

Interpreting the term enterprise for South African value-added tax purposes

HM Botha
24875988

Mini-dissertation submitted in *partial* fulfilment of the requirements for the degree *Magister Commercii* in *South African and International Taxation* at the Potchefstroom Campus of the North-West University

Supervisor: Ms M Lubbe

May 2015

ACKNOWLEDGEMENTS

Firstly I would like to thank God for the strength and perseverance that He has given me to complete this study.

Furthermore I would like to thank the following people:

- My study leader Melissa Lubbe, for her guidance, support and motivation.
- David Levey, for the editing.
- My husband and two sons for their continued support and motivation.

ABSTRACT

Value-added tax (VAT) was introduced in South Africa in 1991 by the Value-Added Tax Act (89 of 1991) (the VAT Act). The South African VAT system is a destination-based, consumption-type VAT and is levied on goods or services consumed in South Africa. The definition of enterprise is an important definition in the VAT Act and it sets out the persons, activities and supplies that are to be included in the VAT base. It is compulsory for a person that conducts an enterprise in South Africa to register for VAT if the threshold set for taxable supplies is exceeded. There are interpretational problems and uncertainties in respect of the definition of “enterprise” and when an enterprise is conducted in South Africa or partly in South Africa.

The purpose of this research study was to interpret the term enterprise for South African VAT purposes, to identify interpretational challenges and uncertainties and to suggest what must be addressed through guidance and interpretation by the South African Revenue Service (SARS) to provide more clarity. The research methodology followed to achieve the set objectives was normative research which is a form of legal research, specifically doctrinal. The requirements in terms of the VAT Act for levying of VAT, registration for VAT and the conducting of an enterprise in South Africa were explored and interpretational challenges and uncertainties were identified. The requirements for levying of and registration for VAT/ GST, in New Zealand, in terms of information supplied by the EU and guidance supplied in respect thereof by the OECD were analysed and discussed. The information obtained was used to establish how the interpretational problems and uncertainties that were identified are dealt with in New Zealand and in terms of the information and guidance from the EU and the OECD.

The interpretational challenges and uncertainties identified include the reference in the definition of enterprise in Section 1(1) of the VAT Act to activities that must be conducted continuously or regularly in South Africa or partly in South Africa. Uncertainty as to the interpretation of the term “utilised or consumed in the Republic” also exists. Guidance in respect of these interpretational problems and uncertainties is necessary to

enable suppliers and consumers to determine with certainty if a person is obliged to register for and levy VAT on supplies made in South Africa.

KEYWORDS

Activity, Consideration, Continuously, Enterprise, Person, Registration, Regularly, Supply, Value-added tax, Vendor.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	i
ABSTRACT	ii
KEYWORDS	iii
TABLE OF CONTENTS	iv
ABBREVIATIONS	x
CHAPTER 1	1
INTRODUCTION	1
1.1 BACKGROUND	1
1.2 MOTIVATION OF TOPIC ACTUALITY	3
1.3 RESEARCH QUESTION	4
1.4 OBJECTIVES	5
1.4.1 Main objective	5
1.4.2 Secondary objectives	5
1.5 RESEARCH DESIGN AND METHOD	5
1.5.1 Research design	5
1.5.2 Research methodology	6

TABLE OF CONTENTS (Continued)

1.6	DELINEATIONS OF THE STUDY	7
1.7	OVERVIEW	8
CHAPTER 2	9
THE LEVYING OF AND REGISTRATION FOR VAT IN SOUTH AFRICA	9
2.1	INTRODUCTION.....	9
2.2	LEVYING OF VAT	9
2.2.1	Supply	10
2.2.1.1	Deemed supplies	11
2.2.2	Vendor.....	12
2.2.3	Goods or services	12
2.2.3.1	Goods	12
2.2.3.2	Services	13
2.2.4	In the course or furtherance of any enterprise.....	13
2.2.5	Importation of goods	14
2.2.6	Imported services	14
2.2.6.1	Resident of the Republic.....	14

TABLE OF CONTENTS (Continued)

