PLACE OF SUPPLY RULES IN THE SOUTH AFRICAN VALUE-ADDED TAX SYSTEM

by

FERDINAND DIRK SCHNEIDER

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PLACE OF SUPPLY RULES IN THE SOUTH AFRICAN VALUE-ADDED TAX SYSTEM

F.D. SCHNEIDER
PREFACE

The uncertainty in value-added tax practitioners' circles, value-added tax vendors and the South African Revenue Service in connection with legislative interpretation of cross-border transactions, specifically their places of supply led to the formation of a sub-committee under the banner of the South African Fiscal Association's value-added tax committee with the mandate to investigate the possible introduction of place of supply rules for South Africa.

I have had the privilege to work with other value-added tax consultants on this sub-committee in our endeavours to investigate and also to formulate place of supply rules for South Africa. In this regard I had the benefit of very valuable input from colleagues at my employer, Deloitte & Touche.

My involvement at the Fiscal Association and also being a member of a Deloitte & Touche global value-added tax committee were instrumental forces in bringing me to write this dissertation on place of supply rules for South Africa.

I would like to express my gratitude towards my colleagues at Deloitte & Touche, the South African Fiscal Association and my study leader that assisted in formulating and putting onto paper my contribution towards the possible introduction of place of supply rules in South Africa.

A special word of appreciation should go to Des Kruger of Deloitte & Touche who worked his way through this dissertation whilst in London. His insightful comments, especially on Chapter V, proved to be invaluable.

Finally, I would like to, once again, express my real appreciation to my spouse Wilna for her dedicated commitment to my academic time consumers (and, yes, it takes time!) and would like to dedicate this study to her.

Johannesburg
October 2000 AD
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PLEK-VAN-LEWERING-REËLS IN DIE SUID-AFRIKAANSE BELASTING OP TOEGEVOEGDE WAARDE STELSEL
deur

FERDINAND DIRK SCHNEIDER

STUDIELEIER: PROF. K. JORDAAN
DEPARTEMENT: REKENINGKUNDE
GRAAD: M.COMM (BELASTING)

Die oogmerk met hierdie verhandeling is om ondersoek in te stel na die wenslikheid van die instelling van plek-van-lewering-reëls in die Suid-Afrikaanse belasting op toegevoegde waarde stelsel om die graad van sekerheid te verhoog, veral met betrekking tot oorgrenstransaksies.

Die toename in oorgrenstransaksies het verskeie lande tot die besef gebring dat so 'n toename onsekerheid en dubbelbelasting of belastingvermyding vanuit 'n belasting op toegevoegde waarde stelsel te weeg kan bring. Verskeie lande het plek-van-lewering-reëls ingestel om die probleme die hoof te bied.

Suid Afrika was met die instelling van belasting op toegevoegde waarde in 1991 tot 'n groot mate afgesluit van die wêreldwêreld en het eers sedert die vroeë 1990s weer tot die wêreldwêreld begin toetree. Die Suid-Afrikaanse belasting op toegevoegde waarde stelsel maak egter steeds nie voorsiening vir plek-van-lewering-reëls nie. Hoewel die Suid-Afrikaanse belasting op toegevoegde waarde stelsel teoreties goed vir alle transaksies met 'n Suid-Afrikaanse verbintenis aan die belasting te onderwerp, is daar tans ernstige onsekerhede in konsultasie- en owerheidskringe oor die toepassing van die wetgewing op oorgrenstransaksies.

Plek-van-lewering-reëls het hoofsaaklik ten doel om te bepaal waar 'n lewering aan belasting op toegevoegde waarde onderhewig sal wees, ten einde dubbelbelasting of belastingvermyding te voorkom. In ooreenstemming met die bestemmingsbeginsel moet goed wat 'n grens oorsteek belas word waar die goed verbruik word. Die voordeel hiervan is dat alle produkke, ongeag hulle oorsprong, dieselfde belastinglas dra wanneer dit aan die finale verbruiker verkoop word. Gesien dat die bestemmingsbeginsel dubbelbelasting voorkom, voldoen dit ook aan die beginsel van belastingneutraliteit.
Vir belasting op toegevoegde waarde doeleindes word goed internasionaal meestal gedefinieer as alle soorte persoonlike of tasbare eiendom, insluitend saaklike regte in sulke eiendom. Geld word oorwegend uitgesluit van dié definitie van goed. Die Europese Unie definieer die lewering van goed as die oordrag van die reg om afstand te doen van tasbare eiendom. Gestandardiseerde sagteware word oorwegend geklassifiseer as goed, terwyl doelgemaakte sagteware as dienste geklassifiseer word. Meeste lande beskou egter nie voorraad op besending ("consignment stock") as 'n lewering vir belasting op toegevoegde waarde doeleindes nie.

Die plek-van-lewering-reëls ten opsigte van goed en dienste verskil. Nieu Seeland ag die plek van lewering van goed te wees in die land waar die leweraar woonagtig of resident is. Die inkomstebelastingreëls van residensie geld. Twee addisionele toetses word egter ingespan om residensie te bepaal vir belasting op toegevoegde waarde doeleindes. Eerstens, word 'n persoon geag resident in Nieu Seeland te wees tot die mate waartoe die persoon aktiwiteite in Nieu Seeland bedryf wat 'n vaste plek van besigheid in Nieu Seeland het. Tweedens, word 'n ongeïnkorporeerde liggagm van persone, 'n vennootskap, 'n gemeenskaplike onderneming ("joint venture") en 'n trust geag resident van Nieu Seeland te wees indien die kern van sy administrasie in Nieu Seeland is. 'n Buitelandse maatskappy is resident ten opsigte van sy aktiwiteite wat betrekking het op die vaste of permanent plek. Die residensie van individue word bepaal met verwysing na die aantal dae wat die persoon in Nieu Seeland vertoe in 'n aaneenlopende 12 maande tydperk. Indien die leweraar nie resident in Nieu Seeland is nie, word die goed slegs geag gelewer te wees in Nieu Seeland indien die goed in Nieu Seeland is, word die goed slegs geag gelewer te wees in Nieu Seeland indien die goed in Nieu Seeland is te wees in die land waar die leweraar woonagtig of resident is. Die Europese Unie ag die plek van lewering van goed te wees waar die vervoer of versending daarvan begin. Die plek van lewering van goed wat geag word, word geag te wees waar dit aanmekaar gesit of geïnstalleer word. Die plek van lewering van goed wat nie vervoer of versend word nie, word geag te wees waar die goed is wanneer die lewering plaasvind. Die Europese Unie ag die plek van lewering van dienste as 'n plek te wees waar die leweraar sy besigheid gevestig het of 'n vaste plek van besigheid het vanwaar hy die dienste lever. In die
afwesigheid van so’n vaste plek word die plek van lewering geag te wees waar die verskaffer sy permanente adres het of gewoonlik woonagtig is.

Europese Unie lande ag gewoonlik die plek van lewering van telekommunikasiedienste deur nie-Europese Unie leweraars aan belasbare persone gevestig in die Europese Unie te wees in die Europese Unie land. Die ontvanger moet vir die belasting verantwoord deur self-aanslag. Indien nie-Europese Unie leweraars aan nie-belasbare persone in die Europese Unie lewer moet die leweraars vir belasting registreer in die betrokke Europese Unie land. Indien Europese Unie leweraars telekommunikasiedienste lewer aan Europese Unie belasbare persone of aan persone buite die Europese Unie word die dienste geag gelever te wees waar die ontvangers gevestig of resident is. Indien Europese Unie leweraars telekommunikasiedienste lewer aan nie-belasbare persone in ‘n ander Europese Unie land word die dienste geag gelever te wees waar die verskaffers gevestig is.

Kanada ag die plek van lewering van telekommunikasiedienste in Kanada te wees as die fasiliteite in die Kanada is of indien die dienste uitgestuur en ontvang word in Kanada of as die dienste uitgestuur of ontvang word in Kanada en die fakturering in Kanada gedoen word.

Meeste lande ag die plek van levering van dienste in verband met vaste eiendom te wees waar die eiendom geleë is.

Meeste lande in die Europese Unie ag die plek van levering van dienste wat fisies uitgevoer kan word te wees waar die dienste fisies uitgeoef word.

Suid Afrika het in 1991 ‘n belasting op toegevoegde waarde stelsel ingestel, gebaseer op die Nieu Seelandse model. Die Suid-Afrikaanse stelsel is ‘n bestemmingsgebaseerde stelsel wat vereis dat persone wat belasbare leverings in die loop of ter bevordering van ‘n onderneming doen moet registreer (gegewe die registrasieperk) en verantwoord vir belasting na verrekening van insetbelastingkredite. Die heffingsartikel hef belasting op die levering van goed of dienste verskaf deur ‘n onderneming in die loop of ter bevordering van ‘n onderneming.

Suid Afrika definieer goed breedweg as tasbare roerende goed, vaste eiendom en enige saaklike reg in diesulke goed of vaste eiendom. Die verskaffing van die gebruik of reg van gebruik van goed ingevolge ‘n huur- of paaientkredietooreenkoms word ook geag goed te wees.

Slegs leverings aangegaan in die loop of ter bevordering van ‘n ondernemer se onderneming kan belasbare leverings wees. Daar moet dus ‘n kousale verband tussen die levering en die aktiwiteit wees ten einde in die loop of ter bevordering van ‘n onderneming te wees. Onderneming word by wyse van ‘n algemene definitie gedefinieer en ook by wyse van spesifieke in- en uitsluitings. Die algemene definitie bepaal, in die geval van ‘n ondernemer (uitsluit ‘n plaaslike overheid), dat enige onderneming of aktiwiteit wat gereeld of herhalend aangegaan word deur enige persoon in of gedeeltelik in Suid Afrika in die loop waarvan goed of dienste gelever word aan enige persoon teen ‘n vergoeding as ‘n onderneming gesien sal word. Die eerste vereiste is dus dat ‘n onderneming of aktiwiteit teenwoordig moet wees. Die definitie sluit besighede in maar is nie daartoe beperk nie. Die tweede vereiste is dat die onderneming of aktiwiteit gereeld of herhalend van aard moet wees.
Die vereiste dat ’n persoon moet registreer indien ’n onderneming bedryf word en die registrasieperk bereik word, is onafhanklik van die persoon se plek van residensie. Buitelanders moet dus ook registreer indien aan die vereistes voldoen word. Belasting word egter net gehef op leverings gemaak deur ’n persoon wat ’n onderneming gereeld of herhalend bedryf. Die plek van levering word dus indirek verweef in die heffingsartikel met behulp van die definisie van onderneming.

Die levering van ingevoerde dienste is ook onderhewig aan belasting indien die leweraar ’n nie-inwoner van Suid-Afrika is of ’n besigheid buite Suid-Afrika beoefen en die ontvanger van die dienste dit gaan aanwend anders as om belasbare leverings te maak. Hiervan word spesifiek uitgesluit dienste wat normaal aan die heffingsartikel onderhewig sou wees of nulkoersleverings. Die ontvanger van die dienste moet egter vir die belasting verantwoord onder ’n self-aanslagstelsel ("reverse charge mechanism").

Die primêre oogmerk met die instelling van plek-van-lewering-reëls moet wees om regssekerheid te verhoog. Gegewe die mannekragtekorte van die belastingowerheid behoort enige wetswyssigings sorg te dra dat dit nie ’n addisionele las op die belastingowerheid plaas nie. Buitelandse ondernemings moet ook, waar moontlik, nie onderwerp word aan registrasie in Suid-Afrika nie, tensy die nie-registrasie sou lei tot 'n verlies aan inkomste vir die fiskus.

Ten einde die plek van levering in ’n Suid-Afrikaanse konteks vas te stel, soos die wetgewing tans daar uitsien, moet die bepalings van die heffingsartikel en ook die definisie van onderneming ontleed word. Die heffingsartikel het 4 vereistes waaraan voldoen moet word alvorens ’n levering aan belasting onderhewig is, naamlik die teenwoordigheid van ’n levering; deur ’n ondernemer; van goed of dienste; in of gedeeltelik in Suid-Afrika; in die loop waarvan goed of dienste teen vergoeding. Dienste fisies in Suid Afrika gelewer voldoen aan die eerste 3 vereistes van die heffingsartikel. Voldoening aan die ondernemingsvereiste moet egter vasgestel word. Die 5 vereistes van die algemene definisie van onderneming sluit in: onderneming of aktiwiteit; gereeld of herhalend; in of gedeeltelik in Suid Afrika; in die loop waarvan goed of dienste gelewer word aan ’n ander persoon; teen vergoeding. Die fisiese levering van dienste in Suid Afrika wat gereeld of herhalend plaasvind teen ’n vergoeding sal dus die leweraar (ongeag residensie) aanspreeklik maak om te registreer indien aan die registrasieperk voldoen word.

Die levering van ontasbare of intellektuele dienste deur ’n nie-Suid-Afrikaanse inwoner sonder ’n vaste of permanente plek van besigheid in Suid Afrika is al telkemal in Suid Afrika vertolk. Die hantering van dienste gelewer deur sulke persone of deur hulle agente wat vir en namens hulle optree in Suid Afrika sal as ’n reël nie verskil nie. Die belastingowerheid het onlangs die mening uitgespreek dat die verlenging van die gebruik in Suid Afrika van enige handelsmerk of intellektuele eiendom oor ’n tydperk beskou sal word as die bedryf van ’n onderneming vir belasting op toegevoegde waarde doeleindes. Daar is betoog dat ’n buitelandse onderneming wat gereeld tantième, konssesie- of agentfooie ontvang verplig is om te registreer indien so ’n onderneming se ontvangste R300 000 per jaar sou oorskry.

Om vas te stel of buitelandse ondernemings in bogenoemde geval noodwendig verplig sal wees om te registreer moet die bepalings van die heffingsartikel en die definisie van onderneming
weereens ondersoek word. Eerstens moet bepaal word of die vereiste onderneming of aktiwiteit wel aanwesig is. Sou die betoog slaag dat die buitelandse onderneming nie 'n onderneming of aktiwiteit beoefen nie aangesien die reg slegs "passief" beskikbaar gemaak word eindig die ondersoek hier en die onderneming het geen verpligting om te registreer nie. Dit word aan die hand gedoen dat die aktiwiteit van die buitelandse onderneming die beskikbaarmaking van die reg is. Die beskikbaarmaking kan egter gesien word as 'n eenmalige aktiwiteit wat nie herhalend van aard is nie. Die feit dat verbruik in Suid Afrika plaasvind moet nie aanduidend wees daarvan of 'n aktiwiteit in Suid Afrika beoefen word of nie. Die aktiwiteit sou slegs as herhalend beskou kon word indien die begrip aktiwiteit gelykgestel word aan 'n soort ekonomiese handeling of aktiwiteit. Tweedens moet bepaal word of die aktiwiteit herhalend van aard is. Indien die buitelandse onderneming soortgelyke regte herhalend en aan meer as een ontvangers beskikbaar stel kan dit wel geraamde word dat die aktiwiteit herhalend van aard is. Derdens moet bepaal word waar die aktiwiteit aangegaan word. Met die veronderstelling dat die reg in hoofsaak geregistreer is in die buiteland en dat die reg effektiewelik in die buiteland beskikbaar gestel word (gegee dat die buitelandse onderneming georganiseer is en bestaan onder die wette van 'n ander land), kan daar sterk betoog word dat geen aktiwiteit in Suid Afrika beoefen word nie. Weereens moet die feit dat verbruik in Suid Afrika plaasvind moet nie aanduidend wees van waar die aktiwiteit plaasvind nie. In onderhawige geval sal die fiskus ook nie slegter daaraan toe wees op inkomstekant nie aangesien die ontvangers van die dienste in Suid Afrika die verpligting (in sekere gevalle) om belasting te hef ingevolge die self-aanslagstelsel.

Die definisie van onderneming is in 1997 gewysig om die weersaars van telekommunikasiedienste wat verbruik word in Suid Afrika te verplig om vir belasting op toegevoegde waarde te registreer indien aan die registrasieperk voldoen word. Hoewel die wysiging nog nie 'n vasgestelde effektiewe datum het nie is die wysiging tog aanduidend van die algemene uitgangspunt van die wetgewer. Dit blyk asof die wetgewer, by vasstelling of 'n onderneming beoefen word, eerder kyk na die aktiwiteite van die weersaar en nie noodwendig waar verbruik plaasvind nie. Dit volg uit die nodigheid om wel die wysiging aan te bring. Sou die soort dienste in elk geval belas word (ingevolge die definisie van onderneming) waar dit verbruik word sou die wysiging nie nodig gewees het nie.

Die definisie van onderneming is verder gewysig, met effek van 1 Januarie 2001, om die plek van levering van onderskrywingsbesigheid van onderskrywingslede van Lloyd's of London te bepaal as waar die kontrak geteken word. Sou die kontrak in Suid Afrika getekend word kan dit tot gevolg hê dat die onderskrywingslid moet registreer vir belasting op toegevoegde waarde doeleindes.

Die fisiese levering van goed in Suid Afrika sal gesien word as 'n aktiwiteit soos vervat in die definisie van onderneming aangesien dit sekere handelinge deur die leveraar of sy agent, wat vir of namens hom optree, verg. Sou die leveraar 'n buitelandse onderneming wees kan registrasie verpligtend wees indien die leverings gereeld plaasvind en die registrasieperk bereik word. Die plek van levering van goed in Suid Afrika sal dus geag wees Suid Afrika te wees. Die plek van levering van die geagte levering van goed ingevolge 'n huur- of paaiementkredietoorlooskom kon potensieël dieselfde wees as die van ontasbare dienste. Weereens kan betoog word dat die buitelandse leveraar wat goed beskikbaar stel in die buiteland geen handeling of aktiwiteit in Suid Afrika het nie en derhalwe nie 'n registrasieplig het nie.
Die plek van lewering van goed wat in- of uitgevoer word in/uit Suid Afrika sal geag word in Suid Afrika te wees.

Die "South African Fiscal Association" ("SAFA") het voorlopige plek-van-lewering-reëls saamgestel met die oog om dit aan die belastingowerheid voor te lê om in die wetgewing opgeneem te word. SAFA definieer plek van aktiwiteit in teenstelling met die meer algemene plek van lewering sooos deur meeste lande gedefinieer. Die gevolg is dat die beoogde reëls poog om 'n groot komponent van die definisie van onderneming te verklaar. So 'n benadering kan moontlike nadelige gevolge inhou wat kan insluit dat inwoners van Suid-Afrika se aktiwiteite buite Suid Afrika geag kan word, wat duidelik nie die bedoeling van die wetgewer kan wees nie.

SAFA differensieer ten opsigte van goed tussen verkope, paaiementkredietooreenkomste, huuroorenkomste en ooreenkomste vir die lewering van saaklike regte in roerende bates en vaste eiendom. ‘n Aktiwiteit word geag plaas te vind in of gedeeltelik in Suid Afrika indien ‘n persoon goed ingevoelde ‘n verkoops- of paaiementkredietooreenkomst lever of indien ‘n persoon saaklike regte in roerende goed lewer en die goed in Suid Afrika is wanneer die ooreenkomst gesluit word. ‘n Aktiwiteit word geag plaas te vind in of gedeeltelik in Suid Afrika indien ‘n persoon goed ingevoelige ‘n huuroorenkoms lever en die goed in geheel of gedeeltelik in Suid Afrika gebruik gaan word.

SAFA differensieer ten opsigte van dienste tussen dienste wat fisies gelewer kan word en ander dienste. ‘n Aktiwiteit word geag plaas te vind in of gedeeltelik in Suid Afrika indien diens fisies deur die leweraar of sy agent wat vir en namens hom optree in Suid Afrika gelewer word. ‘n Aktiwiteit word geag plaas te vind in of gedeeltelik in Suid Afrika, in die geval van dienste wat nie fisies uitgevoer kan word nie, indien die leweraar of sy agent die dienste lever vanaf ‘n vaste of permanente plek in Suid Afrika van waar hy (of sy agent namens hom) sy besigheid bedryf.

Na ontvangs van kommentaar het SAFA die plek-van-lewering-reëls aangepas om net van toepassing te wees op persone wat nie resident is van Suid Afrika nie. Die gevolg hiervan is dat die plek-van-lewering-reëls, soos dit tans daaruit sien, slegs van toepassing is op persone wat nie in die definisie van inwoner van die Republiek inval nie. Die voorbehoudsbepaling tot die definisie koppel met die definisie van onderneming en het tot gevolg dat persone wat nie in die definisie van inwoner van die Republiek inval nie ook nie ‘n onderneming kan bedryf nie. Die wyse waarop SAFA gepoog het om die plek-van-lewering-reëls net van toepassing te maak op persone wat in die algemeen aanvaarde sin van die woord nie inwoners is van Suid Afrika, het dus tot gevolg dat die plek-van-lewering-reëls vir situasies voorsien waar die buitelandse persoon in elk geval nie in die Suid Afrikaanse belasting op toegevoegde waarde net sou val nie. Soos in die studie bespreek kan die oorsig op verskeie maniere reggestel word.

Op uitnodiging van SAFA het Deloitte & Touche (D&T) skriftelik kommentaar gelewer op die plek-van-lewering-reëls. D&T doen aan die hand dat wegbeweeg moet word van ‘n definisie van wanneer ‘n aktiwiteit geag sal wees plaas te vind in Suid Afrika en dat die meer konvensionele plek-van-lewering-reëls eerder ingestel moet word.

D&T stel voor dat waar goed verkoop word en beskikbaar gestel word aan die koper in Suid Afrika die plek van lewering in Suid Afrika moet wees. Ten opsigte van goed waarvan eienaarskap nie oorgaan nie maar die gebruik in Suid Afrika plaasvind stel D&T voor dat die buitelandse
ondernemer slegs verplig moet word om in Suid Afrika te registreer indien die gebruiker van die goed nie 'n volle insetkrediet kan eis nie of waar die buitelandse ondernemer 'n vaste plek van besigheid in Suid Afrika het of vaste eiendom in Suid Afrika besit. D&T stel voor dat die lewering van saaklike regte in roerende goed of die lewering van goed ingevolge 'n huur- of paaiementkredietoooreenkomst bepaal moet word asof die lewering 'n lewering van dienste is, tensy die eienaarskap van die bate oorgaan aan die gebruiker. D&T stel verder voor dat die lewering van saaklike regte in vaste eiendom geag moet word asof die lewering 'n lewering van dienste is, ten opsigte van dienste stel D&T voor dat die plek van lewering geag moet wees waar die dienste verbruik word. Indien die leweraar 'n permanente plek van besigheid in Suid Afrika het met die ander vereistes van die definisie van onderneming nagekom en die registrasieperk bereik word. Indien die leweraar nie 'n permanente plek van besigheid in Suid Afrika het nie en die ontvangers van sy dienste volle insetkrediet sou kon eis, moet die leweraar nie verplig word om in Suid Afrika te registreer nie.

Ten opsigte van dienste stel D&T voor dat die plek van lewering geag moet wees waar die dienste verbruik word. Indien die leweraar 'n permanente plek van besigheid in Suid Afrika het moet hy registreer indien die ander vereistes van die definisie van onderneming nagekom en die registrasieperk bereik word. Indien die leweraar nie 'n permanent plek van besigheid in Suid Afrika het nie en die ontvangers van sy dienste volle insetkrediet sou kon eis, moet die leweraar nie verplig word om in Suid Afrika te registreer nie.

Die studie kom tot die volgende gevolgtrekkings en maak aanbevelings as volg:

- Huidige Suid Afrikaanse belasting op toegevoegde waarde wetgewing maak voldoende voorsiening vir lewerings van die oordrag van die reg om afstand te doen van tasbare roerende bates. Die plek van lewering is waar die goed fisies is ten tye van die oordrag van eienaarskap;

- Huidige Suid Afrikaanse belasting op toegevoegde waarde wetgewing maak voldoende voorsiening vir lewerings van vaste eiendom of lewerings wat verband hou met vaste eiendom. Die plek van lewering is waar die vaste eiendom geleë is;

- Huidige Suid Afrikaanse belasting op toegevoegde waarde wetgewing maak voldoende voorsiening vir die lewering van dienste wat fisies uitvoerbaar is. Die plek van lewering sal wees waar die dienste fisies gelever word, d.w.s. waar verbruik plaasvind. Die belastingowerheid moet egter ernstige oorweging skenk daaraan om Deloitte & Touche se voorstel aanvaar dat 'n buitelandse onderneming nie moet registreer indien die onderneming nie 'n permanente plek van besigheid in Suid-Afrika nie en die ontvangers van lewerings in Suid-Afrika geregistreer is tot 'n volle insetbelastingkrediet;

- Huidige wetgewing maak egter nie voldoende voorsiening vir die bepaling van die plek van lewering waar eienaarskap van goed nie verander nie, soos in die geval van huur- of paaiementkredietoooreenkomst ingevolge waarvan die reg van gebruik van 'n bate aan 'n ander persoon verleen word. Sulke lewerings sal nie noodwendig 'n aktiwiteit daarstel vir 'n buitelandse eienaarskap nie. Die definitie van onderneming kan egter gewysig word ten einde te verseker dat Suid Afrikaanse belasting verbruik belas word;

- Huidige wetgewing maak ook nie voldoende voorsiening vir die bepaling van die plek van lewering ten opsigte van ontasbare of intellektuele dienste nie. Sulke dienste kan op dieselfde wyse geakkommodeer word as lewerings in die voorafgaande paragraaf bespreek;

- Die belastingowerheid moet die administratiewe las wat die registrasie van buitelandse ondernemers kan meebreng sterk oorweg met die implementering van plek-van-lewering-reëls
en kan in die opsig oorweeg om meer steun te plaas op die self-aanslag mekanisme wat reeds in die wetgewing vervat is by wyse van die ingevoerde dienste bepalings.
CHAPTER I

INTRODUCTION

1 Problem Statement

The objective of this dissertation is to examine the desirability of implementing place of supply rules as an instrument to reduce uncertainty in the South African value-added tax system, specifically with respect to cross border transactions.

Value-added tax systems have been introduced in many countries, and experienced a marked increase in popularity, especially since the 1970's. Value-added tax systems often replaced sales taxes due to the many benefits a purist value-added tax system has to offer.

The opening up of the world economy brings the importance of cross border transactions to the fore. Many countries recognised the fiscal uncertainty and imbalances an ever-increasing number of cross border transactions can bring to a country's value-added tax system. Place of supply rules were introduced into the value-added tax systems of many of these countries to enhance legislative certainty, to avoid double taxation and to increase equity of the overall tax system.

However, when South Africa introduced value-added tax in 1991, South Africa was to a large extent still isolated from the world economy. Since the earlier 1990's, particularly since 1994 when South Africa instated its first democratically elected government, the world economy started opening up to South Africa. South Africa's value-added tax system did not and still does not have certainty on place of supply rules. Though, technically, South Africa's value-added tax system seeks to tax most, if not all, transactions with a South African connection, vendors in South Africa, tax consultants and the South African Revenue Service are experiencing difficulty (to some varying degree) on interpreting the value-added tax consequences of cross border transactions.

Place of supply rules have been mooted by various role-players, the South African Revenue Service and value-added tax practitioners alike, as a possible solution to the current uncertainty in respect of cross border transactions.

The relevance and desirability of introducing place of supply rules in South Africa need to be assessed.

2 Method of Inquiry

The objective of this dissertation, as mentioned under the problem statement, is to examine the desirability of implementing place of supply rules as an instrument to reduce the uncertainty in the South African value-added tax system in respect of cross border transactions.

In chapter II the theories and principles of taxation, value-added tax and place of supply rules will be discussed. The economic nature, principles and consequences of a tax system and more particularly a value-added tax system will also be discussed in this chapter. Place of supply
concepts that will be highlighted in this chapter, amongst others, are double taxation and non-taxation in a value-added tax system, the destination principle, the benefit principle and the equality principle.

In chapter III place of supply rules used in other countries will be considered. Place of supply rules in New Zealand, Canada and the European Union will be considered. The place of supply rules as used in certain countries in the European Union, namely the United Kingdom, Italy, Belgium, Greece, Germany and France, will be discussed specifically. Chapter III will also distinguish between place of supply of goods and place of supply of services, against the background of the value-added tax systems in operation in these countries. The various definitions of goods and services will also be outlined.

Chapter IV deals with the South African value-added tax as it currently operates. The underlying principles of the South African system are discussed. Specific reference is made to the South African treatment of cross border transactions. The concepts of supply, vendor, goods, services, enterprise, importation of goods, imported services and deemed supplies will be discussed specifically.

Chapter V analyses the provisions of the South African value-added tax system with a view to critically assess the need for the introduction of place of supply rules in South Africa. Chapter V distinguishes between the current place of supply of services physically rendered in South Africa, the making available of intangible property in South Africa, imported services and the provision of goods in South Africa. The proposed place of supply rules of the South African Fiscal Association and Deloitte & Touche’s commentary on the proposals are also discussed in chapter V.

The conclusion and recommendations of the study are summarised in chapter VI.
CHAPTER II

THEORY AND PRINCIPLES OF TAXATION, VALUE-ADDED TAX AND PLACE OF SUPPLY RULES

1 Introduction

The objective of this chapter is to outline the theoretical principles and bases of taxation, with specific reference to the theory of value-added tax. The theoretical basis of place of supply rules in a value-added tax system is also outlined.

Taxation and fiscal policy have always been fundamental cornerstones of a healthy economy and have often fuelled countries' economies in very distinct directions. Examples of this can be found in "reaganomics" as has been applied in the United States of America and "thatcherism" as has been experienced by the United Kingdom. The importance of direct taxation and the historical reliance on direct taxation as a major source of income has to some extent given rise to an increased focus on indirect taxation. This increased focus on indirect taxation can be best illustrated by looking at the unparalleled interest that value-added tax has received in the last century and the number of countries that have introduced value-added tax systems.

With the increasing emphasis being placed on indirect taxation in mind, this chapter will now proceed with an analysis of the basic principles of taxation. The specific principles underlying a value-added tax system will next be discussed. Finally, the chapter will analyse the theoretical cornerstones of place of supply rules in a value-added tax system.

2 Canons of Taxation

2.1 Introduction

Adam Smith (1776:371) articulated the principles of a good taxation system as far back as 1776. Smith's "An Inquiry into the Nature and Causes of the Wealth of Nations" gave modern tax planners, practitioners and tax authorities guidelines and principles in developing and implementing taxation systems which are as valuable today as some two centuries ago. Smith postulated the canons of taxation that a good tax system should comply with, namely:

- Neutrality;
- Equality;
- Invisibility;
- Certainty and simplicity; and
- Minimum Compliance and Administration Costs

The canons of taxation will be discussed below.
2.2 Neutrality

A taxation system complies with the principle of neutrality if the imposition or increase of the tax does not give rise to an alteration of consumption or expenditure patterns in order to gain certain advantages from changed consumption and expenditure patterns. Kaldor (1965:81) depicted an ideal tax system as one that:

"...succeeds in reducing a person's spending power...without leading him to behave any differently from the way in which he would behaved if he had not been taxed at all, but his spending power had been correspondingly smaller: or in the words of Professor Pigou, a tax without announcement effects."

Interference by the taxation instrument into the economic choices of economic subjects causes unwanted economic distortion, which leads to the misapplication of the scarce resources available. (Musgrave & Musgrave, 1984:225)

A neutral tax should therefore not materially influence the economic behaviour of subjects, including the organisation of the enterprise, labour motivation and the propensity to save. (South Africa (Republic), 1986:50)

Finally, in the words of Smith (1776:371), a tax system should:

"...be so contrived as to take out and keep out of the pockets of the people as little as possible, over and above what it brings into the public treasury of the State."

2.3 Equality

An ideal tax system should also comply with the principle of equality. Smith (1776:371) postulated that:

"...the subjects of every state ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities, that is in proportion to the revenue which they respectively enjoy under the protection of the state."

The equality principle captures the "ability to pay" and the "benefit" principles. The ability to pay principle distinguishes between "horizontal equality" and "vertical equality". Horizontal equality refers to equality between tax subjects in similar circumstances, whereas vertical equality mandates that tax subjects should bear tax in proportion to their income levels or levels of economic well-being, i.e. the higher the level of economic well-being the greater should be the tax burden. The ability to pay principle is often used to justify the imposition of direct taxation such as a tax on income or a capital gains tax. (South Africa (Republic), 1986:50/1)

The benefit principle mandates that those who benefit from the use of commodities or services should be required to pay for such benefit or use. The benefit principle are therefore used as a justification for the imposition of an indirect tax, such as a value-added tax. (South Africa (Republic), 1986:51)
2.4 Invisibility

The principle of invisibility relates to the notion that the best taxes are those paid by other people. The best taxes are therefore those taxes which extracts the spending power from the private sector before it has accrued to obviously to any particular individual. (South Africa (Republic), 1986:51)

Franzsen (1990:22/3) questions this principle by postulating that it should be the privilege and obligation of every citizen to pay his taxes and to call upon the State to account for its application of the available funds, which cannot be the case if the tax is invisible.

2.5 Certainty and Simplicity

The principle of certainty and simplicity demands that the nature and quantum of a taxpayer's liability and the administration costs of the tax system should be simple to determine and observe. The tax system should therefore be as transparent and simple as possible. (Schneider, 1995:9)

In the words of Smith (1776:371) in an ideal tax system:

"...(the) time of payment, the manner of payments, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person"

The principle of certainty and simplicity necessitates that the assessment, collection and administration of a tax should be certain and simple so as to keep the costs to the taxpayer and the fiscus as low as possible. (South Africa (Republic), 1986:51)

2.6 Minimum Compliance and Administration Costs

By its very design, taxation results in administration costs for the State and compliance costs for the taxpayer. A further cost of taxation is the cost to society of the misallocation of resources through distorted economic activity. This cost is referred to as "dead-weight loss", "excess burden" or "distortionary loss". Attempts to avoid tax, often with the aid of tax planners or consultants, results in "pure loss" to the society. Compliance costs for taxpayers and administrative costs for the tax authorities should be minimised as far as possible. (South Africa (Republic), 1986:51)

The administration and compliance costs associated with a tax are influenced by the other principles of taxation, namely neutrality, equity, invisibility, and certainty and simplicity. (Schneider, 1995:10)
3 Theory of Value-added Tax

3.1 Justification for the Imposition of Value-added Tax

Indirect taxation, of which value-added tax is a prime specimen, is justified in terms of the benefit principle since economic subjects are taxed in relation to the benefit they derive from the use of the scarce economic resources available, in the form of consumption. Thomas Hobbes (Rosen: 1985:453) captured this principle very eloquently:

"... when the Impositions are laid upon those things which men consume, every man payeth Equally for what he useth: nor is the common wealth defrauded by the luxurious waste of private men."

3.2 History of Value-added Tax

Value-added tax dates as far back as 1916, when Germany imposed a similar tax on commodities. Since those early days most developed countries and many developing countries have implemented value-added tax systems.

Tait (1988:3), a respected value-added tax commentator of the International Monetary Fund, described the rise of value-added tax (VAT) in the following manner:

"...no other tax...has swept the world in some thirty years, from theory to practice, and has carried along with it academics who where once dismissive and countries that once rejected it...Various similes come to mind; VAT may be thought of as the Mata Hari of the tax world – many are tempted, many succumb, some tremble on the brink, while others leave only to return, eventually the attraction appears to be irresistible."

All the member countries of the European Union implemented value-added tax systems at one stage or another. The European Union decided to introduce Value-added tax in member countries in 1967, following its fiscal committee's (Neumark Committee) proposal in 1963. The Neumark Committee described value-added tax as the apotheosis of good indirect tax policy:

"...the turnover (cascade) tax, the manufacturers sales tax, the wholesale sales tax, and the VAT...each of these taxes discriminates less than it's immediate predecessor among types of business and methods of doing business...the VAT is the latest and probably the final stage in a historical development of general sales taxation at the national level that has eliminated the uneven impact of the turnover tax and the manufacturers and wholesalers sales taxes." (Peacock, 1981:120)

3.3 Classification of Value-added Tax

3.3.1 Introduction

Value-added tax can theoretically be classified in three different ways, namely:

- Stages of imposition;
- Methods of calculation; and
• Tax treatment of capital goods.

The different classifications are discussed below.

### 3.3.2 Stages of Imposition

Classification of value-added tax according to the stages of imposition is the most common method of classifying a value-added tax system. Generally, a value-added tax system levies tax on all stages of production, including retail.

Certain countries' value-added tax systems do not extend to the retail stage and taxes only up to the manufacturers' stage. It is commonly accepted that narrow based value-added tax systems create economic distortions, which necessitates increased rates to yield the required amount of revenue. (Tait, 1988:6/7)

A value-added tax system that taxes imports and domestic production and frees exports from tax is described as a "destination-based" system. The tax basis of a destination-based system is consumption. A destination-based value-added tax system is the most commonly used system around the world. On the other hand, production is the basis of an "origin-based" value-added tax system, since imports are freed from the tax and exports are taxed. (McLure, 1987:31)

### 3.3.3 Additive and Subtractive Methods of Calculation

A value-added tax system can also be classified in accordance with the method of calculation of the tax. In written form, value-added tax represents the value added (V/A) equalling the total output (O) less the total input (I) of purchases on the current account:

\[ V/A = O - I \]

The difference between the input and the output represents the payment of wages and salaries (W) and a profit residue (P):

\[ O - I = W + P \]

From (a) and (b) it follows that:

\[ V/A = O - I = W + P \]

It follows that the tax is calculated on the value added. The value added is calculated by deducting the input amount from the sales (the subtractive method: \( O - I \)) or by adding the amounts that add value, namely wages, interest paid, net profit, etc. (the additive method: \( W + P \)).

The tax rate (t) can be applied to the value added in one of four forms, namely:

(d) \[ tV/A = t(W + P) : \] the additive-direct or accounts method

(e) \[ tV/A = tW + tP : \] the additive-indirect method
From (c) above it follows that:

\[(f) \quad \text{tV/A} = \text{t(O – l)}: \quad \text{the subtractive-direct (also accounts) method}\]

\[(g) \quad \text{tV/A} = \text{tO – tI}: \quad \text{the subtractive-indirect (also invoice or credit) method}\]

Although it would seem that (c) and (g) are mathematically identical to (d) and (f), respectively, it does not necessarily follow in practice.

The subtractive-indirect or so-called invoice or credit method is the method most commonly used since it is relatively simple to calculate, it creates a good audit trail, profits do not have to be calculated as with the accounts methods and it attaches the tax liability to a specific transaction. (Tait, 1988:4/5)

### 3.3.4 Tax-inflammatory and the Tax-exclusive Methods of Calculation

Value-added tax can also be classified in terms of tax-inclusiveness or tax-exclusiveness. Although there is no theoretical difference between these two methods it can impact on the tax canon of invisibility.

