country where the recipient of the services is established or where he has a fixed establishment to which the services are provided. Concerning B2C, general services are taxable in the country where the supplier of the services is established or where he has a fixed establishment from which the services are provided.

It was determined that in the UK, irrespective of whether portfolio management services are rendered to a consumer or business, the place of supply is where the consumer or business belongs.

Furthermore, in Ireland, it was determined that fund management services received from abroad by a non-taxable person would be taxable in Ireland, since such services would be seen to be "used and enjoyed" in Ireland.

In New Zealand, the place of supply rules gathered from the New Zealand GST Act, is not clear enough to indicate where the supply of offshore fund management services is deemed to take place; however should such services be determined as not being wholly consumed outside New Zealand, GST on imported services will apply.

In Canada, the place of supply of services is deemed to be made in Canada, should such services be performed wholly or partially in Canada.

From the research study performed, it is clear that the place of supply of services in various countries differ. The major difference was that some countries deem the place of supply to be where the customer is located and others deem the place of supply to be where the services are performed.

5.3 Recommendations

The South African VAT Act does not include specific place of supply rules, but certain provisions do imply, to an extent, place of supply rules. However, these are not clear distinguished rules and are open for interpretation. The South African VAT system is destination based and VAT is payable where consumption takes place. The current legislation does not effectively cater for the taxation of the supply of intangible services.

For South Africa to be in line with its global partners, VAT place of supply rules should be introduced. However, the implementation and administration thereof should not be overlooked. The following approaches may be considered:

- Specific VAT place of supply rules could be introduced for certain transactions. However, the implication and the administration burden to amend the relevant sections of the VAT Act could result in further complications and interpretation difficulties.
- The alternative option could be to introduce general place of supply rules governed by certain requirements and exceptions. The introduction of a new section in the VAT Act should theoretically result in the least administrative complications. In addition, SARS could issue a VAT guide or interpretation note to explain this section and amend it accordingly to include the implications of specific transactions.

The inclusion of place of supply rules in South Africa by either amending the VAT Act for specific transactions or general place of supply rules, will assist the supplier and consumer to determine whether they have a VAT liability in South Africa and resolve the interpretation difficulties and complications South Africans and its international counterparts are currently facing. The urgency in finding a solution is further encouraged to ensure that the appropriate amount VAT accrues to the various revenue authorities and that potential double or non-taxation is avoided.

The implementation of these rules in South Africa will not be easy, since the taxation environment is constantly changing due to technological advancements and new developments. However, the implementation of place of supply rules will most definitely benefit South Africa.

Some of the benefits of introducing VAT place of supply rules in South Africa are that they would:

- Standardize the international VAT treatment of transactions globally
- Simplify the decision making process to determine which jurisdiction has the taxing right and
- Limits or reduce the possibility of double or non-taxation.

5.4 Further Studies

The study with regard to the implementation of place of supply rules would most definitely be beneficial. The current processes in place in South Africa and the potential administrative burden will need to be analysed, in order to determine if such implementation is possible and whether it is worthwhile with regard to the associated costs involved. This could include a research study on other countries when place of supply rules were first introduced and the complications that arose.

Furthermore, a comparative study could be conducted on the VAT treatment of foreign portfolio fees in developed countries, which has place of supply rules in place.