2.2.6.2 Utilised or consumed in the Republic.....	15
2.2.7 Persons responsible for the payment of VAT	17
2.3 REGISTRATION FOR VAT	17
2.3.1 Compulsory registration	18
2.3.2 Voluntary registration	19
2.3.3 Separate registration of an enterprise or branch or division	20
2.3.4 Non-residents VAT registration	20
2.3.5 Failure to register for VAT	21
2.4 INTERPRETATIONAL CHALLENGES AND UNCERTAINTIES.....	22
2.5 CONCLUSION	23
CHAPTER 3	24
ENTERPRISE FOR VAT PURPOSES IN SOUTH AFRICA.....	24
3.1 INTRODUCTION	24
3.2 DEFINITION OF ENTERPRISE	24
3.2.1 General test for enterprise.....	25
3.2.2 Special inclusions in respect of enterprise	25

TABLE OF CONTENTS (Continued)

3.2.3	Provisos to the definition of “enterprise”	26
3.3	COMPONENTS OF THE DEFINITION OF “ENTERPRISE”	27
3.3.1	Any enterprise or activity	28
3.3.2	Carried on continuously or regularly	29
3.3.3	By any person	30
3.3.4	In or partly in the Republic.....	31
3.3.4.1	Place of supply rules	32
3.3.5	In the course or furtherance of which goods or services are supplied to any other person	34
3.3.6	For a consideration	34
3.3.7	Whether or not for profit	35
3.4	INTERPRETATIONAL CHALLENGES AND UNCERTAINTIES.....	35
3.5.	CONCLUSION	36
CHAPTER 4	38
THE LEVYING OF AND REGISTRATION FOR VAT IN NEW ZEALAND, THE EU AND GUIDANCE BY THE OECD	38
4.1	INTRODUCTION.....	38

TABLE OF CONTENTS (Continued)

4.2	NEW ZEALAND.....	39
4.2.1	Levy of GST in New Zealand.....	39
4.2.1.1	Activity	40
4.2.1.2	Continuously or regularly	40
4.2.1.3	Whether or not for a profit	40
4.2.1.4	Goods and services	41
4.2.1.5	Consideration.....	41
4.2.2	Registration for GST in New Zealand.....	41
4.2.3	Non-residents and GST registration in New Zealand	42
4.2.3.1	The resident status of the person for GST purposes in New Zealand.....	42
4.2.3.2	Conducting of a taxable activity by a person in New Zealand	43
4.2.3.3	Time and location of supplies and services – Place of supply rules.....	43
4.2.3.4	Agreements.....	44
4.3	EU	44
4.3.1	Levy of VAT and the registration for VAT in the EU	45
4.3.1.1	Supply of goods in the EU	45

TABLE OF CONTENTS (Continued)

4.3.1.2 Supply of services in the EU	47
4.4 OECD	49
4.4.1 International VAT/ GST Guidelines issued by the OECD	49
4.5 CONSIDERATION OF TREATMENT OF INTERPRETATIONAL CHALLENGES AND UNCERTAINTIES	51
4.6 CONCLUSION	53
CHAPTER 5	55
CONCLUSION, RECOMMENDATIONS AND IDENTIFICATION OF FUTURE RESEARCH AREAS	55
5.1 INTRODUCTION	55
5.2 ACHIEVEMENT OF RESEARCH OBJECTIVES AND CONCLUSIONS REACHED	55
5.3 RECOMMENDATIONS	60
5.4 SUGGESTIONS FOR FUTURE RESEARCH	61
5.5 CONCLUSION	62
REFERENCES	64

ABBREVIATIONS

BPR	Binding Private Ruling
B2B	Business to business
B2C	Business to customer
CIR	Commissioner for Inland Revenue
CSARS	Commissioner for South African Revenue Service
EU	European Union
GST	Goods and Services Tax
ITC	Income Tax Case
OECD	Organisation for Economic Co-operation and Development
SARS	South African Revenue Service
SCA	Supreme Court of Appeal
TA	Tax Administration
VAT	Value-Added Tax

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

Value-added tax (VAT) was introduced in South Africa on 30 September 1991 and is levied in terms of the Value-Added Tax Act (89 of 1991) (the VAT Act). The VAT system in South Africa was primarily based on the New Zealand legislation applicable at the date of the introduction of VAT, as legislated in the New Zealand Goods and Services Tax Act (141 of 1985) (the New Zealand GST Act) (Olivier & Honiball, 2011:763). VAT has been implemented in more than 140 countries (Stiglingh, 2013:1039).

The VAT system in South Africa is a destination-based; consumption-type VAT and is levied on the consumption of goods and services in South Africa (Olivier & Honiball, 2011:763; Stiglingh, 2013:1039). VAT is levied on the supply of goods or services in South Africa and on the importation of goods into South Africa (SARS, 2014a:9).