Within the tax-inclusive and tax-exclusive methods, one can further distinguish between the direct and indirect methods of calculation.

The direct subtractive method is commonly known as the accounting method, whereas the indirect subtractive method is commonly known as the credit-invoice method. The credit-invoice method links the tax liability to the value of the transaction. This method is consequently more desirable from a legalistic and technical perspective. The invoice is the proof of the transaction and tax liability. This method also creates a definite audit trail, which ensures that input tax deductions are usually only made when the output tax has been or will be paid. This method also lends itself to the imposition of differential rates. (Tait, 1972:4/5)

### 3.3.5 Tax Treatment of Capital Goods

A value-added tax system can also be classified with reference to its treatment of capital goods.

Firstly, in the case of the consumption type value-added tax system, as used in the European Union, tax on capital expenditure is deductible on an ongoing basis. The tax deduction is therefore available at the time of, and directly related to, consumption or gross investment. The deductibility of tax on capital expenditure results in only consumable goods being subject to tax.

Secondly, in the case of the income method, tax on durable capital expenditure is deductible only to the extent of depreciation.

Finally, the product method limits the input tax deduction to materials and parts, which physically forms part of the manufactured goods. Tax on capital goods is therefore not allowed on an ongoing or depreciation basis. (Musgrave & Musgrave, 1984:442/3)
4 Theory of Place of Supply Rules

4.1 Introduction

Place of supply rules are used to determine where a supply should be taxed. Differences in taxing rules and definitions of services and goods result in a risk of double or unintentional non-taxation. Double taxation may distort competition between suppliers cross-border, whereas non-taxation threatens the tax base of the country where consumption takes place. (OECD 1998: 19)

The doctrine of place of supply in a value-added tax system does not apply to transactions restricted to one tax jurisdiction with one tax rate, and between persons belonging to only that jurisdiction. Within one tax jurisdiction it is irrelevant where supplies actually take place. (Terra, 1998:1)

When two or more tax jurisdictions are involved, for instance with cross-border transactions, the place of supply plays a determining role in the allocation of tax between, presumably, countries competing for tax revenue. The place of supply of taxable transactions is influenced by the neutrality canon of taxation, as discussed in section 2.2 above, and is in itself an aspect of the broader concepts of tax avoidance, double taxation or non-taxation. (Terra, 1998:1)

Place of supply rules are an essential instrument used against the avoidance of double taxation. In addition, a series of guiding and sometimes contradicting principles, such as the origin principle and the destination principle are important in the determination of the place of a supply. (Terra, 1998:1) These concepts are discussed below.

4.2 Double Taxation and Non-taxation in a Value-added Tax System

Terra (1998:2) holds the view that the place of supply is the pre-eminent instrument for the avoidance of double taxation or non-taxation in a value-added tax system. However, the subject of double taxation or non-taxation of transactions for value-added tax purposes has not received much interest and no separate study has been conducted in this field. Most double taxation agreements do not cover value-added tax in particular.

The reasons for the lack of interest in double taxation of transactions for value-added tax purposes can be ascribed to the orthodox definition of double taxation and the fact that the risk of double taxation for value-added tax purposes is reduced by the possibility of an input tax deduction. Also, companies appear to treat value-added tax as a cost factor. Double taxation is most frequently defined with reference and restricted to one taxpayer regarding the levy of a comparable tax on the same tax object, for the same period, by more than one country. A definition based on the same taxpayer is not necessarily suitable for taxes on consumption of goods or services. A consumption tax concerns itself with the same object or item, but not necessarily with the same subject or taxable person. It has therefore been suggested that, in the field of value-added tax, double taxation (cross-border) exists when an international transaction is subject to a general tax on consumption in more than one tax jurisdiction, irrespective of whether it concerns one or more taxpayers. (Terra, 1998:2)
Legal double taxation should be distinguished from economic double taxation. Legal double taxation exists when two or more tax jurisdictions subject a transaction to their fiscal sovereignty, by charging a comparable rate. Economic double taxation, on the other hand, exists where the price structure is not in line with a legislator’s intentions, in other words notwithstanding the legislator’s intention to avoid double taxation. Economic double taxation is often found in value-added tax where at least one of the transacting country’s value-added tax systems provide for exemptions. Maurice Laure described exemptions as “the cancer of the VAT”. (Terra, 1998:2)

Two principles can be applied to avoid double taxation in the value-added tax sense, namely:

- The Destination Principle; and
- The Equality Principle. (Terra, 1998:3)

These principles are discussed below.

4.3 The Destination Principle

The destination principle mandates that goods moving across borders should only be taxed in the country of consumption, which means that imports should be taxed and exports should be freed from the tax. The destination principle mandates that only transactions taking place on national territory or country should be subject to tax. Foreign transactions should not be subject to tax, even if carried out by domestic persons or firms. On the other hand, domestic transactions should be taxed regardless of whether the business, which carries them out, is domestic or foreign. The destination principle governs the law on the taxation of consumption of goods and services in most countries. (Terra, 1998:3)

The destination principle concerning consumption taxes provides that tax revenues should accrue to the country or revenue authority where supplies or products are deemed to be consumed. (OECD 1998: 19)

Conversely, in terms of the origin principle goods are taxed where they are produced, which means that imports are freed from the tax, whilst exports are taxed. The origin principle has the disadvantage that imported goods and domestically produced goods are not necessarily taxed at the same tax rate. (Terra, 1998:4)

Countries applying the destination principle generally impose a surcharge on imports not exceeding the domestic tax rate on similar products. The destination principle has the advantage that all products, irrespective of origin, bear the same tax burden when finally sold to a customer. The disadvantage of a destination-based tax is that physical border tax adjustments or compensation between the relevant tax jurisdictions always seem necessary. (Terra, 1998:5)

Consumption taxes cannot, unlike income taxes, be justified in terms of the ability-to-pay-principle. From this perspective, no arguments can be derived in favour or against the destination principle or the origin principle. The guiding principle that should be used to choose in favour of the destination principle is the benefit principle, as envisaged by the equality principle. (Terra, 1998:5)
4.4 The Equality Principle

In terms of the benefit principle, taxes on private consumption should only benefit the country where the consumption takes place, i.e. the country of destination. Based on the benefit principle, the place of supply will generally guarantee the avoidance of double taxation, thus adhering to the principle of neutrality. (Terra, 1998:6)

Within one tax jurisdiction the general characteristics of a tax on turnover demands that the equal be treated equally and the unequal be treated proportionally unequally. The theory of tax justice is a guiding principle in distributing a country’s tax liabilities amongst the individual taxpayers. The equality principle, therefore, mandates that within one tax jurisdiction, identical goods should be taxed equally. (Terra, 1998:7)

Double taxation and non-taxation of goods and services violate the principle of equality. Where the destination principle results in double taxation or non-taxation, the principle of equality should play a decisive role in determining whether a transaction can be taxed (again). (Terra, 1998:7)

5 Summary

A good tax system should comply with certain requirements or canons of taxation. Neutrality, equality, invisibility, certainty and simplicity, and minimum compliance and administration costs are all essential requirements for a good tax system, but can in practice, not all be achieved simultaneously. The choice of the optimal tax system therefore often requires a fine balance between the different canons of taxation. Adherence to one might often lead to less compliance to one or more of the other.

The equality principle captures the “ability to pay” and “benefit” principles. Since the benefit principle mandates that those who benefit from the use of commodities or services should be required to pay for them it is used to justify the imposition of indirect taxation such as value-added taxation.

Value-added tax is by far the most used indirect tax system in the world and has been in use since 1916. Value-added tax can be classified with reference to the stages of imposition, the methods of calculation or the tax treatment of capital goods.

Value-added tax the world over has undergone various changes to cater for cross-border transactions. Place of supply rules are generally used to determine where a supply should be taxed. Differences in taxing rules and definitions of services and goods can result in double or non-taxation. The place of supply plays a determining role in the allocation of tax, in respect of cross-border transactions, between countries. The place of supply is influenced by the neutrality canon of taxation and is in itself an aspect of the broader concepts of tax avoidance, double taxation or non-taxation.
The place of supply is the pre-eminent instrument for the avoidance of double taxation or non-taxation in a value-added tax system. However, double taxation or non-taxation of transactions for value-added tax purposes has not received much interest and no separate study has been conducted in this field. Most double taxation agreements do not cover value-added tax in particular. The lack of interest in double taxation of transactions for value-added tax purposes can be ascribed to the orthodox definition of double taxation and the fact that the risk of double taxation for value-added tax purposes is reduced by the input tax deduction mechanism. Companies also appear to treat value-added tax as a cost factor.

Since a consumption tax concerns itself with the same object or item, it has been suggested that for value-added tax purposes, double taxation (cross-border) occurs when an international transaction is subject to a general tax on consumption in more than one tax jurisdiction, irrespective of whether it concerns one or more taxpayers.

The destination principle and the principle of equality can be applied to avoid double taxation in the value-added tax sense.

In terms of the destination principle only transactions taking place on national territory or country should be subject to tax. The destination principle governs the law on the taxation of consumption of goods and services in most countries and provides that tax revenues should accrue to the country or revenue authority where consumption takes place.

In terms of the destination principle (as opposed to the origin principle) goods moving across borders are only taxed in the country of consumption, which means that imports are taxed and exports are freed from the tax. The destination principle has the advantage that all products, irrespective of origin, bear the same tax burden when finally sold to a customer. The disadvantage of a destination-based tax is that physical border tax adjustments or compensation between the relevant tax jurisdictions always seem necessary.

The guiding principle used to choose in favour of the destination principle is the benefit principle as envisaged by the equality principle. The benefit principle provides that taxes on private consumption should only benefit the country where the consumption takes place, i.e. the country of destination. The benefit principle will generally guarantee the avoidance of double taxation, thus adhering to the principle of neutrality.

The theory of tax justice is a guiding principle for the distribution of a country’s tax liabilities amongst the individual taxpayers. The equality principle therefore mandates that, within one tax jurisdiction, identical goods should be taxed equally.

Double taxation and non-taxation of goods and services violate the principle of equality. Where the destination principle results in double taxation or non-taxation, the principle of equality should play a decisive role in determining whether a transaction can be taxed.
CHAPTER III

PLACE OF SUPPLY RULES IN OTHER COUNTRIES

1 Introduction

The objective of this chapter is to examine the use of place of supply rules in the value-added tax systems in other countries. The chapter distinguishes between place of supply rules of goods and place of supply rules of services used in other countries. For ease of comparison, the value-added tax system, definition of goods, and definition of services are discussed in each country.

The globalisation of the world economy and the move towards harmonisation of both direct and indirect tax systems in certain parts of the world saw many countries introducing place of supply rules.

The use and interpretation of place of supply rules in countries world-wide are important to consider when a country considers the introduction of place of supply rules. An international perspective can be of importance for two reasons. Firstly, the experience of other countries presents the researcher with various lessons of the countries studied and brings to the fore a path of evolution with some degree of finality of principles adapted, especially if the so-called evolution took place over a number of years. Secondly, due to the increasing global economic interdependence the legislator needs to take heed of factors that could influence international trade.

Care should always be taken that fiscal rules or provisions used in other countries are not merely replicated in a country that might not have all the intricacies catered for in the country of origin. Tax reform must always take account of initial conditions, both domestic and foreign. Country experiences, in general tax reform, suggest a need to assess carefully the institutional features and tax cultures in each country. (World Bank, 1991:7)

Place of supply rules in countries with value-added tax systems generally distinguishes between the place of supply of goods as opposed to the place of supply of services. The place of supply of goods generally distinguishes between goods in general and fixed property or land, whereas the place of supply of services generally distinguishes between services capable of being physically rendered and services not capable of being physically rendered. Place of supply rules are also often found in the manner in which a particular country defines the boundaries of that country and also residents of that country.

The intention is generally to treat internationally provided services in such a way so as to have the same result as the taxation of internationally traded goods. The usual place of supply of services is where the services are performed or rendered, or, as an alternative, the usual place of residence of the supplier of the service or the country where the supplying company is legally incorporated. In essence, these two categories distinguish between the place where the supply is performed and the place where the supply is received. An underlying rule is that any service that is not specifically covered by one of these two rules, should in terms of legislation be taxable in the country of the supplier. (Tait, 1988:371)
Where the tax liability arises where the supply is received, the treatment is parallel to that of the supply of goods. The trader that is enjoying the use pays the tax at the rate appropriate to his own country. The supplier (the exporter) claims an input tax deduction against his zero tax liability (if his service would have been taxable if provided domestically). When the service performed is exempt in the export country, no input tax deductions can be claimed. The European Union introduced an important exception to this rule in respect of financial and insurance services provided outside of the European Union. To prevent financial and insurance services to be provided at an international disadvantage, these service providers are allowed to claim input tax deductions needed to provide the overseas services. (Tait, 1988:371)

The concept of “belonging” is peculiar to value-added tax, but is now more commonly replaced by the place where the service is performed or rendered. The difference between these two concepts can be illustrated by reference to advertising services. If a person visiting a country gives advertising advise, that service can be deemed (if applying the concept of belonging) to be taxable in the country where the supplier has his fixed place of business, office or establishment. Applying the concept of “rendered” would subject the supplier to tax in the country where the service has been rendered. (Tait, 1988:371)

In general it would seem more desirable to tax by applying the concept of “rendered”, since this concept taxes consumption and ensures that substantial amounts of value added supplied abroad does not go untaxed. An architect or a consultant might well perform the services in his home country, but the customer enjoys them in a different country. The supply of the service and the enjoyment can be separated. With the move into the technology and information era, the place of supply and movement of services could prove to be difficult to determine, except in respect of the individual or agency who actually gains advantage from it. (Tait, 1988:371/2 & 391)

The use of place of supply rules in other countries will be discussed in more detail below.

2 Place of Supply Rules in New Zealand

2.1 Introduction

New Zealand introduced a value-added tax system on 1 October 1986. New Zealand’s value-added tax system, more commonly referred to as the goods and services tax, is similar to and is to a large extent modelled on value-added tax systems operating in many other countries. Supplies of goods and services made in New Zealand by registered persons in the course of conducting taxable activities are charged with the tax, except for exempt supplies. A taxable activity is an activity carried on continuously or regularly in the course of which goods or services are supplied to another person for consideration. A profit motive is not a requirement. (Deloitte Touche Tohmatsu, September 1998:77)

A person is liable to register and account for value-added tax if he supplies goods and services in the course of carrying on a taxable activity. A taxable activity is likely to have “business” characteristics such as frequent supplies; a businesslike nature of operations; some form of
structure and organisation; and a reasonable level of financial investment (CCH New Zealand Limited 1998:21-320).

The specific elements of "taxable activity" include:

- **Activity.** Activity has a wide meaning and does not necessarily have to be an economic or commercial activity. (CCH New Zealand Limited 1998:93-212) Fraser J in *Newman v C of IR (1994) 16 NZTC 11, 229 (HC)* at p.11, 233 stated that:
  
  "[Activity] is a word of considerable breadth. The New Shorter Oxford English Dictionary 1993 ascribes a number of varying meanings or shades of meanings, none of which is exactly apposite to the word in s 6. The nearest, I think, is 'an occupation, a pursuit' and (in the plural) 'things that a person animal or group chooses to do.' In its context here I think the word means a course of conduct or series of acts which a person has chosen to undertake or become engaged in."

In *Bayly Trust v C of IR (1998) 18 NZTC 13, 559* the High Court noted that the word "activity" involves the concept of a person doing something, being active, taking some action. On appeal it was held that the "person" who carries on the activity for value-added tax purposes is invariably the person undertaking the relevant activity in terms of legal principles as opposed to a person having some beneficial interest in that activity;

- **Continuously or regularly.** In *Case N27 (1991) 13 NZTC 3, 229* it was held that "continuously" means that the "activity has not ceased in a permanent sense, or has been interrupted in a significant way. Bathgate DCJ at p.3, 239 held that "regularly" embodies "a 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 of character." Isolated or single transactions would therefore not usually attract the tax; and

- **Consideration.** A taxable activity generally involves (or is intended to involve) the supply of goods and services to any other person for a consideration. (CCH New Zealand Limited, 1998:21-200)

Goods and certain services imported into New Zealand for domestic consumption are subject to the tax on importation. (Deloitte Touche Tohmatsu, September 1998:77)

New Zealand provides that the time of a supply takes place at the earlier of payment or when an invoice is issued. Certain special time of supply rules apply in respect of lotteries, rental agreements, supplies made by instalments and hire-purchase agreements. (Deloitte Touche Tohmatsu, September 1998:78)

New Zealand allows grouping for value-added tax purposes in the case of certain groups of companies, which has the effect of ignoring inter-group transactions for value-added tax purposes. Separate registration of branches or divisions is also provided for in certain instances. (Deloitte Touche Tohmatsu, September 1998:79)

New Zealand zero-rates the exportation of goods, the exportation of services and the sale of a going concern. (Deloitte Touche Tohmatsu, September 1998:81)
2.2 Place of Supply of Goods in New Zealand

New Zealand defines goods as all kinds of personal or real property, to the exclusion of choses in action or money. Personal possessions (other than choses in action or money) and real estate are therefore included in the definition of goods. A chose in action is a right to recover a thing (if withheld by action) of which a person does not have immediate enjoyment or possession. Choses in action include debts, insurance contracts, shares, copyrights and patents and trademarks. (CCH New Zealand Limited, 1998:11-600)

Money is the only commodity that is not subject to New Zealand value-added tax. All other commodities are covered by the New Zealand value-added tax system, either as taxable, zero-rated or exempt supplies. (CCH New Zealand Limited, 1998:10-103)

A supply of goods is deemed to be made in New Zealand if the supplier is resident in New Zealand. This rule applies irrespective of the physical place of the supply. Generally income tax rules determine whether a person is resident in New Zealand for value-added tax purposes. A company is “resident” in New Zealand if it is incorporated in New Zealand; its head office is located in New Zealand; its centre of management is in New Zealand; or control of the company by the directors, acting in the capacity of directors, is exercised in New Zealand, whether or not decision-making is confined to New Zealand. In addition to the income tax rules, the value-added tax system prescribes two additional overriding rules for determining residence. Firstly, a person is resident in New Zealand to the extent that the person carries on an activity in New Zealand, which has a fixed or permanent place of business in New Zealand, for example, local branches. Secondly, an unincorporated body of persons, partnership, joint venture or trust is resident in New Zealand if its centre of administration is in New Zealand. The New Zealand revenue authorities considers a “fixed or permanent place” of business to be a place of business which is fixed (via an identifiable place or site) and which is used in a productive manner in the course of the person’s activity. A foreign company is resident under this rule only to the extent that its activities relate to that fixed or permanent place. As a consequence, the foreign company might not be resident in relation to unconnected supplies made in New Zealand. (CCH New Zealand Limited, 1998:11-400)

An individual is deemed to be resident of New Zealand if he/she has a permanent place of abode in New Zealand; or, if he/she is personally present in New Zealand for one or more periods exceeding 183 days in aggregate in any 12-month period. A resident individual who becomes personally absent from New Zealand for one or more periods exceeding 325 days in the aggregate in any 12-month period is deemed not be resident of New Zealand. (CCH New Zealand Limited, 1998:11-400)

If the supplier is a non-New Zealand resident, a supply of goods is deemed to be made in New Zealand only if the goods are in New Zealand at the time of supply. (CCH New Zealand Limited, 1998:11-400)

The non-New Zealand resident rule is subject to an exception. If the non-New Zealand resident makes a supply to a registered person in New Zealand for use in a taxable activity it will be deemed to be supplied outside New Zealand unless the supplier and recipient agree otherwise. The supplier
will therefore not be able to charge or recover value-added tax. As an alternative, the supplier can
agree with the recipient and have the supply treated as if it was made in New Zealand. The supplier
might then be required to register for value-added tax purposes and (among other things) be entitled
to recover input tax paid. (CCH New Zealand Limited, 1998:11-400)

The converse would also apply. If a non-New Zealand resident provides goods, which are in New
Zealand at the time of supply, to a person in New Zealand for use outside of or partially outside of
that person’s taxable activity, the non-New Zealand resident will be deemed to be making a supply

2.3 Place of Supply of Services in New Zealand

The term “services” is defined as anything, which is not goods or money. All commodities would
therefore be services unless they are “goods” or “money”. Choses in action will therefore be services
since they are neither “goods” nor “money”. (CCH New Zealand Limited, 1998:11-600)

In Case T28 (1997) 18 NZTC 8, 197 computer programs and software were held not to be goods, but
intellectual property in the form of know-how. (CCH New Zealand Limited, 1998:11-600)

Although the definition of “services” would seem all-inclusive, case law suggests that this definition
should not be taken to literally. It was held in Case S65 (1996) 17 NZTC 7, 408 that for an activity to be
a service it must benefit the recipient in some way. The taxpayer was ordered to pay costs after he
was successfully prosecuted. The taxpayer’s claim for an input tax deduction was denied on the
grounds that he had not been supplied with goods or services. Case FB Duvall Ltd v C of IR (1997) 18
NZTC 13, 470 also emphasised that a service must involve some element of serving, helping or
benefiting another. (CCH New Zealand Limited, 1998:11-600)

If the supplier is a non-New Zealand resident a supply of services is deemed to be made in New
Zealand only if the services are physically performed in New Zealand. The exception to the non-
New Zealand resident rule as discussed in section 2.2, applicable to the place of supply of goods,
applies also to the place of supply of services. (CCH New Zealand Limited, 1998:11-400)

The converse, as applicable to goods, would also apply in respect of services. If a non-New Zealand
resident provides services, which are physically performed in New Zealand, to a person in New
Zealand for use outside of or partially outside of that person’s taxable activity, the non-New Zealand
resident will be deemed to be making a supply of services in New Zealand. (CCH New Zealand
Table 1: Supplies Deemed to be in New Zealand (NZ)

<table>
<thead>
<tr>
<th>Residence of Supplier</th>
<th>Location of Supply</th>
<th>Value-added Tax (VAT)/not</th>
</tr>
</thead>
<tbody>
<tr>
<td>NZ resident</td>
<td>Deemed in NZ</td>
<td>Subject to VAT</td>
</tr>
<tr>
<td>Not NZ resident</td>
<td>Deemed outside NZ</td>
<td>Not subject to VAT unless parties agree otherwise</td>
</tr>
<tr>
<td>- Goods/services in NZ</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Supply to registered person</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not NZ resident</td>
<td>Deemed in NZ</td>
<td>Subject to VAT</td>
</tr>
<tr>
<td>- Goods/services in NZ</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Supply to unregistered person</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not NZ resident</td>
<td>Outside NZ</td>
<td>Not subject to VAT</td>
</tr>
<tr>
<td>- Goods not in NZ</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Services not in NZ</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


3 Place of Supply Rules in Canada

3.1 Introduction

Canada introduced a value-added tax system on 17 December 1990. Canada’s value-added tax system, more commonly referred to as the goods and services tax, is similar to and is to a large extent modelled on value-added tax systems operating in many other countries. Supplies of goods and services made in Canada by registered persons engaged in commercial activities are charged with tax, except for exempt supplies. Businesses engaged in the sale of taxable goods and services are deemed to be conducting commercial activities. (Deloitte Touche Tohmatsu, December 1996:131)

The concept “commercial activity” includes the importation of goods or certain services into Canada for domestic consumption and as a consequence, importation is subject to tax. (Deloitte Touche Tohmatsu, December 1996:131)

A “commercial activity” of a person is defined specifically as meaning:

- An adventure or concern of the person in the nature of trade (other than a business carried on without a reasonable expectation of profit), except for the making of exempt supplies;
- A business carried on by the person (other than a business carried on without a reasonable expectation of profit), except for the making of exempt supplies; and
- The making of a supply (not being an exempt supply) by the person of real property of that person, including anything done by the person in the course of or in connection with the making of the supply. (Sherman, 1999:27/8)

Business is defined as including a profession; calling; trade; manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit; and any activity engaged in...
on a regular or continuous basis that involves the supply of property by way of lease, license or similar agreement, but does not include an office or employment. (Sherman, 1999:25)

Non-residents doing business in Canada must determine whether they are considered to have a permanent establishment in Canada. Businesses carried on by non-residents with permanent establishments in Canada are treated in a similar manner to businesses resident in Canada and are generally required to register for the tax in Canada. A non-resident without a permanent establishment in Canada may also be required to register for the tax if it is considered to be carrying on a business in Canada. Generally, a person will be considered to be carrying on a business in Canada if it conducts a regular or continuous business activity. (Deloitte Touche Tohmatsu, December 1996:132)

A “permanent establishment” in respect of a particular person is defined as meaning:

- A fixed place of business of that person, including:
  - A place of management, a branch, an office, a factory or a workshop, and
  - A mine, an oil or gas well, a quarry, timberland or any other place of extraction of natural resources, through which that person makes supplies, or

- A fixed place of business of another person (other than a broker, general commission agent or other independent agent acting in the ordinary course of business) who is acting in Canada on behalf of that person and through whom that person makes supplies in the ordinary course of business. (Sherman, 1999:62)

Canada provides that the tax in respect of a taxable supply is payable by the recipient at the earlier of the day on which payment is made or the day when the consideration for the supply becomes due. (Sherman, 1999:202)

Separate registration of branches or divisions is also provided for in certain instances. (Deloitte Touche Tohmatsu, December 1996:543/4)

Canada zero-rates prescription drugs, medical devices, basic groceries, the exportation of goods and services and financial services relating to deposits outside Canada. (Deloitte Touche Tohmatsu, December 1996:132/3)

### 3.2 Place of Supply of Goods in Canada

Canada’s value-added tax system refers to the term “property” as opposed to “goods”, used more commonly in other countries. Property is defined as any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, but does not include money. (Sherman, 1999:66)
Real property includes:

- In respect of property in the Province of Quebec, immovable property and every lease thereof;
- In respect of property in any other place in Canada, messuages, lands and tenements of every nature and description and every estate or interest in real property, whether legal or equitable; and
- A mobile home, a floating home and any leasehold or proprietary interest therein. (Sherman, 1999:68/9)

Personal property is defined as property that is not real property. (Sherman, 1999:63)

The place of supply of tangible personal property, by way of a sale, is deemed to be where the property is, or is to be delivered or made available to the recipient of the supply. For example, if the property is, or is to be, delivered or made available in Canada to the recipient of the supply, the place of supply is deemed to be in Canada. (Sherman, 1999:139)

The place of supply of tangible personal property, otherwise than by way of a sale, is deemed to be where possession or use of the property is given or made available to the recipient. For example, if possession or use of the property is given or made available to the recipient outside Canada, the place of supply is deemed to be outside Canada. (Sherman, 1999:139)

The place of supply of intangible personal property is deemed to be in Canada where:

- The property may be used in whole or in part in Canada; or
- The property relates to real property situated in Canada, to tangible personal property ordinarily situated in Canada or to a service to be performed in Canada. (Sherman, 1999:139)

The place of supply of intangible personal property is deemed to be outside Canada where:

- The property may not be used in Canada; or
- The property relates to real property situated outside Canada, to tangible personal property ordinarily situated outside Canada or to a service to be performed wholly outside Canada. (Sherman, 1999:139)

The place of supply of real property or of a service in relation to real property is deemed to be where the real property is situated. (Sherman, 1999:139)

### 3.3 Place of Supply of Services in Canada

Canada defines “service” as anything other than property; money; and anything that is supplied to an employer by a person who is or agrees to become an employee of the employer in the course of or in relation to the office or employment of that person. (Sherman, 1999:80)
The place of supply of telecommunication services is deemed to be made in Canada where:

- The telecommunication service consists of the making available of telecommunication facilities, the facilities or any part thereof are located in Canada; and
- In any other case:
  - The telecommunication is emitted and received in Canada, or
  - The telecommunication is emitted or received in Canada and the invoicing is done in Canada. (Sherman, 1999:141/142)

The place of supply of a prescribed service can be deemed to be in or outside Canada. (Sherman, 1999:139/140) Although “prescribed service” is not specifically defined, “prescribed” is defined as meaning:

- In the case of a form or the manner of filing a form, authorised by the Minister;
- In the case of the information to be given on a form, specified by the Minister;
- In the case of the manner or making or filing an election, authorised by the Minister; and
- In any other case, prescribed by regulation or determined in accordance with rules prescribed by regulation. (Sherman, 1999:65)

The place of supply of any other service is deemed to be in Canada if the service is, or is to be, performed in whole or in part in Canada. (Sherman, 1999:139)

The place of supply of any other service is deemed to be outside Canada if the service is, or is to be, performed wholly outside Canada. (Sherman, 1999:140)

4 Place of Supply Rules in the European Union

4.1 Introduction

In 1963 the European Union’s Neumark Committee proposed a value-added tax system for all Member States of the European Union. In 1967 the European Union adopted the requirement of a general value-added tax system as a prerequisite for joining the Union. (Peacock & Forte, 1981:120)


Since 1993 the European Union countries apply the destination principle. The country receiving the goods (country of destination) accounts for output tax on the goods. Advantages of the single market for indirect tax purposes is that no border documentation needs to be completed, goods no longer need to be presented to the customs office for inspection, the financing requirements of stock is minimised and a simple control system has been introduced based on consignment notes. (Commission of the European Union, 1992)
Since 16 December 1991, the “Sixth Value-added Tax Directive” (hereafter referred to as “the Sixth Directive”) of the European Union regulates the supply of goods and services by and to Member States through a common value-added tax system. Importation and exportation between Member States are dealt with as value-added tax free intra-European Union supplies. To use the intra-European Union arrangement both contracting parties must be merchants and provide each other with the necessary value-added tax identification numbers. The invoice must contain a value-added tax identification number. An intra-European Union supply is deemed to exist once European Union suppliers introduce goods into another Member State. These suppliers are considered to have performed both an intra-European Union supply in one country and an acquisition in the other. (Deloitte Touche Tohmatsu, January 1995:146)

Under the European Union system, a “taxable person” (as defined in article 4 of the Sixth Directive) charges value-added tax on his invoice to the customer as and when the goods are supplied and remits the tax less any prepaid tax, on his return, to the tax authorities. As a consequence, value-added tax only generates government revenue when the customer cannot deduct the value-added tax charged. In extent, goods and services exchanged between value-added tax liable persons are not charged with value-added tax. It follows that the value-added tax paid on consumer expenditure is directly proportional to the (net) expenditure of each consumer, irrespective of the number of stages through which the goods or services have passed in the production or distribution chain – the so-called principle of internal neutrality. (Kogels, 1999:118)

The second main value-added tax principle in the European Union is the principle of external neutrality. This principle mandates that the value-added tax in the final consumption price of a good is in accordance with the value-added tax rate applicable in the country of consumption, irrespective of whether the good has been purchased in that country or abroad. Cross-border supplies of goods between entrepreneurs are zero-rated in the country of origin and subject to tax in the country of destination. In respect of cross-border purchases by private persons, if not done under the mail order rule, value-added tax of the country of origin is imposed on such goods. The country-of-destination principle is applied to a more limited extent in the case of cross-border services. (Kogels, 1999:118)

4.2 Place of Supply of Goods in the European Union

Article 5(1) of the Sixth Directive defines a supply of goods as the transfer of the right to dispose of tangible property as owner. Electricity, current, gas, heat, refrigeration and the like are considered to be tangible property. (Kogels, 1999:118)

Article 8(1) of the Sixth Directive deems the place of supply of goods dispatched or transported either by the supplier or by the person to whom they are supplied or by a third person to be where the goods are at the time when the dispatch or transport to the person to whom the goods are supplied begins. (Terra, 1998:20/21)

Article 8(1)(a) of the Sixth Directive deems the place of supply of goods installed or assembled by or on behalf of the supplier to be where the goods are installed or assembled. Where the installation or assembly is carried out in a Member State other than that of the supplier, the
Member State within the territory of which the installation or assembly is carried out shall take steps necessary to avoid double taxation in that State. (Terra, 1998:23/24)

Article 8(1)(b) of the Sixth Directive deems the place of supply of goods not dispatched or transported to be where the goods are when the supply takes place. (Terra, 1998:25)

Article 8(1)(c) of the Sixth Directive deems the place of supply of goods on board ships, aircraft or trains, in the case where the places of departure and destination are within the territory of the European Community, to be where the goods are at the time of departure of the transport. (Terra, 1998:26)

4.3 Place of Supply of Services in the European Union

Article 6(1) of the Sixth Directive defines a service as any transaction, which does not constitute a supply of goods. Services may include assignments of intangible property whether or not it is the subject of a document establishing title; obligations to refrain from an act or to tolerate an act or situation; and the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law. (Kogels, 1999:118)

Article 9(1) of the Sixth Directive is the general place of service rule and deems the place where a service is supplied to be where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides. (Terra, 1998:224)

The meaning of “permanent establishment” for value-added tax purposes is not the same as for income tax purposes. A Member State can define a permanent establishment for value-added tax purposes as it chooses, since the European regulations contain no definition of the term. The Netherlands deems a business establishment operated by a foreign entrepreneur, operated with some degree of permanence, from which goods and/or services are supplied to third parties, to be a permanent establishment. The Court of Justice of the European Communities has defined a permanent establishment as a facility for carrying on a business that has a permanent presence in the form of personnel and technical resources necessary for supplying the services in question where it is not appropriate to link those services with the principle place of business of their supplier. (Kogels, 1999:118/9)

Having regard to these terms, a foreign entrepreneur selling goods via electronic modus with a Member State and for that purpose keeps a stock of goods in that Member State, managed by personnel on his behalf, can be deemed to have a permanent establishment in that Member State. The presence of a web-site on a server is not the deciding factor (since that could be possible anywhere in the world), but a permanent goods storage and management facility serving the local market. (Kogels, 1999:119)

Should the supplier be a foreign entrepreneur without a permanent establishment in the Member State who has bought the goods in that Member State or has procured them from another Member State, the tax levy will depend on a number of circumstances. If the supplier previously brought the goods over from another Member State for storage on third-party premises, this is regarded as
a notional intra-European Union supply and acquisition. The supplier must register for value-added tax in the Member State of acquisition and when selling those goods in the Member State makes a domestic supply subject to value-added tax. The foreign entrepreneur must also register for value-added tax purposes if he has bought the goods in the Member State in order to supply them to private persons. The foreign entrepreneur would then be entitled to claim an input tax deduction on the acquisition of the goods. If the foreign entrepreneur has bought the goods domestically in order to supply them to value-added tax registered customers in that Member State, a reverse charge is applicable on those customers. The foreign entrepreneur can claim back the value-added tax paid under the Eighth Directive procedure (or the Thirteenth Directive procedure if the supplier is established outside the European Union) and need not register for value-added tax purposes in that Member State. (Kogels, 1999:119)

Article 9(2)(a) of the Sixth Directive deems the place of supply of services connected with immovable property to be in the country where the property is situated. Such services would include the services of estate agents and experts and services for preparing and co-ordinating construction works, such as the services of architects and of firms providing on-site supervision. Services in connection with immovable property that can be supplied on-line, such as constructional designs prepared by an architect or engineer, are therefore taxed in the country where the immovable property is or will be situated. If such services are supplied to an entrepreneur, the tax levy is transferred to that entrepreneur. If no link exists between the services and a specific immovable property, the services are regarded as the transfer of copyright or as engineering or similar services. (Kogels, 1999:120)

Article 9(2)(b) of the Sixth Directive deems Intra-European Union transportation services to have been rendered in the originating Member State. Only if the recipients of the transported goods provide the transportation service providers with their value-added tax identification numbers, is the place of service deemed to be in the recipients’ Member State. (Deloitte Touche Tohmatsu, January 1995:147)

Article 9(2)(c) of the Sixth Directive deems the place of supply of services relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities to be in the country where those activities actually take place. Entertainment supplied via telephone line or on-line services supplied via the Internet are therefore deemed to take place in the country where it is used. The making available of computer and peripheral hardware, including server capacity for the purposes of running a web-site is subject to tax in the country where the supplier of that services is established. (Kogels, 1999:121)

Article 9(2)(e) of the Sixth Directive determines the place of supply of intangible services such as the transfer and conferring of copyright, patent rights, license rights, advertising services and services rendered by advisers, engineers, consultants, lawyers, auditors and the like, as well as the processing and provision of information. This Article also includes banking, financial and insurance (including reinsurance) services, and the provision of personnel. Finally, it also includes mediation of all these services, if done by an intermediary acting on behalf of and for account of some other party. These services are taxed where the customer is established, via the reverse charge mechanism, if the customer is an entrepreneur in another Member State. If the services are supplied to non-entrepreneurs in Member States, they are taxed in the country where
the service provider is established or has a permanent establishment when he supplies those services. If the customer is established outside the European Union, the services are taxed where the customer is established and effective use and enjoyment of the service takes place, irrespective of whether he is an entrepreneur or a private person. (Kogels, 1999:121)

The European Commission submitted a proposed amendment (Article 9(2)(f)) to the Sixth Directive in 1997 with a view to making all telecommunication services utilised in the European Union taxable. In terms of the basic place of service rule (place of establishment of the supplier), telecommunication services supplied from non-European Union countries to customers in the European Union fall outside of European value-added tax. The Commission’s proposals entails that telecommunication services of entrepreneurs outside the European Union should be taxed in the country where the customer has his place of business, permanent establishment or place of residence. Conversely, telecommunication services provided to customers outside the European Union would no longer be charged with European value-added tax. If the customer is an entrepreneur, the value-added tax liability is transferred to him via the reverse charge mechanism. Telecommunication services provided to private persons or non-entrepreneurs should be taxed where they are effectively utilised or consumed. A supplier of telecommunication services are deemed to be established in the country where his customers are situated and should register for value-added tax purposes in that country. The proposal does not cover services supplied via Internet on-line, but only services pertaining to the transfer of signals over the communication network, or the right of use of facilities employed for transfer (transmission or reception) of those signals. (Kogels, 1999:121/2)

Intra-European Union brokerage services are treated as having been rendered at the place where the brokered sales occurred. However, where the recipient of the brokerage services provides the broker with a value-added tax identification number, the brokerage service is deemed to have occurred at the service recipient’s place of business. (Deloitte Touche Tohmatsu, January 1995:147)

Kogels (1999:117) highlights the increase in global electronic communication and electronic trade and mentions that the number of Internet users, estimated at 100 million in 1999, is expected to increase to 500 million in 2002. Business to business electronic trade, amounting to approximately 7 billion euro in 1997, could grow to 300 billion euro in the year 2000 and to 1000 billion euro in 2001. Various questions surround this new and increasing phenomenon. Questions have been raised on the concept of permanent establishment in relation to the presence of a supplier’s web-site on a server. The volume of inter-company and intra-group supplies of goods and services through the Internet (either through Intranet or Extranet) is growing rapidly. Mail-order companies, in particular, market their goods and services to their target market through their web-sites on the public Internet. In addition, payment systems through the Internet are constantly being developed. Goods, previously limited to physical supply only, can now be transferred in digitised form (the so-called “virtual goods”) and become competitive substitutes in a global market. Supply and demand curves are being met electronically on a global virtual market place. (Kogels, 1999:117)
The European Commission laid down certain principles in connection with indirect taxes and electronic trade in its COM(1998)374 report of June 1998. These principles include:

- The Internet in itself should not lead to new taxes;
- On-line supply of "virtual goods" should for value-added tax purposes be treated as a service;
- Services consumed in the European Union should be subject to value-added tax in the European Union, irrespective of where they are performed;
- Services performed from the European Union to a third country should not be subject to value-added tax in the European Union;
- Administrative requirements in connection with value-added tax on electronic trade should be kept as simple as possible; and
- Traders should be allowed to use electronic invoicing and bookkeeping (Kogels, 1999:117)

The value-added tax consequences of electronic commerce distinguishes between situations where the contract of sale is concluded electronically whilst the goods or services are supplied in the traditional manner (i.e. off-line), and those where the goods or services (i.e. digitised) are supplied via electronic modus (i.e. on-line). (Kogels, 1999:118)

The European Commission has opted to treat the supply of virtual goods as a service. The levying of value-added tax on services depends on the place or country where the service is deemed to take place. This treatment applies to services supplied physically (off-line) and those supplied via electronic modus (on-line), including the supply of digital goods. (Kogels, 1999:118) Although digital goods can be transformed into physical goods by the recipient (as printouts or scanned onto compact discs), the subject of such transactions is so remote from what is understood to be the supplying of goods under the European Union value-added tax system, that supplies of virtual goods are regarded as services. (Kogels, 1999:120)

5 Place of Supply Rules in the United Kingdom

5.1 Introduction

The United Kingdom introduced a value-added tax system on 1 April 1973 after becoming a Member State of the European Union on 1 January 1973. (Morris, Huxham & Haupt, 1988:3)

Supplies of goods and services made in the United Kingdom by taxable persons in the course or furtherance of any business is charged with the tax, except for exempt supplies. (Deloitte Touche Tohmatsu, October 1994:147)

The importation of goods and certain services are also charged with value-added tax. (Deloitte Touche Tohmatsu, October 1994:147)

A taxable person is a person that is registered or should be registered with Customs and Excise, the tax authorities that administer the tax in the United Kingdom. (Deloitte Touche Tohmatsu, October 1994:147) Only persons carrying on a business are subject to register for value-added tax purposes. A business is includes any trade, profession or vocation. Customs give the term a wide meaning,
including “any continuing activity which involves making supplies of goods or services, even if supplies are made irregularly or on a non-profit basis”. It was ruled in Three H. Aircraft v C&E Commissioners that “business” for value-added tax purposes requires some activity. An oral agreement between friends who jointly owned an aircraft and who sometimes hired it to a company did not constitute a business. Specific principles were used in the case of C&E Commissioners v Lord Fisher (QB 1981, STC 238) to establish whether an activity could be treated as a business. (Dawes, I; Maxwell, R & Richardson, A 1999: 19)

The United Kingdom provides that the time of supply of goods is at the earlier of the time when the goods are made available to the purchaser; when an invoice is issued; or when payment is received. Services are deemed to be supplied at the earlier of date of invoice; the date payment is received; or the date the service is completed. Only goods and services supplied in the United Kingdom are subject to the tax. (Deloitte Touche Tohmatsu, October 1994:147)

The United Kingdom zero-rates most food, books, public transport, buildings constructed for domestic or charitable use, children’s clothing, the exportation of goods and many services. (Deloitte Touche Tohmatsu, October 1994:150)

5.2 Place of Supply of Goods in the United Kingdom

Although the term “goods” is not defined comprehensively, “goods” must be assumed to include all tangible, movable items. There is no supply until the purchaser signifies his approval or acceptance or otherwise indicates that he is taking the goods. (Dawes, I; Maxwell, R & Richardson, A 1999: 29)

Schedule 4 to the Value Added Tax Act 1994 (VATA) (consolidating the United Kingdom’s value-added tax legislation) determines that the supply of goods specifically includes:

- transfer of the whole property in goods or of the possession of goods under an agreement for sale or under agreements contemplating that the property will pass at some time in the future determined by the agreements but not later than when the full price is paid;
- the supply of any form of power, heat, refrigeration or ventilation;
- the granting, assignment or surrender of a major interest in land (i.e., the absolute title or a tenancy for longer than 21 years; special provisions apply to Scotland);
- the disposal or transfer of goods forming part of the assets of a business unless they are a gift costing the donor not more than £10 or they are an industrial sample;
- goods sold in satisfaction of a debt under a power excisable by another person; and
- goods forming part of the assets of a business upon cessation, except where the business is sold as a going concern. (Dawes, I; Maxwell, R & Richardson, A 1999: 29)

Paragraph 1(2)(b) of Schedule 4 to the VATA further provides that there is a supply of goods where there is a transfer of possession of goods under an agreement which expressly provides that the property will pass at some time in the future determined by the agreement, but no later than when the full price is paid. Only the transfer of the possession is a supply of goods. Any credit facility provided for in the agreement is a supply of services. (Dawes, I; Maxwell, R & Richardson, A 1999: 30)
“Bespoke” or personalised software is treated as a supply of services, whereas “off-the-shelf” or standardised software is regarded as a supply of goods, except when the transfer of the right to dispose of the property as owner cannot be established, or the goods are not tangible as there is no support or when the subject of the contract is the transfer of the copyright. In these circumstances, standardised software is treated as a supply of services. (Dawes, I; Maxwell, R & Richardson, A 1999: 30)

The importation of personalised software is treated as a supply of goods (the carrier medium, e.g. diskette) and a supply of services (the data and/or instructions). However, to simplify the accounting, the import is treated as an importation of services (including the carrier medium), and the importer, if he is a taxable person, accounts for value-added tax under the reverse charge mechanism. (Dawes, I; Maxwell, R & Richardson, A 1999: 30)

The importation of standardised software is regarded as a supply of goods and services. Unless the value attributed to the carrier medium is identified separately, the whole importation (including the service element) is treated as a supply of goods. (Dawes, I; Maxwell, R & Richardson, A 1999: 30)

Work carried out on another person’s goods is treated as a supply of services, with effect from 1 January 1996. (Dawes, I; Maxwell, R & Richardson, A 1999: 31)

The place of supply of goods is deemed to be in the United Kingdom if the goods are physically located in the United Kingdom at the time of their supply. (Deloitte Touche Tohmatsu, October 1994:147) Otherwise, the place of supply is treated as outside the United Kingdom. As a consequence, even if a supply is made between two United Kingdom residents if the goods are located outside the United Kingdom at the time of supply, the supply may fall outside the scope of the United Kingdom’s value-added tax system. (Dawes, I; Maxwell, R & Richardson, A 1999: 41)

Goods sent out of the United Kingdom on consignment will be deemed to be supplied outside the United Kingdom if the goods are outside the United Kingdom at the time the transaction is adopted. Goods brought into the United Kingdom on consignment from outside the European Union will be subject to value-added tax on importation. If the goods are in the United Kingdom when the transaction is adopted and the supplier is the importer and registered for value-added tax purposes, the supply (adoption) will again attract value-added tax, although the supplier will be entitled to claim an input tax deduction. If the supplier is not registered nor required to be registered, the supply (or adoption) will not be subject to value-added tax again. The supplier would then not be entitled to claim an input tax deduction on importation. However, where the recipient is the importer and is registered for value-added tax purposes, he may claim the value-added tax paid on importation as an input tax deduction. (Dawes, I; Maxwell, R & Richardson, A 1999: 42)

Illustrative of the place of supply of goods is a court case on the application of Article 8 of the Sixth Directive heard by the Commissioners of Customs and Excise in 1987. A German company, not resident in the United Kingdom, entered into a contract with a United Kingdom company to supply and install a bulk material handling system. The German company appointed another United Kingdom company to act as its sales representative and to supply technical services. The German company contended that the goods should be deemed to have been
supplied in Germany. The Commissioners of Customs and Excise ruled that the place of supply was the site where the components of the systems were installed and commissioned. Since the site was in the United Kingdom, the supply of goods was deemed to have taken place in the United Kingdom. (Dolton, Wareham & Grout, 1993:279)

5.3 Place of Supply of Services in the United Kingdom

Section 5(2)(b) of the VATA defines “a supply of services” vaguely as “anything which is not a supply of goods but is done for a consideration”. The supply of services includes the granting, assignment or surrender of the whole or part of any right, which is done for a consideration. (Dawes, I; Maxwell, R & Richardson, A 1999: 34)

The place of supply of services is generally deemed to be in the United Kingdom if the supplier belongs in the United Kingdom. However, certain supplies by a person who belongs outside the United Kingdom to a taxable person in the United Kingdom are treated as though they were made in the United Kingdom. (Dawes, I; Maxwell, R & Richardson, A 1999: 47) A business normally belongs in the United Kingdom if it has a business establishment or some other fixed establishment there and that establishment is the one most concerned with the supply. The term “belonging in” a country is not necessarily equivalent to being a resident in a country (Deloitte Touche Tohmatsu, October 1994:147 & Dawes, I; Maxwell, R & Richardson, A 1999: 47)

The following rules determine in which country the supplier and recipient of services are treated as belonging:

- An individual receiving a supply in a private capacity and not for business belongs in the country where he has his place of residence;
- A person having a business establishment or other fixed establishment in one country alone belongs in that country;
- A person having no such establishment belongs in the country where his usual place of residence is (the usual place of residence of a corporation for these purposes is the place in which it is legally constituted). In some instances even a hotel room can be regarded as a business establishment;
- A supplier having establishments in two or more countries belongs in the country of the establishment most directly concerned with the supply; and
- A recipient of services having such establishments in two or more countries belongs in the country of the establishments at which, or for the purposes of which, the services are most directly used. (Dawes, I; Maxwell, R & Richardson, A 1999: 47)

A person carrying on a business through an agency or branch in the United Kingdom is treated as having a business or fixed establishment in the United Kingdom. In certain instances, even a registered office in the United Kingdom can be regarded as a fixed establishment for value-added tax purposes. (Dawes, I; Maxwell, R & Richardson, A 1999: 47)

With effect from 1 July 1997, the place of supply of telecommunication services provided to customers established outside the European Union or taxable persons in the European Union (but not in the United Kingdom) is deemed to be where the supplier belongs. However, the place of
supply of broadcasting services is deemed to be where the supplier belongs. If the supplier belongs in the United Kingdom, the supply will be subject to value-added tax in the United Kingdom. The United Kingdom authorities consider that where telecommunication services are used and enjoyed in the United Kingdom when supplied to a person outside the European Union, that part of the supply must be identified and value-added tax must be charged on that part. (Dawes, I; Maxwell, R & Richardson, A 1999: 48)

The place of supply of services connected with immovable property is deemed to be where the property is physically situated. Such services include:

- Grants, assignments and surrender in land;
- Works of construction and demolition; and
- Services supplied by estate agents, auctioneers, architects, surveyors and engineers. Where services contained in the second and third indentation above are supplied to a taxable person in the United Kingdom, the supplier will be liable to account for the tax under the reverse charge mechanism. Where the recipient is not a taxable person in the United Kingdom, the supplier will, depending on the value of the supplies, be liable to register for value-added tax purposes in the United Kingdom. (Dawes, I; Maxwell, R & Richardson, A 1999: 48)

The United Kingdom deems the place of supply of certain services to be where the supplies are physically carried out. These services include:

- Cultural, artistic, sporting, scientific, educational or entertainment services;
- Services relating to exhibitions, conferences or meetings;
- Ancillary services to those detailed above; and
- The valuation of, or work performed on, goods. (Dawes, I; Maxwell, R & Richardson, A 1999: 48)

The place of supply of valuation, repair, etc. of movable goods is shifted to the place of belonging of the customer if the customer is registered for value-added tax in another Member State and the goods in question leave the Member State where the service was physically performed. As a consequence, the place of a supply performed in a Member State (other than the United Kingdom) for a United Kingdom registered person will be the United Kingdom. (Dawes, I; Maxwell, R & Richardson, A 1999: 48)

The place of supply of intangible services is, in principle, deemed to be where the services are received. If the recipient belongs outside the European Union the supply will fall outside the scope of value-added tax and input tax incurred in making the supply may be recovered in full. Where the recipient belongs in another Member State and receives the service for the purposes of any business carried on, the place of supply will be in the Member State of the recipient and outside the scope of value-added tax in the United Kingdom. The recipient will have to account for tax in his Member State. If the recipient belongs in another Member State but does not receive the services in a business capacity, the supply will be subject to value-added tax in the United Kingdom. (Dawes, I; Maxwell, R & Richardson, A 1999: 49)
Intangible services received by a recipient in the United Kingdom who is registered for value-added tax in the United Kingdom and uses the service in his business is subject to the reverse charge mechanism. The recipient can claim an input tax deduction to the extent that the service is attributable to the making of taxable supplies. Services which would be exempt if supplied in the United Kingdom or which are received for non-business purposes are not subject to the reverse charge. (Dawes, I; Maxwell, R & Richardson, A 1999: 49)

Personalised software is treated as services, whereas standardised software is treated as goods. However, the transfer of standardised software is treated as services when:

- The transfer of the right to dispose of the property as owner cannot be established; or
- The goods are not tangible as there is no support or when the subject of the contract is the transfer of copyright. (Dawes, I; Maxwell, R & Richardson, A 1999: 49)

The place of supply of the hiring out of a means of transport is where the supplier is established. However, where the use and enjoyment takes place outside the European Union, the place of supply will be where the transport is used. Conversely, where the supplier is established outside the European Union, but the use and enjoyment of the transport is in the United Kingdom, the place of supply is deemed to be in the United Kingdom. (Dawes, I; Maxwell, R & Richardson, A 1999: 50)

The place of supply of services which consist of the making of arrangements for a supply by or to another person or of any other activity intended to facilitate the making of such a supply are treated as being supplied in the same place as the supply which is being arranged. (Dawes, I; Maxwell, R & Richardson, A 1999: 50)

Services consisting of the transportation of goods are treated as being supplied in the country where the transport takes place, to the extent that it takes place in that country. (Dawes, I; Maxwell, R & Richardson, A 1999: 51)

6 Place of Supply Rules in Italy

6.1 Introduction

Italy introduced a value-added tax system (also called Imposta sul Valore Aggiunto) with effect from 1 January 1973. Italy does not have a provision similar to that of the European Union specifically defining "taxable person". Rather, the person falling within the scope of the Italian value-added tax emerges from the various legislative provisions relating to "taxable transactions". Supplies of goods and services for a consideration in the course of a business or an artistic or professional activity within Italy and all imports into Italy are subject to value-added tax. (Barr, 1995:17)

Under European Union regulations, a business that is established in Italy and has incurred value-added tax in another Member State qualifies for a reimbursement of the tax paid. (Deloitte Touche Tohmatsu, July 1995:88)
Italy zero-rates exports. (Deloitte Touche Tohmatsu, July 1995:88)

A foreign enterprise may recover value-added tax incurred in Italy, provided it does not have a permanent establishment in Italy and provided also that the tax paid would have been deductible in Italy. (Deloitte Touche Tohmatsu, July 1995:88)

Italy has implemented the European Union’s directive regarding the regulation of intra-European Union value-added tax transactions. As a result of the abolition of fiscal frontiers between Member States, the purchase of European Union goods derived from another Member State is considered an intra-European Union acquisition when the purchaser is an Italian value-added tax registered concern. In the absence of frontiers, the concern accounts for Italian value-added tax on acquisition. Intra-European Union sales follow the same value-added tax rules applicable to exports, namely exemption with recovery. (Deloitte Touche Tohmatsu, July 1995:89)

6.2 Place of Supply of Goods in Italy

The supply of goods is defined as the transfer of ownership in goods for valuable consideration. Goods include all tangible movable; immovable property; standardised software; hire purchases if the parties agree that ownership will be transferred; gas; steam; electricity; the transfer of the right of usufruct and other rights in property. Other rights of intangible property (e.g. patent rights) are considered to be a supply of services. (Barr, 1995:25-27)

The place where the goods are located at the time the supply takes place is decisive in determining the place of supply and application of Italian value-added tax. The time of supply of movable goods is, in principle, when the goods are placed at the disposal of the customer. The time of supply of transported goods, where the contractual terms are “ex-works”, is when the transport commences. (Barr, 1995:35)

If goods are located outside Italy at the time of supply, the supply is deemed to take place outside Italy and is not subject to tax in Italy, even if the transaction is concluded between two Italian residents. However, although goods bought outside Italy are not subject to Italian value-added tax, the subsequent importation into Italy is a taxable event and subject to Italian value-added tax. If goods are imported into Italy prior to the conclusion of the sale agreement the place of supply is deemed to be Italy. (Barr, 1995:35/6)

The consignment of goods is not considered to be a supply for value-added tax purposes and is not subject to tax since ownership does not transfer. A taxable supply often only occurs when the consignor or consignee sells the goods and the goods are simultaneously supplied to and by the consignee. The place of supply will be where the goods are located when ownership transfers. (Barr, 1995:36)

6.3 Place of Supply of Services in Italy

All transactions carried out in exchange for consideration, which are not supplies of goods, are deemed to be supplies of services. Services usually consist of the obligation to perform or refrain from performing acts or the granting of permission to perform acts. (Barr, 1995:29)
Services specifically include the transfer of goods pursuant to a contract for rent or lease; the
transfer, licensing or sublicensing of copyrights and of rights relating to industrial inventions,
models, plans, processes, formulae, trade marks and similar rights; the provision of food and drink;
the transfer of contracts of any kind and for whatever purpose; the leasing or hiring of movable
goods including means of transport; the provision of personalised software; contract work involving
the production of goods using materials supplied by the customer. (Barr, 1995:29/30)

Services specifically exclude, amongst others, the transfer, licensing or sublicensing of copyrights
by the author or his heirs. (Barr, 1995:29)

The place of supply of a service is, in principle, in Italy if the supplier has his domicile or residence
in Italy or, in the absence of domicile or residence, if he has a permanent establishment within Italy,
which supplies the services. A legal person is “domiciled” where its legal seat is situated and
“resident” where its effective management is located. (Barr, 1995:42)

In certain instances, Italy deems a supply of services to take place in the country where the activity
actually takes place or in the country of the recipient of the service. These exceptions to the main
rule include:

- Services connected with immovable property;
- Cultural, artistic, sporting, scientific, educational or entertainment services;
- Valuation, repair, etc. of movable goods;
- Intangible services;
- Leasing of means of transport;
- Transport services and ancillary transport activities such as loading, unloading and handling
  services. (Barr, 1995:42)

Italy has amended the place of supply of telecommunication services to specifically cater for the
derogation requested by the Member States of the European Union in article 27 of the Sixth
Directive, with effect of 1 January 1997. The place of supply of telecommunication services is
deemed to be:

- In Italy if the services are provided to (a) subjects domiciled or resident in Italy who have not
  established their domicile abroad or (b) permanent establishments in Italy of subjects domiciled
  or resident abroad, unless the services are used outside the European Union;
- In Italy if the services are provided to subjects domiciled or resident in other Member States if
  the recipient is not a taxable person in the state in which he is domiciled or resident;
- Not in Italy if the services are provided to subjects domiciled or resident outside the European
  Union; and
- In Italy if the services are provided to subjects domiciled or resident outside the European
  Union by subjects domiciled or resident outside the European Union if the services are used within
  Italy. The services are deemed to be used in Italy when departing from Italy or, if the services
  are supplied through the sale of prepaid cards or other technical means, aimed at the fruition of
  the services if their distribution occurs, directly or through intermediaries on Italian territory.
  (Giannini & Seregni, 1998:i)
The place of supply of intangible services is, in principle, deemed in accordance with the place of
residence or establishment of the recipient of the service and the status of the recipient.

The place of supply of an intangible service is deemed to be:

- In Italy if supplied by an Italian supplier to a person in Italy, unless the service is used outside
  the European Union;
- In Italy if supplied by a non-resident supplier to an Italian resident business or a permanent
  establishment in Italy, unless the service is used outside the European Union;
- Not in Italy if supplied by an Italian supplier to a person outside Italy, unless it is supplied to a
  non-taxable person who is resident in another Member State; and
- In Italy if supplied by an Italian supplier to a person resident outside the European Union and
  used in Italy. (Barr, 1995:45)

Intangible services include the letting or hiring of goods other than the means of transport; advice,
consulting, technical and legal assistance; staff training; data processing; the supplying of
information and similar services; banking, financial and insurance transactions; the supply of staff;
the exploitation of intangible rights; intermediary services connected with the above services; and
the obligation not to perform them. (Barr, 1995:43)

7 Place of Supply Rules in Greece

7.1 Introduction

Greece replaced a cumulative turnover tax with a value-added tax system in January 1986. Greece
operates a destination based value-added tax system, by zero-rating exports and taxing imports.
Supplies of goods and services for a consideration made in Greece by a taxable person in the course
or furtherance of any business carried on by him and goods imported into Greece are subject to tax,
except for exempt supplies. A taxable person is defined as anyone who independently carries on a
business activity. A business activity, for value-added tax purposes, results from an economic rather
than a civil or commercial law approach. (Anon., July 1998:11, 19)

A non-resident taxable person supplying goods or services in Greece is in principle liable to register
for value-added tax purposes in Greece, except where the reverse charge mechanism applies.
(Anon., July 1998:19)

7.2 Place of Supply of Goods in Greece

Greece defines goods as all tangible (movable or immovable) objects, including electricity, gas,
heat, cold and such, hire purchase, standard software, which can be the object of economic
transactions. Electricity, gas, heat and cold are considered to be tangible objects for value-added tax
purposes. The supply of certain rights to immovable property (e.g. personal or real easements,
usufructs) is deemed to be a supply of goods. (Anon., July 1998:27)
Goods include the transfer of legal ownership by agreement, which requires a legal title, e.g. an agreement, accompanied by a transfer of possession. The transfer of possession does not always imply the acquisition of physical possession, since a supply of goods may also take place *traditio longa manu* and *traditio brevi manu*. Goods include sales contracts and exchange contracts. (Anon., July 1998:28)

The place of supply of goods is deemed to be in Greece if, at the time the tax obligation arises, the goods are in Greece or aboard a ship, aircraft or train and are sold to passengers during the part of the journey which takes place in Greece, provided the place of departure is Greece. (Anon., July 1998:39)

Greece does not treat the actual handing over of consignment stock as a taxable supply for value-added tax purposes, since ownership does not pass. The supply only takes place when the consignee sells the goods. The goods are simultaneously supplied to and by the consignee. When a supply has occurred the normal place of supply rules apply. If a non-resident consignor is holding stock in Greece, he is required to appoint a fiscal representative in Greece. (Anon., July 1998:39)

The place of supply of goods, which have been transported from a place outside Greece (and outside the European Union) to a place within Greece, is deemed to be in Greece. Supplies actually made before importation are deemed not to take place in Greece. (Anon., July 1998:40)

The place of supply of goods, which are installed or assembled by or on behalf of the supplier, is the place where the goods are installed or assembled. If a non-resident supplier installs goods at his customer’s premises in Greece, the non-resident will have to register for value-added tax purposes in Greece and Greek value-added tax is due on these services. (Anon., July 1998:40)

### 7.3 Place of Supply of Services in Greece

Greece defines the supply of services as any commercial activity performed for consideration, other than the supply of goods. The supply of intangible property, for instance a copyright, is in principle a supply of a service. In certain instances breach of contract payments may be subject to value-added tax since the payment is made not only to cover the damages but is made also in relation to an agreement not to bring the case to court. (Anon., July 1998:27, 31)

The place of supply of services, in principle, is deemed to be in the country where the supplier has his fixed business establishment or residence. If the supplier has more than one establishment or several establishments at different locations, the place of supply of the service will be the place of the establishment most connected with the supply. If the supplier has no establishment, the place of supply will be his usual place of residence. (Anon., July 1998:45)

In certain instances, Greece deems supplies of services to take place in the country where the activity actually takes place or in the country of the recipient of the service. This has the result that although non-resident businesses may supply services in Greece the reverse charge mechanism avoids the necessity for foreign businesses to register and account for value-added tax in Greece in
most situations. These exceptions to the main rule include:

- Services connected with immovable property;
- Transport services and ancillary transport activities such as loading, unloading and handling services;
- Cultural, artistic, sporting, scientific, educational or entertainment services;
- Valuation, repair, etc. of movable goods;
- Intangible services; and
- Intermediary services. (Anon., July 1998:45)

The place of supply of intangible services, in principle, is deemed to be in the country of the recipient of the service. If the customer is:

- A taxable person in the European Union, the place of supply is the country of residence of the customer;
- A taxable person outside the European Union, the place of supply is the country of residence of the customer;
- A non-taxable person in the European Union, the place of supply is the country of residence of the supplier;
- A non-taxable person outside the European Union, the place of supply is the country of residence of the customer. (Anon., July 1998:46)

Suppliers who are established outside the European Union must register in Greece and appoint a value-added tax representative if they render intellectual services to non-taxable persons or to taxable persons without a right to recover the value-added tax. (Anon., July 1998:47)

Intangible services include the transfer and assignment of copyrights, patents, licenses, trade marks, brands and similar rights; advertising services; services rendered by consultants, engineers, consulting, lawyers, accountants and similar groups, as well as data processing and the supply of information; obligation to refrain, in whole or in part, from pursuing a professional activity or an activity referred to as an intangible service; banking, financial and insurance transactions, except the hire of a safe deposit box; supply of staff; leasing of movable tangible property, other than means of transport; and all intermediary services in respect of the aforementioned services. (Anon., July 1998:47)

As of 1 July 1997, the place of supply of telecommunication services rendered by non-resident suppliers to taxable persons in Greece, is deemed to be in Greece. The customer must account for value-added tax under the reverse charge mechanism. If a supplier, established in a non-European Union country, supplies telecommunication services to a non-taxable person with an establishment or residence in Greece, or to taxable persons established in Greece which, due to their activities or status, have no right of input tax deduction, he has an obligation to register for value-added tax purposes and appoint a value-added tax representative in Greece. Telecommunication services are deemed to be services relating to the transmission, emission or reception of signals, writing, images and sounds of information of any nature by wire, radio, optical or other electromagnetic systems, including the transfer or assignment of the right to use capacity for such transmission, emission or reception. Telecommunication services would therefore include telephone and mobile
communications; call and call-back services; access to networks (e.g. the Internet) and telephone cards. (Anon., July 1998:47/8)

8 Place of Supply Rules in Belgium

8.1 Introduction

On 3 July 1969 Belgium adopted a value-added tax type of turnover tax on the supply of goods and services, the supply of certain vehicles for transportation, and importation. The tax replaced as of 1 January 1971, the old cumulative turnover taxes. (Pollet, 1996:9) Value-added tax (known as taxe sur la valeur ajoutée – TVA or belasting over de toegevoegde waarde – BTW) is charged on the delivery of goods and the rendering of services in Belgium by taxable persons in the course of a business, on intra-European Union acquisitions by (amongst others) taxable persons liable for filing periodic returns, and on the importation of goods (except those placed under customs arrangements). (Deloitte Touche Tohmatsu, July 1996:91)

Delivery includes outright sales, leasing, exchanges, and, in some cases, contributions in kind to a company. A taxable person is any person, whether an individual, a legal person, or an entity without legal personality, who in the exercise of his or its economic activity in a regular and independent manner, with or without profit motive, on a principal or an accessory basis, supplies goods or services or intends to do so. (Deloitte Touche Tohmatsu, July 1996:91)

In principle, a person who supplies goods or services is deemed to exercise an economic activity. (Pollet, 1996:13)

The regularity test referred to above, in respect of persons not established in Belgium, takes into account the totality of the activities carried on in Belgium and abroad. A German contractor involved in constructing a single building in Belgium would be subject to value-added tax in Belgium if he regularly carries on building activities abroad. (Pollet, 1996:13)

Belgium zero-rates exports. (Deloitte Touche Tohmatsu, July 1996:92)

Non-resident suppliers with permanent establishments in Belgium are treated in a similar manner to businesses resident in Belgium and are generally required to register for value-added tax purposes in Belgium. Non-residents that trade with Belgian residents but do not have an established office in Belgium must generally appoint a representative to be responsible for value-added tax payments and collections. Any resident individual or company may be appointed, subject to approval, although the representative is normally an accounting firm, a forwarding or transportation agent, or the like. The non-resident will forego any credit for value-added tax suffered if no representative is appointed. In such a case, the authorities may require the customer to pay the value-added tax due, including interest for late payment. (Deloitte Touche Tohmatsu, July 1996:93)

A non-commercial entity, such as a representative office, is generally not regarded as a permanent establishment and may, in principle, not register for value-added tax purposes and recover Belgian
value-added tax charged to it. Entrepreneurs from other countries without permanent establishments in Belgium may, however, recover Belgian value-added tax paid if:

- The Belgian value-added tax had been imposed on supplies of goods or services made to that entrepreneur within Belgium or on imports made by him or her into Belgium;
- The value-added tax would have been recoverable by the entrepreneur if he or she had made supplies in Belgium. (Deloitte Touche Tohmatsu, July 1996:93)

### 8.2 Place of Supply of Goods in Belgium

Belgium defines the supply of goods as the transfer of the power to dispose of a good pursuant to a contract for consideration. A supply of goods is characterised by:

- A contract for the transfer of goods. Goods that are returned because of non-acceptance by the buyer is not supplied;
- A consideration;
- A transfer or declaration of ownership or “real rights” (rights in rem). A transfer of ownership may result from a sale, an exchange or any other transaction, whereas a declaration of ownership may occur when jointly owned property is divided. Real rights are usufructs, long leases, building rights and servitudes; and
- The placing of the goods at the transferee’s disposal. (Pollet, 1996:19)

Goods are defined as:

- Goods of a movable nature and tangible movable property used to service and operate immovable property;
- The supply of heat, cooling or energy; and
- Buildings, excluding the land on which they are or will be constructed. (Pollet, 1996:20)

The place of supply of goods is, in principle, the place where the goods are placed at the disposal of the purchaser. In the case where the goods are transported the place of supply of the goods is where the transportation to the customer begins. (Pollet, 1996:29)

The consignment of goods is not considered to be a supply for value-added tax purposes and is not subject to tax. A supply only occurs when the consignee purchases the goods from the consignor and will generally only take place when the consignee has found a buyer or lessee for the goods. If the consignee actually purchases the goods and the goods are located in Belgium at the time of the supply, the supply is subject value-added tax. (Pollet, 1996:29)

Where the consignee is a commissionaire, the taxable supply is deemed to occur when he supplies the goods sold through his agency. The time of supply may be different from that of a simple consignee, since the supply to the commissionaire’s customer only takes place when the transportation takes place. The place of supply is deemed to be where the goods are actually located when the supply to the purchaser takes place. (Pollet, 1996:29/30)
The place of supply of goods, which are installed or assembled by or on behalf of the supplier, is the place where the goods are installed or assembled. (Pollet, 1996:31)

The place of supply of goods dispatched or transported by or on behalf of the supplier to a non-taxable person in Belgium is the place where the goods are located when the dispatch or transportation ends. This has the effect that the foreign distance seller or supplier, supplying goods in Belgium must register for value-added tax in Belgium. (Pollet, 1996:31)

Any person who has acquired goods abroad or has had such goods processed for his own account shall be deemed to have imported those goods unless he can submit prove to the contrary. The tax is normally paid at the time the goods pass through the border post. (Pollet, 1996:32)

8.3 Place of Supply of Services in Belgium

The place of supply of services is, in principle, the place where the supplier has his business or other fixed establishment or, in the absence of such business or other fixed establishment, his residence or customary place of abode. (Pollet, 1996:35)

Belgium does not have a special rule for the place of supply of telecommunication services. As a consequence, these services are deemed to take place where the supplier of the service has his business or other fixed establishment or, in the absence of such business or other fixed establishment, his residence or customary place of abode. (Pollet, 1996:35)

The place of supply of services in connection with immovable property is deemed to be where the property is located. Such services include:

- Any work on buildings;
- Studies and supervision which form part of the regular activities of architects, land surveyors and construction engineers, carried out for use in preparing or co-ordinating the activities involved in the construction of a building;
- The inspection of immovable property;
- The placing of parking space at the disposal of users of automobiles or other vehicles;
- The placing of storage space at the disposal of third persons;
- The supplying of furnished rooms and campground space;
- The leasing of safes, if such safes are immovable property;
- Activities intended to effect or facilitate the granting or transfer of rights to real property;
- The leasing of real property by an enterprise, the main purpose of which is to finance and lease real property, provided that certain conditions have been met; and
- The management of real property. (Pollet, 1996:35/6)

The place of supply of valuation and repair services to movable goods and contracts is, in principle, deemed to be where the goods are located when the service is actually carried out. (Pollet, 1996:36)

The place of supply of cultural, artistic, sporting, scientific, educational and entertainment services is, in principle, deemed to be where it is actually performed. (Pollet, 1996:36)
The place of supply of leasing of means of transportation is, in principle, deemed to be where the vehicle is actually utilised. (Pollet, 1996:36)

The place of supply of intangible services is deemed to be where the customer has his business or other fixed establishment or, in the absence of such business or fixed establishment, his residence or customary place of abode. Intangible services include transfers and assignments of copyrights, patents, licenses, trademarks and similar rights, goodwill and obligations to refrain from engaging in a particular business activity or from exploiting certain rights; publicity services; intellectual services performed by accountants, engineers and consultants; professional transactions by banks and other financial institutions with the exception of the rental of safes; the supply of staff; the activities of intermediaries in relation to the aforementioned services; and the leasing of movable tangible property other than means of transport. (Pollet, 1996:37/8)

9 Place of Supply Rules in Germany

9.1 Introduction

Germany introduced a value-added tax system on 1 January 1969. (Linssen, Verwaal & Franke, 1999:11) Supplies of goods and services for a consideration by a taxable person in Germany in the course of his business and the importation of goods are subject to value-added tax (also known as umsatzsteuer). (Deloitte Touche Tohmatsu, January 1995:145)

A taxable person is any person, including a legal entity, who independently carries on a business or professional activity. A profit motive is not a requirement. (Deloitte Touche Tohmatsu, January 1995:145) Business implies the establishment of an organisation of capital and labour to meet certain economic needs. Being acknowledged as a taxable person for value-added tax purposes results from an economic rather than a civil or commercial law approach. (Linssen, Verwaal & Franke, 1999:19)

Companies in a group may in certain instances pool and offset profits and losses in the group for income tax purposes under the interlocking relationship (known as organischaft). The total net group income is taxed at the controlling company level. (Deloitte Touche Tohmatsu, January 1995:112) A company controlled by another company under the interlocking relationship is not a taxable person for value-added tax purposes and its sales are attributed to its controlling company, which acts as entrepreneur for the whole group. Transactions between domestic enterprises in the same group are exempt from value-added tax. If the controlling company is a non-resident, the principal German company in the group is regarded as the taxable person. (Deloitte Touche Tohmatsu, January 1995:145)

Supplies of goods or services are taxable only if the transactions are deemed to take place in Germany. (Deloitte Touche Tohmatsu, January 1995:145)

Germany zero-rates exports, most transfers to German duty-free locations, processing for foreign customers and certain international transportation services. (Deloitte Touche Tohmatsu, January 1995:149)
If a non-resident renders a taxable service to, or carries out a supply and install contract for a resident entrepreneur, that entrepreneur must generally deduct value-added tax from the total amount due to the non-resident and remit payment directly to the tax office on behalf of the non-resident. However, the resident entrepreneur need not withhold value-added tax on behalf of the non-resident if the non-resident prepares an invoice without showing a value-added tax amount and the resident entrepreneur would have been entitled to claim an input tax deduction if the invoice had shown the value-added tax amount. If these procedures are followed, a non-resident is normally not required to file a return. (Deloitte Touche Tohmatsu, January 1995:150)

A non-resident entrepreneur may apply for a refund of German value-added tax paid on goods or services supplied by a resident entrepreneur, provided that the non-resident has not supplied goods or services subject to German value-added tax or has been a party to transactions in which the recipient had to withhold value-added tax as discussed in the preceding paragraph. (Deloitte Touche Tohmatsu, January 1995:150)

9.2 Place of Supply of Goods in Germany

Goods are not specifically defined in Germany for value-added tax purposes. Case law, however, dictates that not only the civil law meaning of the term "goods" is to be followed. Germany also follows the definition of goods in the Sixth Directive of the European Commission. In terms of the Sixth Directive the supply of goods means the transfer of the right to dispose of tangible property as owner. Electricity, gas, heat and cold are considered to be tangible objects. In principle, a supply of goods occurs when the legal (juridical) ownership is transferred. The transfer of a good for security purposes only are not regarded as the supply of goods, notwithstanding that German civil law dictates that the legal ownership of the pledge is transferred. The supply of stolen goods, however, is a taxable supply for value-added tax purposes, despite the fact that the legal ownership cannot be transferred. (Linssen, Verwaal & Franke, 1999:29/30)

The supply of standard software; contract work and goods supplied with assembly or installation; and goods purchased in terms of a hire-purchase contract and handed over to the customer are regarded as supplies of goods. (Linssen, Verwaal & Franke, 1999:30/31)

The place of supply of goods is generally deemed to be where the goods are situated at the time the right to dispose of them is transferred or where the supply of the goods requires transportation, the place from where the goods are transported or dispatched. In the case of supplies from outside the European Union the place of supply is deemed to be in the foreign country, provided that the supplier is not subject to German value-added tax on importation. (Deloitte Touche Tohmatsu, January 1995:145)

The place of supply of goods, which are installed or assembled by or on behalf of the supplier, is deemed to be the place where the goods are installed or assembled. The installation of goods by a non-resident supplier at his customer's premises in Germany is subject to German value-added tax. The non-resident business is, however, not required to register for value-added tax purposes, since the German customer accounts for the value-added tax. (Linssen, Verwaal & Franke, 1999:43)
The consignment of goods is not considered to be a supply for value-added tax purposes and is not subject to tax since ownership has not been transferred. A taxable supply often only occurs when the consignor or consignee resells the goods and the goods are simultaneously supplied to and by the consignee. (Linssen, Verwaal & Franke, 1999:41)

9.3 Place of Supply of Services in Germany

The definition of services follows the definition adopted in the Sixth Directive and is a residual one meaning that what is not considered to be a "good" is a service. The supply of services is therefore considered to be any commercial activity for consideration other than the supply of goods. (Linssen, Verwaal & Franke, 1999:29, 33)

Subject to various exceptions, a supply of services is generally deemed to take place in the country where the supplier runs his business or has a permanent establishment. If the supplier has no establishment, the place of supply is his usual place of residence. A service in connection with real estate is deemed to be performed at the place where the property is situated. Legal, tax, technical, management consulting, advertising, and data processing services and the granting of patents, trademarks, or copyrights are deemed to be performed at the place where the recipient's enterprise is located. (Deloitte Touche Tohmatsu, January 1995:147)

In certain instances, Germany deems supplies of services to take place in the country where the activity actually takes place or in the country of the recipient of the service. This has the result that non-resident businesses may be deemed to be supplying services in Germany. However, the reverse charge mechanism avoids the necessity for foreign businesses to register and account for value-added tax in Germany in most situations. These exceptions to the main rule include:

- Services connected with immovable property;
- Transport services and ancillary transport activities such as loading, unloading and handling services;
- Cultural, artistic, sporting, scientific, educational or entertainment services;
- Valuation, repair, etc. of movable tangible goods;
- Intangible services and services in the area of telecommunications; and
- Intermediary services. (Linssen, Verwaal & Franke, 1999:49)

The place of supply of intangible services is, in principle, deemed to be in the country of the recipient of the service. If the customer is:

- A taxable person in the European Union, the place of supply is the country of residence or establishment of the customer;
- A taxable person outside the European Union, the place of supply is the country of residence or establishment of the customer;
- A non-taxable person in the European Union, the place of supply is the country of residence or establishment of the supplier;
- A non-taxable person outside the European Union, the place of supply is the country of residence or establishment of the customer. (Linssen, Verwaal & Franke, 1999:49)
If a foreign supplier supplies intangible services to a person in Germany, to be used for business purposes, the person receiving the services is required to account for value-added tax under the reverse charge mechanism. (Linssen, Verwaal & Franke, 1999:50)

Intangible services include the transfer and assignment of copyrights, patents, licenses, trade marks, brands and similar rights; advertising services or public relations; services rendered by consultants, engineers, consulting, lawyers, patent lawyers, experts, accountants and similar groups; data processing; the supply of information including industrial processes and experiences; the complete or partial relinquishment of the exercise of professional or commercial activities; certain financial transactions; the supply of staff; the hiring out of movable tangible property, other than means of transport; services in the area of telecommunications; and all intermediary services in respect of the aforementioned services. (Linssen, Verwaal & Franke, 1999:49)

As of 1 July 1997, the place of supply of telecommunication services rendered by non-resident suppliers to taxable persons in Germany, is deemed to be in Germany. A German taxable person customer must account for value-added tax under the reverse charge mechanism. If the suppliers are established in countries other than Germany and they render telecommunication services to private individuals in Germany, the supplier must register for value-added tax in Germany and account for tax on these services. (Linssen, Verwaal & Franke, 1999:51)

Telecommunication services are defined as the transmission of data, signals, sounds and images by electronic means. Telecommunication services would therefore include telephone, facsimile and telegraphic services, as well as e-mail and access to and use of electronic databases, such as the Internet. The supply of information ("contents") does not qualify as telecommunication services. (Linssen, Verwaal & Franke, 1999:51)

10 Place of Supply Rules in France

10.1 Introduction

France, and more specifically Maurice Laure, can be seen as the auctor intellectualis of the modern value-added tax system. Although France adopted an additive based value-added tax in 1948, the broad based value-added tax system commonly in use around the world today only came into effect (after various developments) on 1 January 1968. (McLure, 1987:44)

Supplies of movable tangible property and/or services by a taxable person, acting as such, for consideration are subject to value-added tax in France. A taxable person is any person who independently carries on an activity such as the activities of producers, traders and persons supplying services including the extractive industry (mining), agriculture and activities of the professions (lawyers, notaries, etc), and, in particular, activities consisting of the exploitation of tangible or intangible movable property for the purpose of obtaining income therefrom on a continuing basis. (van Waardenburg & Ermel, 1999:17/8, 25)

In certain instances imported services may be charged with value-added tax. (Deloitte Touche Tohmatsu, June 1995:105)
Goods imported into France from outside the European Union are subject to value-added tax on their introduction into French territory. Value-added tax on importation is payable by the importer. (Deloitte Touche Tohmatsu, June 1995:105)

France zero-rates services related to international trade such as the import or export of goods, the processing, repair and maintenance of goods for export, and the supplying of bonded warehouse facilities and also related insurance and banking or financial services linked to the export of goods. Transactions concluded in other countries by taxable persons in France are zero-rated when, if those supplies had been made domestically, an input tax deduction could have been claimed. (Deloitte Touche Tohmatsu, June 1995:107/8)

10.2 Place of Supply of Goods in France

France defines the supply of goods as the transfer of the right to dispose of movable tangible property as owner. Movable tangible property includes gas, electricity, and the supply of heating, cooling and the like. It also includes software if it is standardised and mass-produced. (van Waardenburg & Ermel, 1999:25/6)

The consignment of goods is not considered to be a supply for value-added tax purposes and is not subject to tax since there is no transfer of ownership. A taxable supply only occurs when the consignor sells the goods on consignment and the supply is deemed to take place when the consignee delivers the goods to the purchaser.