Bibliography

- ASISA. (not dated a). *The Facts On Investing In Foreign Collective Investment Schemes*. [Online]. Available from: <http://asisa.org.za/en/transformation-education/consumer-education/collective-investment-schemes/facts-on-collective-investment-portfolios/the-facts-on-investing#> [Accessed on 21/04/2015]
- ASISA. (not dated b). *Introduction to Collective Investment Schemes*. [Online]. Available from: <http://www.asisa.org.za/docs/Chapter%201.pdf>
- ASISA. (not dated c). *Introduction to Collective Investment Schemes*. [Online]. Available from <http://asisa.org.za/en/transformation-education/consumer-education/collective-investment-schemes/facts-on-collective-investment-portfolios>
- Annacondia, F. (2010). EU Place of Supply Rules from 2010 – VAT Committee Guidelines. *International VAT Monitor*. [Online]. Volume 21, No.3. Available from: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/kbase/#topic=doc&url=/highlight/collections/ivm/html/ivm_2010_03_e2_5.html&q=%2522place+of+supply%2522&WT.z_nav=Paginatio&colid=4947 [Accessed on 24/08/2015]
- Badenhorst, G. (2007). *Are foreign banking fees subject to VAT?* [Online] Available from: <https://www.ensafrica.com/newsletter/briefs/taxJul07Double.html> [Accessed on 11/08/2015]
- Bardopoulos, A. (2013). *eCommerce and the Effects of Technology on Taxation: Could VAT be the eTax solution?* [Online] Law, Governance and Technology Series 22. Springer International Publishing. Available from: <https://books.google.com/> [Accessed on 11/08/2015]
- Bell, E. (2015). *Tax Talk: ABD CC v CSARS (VAT 969)*. [Online] Available from: <http://www.taxtalk.co.za/abd-cc-v-csars-vat-969-30-march-2015/> [Accessed on 31/08/2015]
- Botes, M. (2011). South African VAT and Non-Resident Businesses. *International VAT Monitor* [Online] November/December 2011. Available from: http://empcom.gov.in/WriteReadData/UserFiles/file/No_6%20A-5.pdf [Accessed on 18/08/2015]

Butcher, R. (2009). *Value-Added Taxation in Canada: GST, HST and QST* [Online] 3rd edition. Canada: CCH Canadian Limited. Available from:

<https://books.google.com/> [Accessed on 09/09/2015]

Canada Revenue Agency, (2004). *GST/HST Memoranda Series (chapter 3.3, place of supply)*. [Online] Available from: [http://www.cra-arc.gc.ca/E/pub/gm/3-](http://www.cra-arc.gc.ca/E/pub/gm/3-3/README.html)

[3/README.html](http://www.cra-arc.gc.ca/E/pub/gm/3-3/README.html) [Accessed on 10/09/2015]

Davis Tax Committee, (2014). *First Interim Report on Value-Added Tax for the Minister of Finance*. [Online] Available from:

<http://www.taxcom.org.za/docs/20150707%20DTC%20VAT%20First%20Interim%20Report%20for%20public%20comment.pdf> [Accessed on 12/08/2015].

De Wet, C.G. & Du Plessis, R. 2004. Indirect taxation – VAT. In: Buys, R. & Cronje, F. (eds.) 2004. *Cyberlaw@SA – The Internet and the Law of South Africa*. Cape Town, South Africa: Van Schaik Publishers.

Ecker, T. (2012). Place of Effective Use and Enjoyment of Services – EU History Repeats Itself. *International VAT Monitor*. [Online] Volume 23, No.6. Available from:

http://ip-online2.ibfd.org.ezproxy.uct.ac.za/kbase/#topic=doc&url=/highlight/collections/ivm/html/ivm_2012_06_e2_1.html&q=%2522place+of+supply%2522&WT.z_nav=Paginatio&colid=4947 [Accessed on 24/08/2015].

Ecker, T. (2013). Chapter 2: VAT/GST Double (Non-)Taxation. In *A VAT/GST Model Convention*. [Online] Online Books IBFD. Available from: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/document/vgmc_head [Accessed on 12/08/2015]

European Commission, (not dated). *VAT on services*. [Online] Available from:

http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/vat_on_services/index_en.htm [Accessed on 12/08/2015].

Ireland Revenue Authority, (2010). *Value-Added Tax Consolidation Act no.31 of 2010*. [Online] Available from:

<http://www.oireachtas.ie/documents/bills28/acts/2010/a3110.pdf> [Accessed on 31/08/2015]