The definition of enterprise in Section 1(1) of the VAT Act is an important one. Its intention is to indicate which persons, activities or supplies is to be part of the VAT system (SARS, 2013a:2). Section 23 of the VAT Act determines that any person that conducts an enterprise in South Africa, exceeding the prescribed registration threshold value in respect of taxable supplies, has to register with SARS as a vendor. To conduct an enterprise for VAT purposes is necessary for the application of: Section 7 dealing with the imposition of VAT; Section 16 dealing with the calculation of tax payable and Section 17 of the VAT Act dealing with the permissible deductions in respect of input tax.

Problems and interpretational uncertainties arise due to the cross-border application of the South African VAT legislation (Olivier & Honiball, 2011:764). This includes the interpretation of the definition of enterprise with specific reference to which activities are “partly” carried on in South Africa (Olivier & Honiball, 2011:769). There is a possibility that all supplies, irrespective of where the supplies are made, will be subject to VAT if

the supplies are made in the course or furtherance of an enterprise conducted in or partly in South Africa. Uncertainty exists in respect of the type and frequency of activities that will result in the conducting of an enterprise in South Africa or partly in South Africa (Glyn-Jones, 2006).

A further question frequently arising is: what is the difference between an enterprise and a fixed or permanent place as mentioned in the definition of the term resident of the Republic in Section 1(1) of the VAT Act? A continuous activity, although not at a particular place, suggest permanency (Olivier & Honiball, 2011:771). It is possible to create a VAT enterprise even though a permanent establishment is not created. The foreign company may then be registered for VAT, but not for South African corporate income tax. The definition of enterprise for VAT purposes is wider than the income tax definition of a permanent establishment (Ernst & Young, 2013).

SARS originally required that foreign businesses receiving royalties from South African clients had to register for VAT (Botes, 2011:397; SARS, 1999:3). SARS subsequently stated that there would be no obligation on the non-resident to register for VAT in South Africa if its activities in South Africa were totally “passive” and if the non-resident had no “physical presence or fixed place of business” in South Africa (Botes, 2011:397; SARS, 2011:2). Due to ongoing uncertainty, SARS announced in VAT News 37 (SARS, 2011:2), that the existing policy and others related to non-resident entities are under review and that the existing policies would be in place until the review has been finalised. The physical presence of a business, delivery of goods or rendering of services in South Africa by an employee, agent or subcontractor of a business suggests that activities are carried on by the business in South Africa (Botes, 2011:397).

The tax principles presented by Adam Smith in 1776 are of great importance. They are the basics of an effective tax system; they are universal and although tax systems are different from what they were previously, these principles should still be applied. Four basic principles were identified:

- First, people ought to contribute, as far as possible, in proportion to the income that they derive under the protection of the state.
- Second, taxes ought to be certain, and not arbitrary.
- Third, taxes should be levied at a convenient time.
- Fourth, taxes should cost no more than necessary. They should not require a great number of expensive officers to collect (Butler, 2011:70-71).

The increase in international trade and investments in South Africa makes it important that certainty is provided in respect of interpretational problems and uncertainties. Certainty is therefore needed as to when an enterprise is conducted in South Africa or partly in it.

1.2 MOTIVATION OF TOPIC ACTUALITY

The definition of enterprise in Section 1(1) of the VAT Act was amended in 2014, to include:

(vi) the supply of electronic services by a person from a place in an export country-

(aa) to a recipient that is a resident in the Republic; or

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

The electronic services included by this amendment of the definition of enterprise in Section 1(1) of the VAT Act are referred to as “imported electronic services” for purposes of this study. Moss-Holdstock (2013) stated that this line of thinking, *i.e.* that the businesses supplying these services, are required to register for VAT, is in line with the trend accepted by the European Union (EU). This determines that suppliers have to register for VAT in the country where the client lives. It was further noted that the issue of whether non-residents should register for VAT in South Africa has been a point of discussion for many years. Normally, a person will not be viewed as conducting an enterprise in a country if the person does not have a physical presence or does not

supply goods or services in that country, either personally or through an agent (Moss-Holdstock, 2013).

There is a proposed further amendment to the definition of enterprise in Section 1(1) of the VAT Act, to include: “the activities of any person who continuously or regularly supplies telecommunication services to any person who utilizes such services in the Republic”. The proposed amendment will be effective from a date to be fixed by the President by proclamation in the Gazette (South Africa, 1997a; South Africa, 1997b). The proposed amendment was announced in 1997, but the effective date has not yet been proclaimed, the reason for which is unknown. The Organisation for Economic Co-operation and Development (OECD) issued new international VAT/GST guidelines (OECD, 2014a).