In practice a distinction is drawn between two situations:

- A proper contract of consignment under which supplier A stores goods with supplier B who sells these goods to customer C. B becomes the owner of the goods at the moment he contracts with C; or
- A contract under which supplier A stores goods with customer B who is entitled to use these goods whenever required for his production process. B becomes the owner of the goods at the moment he uses these goods. (van Waardenburg & Ermel, 1999:34/5)

A supply of goods is generally deemed to take place where the goods are located when delivery or transport to the purchaser begins or where the goods are assembled and installed. (Deloitte Touche Tohmatsu, June 1995:105)

If a supply of goods is made by or on behalf of an importer the place of supply is deemed to be France. This will be the case where a taxable person transports goods from a foreign country (outside the European Union) and delivers these goods to his customer in France. The assumption is that the importer transfers title to these goods whilst they are situated in France. (van Waardenburg & Ermel, 1999:47)

The place of supply of goods, which are not dispatched or transported, is deemed to be in France if the goods are physically situated in France when ownership is transferred. If a seller, established in France, sells goods located abroad to a purchaser also established in France (or abroad) no tax is
due. This will also be the case if the goods are physically in France but are sold before they are released from customs. (van Waardenburg & Ermel, 1999:47)

The place of supply of goods subject to assembly or installation in France are deemed to be in France, provided ownership was not transferred when the goods were physically situated abroad. A non-resident entrepreneur who brings goods into France and assembles them in France for its French customer is subject to French value-added tax. The foreign entrepreneur must generally appoint a fiscal representative unless he is deemed to be operating through a permanent establishment in France. (van Waardenburg & Ermel, 1999:48)

10.3 Place of Supply of Services in France

A supply of services is defined as all transactions other than the supply of movable tangible property. Services include construction work; work performed on movable property; the transportation of goods and passengers; the sale of food and beverages for immediate consumption; research work; the rental of movable or immovable property; the involuntary supply of a service; the supply of personalised software and the hiring of software. Services include, in particular:

- Obligations to refrain from an act or to tolerate a situation; and
- The sale or leasing of movable intangible property (such as business goodwill, patent rights, trade marks and similar industrial property rights). (van Waardenburg & Ermel, 1999: 36/7)

A supply of services is, in principle, deemed to take place in France if the supplier is established or has a permanent establishment in France from where the service is supplied or, in the absence of the above two criteria, if he has his domicile or habitual residence in France. A permanent establishment is defined as a centre of activities from which the taxable person regularly performs taxable activities. This would include a warehouse; an office; a factory, a workshop; or a construction or assembling project, the existence of which the customers are aware of and which is managed by the owner of the undertaking or by a person appointed by him who has been empowered to carry on business operations on behalf of the owner of the undertaking. (van Waardenburg & Ermel, 1999:55)

Certain services are deemed to be supplied in France when they are either utilised in France or actually carried out there, or when the recipient of the service is a taxable person resident in France. Services which are subject to these special rules, include:

- Transportation;
- Leasing of movable tangible property;
- Services connected with immovable property and movable tangible goods;
- Licensing of industrial property rights (patent rights, trade marks, etc); and
- Telecommunication services (as of 1 January 1997)

From 1 January 1997, the place of supply of telecommunication services is deemed to be in France if the recipient (irrespective of his identity) is resident or established in France. French telecommunication services providers need not charge French value-added tax if their customer is a taxable person established outside France or a person (including private individuals) established or
resident outside the European Union. Value-added tax is due if the recipient is a non-taxable person established in the European Union. (van Waardenburg & Ermel, 1999:56)

The place of supply of services in connection with immovable property is deemed to be in France if the property is located in France. Such services include:

- Construction work;
- Preliminary work performed before the construction of immovable property by, for example, architects, construction engineers, geologists, land surveyors, etc.;
- Preparation of a building site;
- Services supplied by real estate developers;
- Services supplied by building supervisors;
- Services supplied by intermediaries who assist with the sale and purchase of immovable property or shares representing such immovable property; and
- Maintenance of immovable property, including cleaning, painting, repairs, etc. (van Waardenburg & Ermel, 1999:56/7)

The place of supply of valuation and repair services to movable goods and contracts is, in principle, deemed to be where the recipient is located. (van Waardenburg & Ermel, 1999:57)

The place of supply of cultural, artistic, sporting, scientific, educational and entertainment services is, in principle, deemed to be where it is actually performed. (van Waardenburg & Ermel, 1999:57)

The place of supply of leasing of means of transportation is, in principle, deemed to be where the lessee actually utilises the vehicle. The lessor must appoint a fiscal representative in France. (van Waardenburg & Ermel, 1999:57)

The recipient of intangible services is liable to account for output tax if the supplier is established outside France and the beneficiary is a taxable person established in France. (van Waardenburg & Ermel, 1999:59)

The place of supply of intangible services are deemed to be in France and subject to value-added tax if:

- The supplier of the service and the customer are both established in France;
- The supplier is established in France and the customer is established in another country in the European Union, but is not subject to value-added tax in that country;
- The supplier is established outside France and the customer is established in France and is subject to value-added tax in the other country (in this case it is the recipient who is subject to value-added tax); or
- The supplier is established outside the European Union and the customer is established in France where he uses the service but is not subject to value-added tax in the other country. (van Waardenburg & Ermel, 1999:59)

Intangible services include industrial and other property rights; telecommunication services, advertising; consulting; software and the supply of information; banking and/or financial
services; the supply of staff; leasing and letting of movable goods (excluding means of transport); licensing of industrial and other property rights; intermediary services rendered in connection with the aforementioned services; and, the refraining from the exercise of a profession or of the use of a right of an industrial or property right. (van Waardenburg & Ermel, 1999:59-61)

11 Summary

11.1 Supplies Subject to Value-added Tax

Most countries levy value-added tax on the supply of goods or services by a person (individuals or legal persons) to another person if done for a consideration and if the supplies form part of an enterprise, business or taxable activity, except exempt supplies. The importation of goods is generally also subject to value-added tax. Most countries do not require a profit motive in order to require registration for value-added tax purposes. New Zealand, as do many other countries, requires some continuous or regular activity for the purposes of registration.

Most countries treat foreign businesses with permanent establishments in their respective countries in a similar manner to resident businesses. In addition, foreign businesses (non-residents) without permanent establishments may also be required to register if carrying on businesses in the country. Foreign taxable persons supplying goods or services in a country is generally, in principle, liable to register for value-added tax purposes in that country, except where the reverse charge mechanism applies.

A permanent establishment is generally a fixed place of business, including a place of management, a branch, an office, a factory or a workshop, and a mine, an oil or gas well, a quarry, timberland or any other place of extraction of natural resources through which a person makes supplies. Permanent establishment also includes a fixed place of business of another person who is acting on behalf of that person in the country through whom that person makes supplies in the ordinary course of business. A non-commercial entity, such as a representative office, is generally not regarded as a permanent establishment and may, in principle, not register for value-added tax purposes. In addition, some countries such as Belgium, applies a regularity test, in respect of persons not established in their country, which takes into account the totality of the activities carried on in their country and abroad.

The term business generally includes any trade, profession or vocation and any continuing activity, which involves making supplies of goods or services, even if made irregularly or on a non-profit basis. Many countries, such as Greece, Germany and Belgium, generally interpret a business activity to be resulting from an economic rather than a civil or commercial law approach. Germany sees business as implying the establishment of an organisation of capital and labour to meet certain economic needs.

Foreign enterprises may recover value-added tax incurred in many European Union countries (such as Italy, Germany and Belgium), provided it does not have a permanent establishment in
that country and provided that the tax paid would have been deductible by the resident entrepreneur in that country.

11.2 Definition of Goods

New Zealand defines goods as all kinds of personal or real property, to the exclusion of choses in action or money. A chose in action is a right to recover a thing (if withheld by action) of which a person does not have immediate enjoyment or possession and includes debts, insurance contracts, shares, copyrights and patents and trademarks.

Canada regards goods as any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, excluding money.

The European Commission and most member countries define a supply of goods as the transfer of the right to dispose of tangible property as owner. Electricity, current, gas, heat, refrigeration and the like are considered to be tangible property.

In the United Kingdom there is no supply until the purchaser signifies his approval or acceptance or otherwise indicates that he is taking the goods.

European Union countries generally regard standardised software as a supply of goods. However, the United Kingdom treats the importation of personalised software as a supply of goods and services. For accounting purposes, the import is treated as an importation of services, and the importer, if he is a taxable person, accounts for tax under the reverse charge mechanism. The importation of standardised software is also regarded as a supply of goods and services. Unless the value attributed to the carrier medium is identified separately, the whole importation is treated as a supply of goods.

Greece defines goods as all tangible objects, which can be the object of economic transactions. The supply of certain rights to immovable property is also deemed to be a supply of goods. Goods include the transfer of legal ownership by agreement, which requires a legal title, e.g. an agreement, accompanied by a transfer of possession. The transfer of possession does not always imply the acquisition of physical possession, since a supply of goods may take place traditio longa manu and traditio brevi manu. Goods include sales and exchange contracts.

Belgium defines the supply of goods as the transfer of the power to dispose of a good pursuant to a contract for consideration. The supply of goods is characterised by a contract for the transfer of goods, a consideration, a transfer or declaration of ownership or real rights. A transfer of ownership may result from a sale, an exchange or any other transaction, whereas a declaration of ownership may occur when jointly owned property is divided. Goods are defined as goods of a movable nature and tangible movable property used to service and operate immovable property, and buildings, excluding the land on which they are or will be constructed.
Most countries do not regard the consignment of goods to be a supply for value-added tax purposes. A supply only occurs when the consignee purchases the goods from the consignor and will generally only take place when the consignee has found a buyer or lessee for the goods.

Although Germany does not specifically define goods case law dictates that not only the civil law meaning of the term goods is to be followed. In principle, a supply of goods occurs when the legal (juridical) ownership is transferred. The transfer of a good for security purposes only are not regarded as the supply of goods. The supply of stolen goods is a taxable supply despite the fact that the legal ownership cannot be transferred. Contract work and goods supplied with assembly or installation; and goods purchased in terms of a hire-purchase contract and handed over to the customer are regarded as supplies of goods.

11.3 Place of Supply of Goods

New Zealand deems the place of supply of goods to be in New Zealand if the supplier is resident in New Zealand, irrespective of the physical place of supply. The determination of the residence of a company follows the normal income tax provisions. In addition, two overriding rules determine residence for value-added tax purposes. Firstly, a person is resident in New Zealand to the extent that the person carries on an activity in New Zealand, which has a fixed or permanent place of business in New Zealand. Secondly, an unincorporated body of persons, partnership, joint venture or trust is resident in New Zealand if its centre of administration is in New Zealand. A foreign company is resident under this rule only to the extent that its activities relate to that fixed or permanent place. The determination of residence of individuals looks to a permanent place of abode in New Zealand or personal presence in New Zealand for certain predetermined periods per 12-month period. If the supplier is a non-New Zealand resident the place of supply of goods is deemed to be in New Zealand only if the goods are in New Zealand at the time of supply. However, if the non-New Zealand resident makes a supply to a registered person in New Zealand for use in a taxable activity it will be deemed to be supplied outside New Zealand unless the supplier and recipient agree otherwise. The supplier will therefore not be able to charge or recover value-added tax. As an alternative, the supplier can agree with the recipient and have the supply treated as if it was made in New Zealand. The supplier might then be required to register for value-added tax. If a non-New Zealand resident provides goods, which are in New Zealand at the time of supply, to a person in New Zealand for use outside of or partially outside of that person’s taxable activity, the non-New Zealand resident will be deemed to be making a supply in New Zealand.

Canada deems the place of supply of tangible personal property, by way of a sale, to be where the property is, or is to be delivered or made available to the recipient of the supply. The place of supply of tangible personal property, otherwise than by way of a sale, is deemed to be where possession or use of the property is given or made available to the recipient of the property. The place of supply of intangible personal property is deemed to be in Canada if the property may be used in whole or in part in Canada; or if the property relates to real property situated in Canada, to tangible personal property ordinarily situated in Canada or to a service to be performed in Canada. The place of supply of intangible personal property is deemed to be outside Canada if the property may not be used in Canada; or if the property relates to real property situated outside Canada, to tangible personal property ordinarily situated outside Canada or to a service to be performed wholly
outside Canada. The place of supply of real property or a service in relation to real property is deemed to be where the real property is situated.

The European Union deems the place of supply of goods dispatched or transported either by the supplier or by the person to whom they are supplied or by a third person to be where the goods are at the time when the dispatch or transport to the person to whom the goods are supplied begins. The place of supply of goods installed or assembled by or on behalf of the supplier is deemed to be where the goods are installed or assembled. The place of supply of goods not dispatched or transported is deemed to be where the goods are when the supply takes place. The place of supply of goods on board ships, aircraft or trains, in the case where the places of departure and destination are within the territory of the European Community, is deemed to be where the goods are at the time of departure of the transport.

The United Kingdom deems the place of supply of goods to be in the United Kingdom if the goods are physically located in the United Kingdom at the time of their supply. Otherwise, the place of supply is treated as outside the United Kingdom. As a consequence, even if a supply is made between two United Kingdom residents if the goods are located outside the United Kingdom at the time of supply, the supply may fall outside the scope of the United Kingdom’s value-added tax system. Goods sent out of the United Kingdom on consignment will be deemed to be supplied outside the United Kingdom if the goods are outside the United Kingdom at the time the transaction is adopted. Goods brought into the United Kingdom on consignment from outside the European Union will be subject to value-added tax on importation. If the goods are in the United Kingdom when the transaction is adopted and the supplier is the importer and is registered for value-added tax purposes, the adoption will again attract value-added tax, although the supplier will be entitled to claim an input tax deduction. If the supplier is not registered nor required to be, the adoption will not attract a further value-added tax charge. The supplier would then not be entitled to claim an input tax deduction on importation. Where the recipient is the importer and is registered for value-added tax purposes, he may claim the value-added tax paid on importation as an input tax deduction.

Italy deems the place where the goods are located at the time the supply takes place to be decisive in determining the place of supply. The time of supply of movable goods is, in principle, when the goods are placed at the disposal of the customer. The time of supply of transported goods, where the contractual terms are ex-works, is when the transport commences. If goods are located outside Italy at the time of supply, the supply is deemed to take place outside Italy and is not subject to tax in Italy, even if the transaction is concluded between two Italian residents. However, although goods bought outside Italy are not subject to Italian value-added tax, the subsequent importation into Italy is a taxable event and subject to Italian value-added tax. If goods are imported into Italy prior to the conclusion of the sale agreement the place of supply is deemed to be Italy.

The place of supply of goods is deemed to be in Greece if, at the time the tax obligation arises, the goods are in Greece or aboard a ship, aircraft or train and are sold to passengers during the part of the journey which takes place in Greece, provided the place of departure is Greece.

The place of supply of goods, which have been transported from a place outside Greece (and outside the European Union) to a place within Greece, is deemed to be in Greece. Supplies actually made
before importation are deemed not to take place in Greece. The place of supply of goods, which are
installed or assembled by or on behalf of the supplier, is the place where the goods are installed or
assembled. If a non-resident supplier installs goods at his customer’s premises in Greece, the non-
resident will have to register for value-added tax purposes in Greece and Greek value-added tax is
due on these services.

In Belgium, the place of supply of goods is, in principle, the place where the goods are placed at the
disposal of the purchaser. In the case where the goods are transported the place of supply of the
goods is where the transportation to the customer begins. Belgium deems the place of supply to be
where the goods are actually located when the legal supply to the purchaser takes place. The place
of supply of goods, which are installed or assembled by or on behalf of the supplier, is the place
where the goods are installed or assembled. The place of supply of goods dispatched or transported
by or on behalf of the supplier to a non-taxable person in Belgium is the place where the goods are
located when the dispatch or transportation ends. This has the effect that the foreign distance seller
or supplier, supplying goods in Belgium must register for value-added tax in Belgium. Any person
who has acquired goods abroad or has had such goods processed for his own account shall be
deemed to have imported those goods unless he can submit prove to the contrary.

Germany deems the place of supply of goods generally to be where the goods are situated at the
time the right to dispose of them is transferred or where the supply of the goods requires
transportation, the place from where the goods are transported or dispatched. In the case of
supplies from outside the European Union the place of supply is deemed to be in the foreign
country, provided that the supplier is not subject to German value-added tax on importation. The
place of supply of goods, which are installed or assembled by or on behalf of the supplier, is deemed
to be where the goods are installed or assembled. The installation of goods by a non-resident
supplier at his customer’s premises in Germany is subject to German value-added tax. The non-
resident business is, however, not required to register for value-added tax purposes, since the
German customer accounts for the value-added tax.

France deems the place of supply of goods, which are transported or dispatched, in principle, to be
where the goods are located when the goods are transported or dispatched. If a supply of goods is
made by or on behalf of an importer the place of supply is deemed to be France. This will be the
case where a taxable person transports goods from a foreign country (outside the European Union)
and delivers these goods to his customer in France. The assumption is that the importer transfers
title to these goods whilst they are situated in France. The place of supply of goods, which are not
dispatched or transported, is deemed to be in France if the goods are physically situated in France
when ownership is transferred. If a seller, established in France, sells goods located abroad to a
purchaser established in France, or abroad, no tax is due. This will also be the case if the goods are
physically in France but are sold before they are released from customs. The place of supply of
goods subject to assembly or installation in France is deemed to be in France, provided the
ownership was not transferred when the goods were still physically situated abroad.

11.4 Definition of Services

Most countries define services as anything, which is neither goods nor money but done for a
consideration. France deems services to include also, in particular, the sale or leasing of movable
intangible property (such as business goodwill, patent rights, trademarks and similar industrial property rights) and obligations to refrain from an act or to tolerate a situation. However, New Zealand case law suggests that for an activity to be a service it must benefit the recipient in some way.

The supply of services generally includes the granting, assignment or surrender of the whole or part of any right, which is done for a consideration. Services usually consist of the obligation to perform or refrain from performing acts or the granting of permission to perform acts. Italy, however, excludes from services specifically, amongst others, the transfer, licensing or sublicensing of copyrights by the author or his heirs.

Most European Union countries treat the supply of personalised or bespoke software as a supply of services. New Zealand treats computer programs and software as intellectual property and consequently services.

In Greece, in certain instances, breach of contract payments may also be subject to value-added tax since the payment is made not only to cover the damages but also is made in relation to an agreement not to bring the case to court.

In most countries intangible services include the transfer and conferring of copyright, patent rights, license rights, advertising services and services rendered by advisers, engineers, consultants, lawyers, auditors and the like and telecommunication services. Intangible services also include banking, financial and insurance (including reinsurance) services, generally to the exception of safety deposit boxes, and the provision of personnel. The processing and provision of information, and mediation of all the above services, if done by an intermediary acting on behalf of and for account of some other party are also regarded as intangible services.

Telecommunication services are generally defined as the transmission, emission or reception of data, signals, sounds and images by electronic means, wire, radio, optical or other electromagnetic systems. Telecommunication services include telephone, facsimile and telegraphic services, call and call-back services, telephone cards, as well as e-mail and access to and use of electronic databases, such as the Internet.

The European Commission has opted to treat the supply of virtual goods as a service.

### 11.5 Place of Supply of Services

New Zealand deems the place of supply of services, if the supplier is not resident in New Zealand, to be in New Zealand only if the services are physically performed in New Zealand. The converse, as applicable to goods, also applies in respect of services. If a non-New Zealand resident provides services, which are physically performed in New Zealand, to a person in New Zealand for use outside of or partially outside of that person’s taxable activity, the non-New Zealand resident will be deemed to be making a supply of services in New Zealand.

In Canada, the place of supply of a prescribed service can be deemed to be in or outside Canada. Canada deems the place of supply of any other service to be in Canada if the service is, or is to be,
performed in whole or in part in Canada. The place of supply of any other service is deemed to be outside Canada if the service is, or is to be, performed wholly outside Canada.

The general place of service rule in the European Union deems the place of a service to be where the supplier has established his business or has a fixed establishment from which the service is supplied. In the absence of a place of business or fixed establishment, the place of supply is deemed where the supplier has his permanent address or usually resides. In the United Kingdom, the place of supply of services is generally deemed to be in the United Kingdom if the supplier belongs in the United Kingdom. A business normally belongs in the United Kingdom if it has a business establishment or some other fixed establishment there and that establishment is the one most concerned with the supply. Belonging in a country is not necessarily equivalent to being resident in a country. A person carrying on a business through an agency or branch in the United Kingdom is treated as having a business or fixed establishment in the United Kingdom. In certain instances, a registered office in the United Kingdom can also create a fixed establishment for value-added tax purposes.

European Union countries generally deem the place of supply of telecommunication services rendered by non-European Union suppliers to taxable persons, established in a European Union country, to be in the European Union country. The customer must then account for value-added tax under the reverse charge mechanism. Where non-European Union suppliers render telecommunication services to non-taxable persons in a European Union country the suppliers must register for value-added tax purposes in that European Union country. Where European Union suppliers render telecommunication services to taxable persons established in the European Union or to persons outside the European Union, the services are deemed to be supplied where the recipients are established or reside. Where European Union suppliers render telecommunication services to non-taxable persons in another European Union country, the services are deemed to be supplied where the suppliers are established.

Canada deems the place of supply of making telecommunication facilities available to be in Canada if the facilities or any part thereof are located in Canada. The place of supply is also deemed to be in Canada if the telecommunication is emitted and received in Canada, or the telecommunication is emitted or received in Canada and the invoicing is done in Canada.

Countries in the European Union generally deem the place of supply of intangible services, in principle, to be where the customer has his business or fixed establishment, or in the absence thereof, his country of residence or customary abode. However, where the customer is a non-taxable person in another European Union country, the place of supply is deemed to be in the country of residence or establishment of the supplier. The customer must reverse charge if the customer is a taxable person in another Member State. If these services are supplied to non-taxable persons in Member States, they are taxed in the country where the service provider is established or has a permanent establishment. If the customer is established outside the European Union, the services are taxed where the customer is established and effective use and enjoyment of the service takes place, irrespective of his identity. If the customer is a non-taxable person or a taxable person without a right to recover the value-added tax, suppliers who are established outside of the European Union must register in the European Union and appoint a value-added tax representative.
Most countries deem the place of supply of services connected with immovable property to be where the property is physically situated. Such services would include the services of estate agents and experts and services for preparing and co-ordinating construction works, such as the services of architects and of firms providing on-site supervision. Services in connection with a specific immovable property that can be supplied on-line, such as constructional designs prepared by an architect or engineer, are therefore taxed in the country where the immovable property is or will be situated. If such services are supplied to an entrepreneur, the tax levy is transferred to that entrepreneur. If no link exists between the services and a specific immovable property, the services are regarded as the transfer of copyright or as engineering or similar services.

Countries in the European Union generally deem the place of supply of cultural, artistic, sporting, scientific, educational or entertainment services; services relating to exhibitions, conferences or meetings; and the valuation of, or work performed on, goods to be where the supplies are physically carried out. The United Kingdom shifts the place of supply of valuation, repair, etc. of movable goods to the place of belonging of the customer if the customer is registered for value-added tax in another Member State and the goods in question leave the Member State where the service was physically performed.

Countries in the European Union generally deem the place of supply of leasing of means of transportation to be where the vehicle is actually utilised.
CHAPTER IV

THE SOUTH AFRICAN VALUE-ADDED TAX SYSTEM

1 Introduction

The objective of this chapter is to analyse the provisions of the South African value-added tax system. The various concepts and definitions, specifically where they might relate to cross-border transactions, are dealt with in detail.

South African introduced a value-added tax system in September 1991. The South African value-added tax system was, in the main, an adoption of the New Zealand value-added tax system, when first introduced. The South African revenue authorities gradually amended the value-added tax legislation to address uncertainty and problems experienced in applying the legislation.

These amendments (covering some nine years) could be categorised mainly into two categories, namely a drive to broaden the base of the South African value-added tax system and secondly, to increase legislative and interpretative certainty. The first category deals fundamentally with the narrowing of the exemptions in respect of financial services. The latter category deals with various interpretative issues, amongst others, zero-rating provisions, place and value of supplies, fixed property and cross-border transactions.

This chapter concerns itself with the second category, namely legislative and interpretative certainty. The chapter analyses specifically the South African value-added tax provisions regarding cross-border transactions.

2 The South African Value-added Tax System

South Africa operates a destination-based value-added tax system, levied on all or almost all the stages of the production and consumption chains. The tax is levied at the standard rate (currently 14%) on the domestic consumption of goods and services, which include final consumption of imported goods and services. The import in itself, and not the nature nor the locality of the supplier, gives rise to the taxability. Imports are subject to value-added tax irrespective of whether the importer is registered for value-added tax. (Huxham & Haupt, 1995:545-547)

Exports are zero-rated in terms of section 11 of the Value-Added Tax Act, 1991 (the Act), thereby freeing exports (or non-South African consumption) from tax and following the destination principle.

The South African value-added tax is of the consumption type, i.e. full and immediate input tax deductions are in general allowed in respect of capital expenditure.

The tax is determined on the credit-invoice method, i.e. calculated on the difference between the tax on sales and the tax on purchases, substantiated by valid tax invoices. This feature enhances the tax’ neutrality. (Cnossen, 1987:425)
The South African value-added tax system levies value-added tax on four broad categories of taxable events, namely:

- Supplies of goods or services by a vendor in the course or furtherance of any enterprise;
- The importation of goods into South Africa;
- The supply of imported services into South Africa; and
- Certain deemed supplies.

The four categories of taxable events will be discussed below.

3 Supplies of Goods or Services by a Vendor in the Course or Furtherance of Any Enterprise

3.1 Introduction

The charging section, or section 7(1)(a), of the Act levies tax:

"on the supply by any vendor of goods or services supplied by him...in the course or furtherance of any enterprise carried on by him...calculated at the rate of 14 per cent on the value of the supply..."

It follows that for a transaction to be subject to value-added tax under the charging section, the following requirements must be met:

- A supply;
- By a vendor;
- Of goods or services;
- In the course or furtherance of any enterprise

The requirements of section 7(1)(a) of the Act will be discussed below.

3.2 Supply

The definition of "supply" is broadly stated and is an integral part of the imposition of value-added tax. The term "supply" is defined in section 1 of the Act as including:

"performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of 'supply' shall be construed accordingly"

The Oxford Dictionary defines supply to include "furnish" or "provide". It follows that the word supply, for value-added tax purposes, has a wide meaning and includes any provision of goods or services by a vendor in the course of his enterprise (or business). (Deloitte & Touche, 1997:15)
Only supplies made in terms of the charging section or supplies subject to the zero-rating provisions of the Act constitute taxable supplies. Section 1 of Act defines “taxable supply” as:

“...any supply of goods or services which is chargeable with tax under the provisions of section 7 (1) (a), including tax chargeable at the rate of zero per cent under section 11’’;

Due to the vagueness of the definition of “supply”, De Koker & Jenkinson (2000:Chapter 5, Introduction) examined various decisions of the New Zealand and United Kingdom courts to interpret the term “supply”, and drew the following general conclusions:

- “supply” in its ordinary and natural sense means to furnish or to serve;
- This appears to indicate that there are two parties to a supply transaction, the person who furnishes or serves goods or services and the person whom receives them. It seems clear that a person cannot supply himself, unless the legislation deems otherwise;
- The supply of goods is the passing of possession in goods pursuant to an agreement in terms of which the supplier agrees to part with and the recipient agrees to take possession. By “possession” is meant in this context control over the goods, in the sense of having immediate facility for their use. This may or may not involve the physical removal of the goods;
- The supplier and the recipient of the goods must have agreed, to part with and to receive the goods, respectively. Goods supplied on consignment would not constitute a supply, as possession or ownership does not pass to the consignee;
- Although the definition of “supply” includes a sale, the supply need not necessarily be a sale;
- If a sale does occur and the contract is void, however, the supplier is still obliged to charge value-added tax;
- The sale of illegal items does not bar the imposition of value-added tax; and
- Where goods are stolen from an innocent owner the owner is not deemed to have made a supply to the thief. (De Koker & Jenkinson, 2000: Chapter 5, Introduction)

“Supply” includes sales, gifts, rental agreements, instalment credit agreements, financial leases and the provision of goods and services. It also extends to goods and services, which have been applied for the private use of the proprietor, the proprietor’s family or an employee subsequent to the acquisition for business purposes. Virtually any transaction constitutes a supply. (De Koker & Jenkinson, 2000: Chapter 5, Introduction)

### 3.3 Vendor

A supply is only subject to value-added tax if made by a vendor. Section 1 of the Act defines a “vendor” to be “any person who is or is required to be registered”.

Supplies made in the course or furtherance of an enterprise are subject to value-added tax. However, the person who conducts the enterprise is liable to account for value-added tax and not the enterprise. This concept is of importance when considering the registration threshold applicable in South Africa. All the taxable supplies made by a person are taken into account, even though they may be made in the course of different enterprises, in determining whether the person should be registered for value-added tax purposes. Once a person becomes liable to register, all of his
business activities or enterprises will be subject to value-added tax. (De Koker & Jenkinson, 2000: paragraph 4.3.1)

Section 1 of the Act defines "person" as including:

"...any public authority, any local authority, any company, any body of persons, (corporate or unincorporate), the estate of any deceased or insolvent person and any trust fund"

In terms of section 51(1), read with the definition of "person" in section 1 of the Act, a body of persons, corporate or unincorporate, other than a company, is treated as a person separate from its members, and should register for value-added tax purposes in respect of any enterprise activity carried on independently from its members. Where a partnership carries on an enterprise the partnership, and not the individual partners, is required to register as a vendor for value-added tax purposes.

However, a person only becomes liable to account for tax if the person makes supplies of goods or services in the course or furtherance of an enterprise and exceeds the registration requirements provided for in the Act. A vendor is, therefore, a person conducting an enterprise or enterprises in the course of which taxable supplies of goods or services exceed R300 000 per annum. Section 23 of the Act renders it compulsory for a person to register for value-added tax purposes who carries on any enterprise where the taxable supplies made by that person will exceed, or are reasonably expected to exceed R300 000 in any twelve consecutive months. However, a person can voluntarily register for value-added tax purposes if his turnover exceeds R20 000 per annum.

3.4 Goods or Services

3.4.1 Introduction

In terms of section 7(1)(a) of the Act, value-added tax is levied on supplies of goods and services made in the course or furtherance of an enterprise. Therefore, supplies which amount to neither a supply of goods nor of services, nor a deemed supply of goods or services, fall outside the scope of section of the Act and are not subject to value-added tax. (De Koker & Jenkinson, 2000: paragraph 4.2)

3.4.2 Goods

Section 1 of the Act defines "goods" very broadly as meaning "corporeal movable things, fixed property and any real right in any such thing or fixed property, but excluding:

(a) money;
(b) any right under a mortgage bond or pledge of any such thing or fixed property; and
(c) any stamp, form or card which has a money value and has been sold or issued by the State for the payment of any tax or duty levied under any Act of Parliament, except when subsequent to its original sale or issue it is disposed of or imported as a collector's piece or investment article"
The word "corporeal" contained in the term "corporeal movable things" is defined in the 'Shorter Oxford English Dictionary' as:

"Tangible; consisting of material objects" (De Koker & Jenkinson, 2000: paragraph 4.2.1)

Tangible things, which are material and movable, therefore constitute goods. Intangible things such as goodwill, trademarks and intellectual property do not fall within the definition of "goods" but may constitute "services". Any interest in or right to a share in the capital of a company or any interest in a close corporation constitutes a right rather than a tangible thing. The issue, allotment or transfer of ownership of shares (except for shares in a share block company) is supplies of financial services. (De Koker & Jenkinson, 2000: paragraph 4.2.1)

Section 1 of the Act defines "fixed property" as meaning:

"land (together with improvements affixed thereto), any unit as defined in...the Sectional Titles Act..., any share in a share block company which confers a right to or an interest in the use of immovable property, and, in relation to a property time-sharing scheme, any time-sharing interest as defined in...the Property Time-sharing Control Act...; and any real right in any such land, unit, share or time-sharing interest".

Also included in the definition of "goods" is "any real right in any such thing or fixed property". A real right, or jus in re, is an exclusive interest or benefit enjoyed by a person in a thing and is binding on all other persons and cannot legally be contested or nullified by any other person. (De Koker & Jenkinson, 2000: paragraph 4.2.1)

A real right, or jus in re, is an assured benefit in a thing, whereas a personal right, or jus in personam, is a personal right entitling a person to claim from another some thing or act. A personal right is merely a hope or spes of acquiring a benefit. (De Koker & Jenkinson, 2000: paragraph 4.2.1)

Tokens, vouchers or stamps (excluding postage stamps) issued for commercial purposes are also goods for value-added tax purposes. (De Koker & Jenkinson, 2000: paragraph 4.2.1)

Section 8(11) of the Act further deems:

"...a supply of the use or right to use or the grant of permission to use any goods (whether with or without a driver, pilot, crew or operator) under any rental agreement, instalment credit agreement, charter party, agreement for charter or any other agreement under which such use or permission to use is granted..." to be a supply of goods.

Goods therefore specifically include fixed property, tangible goods, any real rights in corporeal movable things or fixed property and the right or permission of use under a rental agreement, instalment credit agreement, charter party, agreement for charter or any other agreement under which such use or permission to use is granted. Goods specifically exclude money, rights under a mortgage bond or pledge of anything (being goods as defined) or fixed property and stamps, forms or cards with a monetary value that has been sold by the State as a means to pay tax or duty (except for collector's items).
3.4.3 Services

Deloitte & Touche (1997:18) submits that virtually any type of economic activity, which is not a supply of "goods", could potentially be a supply of "services".