- Ireland Revenue Authority, (2014). *VAT Guide – Supply of Services*. [Online] Available from: <http://www.revenue.ie/en/tax/vat/guide/supply-of-services.html> [Accessed on 31/08/2015]
- Kerrigan, A. (2010). The Elusiveness of Neutrality –Why Is It So Difficult To Apply VAT to Financial Services, *International VAT Monitor*. [Online] Volume 21, No.2 Available from: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/kbase/#topic=doc&url=/highlight/collections/ivm/html/ivm_2010_02_e2_2.html&q=%2522place+of+supply%2522&WT.z_nav=Paginatio&colid=4947 [Accessed on 24/08/2015].
- Lang, M. (2015). *Global Trends in VAT/GST and Direct Taxes*. [Online] Series on International Tax, Volume 93. Available from: <https://books.google.com/> [Accessed on 10/09/2015]
- Mazars. (2013). *European VAT - Business and Taxation Guide*. Netherlands [Online] Available from: <http://www.bkd.com/docs/solution-sheets/european-value-added-tax.pdf> [Accessed on 01/09/2015].
- McKenzie, A. (2012). *GST: A Practical Guide*. [Online] Edition9. New Zealand: CCH New Zealand Limited. Available from: <https://books.google.com/> [Accessed on 15/09/2015]
- McNabb, D. (2010). *Research Methods for political science*. [Online] 2nd edition. New York. Taylor & Francis: Available from: <https://books.google.com/> Accessed on [02/09/2015]
- Millar, R. (2007). Time is of the essence: supplies, grouping schemes and cancelled transactions. *Journal of Australian Taxation*. [Online] Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=711581 [Accessed on 12/08/2015].
- Millar, R. (2008). Jurisdictional reach of VAT. In: Krever, R. (ed.). *VAT in Africa*. [Online] Cape Town: ABC. Available from: <https://books.google.com/> [Accessed on 03/03/2015]
- Moodaley, V and Moonsamy, S (2014). VAT registration of foreign online suppliers not limited to supplies of e-books. [Online] Available from:

<https://www.ensafrica.com/news/VAT-registration-of-foreign-online-suppliers-not-limited-to-supplies-of-e-books?Id=1331> [Accessed on 17/06/2016].

Nevelsteen, L and van Den Plas, R. (2003). Undertakings of collective investments and VAT in the EU. *International VAT Monitor*. [Online] Volume 14. Available from: <http://www.ibfd.org/IBFD-Products/Journal-Articles/International-VAT-Monitor/collections/ivm/pdf/ivm060303.pdf> [Accessed on 24/08/2015].

Niemand, C. De Swardt, R. & Wiid, E. 2011. South Africa: Obligation to register for VAT. Ernst & Young Indirect tax briefing: A review of global indirect tax developments and issues, Issue 2:34-36. [Online] Available from: [http://www.ey.com/Publication/vwLUAssets/Indirect_Tax_Briefing_April_2011/\\$FILE](http://www.ey.com/Publication/vwLUAssets/Indirect_Tax_Briefing_April_2011/$FILE)

New Zealand Inland Revenue, (2004). *GST guidelines for recipients of imported services*. [Online] Available from: <http://taxpolicy.ird.govt.nz/sites/default/files/2004-other-gst-guidelines-imported-services.pdf> [Accessed on 31/08/2015]

New Zealand Inland Revenue, (2012). *Business to business GST neutrality in relation to the cross-border supply of services*. [Online] Available from: <http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-ird-bbgst-sep12.pdf> [Accessed on 31/08/2015]

New Zealand Inland Revenue, (2015). *GST: Cross-border services, intangibles and goods*. [Online] Available from: <http://www.beehive.govt.nz/sites/all/files/Online-GST-discussion-document.pdf> [Accessed on 25/08/2015].

New Zealand Inland Revenue, (2015). *GST: Cross-border services, intangibles and goods*. [Online] Available from: <http://www.beehive.govt.nz/sites/all/files/Online-GST-discussion-document.pdf> [Accessed on 31/08/2015]

OECD. (2003). Implementation of the Ottawa taxation framework conditions: the 2003 report. [Online] available from: <http://www.oecd.org/tax/administration/20499630.pdf> [Accessed on 17/08/2015]

OECD. (2014), *International VAT/GST Guidelines*, OECD Publication. [Online] Available from: <http://www.oecd.org/ctp/consumption/international-vat-gst-guidelines.htm> [Accessed on 17/08/2015]