From the information provided above, some of the interpretational challenges and uncertainties of the definition of enterprise have been addressed. This research study focuses on the remaining interpretational challenges and uncertainties relating to this definition and the requirement to register for and levy VAT in South Africa.

1.3 RESEARCH QUESTION

Due to the importance of the definition of enterprise and the uncertainties that still exist, this study was undertaken to address the following research question:

What are the interpretational challenges and uncertainties identified, in relation to the definition of enterprise that must be addressed through guidance and interpretation by SARS to provide more clarity?

1.4 OBJECTIVES

The study is guided by the following research objectives:

1.4.1 Main objective

The main objective of this study is to interpret the term, enterprise, for South African VAT purposes, to identify interpretational challenges and uncertainties and to suggest what must be addressed through guidance and interpretation to provide more clarity.

1.4.2 Secondary objectives

In addition to the main objective, the study is directed by secondary objectives:

- i. to identify and explore the requirements for the levying of and registration for VAT in terms of the VAT Act and to identify interpretational challenges and uncertainties (refer to Chapter 2);
- ii. to analyse the definition of enterprise and to identify the interpretational challenges and uncertainties experienced (refer to Chapter 3);
- iii. to analyse the requirements for levying of and registration for VAT or goods and services tax (GST) in New Zealand and in terms of information supplied by the EU and guidance supplied by the OECD in respect thereof. To identify how the interpretational problems and uncertainties that have been identified in Chapter 2 and 3 are dealt with, in New Zealand, in terms of information supplied by the EU and guidance supplied by the OECD (refer to Chapter 4).

1.5 RESEARCH DESIGN AND METHOD

1.5.1 Research design

The research design sets out the overall approach to how the research will be conducted (Hofstee, 2011:113). The research question could be attended to with reference to already published data. A non-empirical study approach was followed in the research conducted (Mouton, 2013:179).

The data available included text data and documents as well as websites; therefore a literature review was performed (Mouton, 2013:179-180). This is a description of publications on a topic, including an account of established knowledge and ideas relating to it, as well as its strengths and weaknesses (Taylor, 2009). A literature review is “an exercise in inductive reasoning”, where a sample of literature is selected and read to be able to come to an understanding of the object of the study (Mouton, 2013:179).

The said review was performed to provide the data used to undertake the normative method of study, which is a form of legal interpretive research. The data consisted mainly of primary data; limited use was made of secondary data sources. Primary data refers to “data observed or collected directly from first-hand experience” whereas secondary data refers to “data collected in the past” or by other parties (Business Dictionary, 2014).

1.5.2 Research methodology

Any research methodology is a detailed explanation of the specific use of the research design (Hofstee, 2011:115). The type of ontology (how the world is viewed) and epistemology (how knowledge is created) influence the choice of paradigm within which the research will be conducted (McKerchar, 2008). The research was done based on the view that reality depends on many circumstances and factors and with the perspective that tax is complex and that different interpretations may be possible. The research was therefore conducted with a relativist view of the world in the interpretivist paradigm, which is “based on the assumption that the researcher cannot be detached from the subjects being studied” and that, depending on the researcher’s perspective, there may be different solutions (McKerchar, 2008).

The research method followed was normative, which is a form of legal research, specifically doctrinal. This was chosen because the object of such research is not just to gather information but also to point out in which aspects the object of study may be improved and to investigate the possibilities for improvement (Routio, 2005). Doctrinal research is a research methodology that provides a “systematic process of identifying, analysing, organising and synthesising statutes, judicial decisions and commentary. It is

typically a library based undertaking, focused on reading and conducting intensive, scholarly analysis” (McKerchar, 2008).

The normative research method was applied to identify the VAT requirements and to determine how the VAT legislation is applied in South Africa, in respect of the levying of and registration for VAT and the definition of enterprise in the VAT Act. The sections of the VAT Act closely examined were: Section 7, which deals with the imposition of VAT; Section 23, dealing with the registration for VAT and Section 1(1), which lays down the definition of an enterprise. This was done due to the interpretational challenges and uncertainties that exist in respect of the definition of an enterprise.