Section 1 of the Act defines "services" as meaning:

"... anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods, money or any stamp, form or card contemplated in paragraph (c) of the definition of 'goods'"

The term "services" includes commercial or professional services, services of clubs, organisers of entertainment, cultural or sporting events, certain services of local authorities, certain services of public authorities, and also dealings in intellectual property rights. (De Koker & Jenkinson, 2000: paragraph 4.2.2)

Although financial services fall within the definition of "services", these services are generally exempt from value-added tax in terms of section 12 read with section 2 of the Act. However, fee-based financial services are standard rated with effect from 1 October 1996, and exported financial services are zero-rated.

In terms of the Act "anything done or to be done" constitutes a service. Accordingly, certain transactions fall outside the scope of the Act, for example, fines levied by municipalities. (De Koker & Jenkinson, 2000: paragraph 4.2.2)

3.5 Course of Furtherance of Any Enterprise

3.5.1 Introduction

Only supplies entered into in the course of a vendor's enterprise, constitute taxable supplies. (Deloitte & Touche, 1997:18) Section 7(1)(a) of the Act provides specifically that value-added tax must be levied on:

"the supply by any vendor of goods or services...in the course or furtherance of any enterprise carried on by him"

Unless a vendor carries on an enterprise, and makes supplies in the course or furtherance of that enterprise, he may not register and account for output tax or claim input tax deductions in respect of expenses incurred. It follows that value-added tax is not levied on supplies made outside the course or furtherance of an enterprise.

De Koker & Jenkinson (2000:paragraph 4.4) argues that it appears that where there is a perceivable relationship between a supply and the activities of the enterprise, the supply will be deemed to be made in the course or furtherance of that enterprise. The New Zealand courts have stated the following, regarding the phrase "in the course of furtherance of a taxable activity", which is the New
Zealand equivalent of an enterprise, per Bathgate, DJ:

"...it is a question of fact and degree as to whether a supply is in the course of furtherance of a taxable activity carried on by the person concerned. There must obviously be a discernible relationship between the supply and the activity in the form of a nexus for the supply to be in the course or furtherance of the activity"

A supply can only be charged with value-added tax if it is made in the course or furtherance of a taxable activity. While the phrase is not defined in the New Zealand legislation, as is the case in South Africa, it appears to cover any supplies made in connection with a taxable activity. The New Zealand courts have also held that an activity can be in the furtherance of a taxable activity even though it is not in the course of the taxable activity. Bathgate DJ expressed this view as follows:

"...An act done for the purpose or object of furthering the taxable activity, or achieving its goal, can be to help, achieve, or advance, and thus a 'furtherance' of a taxable activity, although it may not necessarily be always in the course of that taxable activity" (De Koker & Jenkinson, 2000: paragraph 4.4)

The South African value-added tax legislation, in section 1 of the Act defines "enterprise" comprehensively, firstly, by way of a general provision and, secondly, by way of specific inclusions and exclusions. The general definition of "enterprise" will be discussed below.

3.5.2 General Definition of Enterprise

Paragraph (a) of the definition of "enterprise" in section 1 of the Act contains the general definition of what will constitute an enterprise for South African value-added tax purposes, and provides as follows:

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

It follows from the general definition that in order to constitute an "enterprise", five requirements must be met, namely:

- any "enterprise or activity"
- carried on "continuously or regularly by any person"
- "in the Republic or partly in the Republic"
- "in the course of which goods or services are supplied to any other person"
- "for a consideration, whether or not for profit"

The first three and primary requirements of the general definition of "enterprise" will be discussed below.
3.5.3 Enterprise or Activity

The first, and primary defining requirement of an "enterprise", is that an enterprise or activity must be present.

De Koker & Jenkinson (2000:paragraph 4.4.1) mentions that the United Kingdom legislation does not refer to the term enterprise nor taxable activity, but that the term "business" embodies substantially the same meaning. These terms are all critical to the concept of value-added tax, as only vendors operating an "enterprise" (South Africa), "taxable activity" (New Zealand) or "business" (United Kingdom) are entitled to register, account for output tax and claim input tax deductions. The South African and New Zealand concepts are significantly wider than that of the United Kingdom, which only imposes value-added tax on supplies made in the course of conducting a business. Although the South African and New Zealand definitions include the activities of a business, they are not limited to such activities.

According to De Koker & Jenkinson (2000:paragraph 4.4.1) the United Kingdom Courts and Tribunals have consistently declined to state any definitive test to decide whether or not a business is carried on. However, the courts have established a number of factors, which should be considered, namely, whether or not the activity:

- Amounts to a serious undertaking earnestly pursued or a serious occupation, not necessarily confined to commercial undertakings;
- Is an occupation or function actively pursued with reasonable or recognisable continuity;
- Has a certain measure of substance, as measured by the value of taxable supplies;
- Is properly organised in a regular manner, using recognised business principles;
- Is mainly concerned with the making of supplies to customers for a consideration; and
- Involves the making of taxable supplies, which are commonly made by others with a view to making a profit. (De Koker & Jenkinson, 2000: paragraph 4.4.1)

Although important, these factors are not in themselves conclusive as to the existence of a business. The activity and its nature must be examined in its entirety to establish whether a business has been conducted. (De Koker & Jenkinson, 2000: paragraph 4.4.1)

3.5.4 Continuously or Regularly by Any Person

The second requirement of the definition of "enterprise" is that the enterprise or activity must be carried on "continuously or regularly by any person".

Although the South African legislation encompasses a wide spectrum of activities in the definition of enterprise, the Act does not clarify what constitutes an enterprise or activity, which is carried on "continuously or regularly".
However, the New Zealand Taxation Review Authority, in Case N27 (1991) 13 NZTC 3, 229, held the word “continuously” to be meaning:

“the activity has not ceased in a permanent sense, or has not been interrupted in a significant way” (CCH New Zealand Limited, 1998:21-200)

The New Zealand Taxation Review Authority interpreted, per Bathgate DCJ at p.3, 239, the word “regularly” as embodying:

“a 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” (CCH New Zealand Limited, 1998:21-200)

De Koker & Jenkinson (2000:paragraph 4.4.1) submits that the two words should be interpreted to be complementary where “regularly” is concerned with repeated actions and “continuously” with an ongoing assignment or assignments.

The definition of “enterprise” requires that “any person” must carry on the enterprise or activity. The Act includes in person more than only natural and juristic persons. Section 1 of the Act defines “person” as including:

“...any public authority, any local authority, any company, any body of persons (corporate or unincorporate), the estate of any deceased or insolvent person and any trust fund”

The requirement to register for value-added tax purposes if a person is conducting an enterprise and the registration threshold is met is not dependent on the supplier’s place of residence. It follows that foreigners are obliged to register as vendors in the Republic if they conduct an enterprise in, or partly in, the Republic, irrespective of whether they are residents of South Africa. (Deloitte & Touche, 2000:18)

3.5.5 In the Republic or Partly in the Republic

The South African value-added tax net is wider than most other value-added tax systems in the sense that, potentially, supplies made anywhere in the world can attract South African value-added tax if made in or partly in South Africa. (Deloitte & Touche, 1997:18)

Value-added tax is only levied on supplies made by a person who conducts an enterprise, continuously or regularly, “in the Republic or partly in the Republic”. The place of supply is thus indirectly woven into section 7(1)(a) of the Act (the charging section) by means of the definition of “enterprise”. (De Koker & Jenkinson, 2000: paragraph 4.4.1)

Section 1 of the Act defines the “Republic” in the geographical sense and determines that “Republic” means:

“...the territory of the Republic of South Africa and includes the territorial waters, the contiguous zone and the continental shelf referred to respectively in...the Maritime Zones Act, 1994...”
The territorial waters is an area extending for 12 nautical miles from the low-water mark, and the contiguous zone is the area beyond the territorial waters and extends for 24 nautical miles from the low-water mark. (Deloitte & Touche, 1997:19)

The Republic includes the nine provinces, the Prince Edward Islands and the former independent TBVC states of Transkei, Bophuthatswana, Venda, and Ciskei, which now form part of the national territory of the Republic. (De Koker & Jenkinson, 2000:paragraph 4.4.1)

3.5.6 Specific Inclusions in the Definition of Enterprise

In addition to the general definition of "enterprise" in section 1 of the Act, the definition also provides for certain specific inclusions.

Certain vendors are, in addition to the general definition of the term "enterprise", deemed to be conducting an enterprise. These vendors include public authorities; local authorities; welfare organisations and share block companies.

The definition of "enterprise" in section 1 of the Act also specifically includes as enterprise activities, in certain instances, telecommunication services and underwriting insurance business by Underwriting Members of Lloyd's of London. These two specific inclusions will be discussed below.

3.5.7 Telecommunication Services

The supply on a continuous or regular basis of telecommunication services utilised in South Africa is deemed to constitute an enterprise of the supplier, even where the supplier is not resident and has no permanent establishment or place of business in South Africa. As a consequence, all telecommunication service providers are required to register and levy tax on their services, if the value of the services supplied and utilised in South Africa exceeds the registration threshold of R300 000 per annum. Section 1 of the Act includes in paragraph (b)(iv) of the definition of "enterprise":

"the activities of any person who continuously or regularly supplies telecommunication services to any person who utilizes such services in the Republic"

The "Explanatory Memorandum on the Taxation Laws Amendment Bill, 1997" mentioned that, although imported telecommunication services are covered by the general requirements for imported services, tax is seldom paid by the person using the services other than for making taxable supplies. Since imported telecommunication services are used on a large scale, the provision aims to be an alternative method of subjecting the services to tax. De Koker & Jenkinson (2000:paragraph 4.4.2) submits that although the main target of the provision is the so-called call-back operators, the lack of a definition of "telecommunication services" renders the effect of the amendment much wider.

The telecommunication services inclusion in the definition of "enterprise" in section 1 of the Act has not yet been promulgated.
3.5.8 Underwriting Insurance Business by Underwriting Members of Lloyd’s of London

The reference to an “enterprise...carried on...partly in the Republic” led to the specific exclusion in paragraph (vi) of the proviso to the definition of “enterprise” (section 1 of the Act) of the activity of underwriting insurance business by Underwriting Members of Lloyd’s of London. (De Koker & Jenkinson, 2000: paragraph 4.4.1)

However, paragraph (vi) of the proviso to the definition of “enterprise” (section 1 of the Act) has been amended with effect from 1 January 2001 to include in the definition of “enterprise”:

“the activity of underwriting insurance business by Underwriting Members of Lloyd’s of London, to the extent that contracts of insurance are concluded in the Republic, shall be deemed to be the carrying on of an enterprise...”

3.5.9 Specific Exclusions from the Definition of Enterprise

The definition of “enterprise” in section 1 of the Act is extremely broad and is intended to be all encompassing. The definition does, however, make specific provision for the exclusion of certain activities, which would otherwise fall within the definition, for example:

- The rendering of services as employee, to the extent that the employee receives remuneration;
- Exempt supplies; and
- Goods and services supplied outside the Republic by a separately identifiable branch or main business of a South African concern, permanently located at premises outside the Republic, which maintains a separate, independent accounting system.

Supplies outside South Africa from a branch or main business located outside South Africa will be discussed in more detail below.

3.5.10 Supplies Outside South Africa from a Branch or Main Business

A supply outside the Republic of goods or services from a branch or main business permanently located outside the Republic is deemed not to be effected in the course or furtherance of an enterprise, provided certain conditions are met. Paragraph (ii) of the proviso to the definition of “enterprise” (section 1 of the Act) specifically excludes from the definition of “enterprise”:

“the supply outside the Republic of goods or services by any concern from any branch or main business thereof where such branch or main business is permanently located at premises outside the Republic, if—

(aa) the branch or main business can be separately identified; and
(bb) an independent system of accounting is maintained by the concern in respect of the branch or main business”
It follows that the supply of goods or services by an “independent” foreign branch located outside the Republic does not constitute a taxable supply, since the foreign branch is not conducting an enterprise in South Africa. (De Koker & Jenkinson, 2000: paragraph 4.4.3)

However, the transfer of goods or provision of services to an “independent” foreign branch is generally deemed to be a supply for value-added tax purposes. Section 8(9) of the Act provides that:

"... where any vendor in carrying on an enterprise in the Republic transfers goods or provides any service to or for the purposes of his branch or main business in respect of which the provisions of paragraph (ii) of the proviso to the definition of "enterprise" in section 1 are applicable, the vendor shall be deemed to supply such goods or service in the course or furtherance of his enterprise"

However, the transfer of goods or provision of services to an “independent” foreign branch is generally zero-rated for value-added tax purposes. Section 11(2)(o) of the Act provides that:

"...(w)here, but for this section, a supply of services would be charged with tax at the rate referred to in section 7 (1), such supply of services shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where...the services are supplied, as contemplated in section 8 (9), by a vendor to or for the purposes of his branch or main business situated in an export country in respect of which the provisions of paragraph (ii) of the proviso to the definition of "enterprise" in section 1 are applicable"

4 Importation of Goods into South Africa

The importation of goods into South Africa is a taxable event, irrespective of whether the importer is registered for value-added tax purposes or the nature of the goods or the intended use of the goods.

Section 7(1)(b) of the Act levies value-added tax on:

"...on the importation of any goods into the Republic by any person...calculated at the rate of 14 per cent on the value of the ...importation..."

However, only a registered vendor can claim input tax deductions incurred on the importation of goods into South Africa.

In terms of section 13(1) of the Act only goods which are entered for home consumption in terms of the Customs and Excise Act are deemed to be imported and subject to value-added tax on importation. Where goods have been imported and entered into a licensed Customs and Excise warehouse (a bonded warehouse) but have not been entered for home consumption, value-added tax is payable only when the goods are removed from bond.
5 Importation of Services into South Africa

Section 7(1)(c) of the Act levies value-added tax “on the supply of any imported services by any person...calculated at the rate of 14 per cent on the value of ... the importation...”

Section 1 of the Act defines “imported services” as:

“...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 utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies.”

“Imported services” contains the following components:

- A supply of services made;
- By a supplier who is resident or carries on business outside South Africa;
- To a recipient who is resident of South Africa;
- To the extent that such services are utilised or consumed in South Africa otherwise than for the making of taxable supplies.

Section 1 of the Act defines “resident of the Republic” as meaning:

“...a person (other than a company) who is ordinarily resident in the Republic or a company which is a domestic company 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”

Section 14(1) of the Act mandates that the recipient of imported services calculate the tax payable in terms of section 7(1)(c) of the Act and remit payment to the Commissioner for SARS within 30 days of the time of supply.

Section 14(5) of the Act exempts from tax on imported services the following:

- A supply which is chargeable with tax in terms of section 7(1)(a);
- A supply which, if made in the Republic, would be zero-rated in terms of section 11; or
- A supply which, if made in the Republic, would be exempt in terms of section 12.

Thus, if a supplier outside the Republic provides services to a Resident in the Republic which is chargeable under section 7(1)(a) of the Act or would have been subject to the zero rate or exempt if provided in the Republic, the tax in terms of section 7(1)(c) of the Act does not become payable.

Section 7(1)(c) read with the definition of “imported services” in section 1 of the Act serves as South Africa’s reverse charge mechanism. In theory, the reverse charge mechanism ensures tax neutrality between domestic supplies and supplies made by suppliers who are not carrying on a business in South Africa or who are not resident in South Africa.
The effect of section 7(1)(c) of the Act is that all individuals (not being vendors for value-added tax purposes in South Africa) and vendors that import services to make non-taxable supplies should reverse charge for value-added tax purposes and account for output tax to the revenue authorities. These provisions would therefore also subject registered value-added tax vendors to tax on services imported to the extent that these services are utilised or consumed otherwise than for the purpose of making taxable supplies. An example would include the importation of services by a financial institution (such as a bank or long term insurer) to make exempt supplies.

6 Deemed Supplies

Although certain supplies do not ordinarily fall within the ambit of the definition of "supply", certain deeming provisions widen the scope of the term "supply". The deeming provisions include:

- Goods sold in satisfaction of a debt are deemed to be supplied in the course of an enterprise;
- Goods or rights held on cessation of an enterprise is deemed to be supplied in the course of an enterprise immediately before cessation;
- Where credit is granted at a place other than the credit grantor’s normal place of business and the agreement of sale is subject to a cooling-off period of 5 working days, the supplier is deemed not to have made a supply of goods or services until the expiry of the five working day period;
- Where an agreement has been entered into in terms of which the purchaser will not receive the goods until the purchase price has been paid, partly or in full, no supply is deemed to have occurred until the goods are delivered;
- Where a public or local authority pays a vendor, or another person on behalf of the vendor, an amount in respect of taxable supplies made by that vendor to any person, a service will be deemed to have been supplied to the authority concerned;
- Where a local authority does not levy a separate charge for supplies of electricity, gas or water; or drainage, sewage or garbage removal or disposal services; or goods or services incidental to or necessary for the mentioned supplies, the value of the deemed supply is the full amount of the rates on the value of the fixed property;
- Regional service councils and joint service boards are deemed to make taxable supplies to the extent of levies received;
- The disposal of an enterprise as a going concern, or a part thereof which is capable of separate operation, is deemed to be a supply of goods;
- Where a vendor incurs a loss in the course of carrying on an enterprise and receives an indemnity payment under a contract of insurance, the payment is deemed to be a supply of services performed by the recipient;
- Where a creditor repossesses goods, previously supplied under an instalment credit agreement, from a defaulting debtor, the debtor is deemed to have made a supply of goods to the creditor. The debtor must account for output tax if he is a vendor and the goods constituted assets of his enterprise. The creditor may claim an input tax deduction;
- Where a person places a bet on the outcome of a race or event, the person accepting the bet is deemed to supply a service to the person placing the bet. The person accepting the bet is allowed to make an input tax deduction calculated on the amount of the prize or winnings;
• Where a single supply consists of more than one element and if separate considerations had been payable, some of the elements would have been charged at the standard rate, whilst others would have been charged at the zero rate, each element is deemed a separate supply;
• Where a vendor originally acquired goods or services to make partially taxable supplies, any subsequent supply by him of the goods or services is deemed to be made wholly in the course of his enterprise. The vendor will, however, be entitled to a partial input tax deduction equal to the portion of tax paid on original acquisition that did not qualify for deduction, when the goods or services are supplied. (De Koker & Jenkinson, 2000: paragraph 5.1)

Section 18(3) of the Act also deems fringe benefits granted by a registered vendor (the employer), subject to certain exceptions, to be a supply of goods and services made by him in the course of his enterprise.

In terms of section 54 (2A) of the Act an agent acting on behalf of a non-resident principal, who is not a vendor, is entitled to claim an input tax deduction in respect of value-added tax paid on importation on behalf of the principal. In terms of section 8(20) of the Act the agent is deemed to make a supply of the imported goods to the principal’s customer in South Africa.

7 Summary

South Africa introduced a value-added tax system in September 1991 largely based on the New Zealand value-added tax system. South Africa operates a destination-based value-added tax system, levied on all or almost all the stages in the production and consumption chains. Exports are zero-rated which frees non-South African consumption from tax. The South African value-added tax system levies value-added tax on supplies of goods or services by a vendor in the course or furtherance of his enterprise; on the importation of goods into South Africa; on the supply of imported services into South Africa; and on certain deemed supplies.

The charging section levies tax on goods or services supplied by a vendor in the course or furtherance of any enterprise. Supply is defined widely and forms an integral part of the imposition of the tax. Supplies include performance in terms of a sale, rental and instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of supply. However, for a supply to constitute a taxable supply the supply must either form part of the charging section or be zero-rated in terms of the zero-rating provisions.

New Zealand and United Kingdom courts interpreted supply as meaning to furnish or to serve. Two parties to a value-added transaction are generally required, namely the supplier and the recipient. A person cannot self-supply, unless allowed by legislation. The supply of goods is the passing of possession in goods pursuant to an agreement in terms of which the supplier agrees to part with and the recipient agrees to take possession. Possession implies control over the goods or having immediate facility for their use and does not require the physical removal of the goods. Although supply includes a sale, the supply need not necessarily be a sale. If a sale occurs and the contract is void the supplier is generally still obliged to levy value-added tax. The sale of illegal items also
does not bar the levying of value-added tax. Finally, the owner of stolen is not deemed to have made a supply to the thief.

A vendor includes any person who is registered or should be registered. Supplies made in the course or furtherance of an enterprise are subject to value-added tax. However, the person who conducts the enterprise is liable to account for value-added tax and not the enterprise. All the taxable supplies made by a person are taken into account, even though they may be in the course of different enterprises, in determining whether a person should be registered. Once a person becomes liable to register, all of his business activities or enterprises will be subject to the tax.

Person includes public or local authorities, companies, bodies of persons, estates of deceased or insolvent persons and trust funds. A body of persons, corporate or unincorporate, other than a company, is treated as a person separate from its members, and must register for value-added tax purposes in respect of any enterprise activity carried on independently from its members. Where a partnership carries on an enterprise the partnership, and not the individual partners, is required to register.

A vendor is a person conducting an enterprise in the course of which taxable supplies of goods or services are made, which exceed R300 000 per annum. It is compulsory for a person to register for value-added tax purposes if his taxable supplies will exceed, or are reasonably expected to exceed R300 000 in any twelve consecutive months. A person can also register voluntarily if his turnover exceeds R20 000 per annum.

Supplies which amount to neither a supply of goods nor of services, nor a deemed supply of goods or services fall outside the scope of the tax net and are not subject to tax. Goods are defined broadly as meaning corporeal movable things, fixed property and any real right in any such thing or fixed property. Fixed property includes land and improvements, sectional title units, shares in a share block company, which confers a right to, or an interest in the use of immovable property. Fixed property also includes property time-sharing interests and real rights in any land, units, and shares or time-sharing interests. However, goods specifically exclude money; rights under mortgage bonds or pledges of things or of fixed property. Goods also exclude stamps, forms or cards with a money value which have been sold or issued by the State for the payment of tax or duties, except when disposed of or imported as a collector’s piece or investment article. Intangible things such as goodwill, trademarks and intellectual property do not constitute goods, but may constitute services.

The supply of the use or right or permission to use goods under a rental or instalment credit agreement, charter party, agreement for charter or any other agreement under which such use or permission to use is granted is also regarded as a supply of goods.

Virtually any type of economic activity, which is not a supply of goods, could potentially be a supply of services. Services include 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.

Only supplies entered into in the course of a vendor’s enterprise can constitute taxable supplies. Unless a vendor carries on an enterprise, and makes supplies in the course or furtherance of that
enterprise, he may not register and account for output tax or claim input tax deductions in respect of expenses incurred. The New Zealand courts have held it to be a question of fact and degree whether a supply is in the course of furtherance of a taxable activity (New Zealand’s equivalent for enterprise) carried on by a person. There must be a nexus between the supply and the activity to be in the course or furtherance of the activity. Value-added tax can only be levied on a supply if made in the course or furtherance of a taxable activity. While the phrase “in the course or furtherance” is not defined in New Zealand, it appears to cover supplies made in connection with a taxable activity. The New Zealand courts have held that an act done for the purpose of furthering the taxable activity, or achieving its goal, can be to help, achieve, or advance, and thus be in the furtherance of a taxable activity, although not necessarily in the course of that taxable activity.

The South African value-added tax legislation defines enterprise comprehensively, firstly, by way of a general provision and, secondly, by way of specific inclusions and exclusions. The general definition provides that, in the case of a vendor (other than a local authority), any enterprise or 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 a consideration will be regarded as an enterprise. A profit motive is not a requirement. The term enterprise also includes any enterprises or activities carried on in the form of commercial, financial, industrial, mining, farming, fishing or professional concerns or other concerns of a continuing nature and in the form of associations or clubs.

The first and primary requirement of an enterprise is that an enterprise or activity must be present. Although the United Kingdom legislation does not refer to the term enterprise or taxable activity, the term “business” embodies substantially the same meaning. These terms are all critical to the concept of value-added tax, as only vendors operating an “enterprise” (South Africa), “taxable activity” (New Zealand) or “business” (United Kingdom) are entitled to register, account for output tax and claim input tax deductions. The South African and New Zealand concepts are significantly wider than that of the United Kingdom, which only imposes value-added tax on supplies made in the course of conducting a business. Although the South African and New Zealand definitions include the activities of a business, they are not limited to such activities.

The United Kingdom courts have not yet stated any definitive test to decide whether or not a business is carried on. The courts have, however, established a number of factors, which should be considered, namely, whether or not the activity amounts to a serious undertaking earnestly pursued or a serious occupation, not necessarily confined to commercial undertakings. Whether the activity is an occupation or function actively pursued with reasonable or recognisable continuity that has a certain measure of substance, as measured by the value of taxable supplies. Whether the activity is properly organised in a regular manner, using recognised business principles. Whether the activity is mainly concerned with the making of supplies to customers for a consideration and whether it involves the making of taxable supplies, commonly made by others with a view to profit. Although important, these factors are not in themselves conclusive as to the existence of a business. The activity and its nature must be examined in its entirety to establish whether a business is conducted.

The second requirement of the definition of enterprise is that the enterprise or activity must be carried on continuously or regularly. The South African legislation does not clarify what is regarded as continuously or regularly. The New Zealand Taxation Review Authority interpreted the
word continuously as an indication that the activity has not ceased in a permanent sense, or has not been interrupted in a significant way. New Zealand has also interpreted the word regularly to mean a 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 two words should probably be interpreted to be complementary where regularly is concerned with repeated actions and continuously with an ongoing assignment or assignments.

The requirement to register for value-added tax purposes, if a person is conducting an enterprise and the registration threshold is met, is not dependent on the supplier's place of residence. Foreigners are also obliged to register in South Africa if they conduct an enterprise in, or partly in, South Africa, irrespective of whether they are residents of South Africa. Value-added tax is only levied on supplies made by a person who conducts an enterprise, continuously or regularly, in or partly in South Africa. The place of supply is thus indirectly woven into the charging section by means of the definition of enterprise.

The definition of enterprise also provides for specific inclusions. Enterprise specifically includes in certain instances the provision of telecommunication services and underwriting insurance business by Underwriting Members of Lloyd's of London. The definition of enterprise was amended in 1997 to deem the suppliers of telecommunication services used in South Africa to be conducting an enterprise in South Africa. The amendment, although not promulgated yet, will also capture non-resident suppliers without permanent establishments or places of business in South Africa. As a result, all telecommunication service suppliers are required to register and levy tax on their services, if the services utilised in South Africa exceed R300 000 per annum.

The reference to an "enterprise...carried on...partly in the Republic" led to the specific exclusion of the activity of underwriting insurance business by Underwriting Members of Lloyd's of London. However, the definition of enterprise has been amended (effective 1 January 2001) to include the activity of underwriting insurance business by Underwriting Members of Lloyd's of London, to the extent that contracts of insurance are concluded in the Republic.

Although enterprise is defined extremely broad it does, however, exclude certain activities, which would otherwise fall in the definition. Examples include, employee services (for remuneration), and exempt supplies. A supply, in certain instances, outside South Africa of goods or services from a foreign branch or main business located outside South Africa is also deemed not to be in the course or furtherance of an enterprise. However, if a vendor in carrying on an enterprise in South Africa, transfers goods or provides services to or for the purposes of his branch or main business, he is deemed to supply the goods or service in the course or furtherance of his enterprise. The transfer of goods or provision of services to an independent foreign branch is generally zero-rated for value-added tax purposes.

The importation of goods into South Africa is also a taxable event, irrespective of the identity of the importer or the nature or intended use of the goods. Only goods entered for home consumption are deemed to be imported and subject to value-added tax. Goods imported and entered into a bonded warehouse, but not entered for home consumption, is not subject to value-added tax.
The supply of imported services is also subject to value-added tax. Imported services is a supply of services by a non-resident supplier or a supplier who carries on business outside South Africa to a resident recipient to the extent that the services are used in South Africa otherwise than for the purpose of making taxable supplies. A resident of South Africa is a person (other than a company) who is ordinarily resident in South Africa or a domestic company as defined for income tax purposes. Any other person or company shall be deemed to be a resident to the extent that the person or company carries on an enterprise or activity in South Africa and has a fixed or permanent place in South Africa relating to the enterprise or activity. Tax on imported services is not due if a supply is chargeable with tax under the charging section; or the supply, if made in South Africa, would have been zero-rated; or the supply, if made in South Africa, would have been exempt.

Certain deeming provisions widen the scope of the term supply. For instance, if a single supply consists of more than one element and if separate considerations had been payable, some of the elements would have been charged at the standard rate, whilst others would have been charged at the zero rate, each element is deemed a separate supply. Also, an agent acting on behalf of a non-resident principal, who is not a vendor, is entitled to claim an input tax deduction in respect of value-added tax paid on importation on behalf of the principal. The agent is deemed to make a supply of the imported goods to the principal’s customer in South Africa.
CHAPTER V
APPLICATION OF PLACE OF SUPPLY RULES IN SOUTH AFRICA

1 Introduction

The objective of this chapter is to analyse the current provisions of the South African value-added tax system with a view to critically assess the need for the implementation of place of supply rules in South Africa.

South Africa is one of the few countries, operating a value-added tax system, without specific place of supply rules. South Africa’s value-added tax system is to a large extent 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 legislation. Canada’s value-added tax system is also based on the New Zealand system, but Canada has adopted place of supply rules. Canada’s place of supply rules are not based entirely on that of New Zealand.

The primary reason for introducing place of supply rules should be to alleviate the current legislative uncertainty experienced by value-added tax consultants and commercial enterprises alike in interpreting the South African value-added tax provisions as it relates to cross-border transactions and foreign enterprises with some South African connection.

Due to the resource constraints experienced by the South African Revenue Service (SARS), any amendments to the current value-added tax system should be done in such a manner to rather alleviate the resource problem than to add to the administrative burden of SARS. The registration, for value-added tax purposes, of foreign enterprises not conducting a business in South Africa adds to the administrative burden of SARS and also to that of the foreign enterprise. Foreign enterprises should not necessarily be burdened with registration requirements, except where non-registration would lead to a loss of revenue to the fiscus.

As mentioned, South Africa does not have specific place of supply rules as do many other countries.

In the absence of place of supply rules South Africa relies mainly on its definitions of “enterprise” and “imported services” and the charging section, section 7(1)(a), of the Value-Added Tax Act, 1991 (the Act) to determine the place of supply of a transaction. As discussed in chapter IV, South Africa has a very extensive definition of “enterprise”, which potentially subjects all persons making taxable supplies in South Africa to register for value-added tax purposes (subject to the turnover requirements), irrespective of whether they are residents of South Africa or not.

This chapter discusses the place of supply rules proposed by the South African Fiscal Association (SAFA). Deloitte & Touche’s commentary on SAFA’s place of supply rules will also be discussed.

The chapter then proceeds with a discussion of the current legislative provisions relating to:

- Services physically rendered in South Africa by a foreign enterprise;
- The provision by a foreign enterprise of intangible services consumed in South Africa;
• Rights made available by a foreign enterprise and consumed in South Africa;
• Foreign telecommunication services used in South Africa;
• Underwriting insurance business by underwriting members of Lloyd’s of London;
• The importation of services into South Africa;
• The supply of goods in South Africa by a foreign enterprise;
• The importation of goods into South Africa by a foreign enterprise; and
• The exportation of goods from South Africa by a foreign enterprise.

with a view to assess whether the current provisions address the places of supply adequately and whether SAFA’s proposals or that of Deloitte & Touche could address any current uncertainties.

The proposed place of supply rules suggested by SAFA will be discussed immediately below.

2 South African Fiscal Association’s Proposed Place of Supply Rules

2.1 Introduction

Value-added tax practitioners in South Africa have often called for more definitive rules on the place of supply of goods and services in the South African value-added tax system. In light of the uncertainty, the South African Fiscal Association (SAFA) has set itself the target, through its Value-Added Tax Committee (the VAT Committee), to draft and put forward as a proposal to SARS, place of supply rules for South Africa. The VAT Committee appointed a working group to focus on the drafting of possible place of supply rules for South Africa.

The working group drafted an initial set of place of supply rules (see Annexure A). SAFA distributed the initial place of supply rules to the value-added tax divisions of the major auditing firms in South Africa, inviting their commentary. The working group also drafted a list of guiding questions (see Annexure D), to be used by the value-added tax practitioners as guide against which the proposed place of supply rules should be considered and evaluated.

The VAT Committee heard oral representations on the proposed place of supply rules and received written commentary from Deloitte & Touche (see Annexure C). The working group reconsidered their proposal on place of supply rules in light of the representations heard and the commentary received and re-drafted their proposed place of supply rules (see Annexure B).

The initial and second draft proposal on place of supply rules, and the Deloitte & Touche commentary thereon will be discussed below.

2.2 Proposed Place of Activity Rules

2.2.1 Introduction

The initial draft proposal on place of supply rules envisaged catering for the place of supply of goods and services made by residents of South Africa and non-residents. (See Annexure A)
SAFA adopted the approach of defining when an “activity”, as envisaged by the definition of “enterprise” in section 1 of the Act, is deemed to be carried on in or partly in South Africa. As a consequence SAFA refers to the proposed rules as place of activity rules. The effect of this approach is that the requirement of “continuously or regularly” would still remain as a separate requirement that must be met for a person to comply with the definition of “enterprise”. Although not clear, it would seem that the approach adopted also leaves the “enterprise” requirement as captured in the phrase “enterprise or activity” unchanged. Consequently, a person can be carrying on an “enterprise” per definition (section 1 of the Act) if he carries on an “enterprise” continuously or regularly and the other requirements of the definition are met.

The danger of the approach adopted by SAFA is that South African residents or non-residents can escape the registration (section 23 of the Act) and “enterprise” requirements if their activities are deemed not be carried on in or partly in South Africa. A further danger could be that, but for the proposed “activity” rule, a non-resident entity could have been deemed to be carrying on an “enterprise” in South Africa and would have been entitled to zero-rate certain of its supplies and claim input tax deductions in respect of its expenses incurred in South Africa. The adoption of the “activity” rule could in certain instances prevent registration of a non-resident entity in South Africa and deem all of its activities to be outside the South African value-added tax net, thereby denying the entity recourse to the favourable zero-rating provisions.

The place of activity rules draws a clear distinction between when an activity will be deemed to be carried on in or partly in South Africa in respect of goods and in respect of services.

### 2.2.2 Place of Activity of Goods

The proposal differentiates, in respect of goods, between sale agreements, agreements for the supply of real rights in movable goods, agreements for the supply of real rights in fixed property, instalment credit agreements and rental agreements.

An activity is deemed to be carried on in or partly in South Africa where a person supplies goods in terms of a sale agreement and the goods are situated in South Africa at the time the sale agreement is concluded. Goods located in a licensed customs and excise warehouse are specifically excluded. (Section 1(a) of the proposed place of activity rules, Annexure A)

An activity is deemed to be carried on in or partly in South Africa where a person supplies any real rights in movable goods in terms of an agreement and the goods are situated in South Africa at the time the agreement is concluded. (Section 1(b) of the proposed place of activity rules, Annexure A)

An activity is deemed to be carried on in or partly in South Africa where a person supplies any real rights in fixed property in terms of an agreement and the property is located in South Africa at the time the agreement is concluded. (Section 1(c) of the proposed place of activity rules, Annexure A)

An activity is deemed to be carried on in or partly in South Africa where a person supplies any goods in terms of an instalment credit agreement and the goods are situated in South Africa at the time the agreement is concluded. (Section 1(d) of the proposed place of activity rules, Annexure A)
An activity is deemed to be carried on in or partly in South Africa where a person supplies any goods in terms of a rental agreement and the goods are wholly or partly used in South Africa or the goods consist of a foreign going ship or foreign going aircraft which is operated by a resident of South Africa. (Section 1(e) of the proposed place of activity rules, Annexure A)

The first proviso to section 1 (Proposed place of activity rules, Annexure A) provides that section 1 will not apply in respect of goods which are exempt from tax on importation as envisaged in section 13(3) of the Act.

The second proviso to section 1 (Proposed place of activity rules, Annexure A) provides that a sale agreement, an instalment credit agreement and an agreement for the supply of a real right in movable goods or fixed property, shall be deemed to be concluded at the time when the last party to the agreement accepts the terms and conditions of the agreement.

2.2.3 Place of Activity of Services

The proposal differentiates, in respect of services, between services capable of being physically rendered or performed and services not capable of being physically rendered or performed.

An activity is deemed to be carried on in or partly in South Africa to the extent that a supplier or his agent physically renders or performs services in South Africa. (Section 2(a) of the proposed place of activity rules, Annexure A)

An activity is deemed to be carried on in or partly in South Africa to the extent that a supplier or his agent supplies services, not capable of being physically rendered, from a fixed or permanent place in South Africa from where a business is carried on by the supplier or his agent. (Section 2(a) of the proposed place of activity rules, Annexure A)

The proposal also provides that the Commissioner for SARS may, on request, deem any supply of services to be an activity carried on by any person to be supplies made in South Africa.

In terms of SAFA’s revised proposal of 20 September 2000 (see Annexure B), the proposed place of activity rules have been limited to apply only to persons who are not residents of South Africa. All references to persons have been amended to clearly indicate that the rules apply to non-residents of South Africa. The effect of this amendment is far reaching, in that residents of South Africa will no longer be affected by the place of activity rules. The amendment effectively narrows the scope of the place of activity rules considerably, especially given the wide definition of “resident of the Republic” in section 1 of the Act. The term “resident of the Republic” includes “any other person or any other company...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”. It is submitted that this amendment renders the proposed place of activity rules superfluous since it covers the activities of persons only that do not fall within the definition of “resident of the Republic” in section 1 of the Act. Since the proviso to the definition refers to “any enterprise or other activity”, it envisages that such a person comply with one of the requirements of the definition of “enterprise” and that only if you do not comply with that requirement will you be regarded as not being a resident of the Republic. The resultant effect, therefore, is that the
proposed place of activity rules dictates when a person’s activities will be deemed to be carried on in or partly in the Republic, with the knowledge that that person will not be conducting an enterprise in South Africa and hence will never be subject to value-added tax. It is submitted that this problem can be solved in or two manners. Firstly, the proviso to the definition of “resident of the Republic” should be amended to not refer to the carrying on of any enterprise or other activity. Should this route be followed, the place of activity rules should ensure reference to “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 phrased in the proviso to the definition of “resident of the Republic”. The second alternative would be to incorporate the proviso to the definition of “resident of the Republic” into the definition of “enterprise”.

The proposal has also been amended to make it clear that the rules in respect of services apply to suppliers or their agents acting for or on their behalf. This amendment ensures irrevocably that an agent acting on behalf of a principal can render such activity to be an activity of the principal to be carried on in or partly in South Africa.

Section 2(b) has been amended to refer to “fixed or permanent place of business in the RSA from where a business is carried on by the supplier or his agent”. This amendment was done to facilitate the use of income tax case law in interpreting value-added tax legislation.