- Oxford Dictionaries. Not dated. *Consume* [Online] Available from: <http://oxforddictionaries.com/definition/consume> [Accessed on 29/07/2015].
- Ramesh, D and Pandey, D. (2011). *Business research methods*. [Online] India. Dorling Kindersley: Available from: <https://books.google.com/> [Accessed on 01/09/2015]
- Rendahl, P. (2009). *Cross-border Consumption Taxation of Digital Supplies*. [Online] Doctoral Series. Volume 18. Netherlands. Available from: <https://books.google.com/> [Accessed on 02/09/2015]
- SAICA. (2006). *CHANGE IN VAT RULING 442*. [Online]. Available from: <https://www.saica.co.za/Technical/TaxSuite/Submissions/SubmissionstoSARS/tabid/740/language/en-ZA/Default.aspx> [Accessed on 20/08/2015]
- SAICA. (2006b). *Value-added Tax 1471, Imported services*. [Online] Issue 88. Available from: https://www.saica.co.za/integritax/2006/1471_Imported_services.htm [Accessed on 21/10/2015]
- SAICA. (2007). *VALUE ADDED TAX: CONSUMPTION AND UTILISATION*. [Online]. Available from: <https://www.saica.co.za/Technical/TaxSuite/Submissions/SubmissionstoSARS/tabid/740/language/en-ZA/Default.aspx> [Accessed on 20/08/2015]
- Schenk, A and Oldman, O. (2007). *Value Added Tax: A Comparative Approach*. [Online] Cambridge Tax Law Series. United States of America. Cambridge University Press: Available from: <https://books.google.com/> [Accessed on 31/08/2015]
- Schenk, A and Oldman, O. (2015). *Value Added Tax: A Comparative Approach*. [Online] Cambridge Tax Law Series. 2nd Edition. United States of America. Cambridge University Press: Available from: <https://books.google.com/> [Accessed on 31/08/2015]
- Schneider, FD. (2000). *Place of Supply Rules in the South African Value-Added Tax System*. Unpublished Masters Dissertation. Johannesburg: University of Johannesburg
- Schneider, FD. (2009). *SA's VAT place of supply rules are not very specific*. [Online] Available from:

http://www.ens.co.za/newsletter/briefs/11_08_090101lr1108LAW_AL_11.pdf

[Accessed 24/08/2015].

South Africa. (1998). *Explanatory Memorandum on the Taxation Laws Amendment Bill*, 1998. [Online] Available from: <http://www.osall.org.za/docs/2011/02/1998-Taxation-Laws-Amendment-Bill.pdf> [Accessed on 12/08/2015]

South Africa. *ITC 1812*, (2006). 68 SATC 208

South Africa. *Metropolitan Life Ltd vs Commissioner for South African Revenue Services*, (2008)

South African Revenue Services, (2014). *VAT 404 Guide for Vendors*. [Online] Available from: <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors%20-%20External%20Guide.pdf> [Accessed on 02/09/2015]

South African Revenue Service. (2011). VAT News – February 2011. (No 37). [Online] Pretoria: South African Revenue Service. Available from: <http://www.sars.gov.za/AllDocs/Documents/VATNews-Archive/LAPD-IntR-VATN-Arc-2013-37%20-%20VATNews%2037%20February%202011.pdf> [Accessed on 17/08/2015]

Stensgaard, H. (2009). Nexus for Taxpayers in Respect of VAT v. Direct Tax Treaties. In: Lang, M & Melz, P & Kristofferson, E. *Value Added Tax and Direct Taxation: Similarities and Differences*. Available from: <https://books.google.com/> [Accessed on 12/08/2015]

Steyn, T. (2010). VAT and e-commerce: still looking for answers? *South African Mercantile Law Journal*. [Online] Issue 2, Volume 22. Available from: http://reference.sabinet.co.za/sa_epublication_article/ju_samlj_v22_n2_a5 [Accessed on 15/08/2015]

United Kingdom: HM Revenue & Customs, (2010). *Notice 741A Place of Supply of Services*. [Online] Available from: <https://www.aber.ac.uk/en/media/departmental/finance/pdf/notice-741a-place-of-supply-of-services.pdf> [Accessed on 24/08/2015].

United Kingdom: HM Revenue and Customs. Manual VATPOSS01200. (not dated). Available from <http://www.hmrc.gov.uk/manuals/vatpossmannual/VATPOSS01200.htm> [Accessed on 01/09/2015]

van Arendonk, H, Jansen, S and van der Paardt, R. (2012). *VAT in an EU and International Perspective*. [Online] Netherlands. Available from: <https://books.google.com/> [Accessed on 31/08/2015]

Wild, R. (2012). *Tax Journal: Practice guide, Place of supply of services*. [Online] Available from: <http://www.taxjournal.com/tj/articles/practice-guide-place-supply-services-43101> [Accessed on 01/09/2015]