Various local and foreign publications and legislations were selected and analysed to address the research question and objectives. Information and guidance supplied by the EU as well as the OECD, were included in the study. New Zealand was selected due to the fact that VAT in South Africa was primarily based on the New Zealand GST Act. The EU was included because some of the changes made to the South African definition of enterprise in the VAT Act were based on the present trend adopted by the EU. The OECD was included due to the issuing of new international VAT/GST guidelines by the OECD (OECD, 2014). Publications by government departments and certain authorities in tax, for example, law firms and audit firms, were incorporated and examined, in order to suitably address the research question and objectives.

1.6 DELINEATIONS OF THE STUDY

Other categories of consequences regarding the definition of enterprise, such as when input tax is incurred for the purpose of use, consumption or supply in the course of carrying on an enterprise, have not been dealt with as part of the study.

The study does not aim to provide the suggested remedy in respect of specific identified transactions. Its aim is rather to deliver an analysis of the definition of enterprise, to identify interpretational challenges and uncertainties and to make recommendations as to what needs to be clarified through guidance and interpretation.

1.7 OVERVIEW

This research study is presented in five chapters as follows:

Chapter 1 supplies the background and motivates the actuality of interpreting the term enterprise, for South African VAT purposes. This Chapter also describes the research question, objectives, research design and methodology.

Chapter 2 identifies and explores the requirements for the levying of VAT and the requirements for VAT registration in terms of the VAT Act. Each of the main elements identified for the levying of and registration for VAT is explored in more detail: such as supply, vendor, course or furtherance of any enterprise, importation of any goods and imported services. The Chapter also identifies interpretational challenges and uncertainties experienced.

Chapter 3 analyses the definition of enterprise, sets out the importance of the definition and the need for a clear understanding of when a person is required to register for VAT and levy VAT in South Africa. The Chapter additionally identifies interpretational challenges and uncertainties experienced.

Chapter 4 analyses the requirements for registration and levying of VAT in New Zealand and in terms of information in respect thereof as supplied by the EU as well as guidance supplied by the OECD. This is used to identify the manner in which the interpretational problems and uncertainties identified in Chapters 2 and 3, are dealt with in New Zealand and in terms of information supplied by the EU and guidance supplied by the OECD.

Chapter 5 summarises the results of the research conducted and concludes whether the research objectives have been met in order to address the research question. This Chapter also contains recommendations with respect to the research question and suggestions for future research.

CHAPTER 2

THE LEVYING OF AND REGISTRATION FOR VAT IN SOUTH AFRICA

2.1 INTRODUCTION

VAT is an indirect tax and is levied on the consumption of goods and services in the Republic. Vendors that are registered for VAT or are liable to register for VAT are obliged to perform certain duties and accept certain responsibilities (SARS, 2014a:9-10). Traders that meet certain requirements have to register and charge VAT on taxable supplies of goods or services (Section 23 of the VAT Act). VAT is primarily collected, by enterprises that are registered for VAT, as agents for SARS (Section 7(2) of the VAT Act). It is essential to identify and explore the requirements for the levying of and the registration for VAT when interpreting the term enterprise for VAT purposes, due to the fact that the conducting of an enterprise is a requirement for both the registration and the levying of VAT.

The Tax Administration Act (28 of 2011) (the TA Act) together with the VAT Act, controls the identification and registration of vendors (SARS, 2014a:13). Section 22 of the TA Act contains the general registration requirements that must be complied with when registering for a tax, while Section 23 of the VAT Act stipulates when a person that is making taxable supplies in the course of an enterprise is required to register for VAT.

In this Chapter the requirements for the levying of and registration for VAT in South Africa are identified and explored. It furthermore identifies interpretational challenges and uncertainties. This is carried out to address research objective i stated in 1.4.2.

2.2 LEVYING OF VAT

Vendors, in terms of the VAT Act, must levy VAT on all their taxable supplies of goods and services made. Guidance in respect of the requirements for the imposition of output tax is set out in Section 7 of the VAT Act. Section 7(1) of the VAT Act levies VAT, subject to the exemptions, exceptions, deductions and adjustments provided for in the VAT Act:

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

Section 7(1)(b) of the VAT Act levies VAT on the importation of any goods into South Africa by any person (refer to 2.2.5) while Section 7(1)(c) levies VAT on the supply of imported services by any person (refer to 2.2.6).