2.3 Deloitte & Touche’s Commentary on SAFA’s Proposals

2.3.1 Introduction

Deloitte & Touche, on invitation of SAFA, submitted their commentary on the initial place of activity proposals on 31 July 2000. (see Annexure C)

Deloitte & Touche highlighted various examples of problems experienced in practice, which could possibly be solved by the introduction by place of supply rules. Deloitte & Touche also drafted specific commentary on the SAFA proposals and concluded with their own suggested place of supply rules. The examples, the detailed commentary and the conclusion will be discussed below.

2.3.2 Transactions that could Justify Place of Supply Rules

Deloitte & Touche identified certain transactions that could justify the introduction of place of supply rules in South Africa, namely:

- Movable goods made available outside South Africa by a foreign enterprise (who retains ownership) and subsequently imported by a person present in South Africa into South Africa. In terms of current interpretation, the foreign enterprise could be liable to register for value-added tax purposes in South Africa.

- Foreign enterprises granting the use of a right in South Africa. SARS’ view that foreign enterprises granting the right of use in South Africa of trademarks or intellectual property could be liable for registration, it would lead to the registration of many foreign enterprises in
South Africa. It was argued that this would not result in, necessarily, any material revenue gain to the fiscus, and would lead to an additional administrative burden to the fiscus and the foreign enterprise.

- Telecommunication services. The 1997 amendment seems to cater for the fact that most of the recipients of telecommunication services are not registered for value-added tax purposes. It was submitted that the amendment would seem to contradict, to some extent, the application of the reverse charge procedure provided for in section 7(1)(c) and the definition of “imported services” in section 1 of the Act.

- Underwriting insurance business by underwriting members of Lloyd’s of London. The recent amendment does not address the rest of the insurance industry’s value-added tax treatment.

- Foreign enterprises concluding contracts with South African residents to perform or physically render services in South Africa. The nature, duration and continuity of these services might vary. Clear guidelines as to when the foreign enterprise needs to register for VAT in South Africa has not officially been made available.

2.3.3 Detailed Commentary

Deloitte & Touche gave the following detailed recommendations and commentary:

- Place of supply instead of place of activity rules should be introduced. The current uncertainty regarding what constitutes an “enterprise or activity” should be addressed as a distinct separate issue. This could be done by, for example, linking the definition of “enterprise” to the Income Tax concept of permanent establishment via practice note or a section 1 definition or by some other means;

- Affixing place of supply rules to the time when a contract is signed and the location of the goods at that time could be open to manipulation;

- Various countries define goods as the transfer of ownership in tangible property or immovable property, whereas services are defined as any supplies not being supplies of goods. This distinction could be useful in defining place of supply. The European Union deems the supply of goods where the goods are dispatched or transported by the supplier, recipient or a third person to be the place where the goods are at the time when the dispatch or transport to the recipient begins. Where the goods are installed or assembled by or on behalf of the supplier, the place of supply is deemed to be where the goods are installed or assembled. Where the goods are not dispatched or transported, the place of supply is deemed to be where the goods are when the supply takes place;

- Where goods are supplied under a sale agreement and placed at the disposal of the recipient in South Africa, the place of supply of the goods should be deemed to be in South Africa. In the event that ownership of the goods remains in the hands of a foreign enterprise, whilst the goods are used by a recipient at a place in South Africa, the foreign enterprise should be required to register for South African value-added tax purposes only where the recipient is a non-registered
South African person or partially taxable vendor or where the foreign enterprise has a permanent establishment in South Africa or owns fixed property;

- The place of supply of real rights in movable goods, or the supply of goods under an instalment credit agreement or a rental agreement should be determined as if the supply of goods is a supply of services, except where actual ownership of the goods passes;

- Where real rights in fixed property are supplied under an agreement, the place of supply should be where the fixed property is located;

- The danger of linking place of supply or activity rules to time of supply rules or date of acceptance of conditions is that it invites manipulation. This principle is demonstrated by the various amendments to section 11(2)(l) over the last years;

- The European Union generally deems the supply of services to be the place where the supplier established his business or has a fixed establishment from which the service is supplied, or in the absence thereof, the place where he has his permanent address or usually resides. Specific rules also apply. The European Union also deems the place of use to be the place of supply for certain services, such as services relating to fixed property, intellectual property rights, advertising, transport, hiring out of movable tangible property;

- The place of supply of services capable of being physically rendered or performed or services not capable of being physically rendered or performed should be where the consumption takes place. Where the supplier has a permanent establishment in South Africa, irrespective of nationality, the supplier should be liable to account for tax at the standard rate. Where the supplier has no permanent establishment in South Africa, then notwithstanding that consumption takes place in South Africa, the supplier should not be required to register in South Africa, unless any of the recipients are not fully entitled to an input tax deduction. The compliance burden on SARS in applying the reverse charge mechanism where the supplier has no permanent establishment in South Africa would outweigh the benefits;

- Discretion creates an administrative burden for SARS and should be avoided if possible;

- Place of supply rules should take into account the lack of resources of SARS. Any alterations to the Act should endeavour to limit the number of foreign enterprises registering in South Africa for value-added tax purposes, except where non-registration would lead to a loss of revenue to the fiscus or to a lack of neutrality. The nature of the supply; where the goods or services are made available; where the goods or services are consumed; where the supplier operates his business from; and whether the supplier has a permanent establishment in South Africa should be considered when introducing place of supply rules. Permanent establishment rules should be considered in designing place of supply rules for South Africa. Whether the principal supplier operates through a dependent agent (who can legally bind his principal) or an independent contractor who cannot legally bind the principal supplier should also be considered.
In conclusion, Deloitte & Touche recommended that the following steps be followed in determining the place of supply and also a foreign enterprise’s responsibility to register for value-added tax purposes in South Africa:

- Determine the place of supply. If consumption takes place in South Africa, the place of supply is in South Africa;

- If it has been established that the place of supply is in South Africa, the nature of the supplier and recipient must be determined:
  
  - If the supplier owns fixed property in South Africa, the foreign enterprise must register in South Africa for value-added tax purposes, and no further test is required; or

  - If the supplier has a permanent establishment in South Africa, the foreign enterprise needs to register in South Africa for value-added tax purposes, and no further test is required; or

  - If the recipient is a non-registered South African person or a partially taxable South African vendor, the foreign enterprise must register in South Africa for value-added tax purposes, and no further test is required; or

  - If the recipient is a registered South African vendor, the foreign enterprise do not have to register in South Africa for value-added tax purposes, except where he has a fixed property in South Africa or has a permanent establishment in South Africa;

- If it has been established that the place of supply is in not South Africa and the foreign enterprise is not registered in South Africa for value-added tax purposes due to any of its other supplies, there is no need to register in South Africa for value-added tax purposes.

The current legislative provisions, the proposed place of supply rules of SAFA and the commentary of Deloitte & Touche will be tested against various scenarios in the sections to follow in an endeavour to establish the places of different supplies and possible shortcomings in the current legislation.

3 Services Physically Rendered in South Africa by a Foreign Enterprise

To determine the place of supply of services physically rendered in South Africa by a foreign enterprise and to establish whether the foreign enterprise has to register for value-added tax purposes in South Africa, the provisions of section 7(1)(a) (the charging section) and the definition of “enterprise” in section 1 of the Act need to be analysed.

As discussed in sections 3.1 to 3.4 of chapter IV, the charging section has four requirements that must be met to subject supplies of a person to value-added tax, namely:

- A supply;
- By a vendor;
It follows that services physically rendered by a foreign enterprise in South Africa would comply with the requirement that a supply must be present. The person making these supplies will be a vendor if he meets the registration requirements (section 23 of the Act) and it can be said that the supplies are made in the course or furtherance of any enterprise.

As discussed in section 3.5 of chapter IV, the general definition of enterprise has five requirements that must be met for the supplies to be done in the course or furtherance of any enterprise, namely:

- Any enterprise or activity;
- Carried on continuously or regularly by any person;
- In the Republic or partly in the Republic;
- In the course of which goods or services are supplied to any person;
- For a consideration, whether or not for profit.

It follows from the sequential order of the requirements of the definition of enterprise that an enterprise or activity must firstly be carried on continuously or regularly in or partly in South Africa. Then only should one consider whether goods or services are supplied in the course of that enterprise or activity. As a consequence, the mere supply of goods or services is not enough to indicate that an enterprise or activity is being carried on. This statement is especially true when dealing with the supply (and not render) of goods or services which require no enterprise or activity by the supplier in South Africa. However, in Belgium, a person who supplies goods or services is deemed to exercise an economic activity. (Pollet, 1996:13)

In New Zealand it has been held, in Case Newman v C of IR (1994) 16 NZTC 11, 229 (HC) at p.11, 233, that the word “activity” means “an occupation, a pursuit” and (in the plural) “things that a person animal or group chooses to do...a course of conduct or series of acts which a person has chosen to undertake or become engaged in.” (CCH New Zealand Limited, 1998:21-200)

Also in New Zealand, in Bayly Trust v C of IR (1998) 18 NZTC 13, 559, the High Court noted that the word “activity” involves the concept of a person doing something, being active, taking some action. (CCH New Zealand Limited, 1998:21-200)

It follows that services physically rendered in South Africa must constitute “any enterprise or activity” or at the least an “activity” of a foreign enterprise in South Africa, since it involves a series of acts undertaken by the person in South Africa and it involves also a person doing something, being active or taking some action.

It would be a question of fact and degree whether the person is carrying on the activity (supply of services) continuously or regularly and whether consideration is derived from the provision of the services. It is, therefore, submitted that under current legislation the place of supply of services physically rendered in South Africa by a foreign enterprise would be in South Africa. Whether the foreign enterprise would have to be registered in South Africa for value-added tax purposes.
would depend on the factual circumstances and whether all the requirements of the definition of "enterprise" are met. The place of supply of services physically rendered in South Africa by a foreign enterprise will be in South Africa, irrespective of whether the foreign enterprise is a resident of South Africa or not.

Services physically rendered in South Africa by an agent acting for and on behalf of a foreign principal would, in terms of section 54(1) of the Act, be deemed to be made by the principal. In these circumstances the place of supply would still be considered to be in South Africa and the foreign enterprise would be deemed to be the supplier.

**Example 5.1 — Services Physically Rendered in South Africa by a Foreign Enterprise**

Company A (a British company) contracts with company B (a South African company) to install machinery in B's South African factory. A sends its own personnel to South Africa to install the machinery at B's factory. The work is completed in 3 weeks and A's personnel return to the United Kingdom.

The place of the supply of A's services is in South Africa. The fact that the place of supply is in South Africa does not necessarily require A to register in South Africa and charge value-added tax on the services rendered. Company A would only be required to registered for value-added tax purposes in South Africa if it makes supplies continuously or regularly and its supplies exceed R300 000 per annum. The outcome would have been the same even if A contracted with C (an unaffiliated company) to render the services on behalf of A in South Africa.

Example 5.1 illustrates the caution that a foreign enterprise needs to exercise when physically rendering services in South Africa. A foreign enterprise could be liable to register for value-added tax purposes in South Africa if these services are done continuously or regularly and the registration threshold of R300 000 per annum is met.

The current South African value-added tax legislation caters effectively for the supply of services capable of being physically rendered, since it subjects such services to value-added tax if consumption takes place in South Africa. The foreign supplier would be liable to register for value-added tax purposes if it meets the R300 000 per annum registration requirement. Deloitte & Touche suggested that the place of supply should be deemed to be in South Africa if consumption takes place in South Africa; the supplier has a permanent establishment in South Africa; and the recipient of the supply cannot claim a full input tax deduction. This approach could reduce SARS' current compliance burden in respect of the registration, for value-added tax purposes, of foreign entities. Conversely, Deloitte & Touche suggested that the foreign supplier should not be liable to register for value-added tax purposes if he has no permanent establishment in South Africa and consumption takes place in South Africa and the recipients of the supply can claim a full input tax deduction (see Annexure E for a comparative analysis of place of supply rules in South Africa).
4 Intangible Services Provided in South Africa by a Foreign Enterprise

4.1 Introduction

Intangible services form part of the general definition of “services” in section 1 of the Act. The treatment of the provision of intangible services by registered vendors, being residents of South Africa, has not been a point under dispute in the South African value-added tax system. However, the provision of intangible services by a foreign enterprise, not being a resident of South Africa and without a fixed or permanent place of business, has been interpreted often and with no strong guidelines provided by SARS.

The treatment of foreign enterprises providing intangible services in South Africa would in terms of section 54(1) of the Act be the same irrespective of whether the foreign enterprise provide the services himself or through an agent acting for and on his behalf.

Although amendments in recent years and the issue of statements have addressed these problems to a certain extent, uncertainty still surrounds the interpretation of the provision of intangible services for value-added tax purposes. The treatment of rights made available by a foreign enterprise and used in South Africa; foreign telecommunication services used in South Africa; and underwriting insurance business by underwriting members of Lloyd’s of London will be discussed below.

4.2 Rights Made Available by a Foreign Enterprise and Used in South Africa

To determine the place of supply of rights made available by a foreign enterprise and used South Africa and to establish whether the foreign enterprise has to register for value-added tax purposes in South Africa, the provisions of the charging section and the definition of “enterprise” in section 1 of the Act need to be analysed.

SARS, in their Vatnews no.13 of December 1999, expressed the view that the granting of the use in South Africa of any trade mark or intellectual property by a foreign enterprise over a period of time is regarded as the carrying on of an enterprise partly in South Africa for value-added tax purposes. SARS submitted that a foreign enterprise that regularly receives royalties or franchise or agency fees is required to register as a vendor if its annual receipts exceed R300 000.

In terms of South African legislation it needs to be assessed whether the foreign enterprise is carrying on an enterprise or activity (to constitute an “enterprise”) in South Africa or partly in South Africa and also whether such enterprise or activity is carried on continuously or regularly.

Firstly, it needs to be assessed whether an “enterprise or activity” is being carried on. If it could be argued that the foreign entity does not carry on an enterprise or activity, since it only “passively” makes available a right, the investigation ends here and the foreign entity does not need to register.
As mentioned in section 3 above, New Zealand interprets the word "activity", to depict some form of action. It is submitted that the activity of the foreign entity is the making available of a right. In this sense, the making available of a right would constitute an activity. However, it could be argued that the activity of the making available of a right is a once-off activity and not continuously or regularly. The mere fact that consumption or the use of the right is taking place in South Africa should not be construed to be indicative as to whether an activity is carried on in South Africa.

As mentioned in section 11.1 of chapter III, many European countries such as Greece, Germany and Belgium, interpret a business activity to be resulting from an economic rather than a civil or commercial law approach. Should this approach be followed, the foreign enterprise would be conducting an activity and it could then also be argued that the activity is being conducted on a continuos or regular basis, since no physical action is required, but merely an economic activity. It is, however, at this point not conclusive whether this activity is being conducted in South Africa or elsewhere.

Secondly, assuming that it could be argued that the foreign entity is carrying on an activity, it must still be considered whether the activity is carried on continuously or regularly. It is submitted that, following the New Zealand interpretation, there is an argument that the making available of a right should not be viewed as continuous or regular if done once off. However, an argument could be made out that the making available of a right could be seen to be of a continuous and regular nature if the foreign entity is continuously and regularly making available a right to different entities in South Africa (adhering to the aforementioned caveat). It would therefore seem arguable that the making available of a right by the foreign entity could be seen as a continuous and regular activity.

Thirdly, assuming that an enterprise or activity is carried on continuously or regularly, it needs to be assessed where the activity is carried on. Assuming that the right is registered in a foreign country and that the foreign entity is making available the right in a foreign country (since the foreign entity is organised and exists under the laws of a foreign country), it could be strongly argued that the activity is not carried on in South Africa or partly in South Africa. Again, the mere fact that consumption or the use of the trademark is taking place in South Africa should not demand that the activity to be carried on in South Africa.

If it is conceded that the foreign enterprise need not register for South African value-added tax purposes, it could be argued that South African fiscus could be losing revenue. However, section 7(1)(c) read with the definition of "imported services" in section 1 of the Act provide that where services are imported into South Africa for use other than for the making of taxable supplies, value-added tax should be accounted for at the standard rate. It follows that the South African licensee using the right could be importing services into South Africa. The reverse-charging provisions would only be invoked if such services were to be used to make non-taxable supplies.

As can be seen from Example 5.2 below and the interpretation SARS in their Vatnews no.13 of December 1999 (as discussed above) the value-added tax consequences of rights made available by a foreign enterprise and used in South Africa leaves room for interpretation and could be addressed by place of supply rules. It is submitted that SAFA's proposal that the place of supply rule determining that the place of supply should be where the supplier's or his agent's fixed or
permanent place of business is from where the services are consumed could give rise to tax leakage. SARS would in this instance have to place a heavy reliance on the “imported services” definition in section 1, read with section 7(1)(c), of the Act. As a middle ground SARS could adopt the suggestion of Deloitte & Touche to not register a foreign enterprise if he does not have a permanent establishment in South Africa and the recipients of the supply can claim full input tax deductions (see Annexure E for a comparative analysis of place of supply rules in South Africa).

Example 5.2 – Rights Made Available by a Foreign Enterprise and Used in South Africa

Company A (a British company with no physical presence in South Africa) grants a license to company B (a South African company), which gives B the right to use a patent to manufacture incubators in South Africa. B undertakes to pay A an annual fixed fee and a variable fee, dependent on the number of incubators sold, for the right of use of the patent. Company A has no financial interests in South Africa other than the income it receives from company B.

The place of supply of the making available of the rights by company A would be outside South Africa, although consumption would take place in South Africa. It cannot be argued that company A is carrying on any enterprise or activity continuously or regularly in South Africa or partly in South Africa if company A is not represented or present in South Africa. Company B would be liable to reverse-charge on the amount of the fees paid to company A if company B uses the incubators otherwise than for the making of taxable supplies.

Had company A established an office in South Africa to grant licenses in South Africa and to regulate and administer the use thereof in South Africa it could then be argued that company A established itself for value-added tax purposes in South Africa.

4.3 Foreign Telecommunication Services Used in South Africa

The definition of “enterprise” in section 1 was amended in 1997 to include “the activities of any person who continuously or regularly supplies telecommunication services to any person who utilises such services in the Republic”. The amendment has not yet been promulgated.

The definition of “enterprise” in section 1 would seem to indicate that the South African legislator looks to the place of the activities of the supplier in determining whether an enterprise is being conducted and not necessarily the place where the recipient consumes the goods or services. This argument is strengthened by the amendment introduced in 1997, which has the effect that consumption (i.e. the place of the recipient) is taxed. Had the Act set out to tax consumption even prior to the amendment, it could be argued that the subsequent amendment would have been superfluous.

The effect of the amendment is to render the place of supply of telecommunication services to be in South Africa if the services are used in South Africa. If a foreign enterprise supplies telecommunication services that are used in South Africa, the foreign enterprise will be required to register for value-added tax purposes, subject to the registration requirements.
SAFA’s proposal that the place of supply rule determining that the place of supply should be where the supplier’s or his agent’s fixed or permanent place of business is from where the services are consumed could give rise to tax leakage. SARS could opt to adopt the suggestion of Deloitte & Touche to not register a foreign enterprise if he does not have a permanent establishment in South Africa and the recipients of the supply can claim full input tax deductions. Since it would be unlikely that the majority of recipients of foreign telecommunication services would be entitled to claim full input tax deductions, the Deloitte & Touche option would probably not keep many foreign enterprises outside of the South African value-added tax net, if any. SARS would, in future, have to place a heavy reliance on the “imported services” definition in section 1, read with section 7(1)(c), of the Act (see Annexure E for a comparative analysis of place of supply rules in South Africa).

Example 5.3 – Foreign Telecommunication Services Used in South Africa

Lemon (a British telecommunication services provider) regularly supplies telecommunication services to the general South African public who uses these services in South Africa. Lemon has no office or other presence in South Africa.

In terms of the South African value-added tax legislation pre the 1997 amendment (and also pre the promulgation of the amendment) the place of supply of the telecommunication services would be in the United Kingdom, although consumption would take place in South Africa. Lemon would not be liable to register in South Africa for value-added tax purposes. After promulgation of the amendment Lemon would be liable to register in South Africa for value-added tax purposes, provided the R300 000-registration requirement is met.

Prior to promulgation South African consumers would be liable to reverse charge (or charge themselves value-added tax and submit to the South African Revenue Service). The reverse charge would be based on the amount of these services used in South Africa, other than for the purposes of making taxable supplies (i.e. non-registered value-added tax vendors or partially taxable vendors, e.g. banks or long term insurance companies).

4.4 Underwriting Insurance Business by Underwriting Members of Lloyd’s of London

As mentioned in section 3.5.8 in chapter IV, the reference to an “enterprise...carried on...partly in the Republic” led to the specific exclusion in paragraph (vi) of the proviso to the definition of “enterprise”
(section 1 of the Act) of the activity of underwriting insurance business by Underwriting Members of Lloyd’s of London. (De Koker & Jenkinson, 2000: paragraph 4.4.1)

However, paragraph (vi) of the proviso to the definition of “enterprise” (section 1 of the Act) has been amended with effect from 1 January 2001 to include in the definition of “enterprise”:

“the activity of underwriting insurance business by Underwriting Members of Lloyd’s of London, to the extent that contracts of insurance are concluded in the Republic, shall be deemed to be the carrying on of an enterprise...”

The effect of this amendment is that the place of supply of underwriting business of underwriting members of Lloyd’s of London is where the contracts are concluded. This provision and the amendment regarding telecommunication services used in South Africa are the only two specific place of supply rules in South Africa. The general definition of enterprise is the general place of supply provision of the Act.

Example 5.4 — Underwriting Insurance Business by Underwriting Members of Lloyd’s of London

A, an underwriting member of Lloyd’s of London underwrites insurance business of various South African clients. A and his South African clients conclude 50% of these contracts in South Africa and the remainder outside of South Africa.

As of 1 January 2001, the portion of the contracts of insurance concluded in South Africa would create an enterprise for value-added tax purposes in South Africa for A. A would be liable to charge value-added tax on that portion of the insurance business that he underwrites and is concluded in South Africa, provided A complies with the R300 000-registration requirement. The remainder of the insurance business would not be subject to value-added tax in South Africa.

From Example 5.4 it can be seen that underwriting members of Lloyd’s of London underwriting insurance business in South Africa would be conducting an enterprise for South African value-added tax purposes to the extent that insurance contracts are concluded in South Africa. This would seem to almost leave the option to register or not for South African value-added tax purposes in the hands of the underwriting member of Lloyd’s of London, since the place of conclusion of agreements is open to manipulation.

SAFA’s proposal that the place of supply rule determining that the place of supply should be where the supplier’s or his agent’s fixed or permanent place of business is from where the services are consumed could give rise to tax leakage. SARS would in this instance have to place a heavy reliance on the “imported services” definition in section 1, read with section 7(1)(c), of the Act. As a middle ground SARS could adopt the suggestion of Deloitte & Touche to not register a foreign enterprise if he does not have a permanent establishment in South Africa and the recipients of the supply can claim full input tax deductions. Since it would be unlikely that all of the recipients of insurance services of Lloyd’s of London would be entitled to claim full input tax
deductions, the Deloitte & Touche option would probably not many foreign enterprises outside of the South African value-added tax net, if any. This option would, however, be feasible to apply to foreign short-term reinsurance companies (see Annexure E for a comparative analysis of place of supply rules in South Africa).

5 Importation of Services into South Africa

Section 7(1)(c) read with the definition of “imported services” in section 1 of the Act provide that where services are imported into South Africa for use other than for the making of taxable supplies, value-added tax should be accounted for at the standard rate. This would include services to be used by non-registered vendors and vendors using the services to make exempt supplies, and are similar to the reverse-charging provisions operated by many other countries.

A South African user of services or rights could for value-added tax purposes be importing services into South Africa but the reverse-charging provisions would only be invoked if such services were to be used to make non-taxable supplies.

6 Supplies of Goods in South Africa by a Foreign Enterprise

The supply of goods would be considered to be an “activity” as envisaged by the definition of “enterprise” in section 1 of the Act, since it requires some action by the supplier. If a foreign enterprise, or an agent acting for and on behalf of the foreign enterprise as envisaged by section 54(1) of the Act, supplies goods in South Africa the foreign enterprise will be considered to be conducting an “enterprise or activity” as envisaged by the definition of “enterprise” in section 1 of the Act. The foreign enterprise will be required to register for value-added tax purposes if the supplies of the goods are done continuously or regularly and the registration requirements of section 23 of the Act are met.

The place of supply of goods in South Africa is consequently in South Africa.

As can be seen from Example 5.5, a foreign enterprise importing goods into South Africa through an agent acting on its behalf can create a presence for South African value-added tax purposes and could be liable to register since the place of subsequent supplies would be in South Africa. SAFA’s recommendation that the place of supply of goods under a sale agreement should be where the goods are situated at the time the sale agreement is concluded could be open to manipulation. A foreign enterprise (A in Example 5.5) could, for instance, conclude a sale agreement with company B (a South African company) and after conclusion send the goods to company A1 (A’s agent in South Africa). A1 would then deliver the goods (after importation) to B, on behalf of A. A would, if SAFA’s proposals are accepted, not be liable to register for value-added tax purposes in South Africa. It could, however, be beneficial for A (or A1) to register in South Africa to claim an input tax deduction in respect of the importation. In terms of Deloitte & Touche’s recommendation that the place of supply of the goods should be deemed to be where the goods are placed at the disposal of the recipient, company A would be liable to register,
Example 5.5 — Supplies of Goods in South Africa by a Foreign Enterprise

Company A (a British company) sells goods to company B (a South African company). A can either sell the goods directly from the United Kingdom to B (route 1 in diagram) in South Africa or could decide to sell the goods to B after A has imported the goods through A1 (A's agent acting on his behalf in South Africa) (route 2 in diagram).

Should A opt to use route 1, the place of supply would, in respect of the goods sold to B, be outside South Africa. Should A opt to use route 2, the place of supply would, in respect of the goods sold to B, be in South Africa. Route 2 could require A to register for value-added tax purposes in South Africa.

The supply of goods, as envisaged by section 8(11) of the Act (see section 3.4.2 of chapter IV), could have the same effect as the supply of intangible services (see section 4.2 above). Since the phrase "enterprise or activity", as envisaged by the definition of "enterprise" in section 1 of the Act, mandates some action by the supplier, it could be argued that a foreign supplier making available goods outside South Africa that will be imported into South Africa by the user and used in South Africa could not constitute the carrying on of an enterprise by the foreign supplier. The user will nevertheless be entitled to claim an input tax deduction on importation.

Example 5.6 illustrates the value-added tax consequences of the supply of goods in South Africa by a foreign enterprise under an instalment credit agreement. SAFA's recommendation that the place of supply of goods under an instalment credit agreement should be where the goods are...
situated at the time the instalment credit agreement is concluded could be open to manipulation. A foreign enterprise (A in Example 5.6) could, for instance, conclude a sale agreement with company B (a South African company) and after conclusion send the goods to company B in South Africa. A would, if SAFA's proposals are accepted, not be liable to register for value-added tax purposes in South Africa. It could, however, be beneficial for A to register in South Africa to claim an input tax deduction in respect of the importation. Deloitte & Touche recommended that the place of supply of goods supplied under an instalment credit agreement be treated as if it was a supply of services (except where ownership passes). In Example 5.6, company A would not be liable to register if A has no permanent establishment in South Africa and the recipients of the supply would be entitled to a full input tax deduction (see Annexure E for a comparative analysis of place of supply rules in South Africa).

As mentioned above, since section 7(1)(b) of the Act provides for collection of value-added tax on importation, any subsequent supply of the goods on which value-added tax is not charged would not result in a loss to the fiscus since it would imply that the supplier would not be entitled to claim an input tax deduction in respect of tax incurred on importation.

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**Example 5.6 – Supplies of Goods in South Africa by a Foreign Enterprise under an Instalment Credit Agreement**

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*United Kingdom*  
*South Africa*

Company A (a British company) sells a machine to company B (a South African company) under an instalment credit agreement. Company B uses the machine in South Africa. The machine is operated entirely by B and does not require the presence of A in South Africa. Company B assumes the responsibility to collect the machine from company A in London and to import the machine into South Africa.

In terms of section 11(8) of the *Value-Added Tax Act, 1991* (the Act) the supply is deemed to be a supply of goods. Consequently, section 7(1)(b) of the Act applies on importation. The time of supply is deemed by section 9(3)(c) of the Act to be the earlier of the time of delivery or the time any payment of consideration is received by the supplier.

Although not clear from the current legislation it would appear that company A would not be liable to register for value-added tax purposes in South Africa since the place of supply falls outside South Africa. Based on the interpretation followed, company A could be liable to register for value-added tax purposes in South Africa if company A assumed responsibility for importing the machine into South Africa and also imported various other machines into South Africa to supply under instalment credit agreements.
7 Importation of Goods into South Africa by a Foreign Enterprise

As mentioned in section 4 of chapter IV, the importation of goods into South Africa is a taxable event for value-added tax purposes and subject to tax in terms of section 7(1)(b) of the Act. In terms of section 7(2) read with section 13(4) of the Act the tax is payable by the importer within 7 days from date of importation.

A foreign enterprise importing goods into South Africa does not automatically comply with the definition of enterprise in section 1 of the Act. Section 23(1) of the Act requires any person to be registered for tax if "...the total value of taxable supplies made by that person in...12 (consecutive) months...has (or will have) exceeded R300 000". The term "taxable supply" is defined in section 1 of the Act with reference only to supplies chargeable with tax under sections 7(1)(a) or 11 of the Act.

However, where the foreign importer supplies the goods subsequent to importation, the foreign importer could be liable to register for value-added tax if he complies with the requirements of section 23 of the Act and supplies goods continuously or regularly.

Where an agent acting for and on behalf of the foreign principal imports goods and subsequently supplies these goods for and on behalf of the principal, the principal might have a requirement to register in South Africa.

However, where the goods are imported into South Africa on consignment, no supply has occurred for value-added tax purposes. The goods would, however, still be subject to value-added tax on importation since the importation is deemed specifically to be a taxable event in terms of section 7(1)(b) of the Act. If the foreign enterprise is not registered for value-added tax purposes in South Africa he would not be entitled to claim input tax deductions relating to the importation. In terms of section 17(1) an input tax deduction would only be available to a vendor who imported the goods to make taxable supplies. Where the consigned goods are subsequent to importation supplied by the consignee or consignor, a supply would be deemed to have been made by the consignor. This result would also follow if the consignee applies the imported goods in his own business.

It follows from the above that the supply of goods in South Africa, and not the importation of goods, could necessitate a foreign importer to register for value-added tax purposes in South Africa. The place of the supply of goods subsequent to being imported will be regarded to be in South Africa. As mentioned, the importation of goods into South Africa is not a supply for value-added tax purposes but merely a taxable event that is subject to value-added tax.
Example 5.7 — Importation of Goods into South Africa by a Foreign Enterprise

Company A (a British company) provides British goods to company B (a South African company) in South Africa on consignment. B (the consignee) accepts delivery of the consigned goods in South Africa on behalf of A. B sells some of the goods to C and exports the remaining goods to A.

The delivery of the goods by A to B is not a supply for value-added tax purposes, since ownership has not passed to B at the time of importation. When B sells the goods to C two supplies take place for value-added tax purposes. Firstly, A makes a supply of the goods to B — the place of this supply is in South Africa and could render A liable to register for value-added tax purposes in South Africa. Secondly, B makes a supply to C — the place of this supply is also South Africa.

8 Exportation of Goods from South Africa by a Foreign Enterprise

The exportation of goods from South Africa is a supply subject to value-added tax in terms of section 7(1)(a) of the Act at the standard rate, if done by a vendor in the course or furtherance of his enterprise. The exportation of goods will, however, generally be subject to the zero-rate in terms of section 11(1) of the Act.

It follows that the place of supply of the exportation of goods from South Africa will be deemed to be in South Africa.

9 Summary

South Africa is one of the few countries, operating a value-added tax system, without specific place of supply rules.

The primary reason for introducing place of supply rules should be to alleviate the current legislative uncertainty experienced. Due to the resource constraints experienced by the South African Revenue Service (SARS), any amendments to the current value-added tax system should be done in such a manner to rather alleviate the resource problem than to add to the administrative burden of SARS. Foreign enterprises should also not necessarily be burdened with registration requirements, except where non-registration would lead to a loss of revenue to the fiscus.
The South African Fiscal Association (SAFA) set itself the target, to draft and put forward as a proposal to SARS, place of supply rules for South Africa. SAFA distributed initial place of supply rules to the major auditing firms in South Africa, inviting their commentary. SAFA heard oral representations on the proposed place of supply rules and received written commentary from Deloitte & Touche. The proposals were reconsidered in light of the representations made and re-drafted. The initial SAFA proposal on place of supply rules envisaged catering for the place of supply of goods and services made by residents of South Africa and non-residents.

SAFA defines when an "activity", as envisaged by the definition of "enterprise", is deemed to be carried on in or partly in South Africa. The effect of this approach is that the requirement of "continuously or regularly" would still remain as a separate requirement that must be met for a person to comply with the definition of "enterprise". The danger of the approach adopted by SAFA is that South African residents or non-residents can escape the registration and "enterprise" requirements if their activities are deemed not to be carried on in or partly in South Africa. A further danger could be that, for the proposed "activity" rule, a non-resident entity could have been deemed to be carrying on an "enterprise" in South Africa and would have been entitled to zero-rate certain of its supplies and claim input tax deductions in respect of its expenses incurred in South Africa. The adoption of the "activity" rule could in certain instances prevent registration of a non-resident entity in South Africa and deem all of its activities to be outside the South African value-added tax net, thereby denying the entity recourse to the favourable zero-rating provisions.

SAFA differentiates, in respect of goods, between sale, instalment credit, and rental agreements, and agreements for the supply of real rights in movable goods or fixed property. An activity is deemed to be carried on in or partly in South Africa where a person supplies goods in terms of a sale or instalment credit agreement or where a person supplies real rights in movable goods and the goods are situated in South Africa at the time the agreement is concluded. Goods located in a licensed customs and excise warehouse are specifically excluded. An activity is deemed to be carried on in or partly in South Africa where a person supplies any real rights in fixed property located in South Africa. An activity is deemed to be carried on in or partly in South Africa where a person supplies any goods in terms of a rental agreement and the goods are wholly or partly used in South Africa or the goods consist of a foreign going ship or foreign going aircraft operated by a resident of South Africa. The proposals will not apply in respect of goods, which are exempt from tax on importation in terms of section 13(3) of the Act. The proposals also provide that a sale, instalment credit or an agreement for the supply of a real right in movable goods or fixed property, shall be deemed to be concluded at the time when the last party to the agreement accepts the terms and conditions of the agreement.

The proposal differentiates, in respect of services, between services capable of being physically rendered or performed and other services. An activity is deemed to be carried on in or partly in South Africa to the extent that a supplier or his agent physically renders or performs services in South Africa. An activity is deemed to be carried on in or partly in South Africa to the extent that a supplier or his agent supplies services, not capable of being physically rendered, from a fixed or permanent place in South Africa from where a business is carried on by the supplier or his agent. The proposal also provides that the Commissioner for SARS may, on request, deem any supply of services to be an activity carried on by any person to be supplies made in South Africa.
In terms of SAFA's revised proposal of 20 September 2000, the proposed place of activity rules have been limited to apply only to persons who are not residents of South Africa. The amendment effectively narrows the scope of the place of activity rules considerably, especially given the wide definition of "resident of the Republic". It is submitted that this amendment renders the proposed place of activity rules superfluous since it covers the activities of persons only that do not fall within the definition of "resident of the Republic". Since the proviso to the definition refers to "any enterprise or other activity", the resultant effect is, therefore, that the proposed rules dictates when a person's activities will be deemed to be carried on in or partly in South Africa, with the knowledge that that person will not be conducting an enterprise in South Africa and hence will never be subject to value-added tax. This problem can be solved in or two manners. Firstly, the proviso to the definition of "resident of the Republic" could be amended to not refer to the carrying on of any enterprise or other activity. The place of activity rules should then ensure reference to "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 phrased in the proviso to the definition of "resident of the Republic". The second alternative would be to incorporate the proviso to the definition of "resident of the Republic" into the definition of "enterprise". The proposal has also been amended to make it clear that the rules in respect of services apply to suppliers or their agents acting for or on their behalf. This amendment ensures irrevocably that an agent acting on behalf of a principal can render such activity to be an activity of the principal to be carried on in or partly in South Africa.

Deloitte & Touche, on invitation of SAFA, submitted commentary on the initial place of activity proposals. Deloitte & Touche identified certain industries or transactions that could justify the introduction of place of supply rules in South Africa, namely movable goods made available outside South Africa by a foreign enterprise (who retains ownership) and subsequently imported by a person present in South Africa into South Africa; foreign enterprises granting the use of a right in South Africa; telecommunication services; the insurance industry; and foreign enterprises concluding contracts with South African residents to perform or physically render services in South Africa.

Deloitte & Touche recommended that place of supply instead of place of activity rules be introduced and that the current uncertainty regarding the meaning of "enterprise or activity" be addressed as a separate issue; affixing place of supply rules to the time when a contract is signed and the location of the goods at that time could be open to manipulation; where goods are supplied under a sale agreement and placed at the disposal of the recipient in South Africa, the place of supply of the goods should be deemed to be in South Africa. In the event that ownership of the goods remains in the hands of a foreign enterprise, whilst the goods are used by a recipient in South Africa, the foreign enterprise should be required to register for value-added tax purposes only if the recipient is a non-registered South African person or partially taxable vendor or where the foreign enterprise has a permanent establishment in South Africa or owns fixed property; the place of supply of real rights in movable goods, or the supply of goods under an instalment credit agreement or a rental agreement should be determined as if the supply of goods is a supply of services, except where actual ownership of the goods passes; where real rights in fixed property are supplied under an agreement, the place of supply should be where the fixed property is located; the place of supply of services should be where the consumption takes place. Where the supplier has a permanent establishment in South Africa, irrespective of nationality, the supplier should be liable to account for
tax at the standard rate. Where the supplier has no permanent establishment in South Africa, then notwithstanding that consumption takes place in South Africa, the supplier should not be required to register in South Africa, unless any of the recipients are not fully entitled to an input tax deduction. The compliance burden on SARS in applying the reverse charge mechanism where the supplier has no permanent establishment in South Africa would outweigh the benefits; Place of supply rules should take into account the lack of resources of SARS. Any alterations to the Act should endeavour to limit the number of foreign enterprises registering in South Africa for value-added tax purposes, except where non-registration would lead to a loss of revenue to the fiscus or to a lack of neutrality.

To determine the place of supply of services physically rendered in South Africa by a foreign enterprise and to establish whether the foreign enterprise has to register for value-added tax purposes in South Africa, the provisions of the charging section and the definition of “enterprise” need to be analysed. The charging section has four requirements that must be met to subject supplies of a person to value-added tax, namely a supply; by a vendor; of goods or services; in the course or furtherance of any enterprise. It follows that services physically rendered by a foreign enterprise in South Africa would comply with the requirement that a supply must be present. The person making these supplies will be a vendor if he meets the registration requirements and it can be said that the supplies are made in the course or furtherance of any enterprise. The general definition of enterprise has five requirements that must be met for the supplies to be done in the course or furtherance of any enterprise, namely any enterprise or activity; carried on continuously or regularly by any person; in the Republic or partly in the Republic; in the course of which goods or services are supplied to any person; for a consideration, whether or not for profit. An enterprise or activity must first be carried on continuously or regularly in or partly in South Africa, and then only should one consider whether goods or services are supplied in the course of that enterprise or activity. The mere supply of goods or services is not enough to indicate that an enterprise or activity is being carried on, especially when dealing with the supply (and not render) of goods or services which require no enterprise or activity by the supplier in South Africa. However, in Belgium, a person who supplies goods or services is deemed to exercise an economic activity. Following New Zealand’s interpretation of the word “activity”, the physical rendering of services in South Africa must constitute an “enterprise or activity” or at the least an “activity” in South Africa, since it involves a series of acts undertaken by the person and it involves also a person doing something, being active or taking some action. It would be a question of fact and degree whether the person is carrying on the activity continuously or regularly and whether consideration is derived from the provision of the services. It is submitted that the place of supply of services physically rendered in South Africa by a foreign enterprise would be in South Africa, irrespective of whether the foreign enterprise is a resident of South Africa or not. Whether the foreign enterprise would have to be registered in South Africa for value-added tax purposes would depend on the factual circumstances and whether all the requirements of the definition of “enterprise” are met. Services physically rendered in South Africa by an agent acting for and on behalf of a foreign principal would be deemed to be made by the principal. The place of supply would still be considered to be in South Africa and the supplier would be deemed to be the foreign enterprise.

Intangible services form part of the general definition of “services”. The provision of intangible services by a foreign enterprise, not being a resident of South Africa and without a fixed or
permanent place of business, has been interpreted often and with no strong guidelines provided by SARS. The treatment of foreign enterprises providing intangible services in South Africa would be the same irrespective of whether the foreign enterprise provide the services himself or through an agent acting for and on his behalf. To determine the place of supply of rights made available by a foreign enterprise and used in South Africa and whether the foreign enterprise has to register for value-added tax purposes in South Africa, the provisions of the charging section and the definition of "enterprise" need to be analysed. SARS expressed the view that the granting of the use in South Africa of any trademark or intellectual property by a foreign enterprise over a period of time is regarded as the carrying on of an enterprise partly in South Africa. It was submitted that a foreign enterprise that regularly receives royalties or franchise or agency fees is required to register as a vendor if its annual receipts exceed R300 000.

In terms of South African legislation it needs to be assessed whether the foreign enterprise is carrying on an enterprise or activity (to constitute an "enterprise") in or partly in South Africa and whether such enterprise or activity is carried on continuously or regularly. Firstly, it needs to be assessed whether an "enterprise or activity" is being carried on. If it could be argued that the foreign entity does not carry on an enterprise or activity, since it only "passively" makes available a right, the investigation ends here and the foreign entity does not need to register. New Zealand interprets the word "activity" to depict some form of action. It is submitted that the activity of the foreign entity is the making available of a right. In this sense, the making available of a right would constitute an activity. It could also be argued that the activity of the making available of a right is a once-off activity and not continuously or regularly. The fact that consumption takes place in South Africa should not be indicative as to whether an activity is carried on in South Africa. Many European countries interpret a business activity to be resulting from an economic rather than a civil or commercial law approach. Should this approach be followed, the foreign enterprise would be conducting an activity and it could then also be argued that the activity is being conducted on a continuous or regular basis, since no physical action is required, but merely an economic activity. It must still, however, be decided where the activity is being carried on. Secondly, assuming that it could be argued that the foreign entity is carrying on an activity, it must still be considered whether the activity is carried on continuously or regularly. Following the New Zealand interpretation of activity, there is an argument that the making available of a right should not be viewed as continuous or regular if done once off. However, an argument could be made out that the making available of a right could be seen to be of a continuous and regular nature if the foreign entity is continuously and regularly making available a right to different entities in South Africa (adhering to the aforementioned caveat). It would therefore seem arguable that the making available of a right by the foreign entity could be seen as a continuous and regular activity. Thirdly, assuming that an enterprise or activity is carried on continuously or regularly, it needs to be assessed where the activity is carried on. Assuming that the right is registered in a foreign country and that the foreign entity is making available the right in a foreign country (since the foreign entity is organised and exists under the laws of a foreign country), it could be strongly argued that the activity is not carried on in or partly in South Africa. Again, the fact that consumption takes place in South Africa should not demand that the activity to be carried on in South Africa. The fiscus would theoretically not be losing revenue if foreign enterprises are not liable to register for value-added tax purposes in South Africa due to the reverse charging mechanism.
The definition of “enterprise” was amended in 1997 to include “the activities of any person who continuously or regularly supplies telecommunication services to any person who utilises such services in the Republic”. The amendment has not yet been promulgated. The effect of the amendment is to render the place of supply of telecommunication services to be in South Africa if the services are used in South Africa. The definition of “enterprise” would seem to indicate that the South African legislator looks to the place of the activities of the supplier in determining whether an enterprise is being conducted and not necessarily the place where the recipient consumes the goods or services. This argument is strengthened by the amendment introduced in 1997, which has the effect that consumption (i.e. the place of the recipient) is taxed. Had the Act set out to tax consumption even prior to the amendment, it could be argued that the subsequent amendment would have been superfluous.

The definition of “enterprise” has been amended with effect from 1 January 2001 to include: “the activity of underwriting insurance business by Underwriting Members of Lloyd’s of London, to the extent that contracts of insurance are concluded in the Republic...”. The effect of this amendment is that the place of supply of underwriting business of underwriting members of Lloyd’s of London is where the contracts are concluded. This provision and the amendment regarding telecommunication services used in South Africa are the only two specific place of supply rules in South Africa. The general definition of enterprise is the general place of supply provision of the Act.

The supply of goods would be considered to be an “activity” as envisaged by the definition of “enterprise”, since it requires some action by the supplier. If a foreign enterprise, or his agent, supplies goods in South Africa the foreign enterprise will be considered to be conducting an “enterprise or activity”. The foreign enterprise will be required to register if the supplies are done continuously or regularly and the registration requirements are met. The place of supply of goods in South Africa is in South Africa. The place of supply of goods, under a rental, instalment credit or charter agreement, could potentially be the same as that of intangible services. Since the phrase “enterprise or activity”, mandates some action by the supplier, it could be argued that a foreign supplier making available goods outside South Africa that will be imported into South Africa by the user and used in South Africa could not constitute the carrying on of an enterprise by the foreign supplier. The user will nevertheless be entitled to claim an input tax deduction on importation.

The importation of goods into South Africa is, in itself, a taxable event for value-added tax purposes. A foreign enterprise importing goods into South Africa does not automatically carry on an enterprise. However, where the foreign importer supplies the goods subsequent to importation, the foreign importer could be liable to register for value-added tax if he complies with the registration requirements and supplies goods continuously or regularly. Where the foreign principal’s agent imports goods and subsequently supplies these goods, the principal might be required to register. Were goods are imported into South Africa on consignment, no supply has occurred, but the goods would still be subject to tax on importation. An input tax deduction would only be available to a vendor who imported the goods to make taxable supplies. Where the consigned goods are subsequent to importation supplied, a supply would deemed to have been made by the consignor. This result would also follow if the consignee applies the imported goods in his own business. The supply of goods in South Africa, and not the importation of goods, could necessitate a foreign importer to register for value-added tax...
purposes in South Africa. The place of supply of goods imported will be regarded to be in South Africa.

The exportation of goods from South Africa is a supply subject to value-added tax at the standard rate, if done by a vendor in the course or furtherance of his enterprise. The exportation of goods will, however, generally be zero-rated. The place of supply of the exportation of goods from South Africa will be deemed to be in South Africa.
CHAPTER VI

SUMMARY

As mentioned under the problem statement, the objective of this dissertation was to examine the desirability of implementing place of supply rules as an instrument to reduce uncertainty in the South African value-added tax system, specifically with respect to cross border transactions.

The increase in cross border transactions made many countries recognise the fiscal uncertainty and imbalances an ever-increasing number of cross border transactions can bring to a country's value-added tax system. Many of these countries introduced place of supply rules to enhance legislative certainty, to avoid double taxation and to increase equity of the overall tax system.

With the introduction of value-added tax in 1991, South Africa was to a large extent still isolated from the world economy. Since the earlier 1990's, South Africa increasingly became involved in cross-border transactions. South Africa's value-added tax system did not then and still does not have any specific place of supply rules. Though, technically, South Africa's value-added tax system seeks to tax most, if not all, transactions with a South African connection, vendors in South Africa, tax practitioners and the South African Revenue Service are experiencing difficulty on interpreting the value-added tax consequences of cross border transactions.

Place of supply rules have been as a possible solution to the current uncertainty in respect of cross border transactions. The relevance and desirability of introducing place of supply rules in South Africa need to be assessed.

In chapter II the theory and principles of taxation, value-added tax and place of supply rules were analysed. It was seen that a good tax system should comply with certain requirements or canons of taxation. Neutrality, equality, invisibility, certainty and simplicity, and minimum compliance and administration costs are all essential requirements for a good tax system, but can in practice. The choice of the optimal tax system often requires a fine balance between the different canons of taxation.

The equality principle captures the "ability to pay" and "benefit" principles. The benefit principle mandates that those who benefit from the use of commodities or services should be required to pay for them.

Place of supply rules are generally used to determine where a supply should be taxed since differences in taxing rules and definitions of services and goods can result in double or non-taxation. The place of supply is influenced by the neutrality canon of taxation and is in itself an aspect of the broader concepts of double taxation or non-taxation.

Double taxation or non-taxation of transactions for value-added tax purposes has not received much interest and no separate study has been conducted in this respect. The lack of interest in double taxation of transactions for value-added tax purposes can be ascribed to the orthodox definition of double taxation and the fact that the risk of double taxation for value-added tax
purposes is reduced by the input tax deduction mechanism. Companies also appear to treat value-added tax as a cost factor.

Since a consumption tax concerns itself with the same object or item, it has been suggested that for value-added tax purposes, double taxation (cross-border) occurs when an international transaction is subject to a general tax on consumption in more than one tax jurisdiction, irrespective of whether it concerns one or more taxpayers. The destination principle and the principle of equality can be applied to avoid double taxation in the value-added tax sense. In terms of the destination principle only transactions taking place on national territory should be subject to tax. The destination principle governs the law on the taxation of consumption in most countries and provides that tax revenues should accrue to the country where consumption takes place.

In terms of the destination principle goods moving across borders should be taxed in the country of consumption, which means that imports are taxed and exports are freed from tax. The destination principle has the advantage that all products, irrespective of origin, bear the same tax burden when sold to a final consumer. The disadvantage of a destination-based tax is that physical border tax adjustments or compensation between the relevant tax jurisdictions always seem necessary.

The benefit principle provides that taxes on private consumption should only benefit the country where the consumption takes place. The benefit principle will generally guarantee the avoidance of double taxation, thus adhering to the principle of neutrality.

The theory of tax justice is a guiding principle for the distribution of a country’s tax liabilities amongst the individual taxpayers. The equality principle therefore mandates that, within one tax jurisdiction, identical goods should be taxed equally. Double taxation and non-taxation of goods and services violate the principle of equality. Where the destination principle results in double taxation or non-taxation, the principle of equality should play a decisive role in determining whether a transaction can be taxed.

Chapter III analysed the place of supply rules used in other countries. It was seen that most countries levy value-added tax on the supply of goods or services by an individual or legal person to another person if done for a consideration and if the supplies form part of an enterprise, business or taxable activity, except for exempt supplies. The importation of goods is generally also regarded as a taxable event. Most countries do not require a profit motive in order to require registration for value-added tax purposes. Many countries require some continuous or regular activity for the purposes of registration.

Most countries treat foreign enterprises with permanent establishments in a similar manner to resident businesses. Foreign enterprises (non-residents) without permanent establishments may also be required to register if carrying on a taxable activity in a country. Foreign enterprises supplying goods or services in a country is generally, in principle, liable to register for value-added tax purposes in that country, except where the reverse charge mechanism applies.
A permanent establishment is generally regarded as a fixed place of business, a place of management, a branch, an office, a factory or a workshop, and a mine, an oil or gas well, a quarry, timberland or any other place of extraction of natural resources through which a person makes supplies. Permanent establishment also includes a fixed place of business of an agent who acts on behalf of a person in a country through whom that person makes supplies in the ordinary course of a business. A non-commercial entity, such as a representative office, is generally not regarded as a permanent establishment and may, in principle, not register for value-added tax purposes. Some countries, such as Belgium, apply a regularity test in respect of foreign enterprises, which takes into account the totality of the activities carried on in their countries and abroad.

The term business generally includes any trade, profession or vocation and any continuing activity, which involves making supplies of goods or services, even if made irregularly or on a non-profit basis. Many countries interpret a business activity to be resulting from an economic rather than a civil or commercial law approach. Germany regards a business as implying the establishment of an organisation of capital and labour to meet economic needs.

Foreign enterprises may recover value-added tax incurred in many European Union countries provided it does not have a permanent establishment in that country and provided that the tax paid would have been deductible by the resident entrepreneur in that country.

New Zealand defines goods as all kinds of personal or real property, to the exclusion of choses in action or money. A chose in action is a right to recover a thing (if withheld by action) of which a person does not have immediate enjoyment or possession and includes debts, insurance contracts, shares, copyrights and patents and trademarks.

Canada regards goods as any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, excluding money.

The European Commission and most member countries define a supply of goods as the transfer of the right to dispose of tangible property as owner. Electricity, current, gas, heat, refrigeration and the like are considered to be tangible property.

In the United Kingdom there is no supply until the purchaser signifies his approval or acceptance or otherwise indicates that he is taking the goods.

European Union countries generally regard standardised software as a supply of goods. However, the United Kingdom treats the importation of personalised software as a supply of goods and of services. For accounting purposes, the import is treated as an importation of services, and the importer, if he is a taxable person, accounts for tax under the reverse charge mechanism. The importation of standardised software is also regarded as a supply of goods and services. Unless the value attributed to the carrier medium is identified separately, the whole importation is treated as a supply of goods.

Greece does not regard the transfer of possession as necessarily the acquisition of physical possession, since a supply of goods may take place traditio longa manu and traditio brevi manu.
In terms of Belgian legislation a transfer of ownership may result from a sale, an exchange or a declaration of ownership, where a declaration of ownership may occur when jointly owned property is divided. Goods are defined as goods of a movable nature and tangible movable property used to service and operate immovable property, and buildings, excluding the land on which they are or will be constructed.

Most countries do not regard the consignment of goods to be a supply for value-added tax purposes. In terms of German legislation a supply of goods occurs when legal ownership is transferred. Transfer for security purposes only is not regarded as the supply of goods. The supply of stolen goods is a taxable supply despite the fact that the legal ownership cannot be transferred. Contract work and goods supplied with assembly or installation; and goods purchased in terms of a hire-purchase contract and handed over to the customer are regarded as supplies of goods.

New Zealand deems the place of supply of goods to be in New Zealand if the supplier is resident in New Zealand, irrespective of the physical place of supply. The determination of the residence of a company follows the normal income tax provisions. In addition, two overriding rules determine residence for value-added tax purposes. Firstly, a person is resident to the extent that the person carries on an activity in New Zealand, which has a fixed or permanent place of business in New Zealand. Secondly, an unincorporated body of persons, partnership, joint venture or trust is resident if its centre of administration is in New Zealand. A foreign company is resident under this rule to the extent that its activities relate to that fixed or permanent place.

The determination of residence of individuals looks to a permanent place of abode or personal presence in New Zealand for certain predetermined periods per 12-month period. If the supplier is a non-New Zealand resident the place of supply of goods is deemed to be in New Zealand only if the goods are in New Zealand at the time of supply. However, if the non-New Zealand resident makes a supply to a registered person in New Zealand for use in a taxable activity it will be deemed to be supplied outside New Zealand unless the supplier and recipient agree otherwise. The supplier will not be able to charge or recover value-added tax. As an alternative, the supplier can agree with the recipient and have the supply treated as if it was made in New Zealand. The supplier might then be required to register for value-added tax. If a non-New Zealand resident provides goods, which are in New Zealand at the time of supply, to a person in New Zealand for use outside or partially outside of that person's taxable activity, the non-New Zealand resident will be deemed to be making a supply in New Zealand.

Canada deems the place of supply of tangible personal property, by way of a sale, to be where the property is, or is to be delivered or made available to the recipient. The place of supply of tangible personal property, otherwise than by way of a sale, is deemed to be where possession or use of the property is given or made available to the recipient. The place of supply of intangible personal property is deemed to be in Canada if the property may be used in whole or in part in Canada; or if the property relates to real property situated in Canada, to tangible personal property ordinarily situated in Canada or to a service to be performed in Canada. The place of supply of intangible personal property is deemed to be outside Canada if the property may not be used in Canada; or if the property relates to real property situated outside Canada, to tangible personal property ordinarily situated outside Canada or to a service to be performed wholly outside Canada. The place of supply of real property or a service in relation to real property is deemed to be where the real property is located.
The European Union deems the place of supply of goods dispatched or transported either by the supplier or by the person to whom they are supplied or by a third person to be where the goods are at the time when the dispatch or transport to the person to whom the goods are supplied begins. The place of supply of goods installed or assembled by or on behalf of the supplier is deemed to be where the goods are installed or assembled. The place of supply of goods not dispatched or transported is deemed to be where the goods are when the supply takes place. The place of supply of goods on board ships, aircraft or trains, in the case where the places of departure and destination are within the territory of the European Community, is deemed to be where the goods are at the time of departure of the transport.

The United Kingdom deems the place of supply of goods to be in the United Kingdom if the goods are physically located in the United Kingdom at the time of their supply. If a supply is made between two United Kingdom residents if the goods are located outside the United Kingdom at the time of supply, the supply may take place outside the United Kingdom. Goods brought into the United Kingdom on consignment from outside the European Union will be subject to value-added tax on importation. If the goods are in the United Kingdom when the transaction is adopted and the supplier is the importer and is registered for value-added tax purposes, the adoption will attract value-added tax and the supplier will be entitled to claim an input tax deduction.

Italy deems the place where the goods are located at the time the supply takes place to be decisive in determining the place of supply. The time of supply of movable goods is, in principle, when the goods are placed at the disposal of the customer. The time of supply of transported goods, where the contractual terms are ex-works, is when the transport commences. Although goods bought outside Italy are not subject to Italian value-added tax, the subsequent importation into Italy is a taxable event and subject to Italian value-added tax.

The place of supply of goods is deemed to be in Greece if, at the time the tax obligation arises, the goods are in Greece or aboard a ship, aircraft or train and are sold to passengers during the part of the journey which takes place in Greece, provided the place of departure is Greece. The place of supply of goods, which have been transported from a place outside Greece (and outside the European Union) to a place within Greece, is deemed to be in Greece. Supplies actually made before importation are deemed not to take place in Greece.

In Belgium, the place of supply of goods is, in principle, the place where the goods are placed at the disposal of the purchaser. In the case where the goods are transported the place of supply of the goods is where the transportation to the customer begins. Belgium deems the place of supply to be where the goods are actually located when the legal supply to the purchaser takes place. The place of supply of goods dispatched or transported by or on behalf of the supplier to a non-taxable person in Belgium is the place where the goods are located when the dispatch or transportation ends. This has the effect that a foreign distance seller or supplier, supplying goods in Belgium must register for value-added tax in Belgium. Any person who has acquired goods abroad or has had such goods processed for his own account shall be deemed to have imported those goods unless he can submit prove to the contrary.

Germany deems the place of supply of goods generally to be where the goods are situated at the time the right to dispose of them is transferred or where the supply of the goods requires
transportation, the place from where the goods are transported or dispatched. In the case of supplies from outside the European Union the place of supply is deemed to be in the foreign country, provided that the supplier is not subject to German value-added tax on importation. The installation of goods by a non-resident supplier at his customer’s premises in Germany is subject to German value-added tax. The non-resident business is, however, not required to register for value-added tax purposes, since the German customer accounts for the tax.

Where a taxable person transports goods from a foreign country (outside the European Union) and delivers these goods to his customer in France, the assumption is that the importer transfers title to these goods whilst they are situated in France. The place of supply of goods, which are not dispatched or transported, is deemed to be in France if the goods are physically situated in France when ownership is transferred. The place of supply of goods subject to assembly or installation in France is deemed to be in France, provided the ownership was not transferred when the goods were still physically situated abroad.

Most countries define services as anything, which is neither goods nor money but done for a consideration, including also, in particular, the sale or leasing of movable intangible property and obligations to refrain from an act or to tolerate a situation. New Zealand case law suggests that for an activity to be a service it must benefit the recipient in some way.

The supply of services generally includes the granting, assignment or surrender of the whole or part of any right, which is done for a consideration. Italy, however, excludes from services specifically, amongst others, the transfer, licensing or sublicensing of copyrights by the author or his heirs.

Most European Union countries treat the supply of personalised or bespoke software as a supply of services. New Zealand treats computer programs and software as intellectual property and consequently services.

In certain countries breach of contract payments may also be subject to value-added tax since the payment is made not only to cover the damages but also is made in relation to an agreement not to bring the case to court.

In most countries intangible services include the transfer and conferring of copyright, patent rights, license rights, advertising services and services rendered by advisers, engineers, consultants, lawyers, auditors and the like and telecommunication services. Intangible services also include banking, financial and insurance services, generally to the exception of safety deposit boxes, and the provision of personnel. The processing and provision of information, and mediation of all the above services, if done by an intermediary acting on behalf of and for account of some other party are also regarded as intangible services.

Telecommunication services are generally defined as the transmission, emission or reception of data, signals, sounds and images by electronic means, wire, radio, optical or other electromagnetic systems. Telecommunication services include telephone, facsimile and telegraphic services, call and call-back services, telephone cards, as well as e-mail and access to and use of electronic databases, such as the Internet.
The European Commission has opted to treat the supply of virtual goods as a service.

New Zealand deems the place of supply of services, if the supplier is not resident in New Zealand, to be in New Zealand only if the services are physically performed in New Zealand. If a non-New Zealand resident physically performs services in New Zealand, to a person in New Zealand for use outside of or partially outside of that person’s taxable activity, the non-New Zealand resident will be deemed to be making a supply of services in New Zealand.

In Canada, the place of supply of a prescribed service can be deemed to be in or outside Canada. Canada deems the place of supply of any other service to be in Canada if the service is, or is to be, performed in whole or in part in Canada. The place of supply of any other service is deemed to be outside Canada if the service is, or is to be, performed wholly outside Canada.

The general place of service rule in the European Union deems the place of a service to be where the supplier has established his business or has a fixed establishment from where the service is supplied. In the absence of a place of business or fixed establishment, the place of supply is deemed where the supplier has his permanent address or usually resides. In the United Kingdom, the place of supply of services is generally deemed to be in the United Kingdom if the supplier belongs in the United Kingdom. A business normally belongs in the United Kingdom if it has a business establishment or some other fixed establishment there and that establishment is the one most concerned with the supply. Belonging in a country is not necessarily equivalent to being resident in a country. A person carrying on a business through an agency or branch in the United Kingdom is treated as having a business or fixed establishment in the United Kingdom.

European Union countries generally deem the place of supply of telecommunication services supplied by non-European Union suppliers to taxable persons, established in a European Union country, to be in the European Union country. The customer must account for tax under the reverse charge mechanism. Where non-European Union suppliers supply telecommunication services to non-taxable persons in a European Union country the suppliers must register for value-added tax purposes in that European Union country. Where European Union suppliers supply telecommunication services to taxable persons established in the European Union or to persons outside the European Union, the services are deemed to be supplied where the recipients are established or reside. Where European Union suppliers supply telecommunication services to non-taxable persons in another European Union country, the services are deemed to be supplied where the suppliers are established.

Canada deems the place of supply of making telecommunication facilities available to be in Canada if the facilities or any part thereof are located in Canada. The place of supply is also deemed to be in Canada if the telecommunication is emitted and received in Canada, or the telecommunication is emitted or received in Canada and the invoicing is done in Canada.

Countries in the European Union generally deem the place of supply of intangible services to be where the customer has his business or fixed establishment, or in the absence thereof, his country of residence or customary abode. However, where the customer is a non-taxable person in another European Union country, the place of supply is deemed to be in the country of residence or establishment of the supplier. The customer must reverse charge if the customer is a taxable
person in another Member State. If these services are supplied to non-taxable persons in Member States, they are taxed in the country where the service provider is established or has a permanent establishment. If the customer is established outside the European Union, the services are taxed where effective use and enjoyment of the service takes place. If the customer is a non-taxable person or a taxable person without a right to recover the value-added tax, suppliers who are established outside of the European Union must register in the European Union.

Most countries deem the place of supply of services connected with immovable property to be where the property is physically situated. Such services would include the services of estate agents and experts and services for preparing and co-ordinating construction works, such as the services of architects and of firms providing on-site supervision. Services in connection with a specific immovable property that can be supplied on-line, such as constructional designs prepared by an architect or engineer, are therefore taxed in the country where the immovable property is or will be situated. If such services are supplied to an entrepreneur, the tax levy is transferred to that entrepreneur. If no link exists between the services and a specific immovable property, the services are regarded as the transfer of copyright or as engineering or similar services.

Countries in the European Union generally deem the place of supply of services capable of being physically rendered to be where the supplies are physically carried out. Such services include cultural, artistic, sporting, scientific, educational or entertainment services; services relating to exhibitions, conferences or meetings; and the valuation of, or work performed on, goods. The United Kingdom shifts the place of supply of valuation, repair, etc. of movable goods to the place of belonging of the customer if the customer is registered for value-added tax in another Member State and the goods in question leave the Member State where the service was physically performed.

Countries in the European Union generally deems the place of supply of leasing of means of transportation to be where the vehicle is actually utilised.

In chapter IV the provisions of the South African value-added tax system were discussed. It was mentioned that South Africa introduced a value-added tax system in September 1991 largely based on the New Zealand value-added tax system. South Africa operates a destination-based value-added tax system, which frees non-South African consumption from tax. The South African value-added tax system levies value-added tax on supplies of goods or services by a vendor in the course or furtherance of his enterprise; on the importation of goods into South Africa; on the supply of imported services into South Africa; and on certain deemed supplies.

The charging section levies tax on goods or services supplied by a vendor in the course or furtherance of any enterprise. Supply is defined widely and forms an integral part of the imposition of the tax. Supplies include performance in terms of a sale, rental and instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of supply. However, for a supply to constitute a taxable supply the supply must either form part of the charging section or be zero-rated.

New Zealand and United Kingdom courts interpreted supply as meaning to furnish or to serve. Two parties to a value-added transaction are generally required, namely the supplier and the recipient.
The supply of goods is the passing of possession in goods pursuant to an agreement in terms of which the supplier agrees to part with and the recipient agrees to take possession. Possession implies control over the goods or having immediate facility for their use and does not require the physical removal of the goods. A supply need not necessarily be a sale. If a sale occurs and the contract is void the supplier is generally still obliged to levy tax. The sale of illegal items also does not bar the levying of tax. Finally, the owner of stolen is not deemed to have made a supply to the thief.

A vendor includes any person who is registered or should be registered. Supplies made in the course or furtherance of an enterprise are subject to tax. All the taxable supplies made by a person are taken into account, even though they may be in the course of different enterprises, in determining whether a person should be registered. Once a person becomes liable to register, all of his business activities or enterprises will be subject to the tax.

Person includes public or local authorities, companies, bodies of persons, estates of deceased or insolvent persons and trust funds. A body of persons, corporate or unincorporate, other than a company, is treated as a person separate from its members, and must register for value-added tax purposes in respect of any enterprise activity carried on independently from its members. Where a partnership carries on an enterprise the partnership, and not the individual partners, is required to register.

A vendor is a person conducting an enterprise in the course of which taxable supplies of goods or services are made, which exceed or are reasonably expected to exceed R300 000 per annum in any twelve consecutive months. A person can also register voluntarily if his turnover exceeds R20 000 per annum.

Supplies which amount to neither a supply of goods nor of services, nor a deemed supply of goods or services fall outside the scope of the tax net. Goods are defined broadly as meaning corporeal movable things, fixed property and any real right in any such thing or fixed property. Fixed property includes land and improvements, sectional title units, shares in a share block company which confers a right to or an interest in the use of immovable property. Fixed property also includes property time-sharing interests and real rights in any land, units, and shares or time-sharing interests. Goods specifically exclude money; rights under mortgage bonds or pledges of things or of fixed property and stamps, forms or cards with a money value which have been sold or issued by the State for the payment of tax or duties, except when disposed of or imported as a collector’s piece or investment article. Intangible things such as goodwill, trademarks and intellectual property do not constitute goods, but may constitute services.

The supply of the use or right or permission to use goods under a rental or instalment credit agreement, charter party, agreement for charter or any other agreement under which such use or permission to use is granted is also regarded as a supply of goods.

Virtually any type of economic activity, which is not a supply of goods, could potentially be a supply of services. Services include 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.
Only supplies entered into in the course of a vendor’s enterprise can constitute taxable supplies. Unless a vendor carries on an enterprise, and makes supplies in the course or furtherance of that enterprise, he may not register and account for output tax or claim input tax deductions in respect of expenses incurred. The New Zealand courts have held it to be a question of fact and degree whether a supply is in the course of furtherance of a taxable activity (New Zealand’s equivalent for enterprise) carried on by a person. There must be a nexus between the supply and the activity to be in the course or furtherance of the activity. The New Zealand courts have held that an act done for the purpose of furthering the taxable activity, or achieving its goal, can be to help, achieve, or advance, and thus be in the furtherance of a taxable activity, although not necessarily in the course of that taxable activity.

The South African value-added tax legislation defines enterprise by way of a general provision and by way of specific inclusions and exclusions. The general definition provides that, in the case of a vendor (other than a local authority), any enterprise or 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 a consideration will be regarded as an enterprise. A profit motive is not a requirement. The term enterprise also includes any enterprises or activities carried on in the form of commercial, financial, industrial, mining, farming, fishing or professional concerns or other concerns of a continuing nature and in the form of associations or clubs.

The first requirement of an enterprise is that an enterprise or activity must be present. The terms “enterprise” (South Africa), “taxable activity” (New Zealand) or “business” (United Kingdom) are critical to the concept of value-added tax since only enterprises operating as such are entitled to register, account for output tax and claim input tax deductions. The South African and New Zealand concepts are significantly wider than that of the United Kingdom, which only imposes value-added tax on supplies made in the course of conducting a business. The South African and New Zealand definitions include the activities of a business, they are not limited to such activities.

The United Kingdom courts have established a number of factors which should be considered to decide whether or not a business is carried on, namely, whether or not the activity amounts to a serious undertaking earnestly pursued or a serious occupation, not necessarily confined to commercial undertakings. Whether the activity is an occupation or function actively pursued with reasonable or recognisable continuity that has a measure of substance, as measured by the value of taxable supplies. Whether the activity is properly organised in a regular manner, using recognised business principles. Whether the activity is mainly concerned with the making of supplies to customers for a consideration and whether it involves the making of taxable supplies, commonly made by others with a view to profit. Although important, these factors are not in themselves conclusive as to the existence of a business. The activity and its nature must be examined in its entirety to establish whether a business is conducted.

The second requirement of the definition of enterprise is that the enterprise or activity must be carried on continuously or regularly. The South African legislation does not clarify what is regarded as continuously or regularly. New Zealand interpreted the word continuously as an indication that the activity has not ceased in a permanent sense, or has not been interrupted in a
significant way. New Zealand has also interpreted the word regularly to mean a 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 requirement to register for value-added tax purposes, if a person is conducting an enterprise and the registration threshold is met, is not dependent on the supplier's place of residence. Foreigners are also obliged to register if they conduct an enterprise in, or partly in, South Africa, irrespective of whether they are residents of South Africa. Value-added tax is only levied on supplies made by a person who conducts an enterprise, continuously or regularly, in or partly in South Africa. The place of supply is thus indirectly woven into the charging section by means of the definition of enterprise.

The definition of enterprise also provides for specific inclusions. Enterprise specifically includes in certain instances the provision of telecommunication services and underwriting insurance business by Underwriting Members of Lloyd's of London. The definition of enterprise was amended in 1997 to deem the suppliers of telecommunication services used in South Africa to be conducting an enterprise in South Africa. The amendment, although not promulgated yet, will also capture non-resident suppliers without permanent establishments or places of business in South Africa. Telecommunication service suppliers are required to register and levy tax on their services, if the services utilised in South Africa exceed R300 000 per annum.

The definition of enterprise has been amended (effective 1 January 2001) to include the activity of underwriting insurance business by Underwriting Members of Lloyd's of London, to the extent that contracts of insurance are concluded in South Africa.

The term enterprise excludes certain activities, which would otherwise fall in the definition. Examples include, employee services (for remuneration), and exempt supplies. A supply, in certain instances, outside South Africa of goods or services from a foreign branch or main business located outside South Africa is also deemed not to be in the course or furtherance of an enterprise. However, if a vendor in carrying on an enterprise in South Africa, transfers goods or provides services to or for the purposes of his branch or main business, he is deemed to supply the goods or service in the course or furtherance of his enterprise. The transfer of goods or provision of services to an independent foreign branch is generally zero-rated for value-added tax purposes.

The importation of goods into South Africa is also a taxable event. Only goods entered for home consumption are deemed to be imported and subject to value-added tax. Goods imported and entered into a bonded warehouse, but not entered for home consumption, is not subject to value-added tax.

The supply of imported services is also subject to value-added tax. Imported services is a supply of services by a non-resident supplier or a supplier who carries on business outside South Africa to a resident recipient to the extent that the services are used in South Africa otherwise than for the purpose of making taxable supplies. A resident of South Africa is a person (other than a company) who is ordinarily resident in South Africa or a domestic company as defined for income tax purposes. Any other person or company shall be deemed to be a resident to the extent that the person or company carries on an enterprise or activity in South Africa and has a fixed or
permanent place in South Africa relating to the enterprise or activity. Tax on imported services is not due if a supply is chargeable with tax under the charging section; or the supply, if made in South Africa, would have been zero-rated.

Certain deeming provisions widen the scope of the term supply. For instance, if a single supply consists of more than one element and if separate considerations had been payable, some of the elements would have been charged at the standard rate, whilst others would have been charged at the zero rate, each element is deemed a separate supply. Also, an agent acting on behalf of a non-resident principal, who is not a vendor, is entitled to claim an input tax deduction in respect of value-added tax paid on importation on behalf of the principal. The agent is deemed to make a supply of the imported goods to the principal’s customer in South Africa.

Chapter V assessed the provisions of the South African value-added tax system with a view to critically assess the need for the introduction of place of supply rules. As mentioned, South Africa is one of the few countries, operating a value-added tax system, without specific place of supply rules.

The primary reason for introducing place of supply rules should be to alleviate the current legislative uncertainty experienced. Due to the resource constraints experienced by the South African Revenue Service (SARS), any amendments to the current value-added tax system should not add to the administrative burden of SARS. Foreign enterprises should also not necessarily be burdened with registration requirements, except where non-registration would lead to a loss of revenue to the fiscus.

The South African Fiscal Association (SAFA) set itself the target to draft and put forward as a proposal to SARS, place of supply rules for South Africa. SAFA distributed initial place of supply rules to the major auditing firms in South Africa, inviting their commentary. SAFA heard oral representations on the proposed place of supply rules and received written commentary from Deloitte & Touche. The proposals were reconsidered in light of the representations made and re-drafted. The initial SAFA proposal on place of supply rules envisaged catering for the place of supply of goods and services made by residents of South Africa and non-residents.

SAFA defines when an “activity”, as envisaged by the definition of “enterprise”, is deemed to be carried on in or partly in South Africa. The effect of this approach is that the requirement of “continuously or regularly” would still remain as a separate requirement that must be met for a person to comply with the definition of “enterprise”. The danger of the approach adopted by SAFA is that South African residents or non-residents can escape the registration and “enterprise” requirements if their activities are deemed not to be carried on in or partly in South Africa. A further danger could be that, but for the proposed “activity” rule, a non-resident entity could have been deemed to be carrying on an “enterprise” in South Africa and would have been entitled to zero-rate certain of its supplies and claim input tax deductions in respect of its expenses incurred in South Africa. The adoption of the “activity” rule could in certain instances prevent registration of a non-resident entity in South Africa and deem all of its activities to be outside the South African value-added tax net, thereby denying the entity recourse to the favourable zero-rating provisions.
SAFA differentiates, in respect of goods, between sale, instalment credit, and rental agreements, and agreements for the supply of real rights in movable goods or fixed property. An activity is deemed to be carried on in or partly in South Africa where a person supplies goods in terms of a sale or instalment credit agreement or where a person supplies real rights in movable goods and the goods are situated in South Africa at the time the agreement is concluded. Goods located in a licensed customs and excise warehouse are specifically excluded. An activity is deemed to be carried on in or partly in South Africa where a person supplies any real rights in fixed property located in South Africa. An activity is deemed to be carried on in or partly in South Africa where a person supplies any goods in terms of a rental agreement and the goods are wholly or partly used in South Africa or the goods consist of a foreign going ship or foreign going aircraft operated by a resident of South Africa. The proposals will not apply in respect of goods, which are exempt from tax on importation in terms of section 13(3) of the Act. The proposals also provide that a sale, instalment credit or an agreement for the supply of a real right in movable goods or fixed property, shall be deemed to be concluded at the time when the last party to the agreement accepts the terms and conditions of the agreement.

The proposal differentiates, in respect of services, between services capable of being physically rendered or performed and other services. An activity is deemed to be carried on in or partly in South Africa to the extent that a supplier or his agent physically renders or performs services in South Africa. An activity is deemed to be carried on in or partly in South Africa to the extent that a supplier or his agent supplies services, not capable of being physically rendered, from a fixed or permanent place in South Africa from where a business is carried on by the supplier or his agent. The proposal also provides that the Commissioner for SARS may, on request, deem any supply of services to be an activity carried on by any person to be supplies made in South Africa.

In terms of SAFA's revised proposal of 20 September 2000, the proposed place of activity rules have been limited to apply only to persons who are not residents of South Africa. It is submitted that this amendment renders the proposed place of activity rules superfluous since it covers the activities of persons only that do not fall within the definition of "resident of the Republic". Since the proviso to the definition refers to "any enterprise or other activity" the effect is, therefore, that the proposed rules dictates when a person's activities will be deemed to be carried on in or partly in South Africa, with the knowledge that that person will not be conducting an enterprise in South Africa and hence will never be subject to value-added tax. This problem can be solved in or two manners. Firstly, the proviso to the definition of "resident of the Republic" could be amended to not refer to the carrying on of any enterprise or other activity. The place of activity rules should then ensure reference to "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 phrased in the proviso to the definition of "resident of the Republic". The second alternative would be to incorporate the proviso to the definition of "resident of the Republic" into the definition of "enterprise". The initial proposal has also been amended to make it clear that the rules in respect of services apply to suppliers or their agents acting for or on their behalf. This amendment ensures irrevocably that an agent acting on behalf of a principal can render such activity to be an activity of the principal.

Deloitte & Touche submitted commentary on the initial place of activity proposals. Deloitte & Touche identified certain industries or transactions that could justify the introduction of place of
supply rules in South Africa, namely movable goods made available outside South Africa by a foreign enterprise (who retains ownership) and subsequently imported by a person present in South Africa into South Africa; foreign enterprises granting the use of a right in South Africa; telecommunication services; the insurance industry; and foreign enterprises concluding contracts with South African residents to perform or physically render services in South Africa.

Deloitte & Touche recommended that place of supply instead of place of activity rules be introduced and that the current uncertainty regarding the meaning of "enterprise or activity" be addressed as a separate issue; affixing place of supply rules to the time when a contract is signed and the location of the goods at that time could be open to manipulation; where goods are supplied under a sale agreement and placed at the disposal of the recipient in South Africa, the place of supply of the goods should be deemed to be in South Africa. In the event that ownership of the goods remains in the hands of a foreign enterprise, whilst the goods are used by a recipient in South Africa, the foreign enterprise should be required to register for value-added tax purposes only if the recipient is a non-registered South African person or partially taxable vendor or where the foreign enterprise has a permanent establishment in South Africa or owns fixed property; the place of supply of real rights in movable goods, or the supply of goods under an instalment credit agreement or a rental agreement should be determined as if the supply of goods is a supply of services, except where actual ownership of the goods passes; where real rights in fixed property are supplied under an agreement, the place of supply should be where the fixed property is located; the place of supply of services should be where the consumption takes place. Where the supplier has a permanent establishment in South Africa he should be liable to account for tax at the standard rate. Where the supplier has no permanent establishment in South Africa, then notwithstanding that consumption takes place in South Africa, the supplier should not be required to register in South Africa, unless any of the recipients are not fully entitled to an input tax deduction. The compliance burden on SARS in applying the reverse charge mechanism where the supplier has no permanent establishment in South Africa would outweigh the benefits; Place of supply rules should take into account the lack of resources of SARS. Any alterations to the Act should endeavour to limit the number of foreign enterprises registering in South Africa, except where non-registration would lead to a loss of revenue to the fiscus or to a lack of neutrality.

To establish the place of supply of services physically rendered in South Africa by a foreign enterprise and whether the foreign enterprise has to register for value-added tax purposes, the provisions of the charging section and the definition of "enterprise" need to be analysed. The charging section has four requirements that must be met to subject supplies of a person to value-added tax, namely a supply; by a vendor; of goods or services; in the course or furtherance of any enterprise. It follows that services physically rendered by a foreign enterprise in South Africa would comply with the requirement that a supply must be present. The person making these supplies will be a vendor if he meets the registration requirements and it can be said that the supplies are made in the course or furtherance of any enterprise. The general definition of enterprise has five requirements that must be met for the supplies to be done in the course or furtherance of any enterprise, namely any enterprise or activity; carried on continuously or regularly by any person; in or partly in South Africa; in the course of which goods or services are supplied to any person; for a consideration, whether or not for profit. An enterprise or activity must first be carried on continuously or regularly in or partly in South Africa, and then only should one consider whether goods or services are supplied in the course of that enterprise or
activity. The supply of goods or services is not enough to indicate that an enterprise or activity is being carried on, especially when dealing with the supply (and not render) of goods or services which require no enterprise or activity by the supplier in South Africa. However, in Belgium, a person who supplies goods or services is deemed to exercise an economic activity. Following New Zealand's interpretation of the word “activity”, the physical rendering of services in South Africa must constitute an “enterprise or activity” or at least an “activity” in South Africa, since it involves a series of acts undertaken by the person and it involves a person doing something, being active or taking some action. It would be a question of fact and degree whether the person is carrying on the activity continuously or regularly and whether consideration is derived from the supplies. It is submitted that the place of supply of services physically rendered in South Africa by a foreign enterprise would be in South Africa, irrespective of whether the foreign enterprise is a resident of South Africa or not. Whether the foreign enterprise would have to register in South Africa would depend on the factual circumstances and whether all the requirements of the definition of “enterprise” are met. Services physically rendered in South Africa by an agent acting for and on behalf of a foreign principal would be deemed to be made by the principal.

The provision of intangible services by a foreign enterprise, not being a resident of South Africa and without a fixed or permanent place of business, has been interpreted often and with no strong guidelines provided by SARS. The treatment of foreign enterprises providing intangible services in South Africa would be the same irrespective of whether the foreign enterprise provide the services himself or through an agent acting for and on his behalf. To determine the place of supply of rights made available by a foreign enterprise and used in South Africa and whether the foreign enterprise has to register for value-added tax purposes, the provisions of the charging section and the definition of “enterprise” need to be analysed. SARS expressed the view that the granting of the use in South Africa of any trademark or intellectual property by a foreign enterprise over a period of time is regarded as the carrying on of an enterprise partly in South Africa. SARS submitted that a foreign enterprise that regularly receives royalties or franchise or agency fees is required to register as a vendor if its annual receipts exceed R300 000.

In terms of South African legislation it needs to be assessed whether the foreign enterprise is carrying on an enterprise or activity (to constitute an “enterprise”) in or partly in South Africa and whether such enterprise or activity is carried on continuously or regularly. Firstly, it needs to be assessed whether an “enterprise or activity” is being carried on. If it could be argued that the foreign entity does not carry on an enterprise or activity, since it only “passively” makes available a right, the investigation ends here and the foreign entity does not need to register. New Zealand interprets the word “activity” to depict some form of action. It is submitted that the activity of the foreign entity is the making available of a right. In this sense, the making available of a right would constitute an activity. It could, however, be argued that the activity of the making available of a right is a once-off activity and not continuously or regularly. The fact that consumption takes place in South Africa should not be indicative as to whether an activity is carried on in South Africa. Many European countries interpret a business activity to be resulting from an economic rather than a civil or commercial law approach. Should this approach be followed, the foreign enterprise would be conducting an activity and it could then be argued that the activity is being conducted on a continuous or regular basis, since no physical action is required, but merely an economic activity. It must still, however, be decided where the activity is being carried on. Secondly, assuming that it could be argued that the foreign entity is carrying on an activity, it must still be considered whether
the activity is carried on continuously or regularly. Following the New Zealand interpretation of activity, there is an argument that the making available of a right should not be viewed as continuous or regular if done once off. However, an argument could be made out that the making available of a right could be seen to be of a continuous and regular nature if the foreign entity is continuously and regularly making available a right to different entities. It would therefore seem arguable that the making available of a right by the foreign entity could be seen as a continuous and regular activity. Thirdly, assuming that an enterprise or activity is carried on continuously or regularly, it needs to be assessed where the activity is carried on. Assuming that the right is registered in a foreign country and that the foreign entity is making available the right in a foreign country (since the foreign entity is organised and exists under the laws of a foreign country), it could be strongly argued that the activity is not carried on in or partly in South Africa. Again, the fact that consumption takes place in South Africa should not demand that the activity be carried on in South Africa. The fiscus would theoretically not be losing revenue if foreign enterprises are not liable to register for value-added tax purposes in South Africa due to the reverse charging mechanism.

The definition of “enterprise” was amended in 1997 to include “the activities of any person who continuously or regularly supplies telecommunication services to any person who utilises such services in the Republic”. The amendment has not yet been promulgated. The effect of the amendment is to render the place of supply of telecommunication services to be in South Africa if the services are used in South Africa. The definition of “enterprise” would seem to indicate that the South African legislator looks to the place of the activities of the supplier in determining whether an enterprise is being conducted and not necessarily the place where the recipient consumes the goods or services. This argument is strengthened by the amendment introduced in 1997, which has the effect that consumption (i.e. the place of the recipient) is taxed. Had the Act set out to tax consumption even prior to the amendment, it could be argued that the subsequent amendment would have been superfluous.

The definition of “enterprise” has been amended with effect from 1 January 2001 to deem the place of supply of underwriting business of underwriting members of Lloyd’s of London to be where the contracts are concluded. This provision and the amendment regarding telecommunication services are the only two specific place of supply rules in South Africa. The general definition of enterprise is the general place of supply provision of the Act.

The physical supply of goods would be considered to be an “activity” as envisaged by the definition of “enterprise”, since it requires some action by the supplier. If a foreign enterprise, or his agent, supplies goods in South Africa the foreign enterprise will be considered to be conducting an “enterprise or activity”. The foreign enterprise will be required to register if the supplies are done continuously or regularly and the registration requirements are met. The place of supply of goods in South Africa is in South Africa. The place of supply of goods, under a rental, instalment credit or charter agreement, could potentially be the same as that of intangible services. Since the phrase “enterprise or activity”, mandates some action by the supplier, it could be argued that a foreign supplier making available goods outside South Africa that will be imported into South Africa by the user and used in South Africa could not constitute the carrying on of an enterprise by the foreign supplier. The user could nevertheless be entitled to claim an input tax deduction on importation if the goods will be used to make taxable supplies.
A foreign enterprise importing goods into South Africa does not automatically carry on an enterprise. However, where the foreign importer supplies the goods subsequent to importation, the foreign importer could be liable to register for value-added tax if he complies with the registration requirements and supplies goods continuously or regularly. Where the foreign principal’s agent imports goods and subsequently supplies these goods, the principal might be required to register. Where goods are imported into South Africa on consignment, no supply has occurred, but the goods would still be subject to tax on importation. An input tax deduction would only be available to a vendor who imported the goods to make taxable supplies. Where the consigned goods are subsequent to importation supplied, a supply would be deemed to have been made by the consignor. This result would also follow if the consignee applies the imported goods in his own business. The supply of goods in South Africa, and not the importation of goods, could necessitate a foreign importer to register for value-added tax purposes in South Africa. The place of supply of goods imported will be regarded to be in South Africa.

The exportation of goods from South Africa is a supply subject to value-added tax at the standard rate, if done by a vendor in the course or furtherance of his enterprise. The exportation of goods will, however, generally be zero-rated. The place of supply of the exportation of goods from South Africa will be deemed to be in South Africa.

The study concludes and recommends, with regards to the introduction of place of supply rules in South Africa, as follows:

- Current South African legislation caters effectively for a supply in the form of the transfer of the right to dispose of tangible movable property. The place of supply will be where the goods are located at the time the transfer of ownership takes place;

- Current legislation caters effectively for supplies of immovable property or supplies relating to immovable property. The place of supplies of or relating to immovable property will be where the immovable property is physically located;

- Current legislation caters effectively for the supply of services capable of being physically rendered. The place of supply will be where the services are physically rendered, i.e. where consumption takes place. SARS should, however, consider adopting Deloitte & Touche’s suggested approach of not registering a foreign enterprise if the foreign enterprise has no permanent establishment in South Africa and the recipients of the supply can claim a full input tax deduction;

- Current legislation does not, however, cater effectively for the supply of goods where ownership does not pass, i.e. supplies of the nature mentioned in section 8(11) of the Act. It is submitted that under current legislation such supplies would not necessarily create an activity or enterprise for a foreign enterprise, even if the consumption takes place in South Africa since an activity would require some action or set of actions by the supplier in South Africa. Should SARS decide that South African consumption should be taxed this could be effected in the same manner as was done with telecommunication services or by amending the phrase “enterprise or activity” in the definition of “enterprise” to “enterprise or economic or other activity”. The sequential order followed in the definition of “enterprise” could also be amended to effect
that supplies of goods or services would be regarded as an economic activity, irrespective of whether the supplier is a foreign enterprise with or without a permanent or fixed place of business in South Africa;

- Current legislation also does not cater effectively for the supply of intangible services and could be solved as mentioned in the preceding indentation;

- SARS should consider the effect of the registration of foreign enterprises in South Africa on their administrative capacity and could in this regard rely more on the reverse charging mechanism as under section 9(2)(e) of the Sixth Directive of the European Union or alternatively extend the definition of "enterprise".
Place of Activity Rules

For the purposes of the definition of "enterprise" as defined in section 1 of the Act, an activity shall be deemed to be carried on in or partly in the RSA where:

1. In the case of goods supplied by any person under:
   a) a sale agreement, the goods are situated in the RSA, excluding goods located in a licensed customs and excise warehouse, at the time the sale agreement is concluded; or
   b) an agreement for the supply of any real right in movable goods, such movable goods is located in the RSA at the time the agreement for the supply of such rights is concluded; or
   c) an agreement for the supply of any real right in fixed property, such fixed property is located in the RSA at the time the agreement for the supply of such rights is concluded; or
   d) an instalment credit agreement, the goods are situated in the RSA at the time the instalment credit agreement is concluded; or
   e) a rental agreement:
      (i) the goods are used wholly or partly in the RSA; or
      (ii) the goods consist of a foreign going ship or a foreign going aircraft which is operated by a resident of the RSA.

Provided that this subjection shall not apply in respect of goods which are exempt from tax on importation as envisaged in section 13(3) of this Act.

Provided that for purposes of this section, a sale agreement, an instalment credit agreement and an agreement for the supply of a real right in movable goods or fixed property, shall be deemed to be concluded at the time when the last party to the agreement accepts the terms and conditions of the agreement.

2. In the case of services supplied by any person where the services are:
   a) capable of being physically rendered or performed, to the extent that such services are physically rendered or performed by the supplier or his agent in the RSA; or
   b) not capable of being physically rendered or performed to the extent that the supplier or his agent supplies the services from a fixed or permanent place in the RSA from where a business is carried on by the supplier or his agent.

Notwithstanding any of the provisions in this section, the Commissioner may on request, deem any supply of services to be an activity carried on by any person to be supplies made in the RSA.
ANNEXURE B

THE SOUTH AFRICAN FISCAL ASSOCIATION’S REVISED DRAFT PLACE OF ACTIVITY RULES OF 20 SEPTEMBER 2000
Place of Activity Rules – Final Draft (September 20, 2000)

For the purposes of the definition of "enterprise" as defined in section 1 of the Act, a person that is not a resident shall be deemed to carry on an activity in or partly in the RSA where:

1. In the case of goods supplied by that person under:
   
a) a sale agreement, the goods are situated in the RSA, excluding goods located in a licensed customs and excise warehouse, at the time the sale agreement is concluded; or
   
b) an agreement for the supply of any real right in movable goods, such movable goods is located in the RSA at the time the agreement for the supply of such rights is concluded; or
   
c) an agreement for the supply of any real right in fixed property, such fixed property is located in the RSA; or
   
d) an instalment credit agreement, the goods are situated in the RSA at the time the instalment credit agreement is concluded; or
   
e) a rental agreement:
      
      (i) the goods are used wholly or partly in the RSA; or
      (ii) the goods consist of a foreign going ship or a foreign going aircraft which is operated by a resident of the RSA.

Provided that this subjection shall not apply in respect of goods which are exempt from tax on importation as envisaged in section 13(3) of this Act.

Provided that for purposes of this section, a sale agreement, an instalment credit agreement and an agreement for the supply of a real right in movable goods or fixed property, shall be deemed to be concluded at the time when the last party to the agreement accepts the terms and conditions of the agreement.

2. In the case of services supplied by any person where the services are:
   
a) capable of being physically rendered or performed, to the extent that such services are physically rendered or performed by the supplier or an agent in the RSA acting for or on behalf of that supplier; or
   
b) not capable of being physically rendered or performed to the extent that the supplier or an agent acting for or on behalf of that supplier supplies the services from a fixed or permanent place of business in the RSA from where a business is carried on by the supplier or his agent.

Notwithstanding any of the provisions in this section, the Commissioner may on request by such person, deem any supply of services to be an activity carried on by any person to be supplies made in the RSA.
ANNEXURE C

DELOITTE & TOUCHE’S COMMENTARY ON THE SOUTH AFRICAN FISCAL ASSOCIATION'S INITIAL DRAFT PLACE OF ACTIVITY RULES
31 July 2000

The Chairperson
The Value-Added Tax Sub-Committee
South African Fiscal Association (SAFA)

For Attention: Ms Marlene Grimm

Dear Ms Grimm

Deloitte & Touche Commentary on the Value-Added Tax (VAT) Place of Activity Rules Proposed by SAFA

We would like to express our appreciation for the opportunity to give our comments on the proposed place of activity rules drafted by your committee.

We proceed in Part A by introducing some of the problems experienced in the South African VAT field, which could possibly be addressed by the introduction of place of supply rules and guidelines that we believe should be followed. We allude in Part B to specific areas of concern. In Part C we have summarised our commentary on the actual proposals, in seriatim. We give a recommended approach in Part D of how we believe place of activity (or supply) rules can and should address these and more generic problems and conclude in part E.

A Introduction

We are of the view that the primary reason for introducing place of supply (or activity) rules should be to alleviate the current legislative uncertainty experienced by VAT consultants and commercial enterprises alike in interpreting the South African VAT provisions as it relates to cross-border transactions and foreign enterprises with some South African connection.

Due to the resource constraints experienced by the South African Revenue Service (SARS), we would like to propose that any amendments to the current VAT system should be done in such a manner to rather alleviate the resource problem than to add to the administrative burden of SARS. In this respect we propose that foreign enterprises not conducting a business in South Africa should not unnecessarily be burdened with VAT registration requirements, except where non-registration would lead to a loss of revenue to the fiscus.
B Specific Examples

We highlight below various examples of problems experienced in practice, which could possibly be solved by the introduction by place of supply (or activity) rules.

B1 Movable Goods Rented to a South African Person by a Foreign Enterprise and Made Available Outside the Republic of South Africa (SA)

Movable goods made available outside SA by a foreign enterprise (who retains ownership) and subsequently imported by a person present in SA into SA could, in terms of current interpretation of the VAT legislation render the foreign enterprise liable to register for SA VAT purposes.

B2 Royalty Payments

In the SARS' VAT News No.13 of December 1999 the view was expressed that the granting of the right of use in SA of any trade mark or intellectual property by a foreign enterprise over a period of time is regarded as the carrying on of an enterprise in or partly in SA for VAT purposes. It was argued that foreign enterprises that regularly receive royalties, franchise or agency fees are required to register as VAT vendors if their annual receipts exceed R300 000.

Should this be the official view of SARS in future, it would lead to the registration of many foreign enterprises in SA without necessarily any material revenue gain to the fiscus, and an additional administrative burden to the fiscus and the foreign enterprise alike.

B3 Telecommunication Services

The amendment to “enterprise” (albeit not promulgated yet) provides that the place of supply of telecommunication services is where the services are consumed and, it is proposed, would not have been captured in the definition of “enterprise”, had it not been for the amendment.

This amendment seems to cater for the fact that most of the recipients of telecommunication services are not registered for VAT purposes. The amendment would seem to contradict, to some extent, the application of the reverse charge procedure provided for in section 7(1)(c) and the definition of “imported services” in section 1 of the VAT Act.

B4 Insurance

With effect from 1 January 2001, the recent amendment to “enterprise” provides that the place of supply in respect of services rendered by Underwriting Members of Lloyd’s of London is where the contracts of insurance are concluded.

This amendment caters for the unique nature of the business of the Underwriting Members of Lloyd’s of London, but does not address the insurance industry’s VAT treatment in general.
B5 Service Contracts Executed by Foreign Enterprises in South Africa through Agents or Employees

Foreign enterprises often conclude contracts with South African residents to perform or render services physically in South Africa. The nature, duration and continuity of these services might vary. Clear guidelines as to when the foreign enterprise needs to register for VAT in South Africa has not officially been made available.
For the purposes of the definition of “enterprise” as defined in section 1 of the Act, an activity shall be deemed to be carried on in or partly in the RSA where:

We recommend that place of supply rules rather be introduced and that the current uncertainty regarding what constitutes an “enterprise or activity” be addressed as a distinct separate issue. This could be done by, for example, linking the definition of “enterprise” to the Income Tax concept of permanent establishment (PE) via practice note or a section 1 definition or by some other means.

We proceed with suggestions based on place of supply rules with reference to the PE concept:

1. In the case of goods supplied by any person under:

As a general comment we would like to stress that we believe that affixing place of supply rules to the time when a contract is signed and the location of the goods at that time to be very open to manipulation.

It should be noted that various countries and also the European Union (EU) defines goods as meaning the transfer of ownership in tangible property or immovable property, whereas services mean supplies not being supplies of goods. This distinction could be useful in defining place of supply

a) a sale agreement, the goods are situated in the RSA, excluding goods located in a licensed customs and excise warehouse, at the time the sale agreement is concluded; or

The EU deems the supply of goods where the goods are dispatched or transported by the supplier, recipient or a third person to be the place where the goods are at the time when the dispatch or transport to the recipient begins.

Where the goods are installed or assembled by or on behalf of the supplier, the place of supply is deemed to be where the goods are installed or assembled, i.e. where consumption takes place.

Where the goods are not dispatched or transported, the place of supply is deemed to be where the goods are when the supply takes place.

We recommend that where goods are placed at the disposal of the recipient at a place in SA, the
place of supply of the goods should be deemed to be in SA. We further recommend that in the event that ownership of the goods remains in the hands of a foreign enterprise, whilst the goods are used by a recipient at a place in SA, the foreign enterprise be required to register for SA VAT purposes only where the recipient is a non-registered SA person or partially taxable SA VAT vendor or where the foreign enterprise has a PE in SA or owns fixed property.

<table>
<thead>
<tr>
<th>b) an agreement for the supply of any real right in movable goods, such movable goods is located in the RSA at the time the agreement for the supply of such rights is concluded; or</th>
</tr>
</thead>
<tbody>
<tr>
<td>c) an agreement for the supply of any real right in fixed property, such fixed property is located in the RSA at the time the agreement for the supply of such rights is concluded; or</td>
</tr>
<tr>
<td>d) an instalment credit agreement, the goods are situated in the RSA at the time the instalment credit agreement is concluded; or</td>
</tr>
<tr>
<td>e) a rental agreement:</td>
</tr>
<tr>
<td>(i) the goods are used wholly or partly in the RSA; or</td>
</tr>
<tr>
<td>(ii) the goods consist of a foreign going ship or a foreign going aircraft which is operated by a resident of the RSA.</td>
</tr>
</tbody>
</table>

Provided that this subsection shall not apply in respect of goods which are exempt from tax on importation as envisaged in section 13(3) of this Act.

We recommend that the place of supply should be determined as if the supply of goods in these instances is a supply of services, except where actual ownership of the goods passes.

| The danger of linking place of supply or activity rules to the superficial time of supply rules in the VAT Act or date of acceptance of conditions is that it invites manipulation. This principle is demonstrated by the various amendments to section 11(2)(l) over the last years. |

Provided that for purposes of this section, a sale agreement, an instalment credit agreement and an agreement for the supply of a real right in movable goods or fixed property, shall be deemed to be concluded at the time when the last party to the agreement accepts the terms and conditions of the agreement.

| The EU generally deems the supply of services to be the place where the supplier established his business or has a fixed establishment from |

| 2. In the case of services supplied by any person where the services are: |
the place of supply. Therefore, the place where the service is supplied, or in the absence thereof, the place where he has his permanent address or usually resides.

Specific rules also apply. The EU also deems the place of use to be the place of supply for certain services, such as services relating to advertising, transport, hiring out of movable property, intellectual property rights, financial services, and the use of intellectual property.

We recommend that the place of supply should be determined by considering where the consumption takes place. If the consumption takes place in SA, the supply should be deemed to take place in SA. Where the supplier has a PE in SA, irrespective of nationality, the supplier should be liable to account for VAT at the standard rate. Where the consumption takes place in SA, the supplier should be required to register in SA unless any of the recipients are not fully entitled to make an input tax deduction (e.g., individuals or financial institutions).

We have considered whether SA should consider the reverse charge mechanism, where the consumer is required to account for VAT on the supply, but the recipient is not required to register. However, the benefits of the reverse charge mechanism may outweigh the compliance burden on SARS without any of the recipients being non-compliant taxpayers.

We recommend that the place of supply should be determined by considering where the consumption takes place. If the consumption takes place in SA, the supply should be deemed to take place in SA. Where the supplier has a PE in SA, irrespective of nationality, the supplier should be liable to account for VAT at the standard rate. Where the consumption takes place in SA, the supplier should be required to register in SA unless any of the recipients are not fully entitled to make an input tax deduction (e.g., individuals or financial institutions).
<table>
<thead>
<tr>
<th>Notwithstanding any of the provisions in this section, the Commissioner may on request, deem any supply of services to be an activity carried on by any person to be supplies made in the RSA.</th>
<th>consider the reverse charge mechanism where the supplier has no PE in SA, but are of the view that the compliance burden on SARS would outweigh the benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discretion generally creates an enormous administrative compliance burden for SARS and should be avoided as far as possible.</td>
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</tbody>
</table>
D  Suggested Approach

D1 General

Place of supply rules should ideally take into account:

- The lack of resources of the South African Revenue Service (SARS) and in this regard any alterations to the VAT Act should endeavour to limit the number of foreign enterprises registering in South Africa for VAT purposes, except where non-registration would lead to a loss of revenue to the fiscus or to a lack of neutrality;
- The nature of the supply, i.e. a distinction between tangible and intangible goods and services;
- Where specifically the goods or services are made available;
- Where the goods or services are consumed;
- Where the supplier operates his business from;
- Whether the supplier has a permanent establishment (PE) in South Africa. PE rules as used in the OECD or the UN Model Tax Treaties or used in some VAT systems such as Greece, Italy or the UK should be considered in designing place of supply rules for South Africa; and
- Whether the principal supplier operates through a dependent agent (who can legally bind his principal) or an independent contractor who cannot legally bind the principal supplier.

D2 Suggested Place of Supply Rule – Goods (see Annexure A)

We are of the view that the place of supply of movable goods placed at the disposal of the recipient (or made available) outside SA should be deemed to be outside SA and, other things being equal, the owner of the goods should not, by reason of this initial supply of these goods on its own, be required to register in SA for VAT purposes.

Should the place of supply rules cater for this, the South African fiscus would be in a neutral position as regards the once-off and physical making available of the goods. Should the goods subsequent to the placing at the disposal of the recipient outside SA, be imported into SA, it would give rise to SA VAT. The importer would be charged with VAT on importation and physical entry of the goods into SA. The importer should be entitled to claim an input tax deduction on the importation of the goods if it will be used to make taxable supplies.

In the case where the ownership of the goods are retained by a foreign enterprise (such as an instalment credit or rental agreement), who made the goods available outside SA and was not responsible for the importation, the VAT Act needs to charge the domestic consumption of the goods (e.g. the use in SA under a rental) to VAT at the standard rate. In this regard, SARS would have two options of taxing the rental stream in SA.

Firstly, the SA importer could be expected to reverse charge (on the principles of imported services). This option would be impractical and would result in the exact same compliance issues currently experienced in the field of self-supply in respect of imported services and would consequently place an enormous administrative burden on SARS.

The second option would be to deem the foreign enterprise to conduct an enterprise activity in SA, where the foreign enterprise is making available any goods to a non-registered SA person or to a vendor who utilises the goods wholly or partially for making exempt supplies. Should the foreign enterprise
make its SA supplies (ie the making available of the goods) solely to SA VAT vendors, the foreign enterprise should not be required to register for SA VAT purposes and these supplies should not attract SA VAT, since the SA VAT vendor would be entitled to an equal input tax deduction. This option seems viable since the objective should be to not register foreign enterprises in SA, except where non-registration would lead to a loss of revenue to the fiscus. The only degree of a lack in neutrality (cross-border) could be that goods supplied in SA to a VAT vendor under a rental agreement or the like by a foreign enterprise would not have the possible adverse cash flow consequences associated with domestic supplies, where tax is paid in advance of claiming an input tax deduction.

Should the foreign enterprise have a permanent place of business, permanent establishment (using the OECD or UN Model Double Tax Treaty definitions) or place of belonging (as in UK VAT legislation), any supplies made by the foreign enterprise and consumed in SA should be charged with VAT by the foreign enterprise, irrespective of the VAT status of the recipient.

D3 Suggested Place of Supply Rule – Services (see Annexure B)

The place of supply should be where the supplier has established his business or has his PE from which the service is supplied, or in the absence thereof, the place where he has his permanent address or usually resides. Should this place of supply rule be adopted, again, the South African fiscus would not be adversely affected. Non-registered persons or partially taxable registered SA VAT vendors could be required to reverse-charge if the services are acquired to make exempt supplies.

We would again suggest, as in D2 above, that the foreign enterprise should be deemed to conduct an enterprise activity in SA, where the foreign enterprise is making available any rights to a non-registered SA person or partially taxable registered SA VAT vendor. Should the foreign enterprise make its SA supplies (e.g. the making available of rights) only to SA VAT vendors, the foreign enterprise should not be required to register for SA VAT purposes and these supplies should not attract SA VAT, since the SA VAT vendor would be entitled to an equal input tax deduction. Again, this option seems viable since the objective should be to not register foreign enterprises in SA, except where non-registration would lead to a loss of revenue to the fiscus. The only degree of a lack in neutrality (cross-border) could be that services used in and made available in SA to a registered SA VAT by a foreign enterprise would not have the possible adverse cash flow consequences associated with domestic supplies, where tax is normally paid in advance of claiming an input tax deduction.

Should the foreign enterprise have a permanent place of business, permanent establishment (using the OECD or UN Model Double Tax Treaty definitions) or place of belonging (as in UK VAT legislation), any supplies made by the foreign enterprise and consumed in SA should be charged with VAT by the foreign enterprise, irrespective of the nature of the recipient.

E Conclusion

We recommend that the place of supply rules be introduced together with a clarification of “enterprise or activity” as contained in the definition of “enterprise” in section 1 of the VAT Act. We recommend that “enterprise or activity” be given the meaning of a general physical commercial activity, by using the definition of “permanent establishment as used in either the OECD or UN model tax treaties.
We further recommend that the following steps be followed in determining the place of supply and also a foreign enterprise’s responsibility to register for VAT purposes in SA:

1. Determine the place of supply:
   - if consumption takes place in SA – place of supply is in SA.

2. If place of supply is in SA:

3. Determine the nature of the supplier and recipient:
   3.1 If the supplier owns fixed property in SA – foreign enterprise needs to register in SA for VAT purposes – no further test; or
   3.2 If the supplier has a PE in SA – foreign enterprise needs to register in SA for VAT purposes – no further test; or
   3.3 If the recipient is a non-registered SA person or partially taxable SA VAT vendor – foreign enterprise needs to register in SA for VAT purposes – no further test; or
   3.4 If the recipient is a registered SA VAT vendor – foreign enterprise do not need to register in SA for VAT purposes, except where 3.1 or 3.2 above apply.

4. If place of supply is not in SA:
   - and foreign enterprise is not registered in SA for VAT purposes due to any of its other supplies, no need to register in SA for VAT purposes.

Yours faithfully

Deloitte & Touche
Place of Supply of Goods

- Goods
  - Goods placed at disposal of recipient in SA
    - Place in SA
      - Supplies only to registered SA VAT vendors
      - Supplies to final consumer/partially taxable registered SA VAT vendors
        - Foreign Enterprise to register for VAT in SA, irrespective of whether PE or not
        - Foreign Enterprise need not register for VAT in SA, except where he has a PE or fixed situated in SA
  - Importation into SA as principal
    - Place in SA
  - Goods placed at disposal of recipient outside SA
    - Place outside SA
      - Supplies only to registered SA VAT vendors
Place of Supply of Services

Active Services
- eg consulting, advisory, physical
  - place = where physically rendered

  Physically Rendered outside SA
    - Place outside SA

  Physically rendered in SA
    - Place in SA

Passive Services
- eg insurance/license agreements, telecoms, royalties, etc
  - place = where used

  PE
    - Supplies to final consumer/partially taxable registered SA VAT vendors
      - Place outside SA
      - Place in SA
      - Foreign Enterprise need not register for VAT in SA

  No PE
    - Supplies only to registered SA VAT vendors
    - Foreign Enterprise need not register for VAT in SA
ANNEXURE D

THE SOUTH AFRICAN FISCAL ASSOCIATION’S GUIDELINES ON THE PROPOSED PLACE OF ACTIVITY (“SUPPLY”) RULES
Proposed Place of Activity ("Supply") Rules

In view of the current interpretative uncertainty in the South African Value-Added Tax (VAT) system, especially with regards to cross-border transactions the SAFA VAT Committee has drafted proposed “place of supply” rules or what we have termed “place of activity” rules for South Africa.

Please consider the rules in light of, amongst others, the guidelines and/or questions listed below. We would appreciate if the individual firms can provide us with their consolidated and motivated views on the issues raised.

1 Final Domestic Consumption

SA operates a destination based VAT, i.e. the VAT system taxes final domestic consumption by standard rating domestic consumption and importation and zero-rating rating exports.

Would the proposed rules add certainty to these principles or alter the VAT basis in any way?

2 Definition of “enterprise”

Would the rules add clarity to the current definition of “enterprise” or is the definition contradicted in any way?

Does the current definition of “enterprise” cater for all possible scenarios addressed by the proposed rules?

3 Deeming provisions & export provisions

Would the rules contradict any of the deeming provisions in the VAT Act (e.g. section 8(9)) or the zero-rating provisions or even sections 13 (e.g. section 13(3)) and 14?

4 Specific types of transactions

Although the rules do not seek to address all possible specific types of transactions, would the proposed rules give enough guidance on the more common problem areas such as e-commerce, insurance, rental companies (e.g. AVIS and cross border leasing), royalties, etc.?

Would the rules in any way contradict the traditional wisdom regarding the treatment of the specific types of transactions mentioned above and imported goods and/or services?

Should the rules not cater for more specific types of transactions?
5 Place of “activity” as opposed to place of “supply”

Would the term “activity” provide more clarity than the term “supply”?

6 Incorporating the Rules into the Act

How should the rules be incorporated into the Act? A few alternatives are:

- the rules can form part of the definition of “enterprise” (e.g. as was done for telecommunication services) by extending the “SA-use deems enterprise” proviso of telecommunication services
- in a separate section (e.g. section 1A)
- as a separate schedule to the Act (e.g. Schedule 3 or 4)
- “activity” as envisaged in the definition of “enterprise” could be defined in stead of creating separate rules
- would a Practice Note or legislatively incorporated Regulation agreed and drafted by the major consulting firms and SARS under the banner of SAFA suffice in addressing the current uncertainty?

7 Telecommunication services

The proviso in the definition of “enterprise” in section 1 referring to “telecommunication services” and its use in South Africa forming part of an enterprise is effectively a place of supply rule deeming the place of supply to be in South Africa if the consumption takes place in South Africa.

Should it be decided that the proposed rules not form part of the definition of “enterprise” (as posed in paragraph 5 above) in the same manner as telecommunication services, should the proviso relating to telecommunication services be moved contextually to form part of the “place of activity” rules.

8 Commissioner for SARS’ discretion

Should the Commissioner for SARS have the discretion to deem certain activities to take place in South Africa on request?

Should the Commissioner for SARS have the discretion to deem certain activities not to take place in South Africa? If in the affirmative, should this discretion also only be exercisable upon request?

Would the insertion of one or both of the discretions nullify the objective of introducing place of activity rules, i.e. to enhance interpretative certainty?

9 Fixed or permanent place of business

Should the terms fixed or permanent place of business be defined to provide more clarity?
10 "Lloyds of London" and "telecommunication services"

Would the removal of the terms "Lloyds of London" and "telecommunication services" from the definition of "enterprise" alter the width of the South African VAT net?

11 Place of activity of services

Should the place of activity of services distinguish between services capable of being physically rendered and those not capable of being physically rendered?

If in the affirmative, should the place of activity in respect of services not capable of being physically rendered be determined with reference to place of fixed or permanent business and not services capable of being physically rendered?

12 Agent Vs Principal

Would any of the place of activity rules in any way alter section 54?

Should the rules in respect of services refer to agents as well?

13 Practical Examples

Please consider and provide us with some practical examples and test them against the proposed rules.

14 Explanatory Memorandum

Should thought be given to drafting a comprehensive explanatory memorandum, which explains the various provisions by way of practical examples?

Please direct your comments to any of the following people:

Marlene Grimm  marlene.grimm@za.arthurandersen.com
Anne Jenkinson  anne.jenkinson@za.pwcglobal.com  083 255 6291
Andre Myburgh  andre.meyburgh@kpmg.co.za  082 851 6587
Ferdie Schneider  fschneider@deloitte.co.za  082 771 4157
ANNEXURE E

COMPARATIVE ANALYSIS OF PLACE OF SUPPLY RULES IN SOUTH AFRICA
<table>
<thead>
<tr>
<th>Nature of Supply</th>
<th>Place of Supply</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Services</strong></td>
<td><strong>Current Legislation</strong></td>
</tr>
<tr>
<td><strong>Physically Rendered in South Africa (SA) by Foreign Enterprise or Agent Acting on its behalf</strong></td>
<td>SA</td>
</tr>
<tr>
<td><strong>Rights made available by Foreign Enterprise and used in South Africa (SA)</strong></td>
<td>Where consumed (SARS' interpretation – VAT News 13 of December 1999)</td>
</tr>
<tr>
<td><strong>Foreign Telecommunication Services Used in South Africa (SA)</strong></td>
<td>SA (not promulgated)</td>
</tr>
<tr>
<td><strong>Underwriting Insurance Business by Underwriting Members of Lloyd’s of London</strong></td>
<td>Where contract is signed (1/1/2001)</td>
</tr>
<tr>
<td><strong>Importation of Services into South Africa (SA)</strong></td>
<td>Non-supply: reverse charging may apply (s7(1)(c))</td>
</tr>
<tr>
<td><strong>Supplies of Goods in South Africa (SA) by Foreign Enterprise</strong></td>
<td>SA (s7(1)(a))</td>
</tr>
<tr>
<td>Nature of Supply</td>
<td>Place of Supply</td>
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<td></td>
<td>Current Legislation</td>
</tr>
<tr>
<td>Importation of Goods into South Africa (SA) by Foreign Enterprise</td>
<td>Non-supply: look to subsequent supply (s7(1)(b))</td>
</tr>
<tr>
<td>Exportation of Goods from South Africa (SA) by Foreign Enterprise</td>
<td>SA (s7(1)(a))</td>
</tr>
</tbody>
</table>
BIBLIOGRAPHY