The different requirements of Section 7(1) are explored below to obtain an understanding of the imposition of VAT. The criteria set out in Section 7(1)(a) are broken down as follows for the purpose of the analyses below: Supply (refer to 2.2.1); Vendor (refer to 2.2.2); Goods or services (refer to 2.2.3); In the course or furtherance of any enterprise (refer to 2.2.4).

2.2.1 Supply

The term, supply, is defined in Section 1(1) of the VAT Act, so as to include:

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.

For a supply to take place there must be at least a supplier and a recipient (Stiglingh, 2013:1047). The recipient is defined in Section 1(1) of the VAT Act as “the person to whom the supply is made” and the supplier is defined as the “person supplying the goods or services”.

The term supply covers all types of transactions in the VAT system and is widely defined. Care must be taken not to disregard transactions for VAT purposes just because they do not fall into the usual everyday course of business (Clegg & Wiid, 2013:11). Due to the fact that the term supply is widely defined, it has to be explored further. This was done by obtaining the normal dictionary meaning of supply and by examining case law that deals with this term. The Oxford Dictionaries (2014) define supply as to “provide” or to “make available”.

Case law dealing with the term supply includes the following two cases. In the British Airways PLC v CSARS (2005) case, it was held that VAT is chargeable on supplies, not on the receipt of money without any supply. In the National Educare Forum v CSARS (2001) case, the court held that in terms of Section 7(1)(a) of the VAT Act, two requirements must be met before VAT can be levied: a supply has to be present and that supply has to be made in the course or furtherance of an enterprise carried on by the vendor.

To avoid confusion about whether a transaction is a supply or not, or if the transaction is a supply of services or goods, there are deemed provisions contained in Section 8 and 18(3) of the VAT Act.

2.2.1.1 Deemed supplies

Section 8 of the VAT Act deems certain transactions to be a supply, although they do not normally fall into the definition of “supply”. The deeming provisions in Section 8 include:

- Section 8(2), where a person that ceases to be a vendor is deemed to make a supply of any goods other than those goods in respect of which a deduction of input tax under Section 16(3) was denied under Section 17(2).
- Section 8(7), where a business is disposed of as a going concern the disposal is deemed to be a disposal of goods. This could be a zero-rated supply if all the conditions in Section 11(1)(e) of the VAT Act are met.
- Section 8(8), where a vendor receives an indemnity payment in terms of a short term insurance contract. The payment is deemed to be consideration received for the supply of a service rendered by the insured to the insurer to the extent that it relates to a loss incurred in the course of carrying on an enterprise. There will be no deemed supply if the payment is not related to taxable supplies made by the vendor or where the payment relates to goods for which an input tax was denied in terms of Section 17(2) of the VAT Act.

Section 18(3) of the VAT Act deems fringe benefits granted by an employer (that is a registered vendor), subject to certain exclusions, to be a supply of goods or services made by the employer.

The second requirement of Section 7(1)(a) of the VAT Act is that the taxable supply must be made by a vendor. The term taxable supply refers to the supply of goods or services that are subject to VAT at the standard rate of 14% (Section 7(1)(a) of the VAT Act) or subject to VAT at the rate of zero % in terms of Section 11 of the VAT Act. A discussion of the term vendor follows.

2.2.2 Vendor

The term vendor is defined in Section 1(1) of the VAT Act, as any person who is already registered or is required to register for VAT. The person that is registered for VAT or is required to register for VAT is responsible to account for VAT. The person is defined in Section 1(1) of the VAT Act and “includes any public authority, any municipality, any company, any body of persons (corporate or unincorporate), the estate of any deceased or insolvent person, any trust fund and any foreign donor funded project”. A partnership is also included as a person for VAT purposes. Spouses married in community of property are considered to be an unincorporated body of persons for VAT purposes (Stiglingh, 2013:1048).

2.2.3 Goods or services

In terms of Section 7(1)(a) of the VAT Act, VAT must be levied on the supplies of goods or services made by the vendor in the course or furtherance of an enterprise.

2.2.3.1 Goods

Goods are defined in Section 1(1) of the VAT Act as:

corporeal movable things, fixed property, any real right in any such thing or fixed property and electricity, 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 as a collector's piece or investment article.

Corporeal movable things are items that can be physically touched (Stiglingh, 2013:1047).

2.2.3.2 Services

According to Deloitte (2013:23) almost any economic activity that is not a supply of goods could be a supply of services. The word services include everything that is not goods (Clegg & Wiid, 2013:13).

Section 1(1) of the VAT Act defines services as:

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".

2.2.4 In the course or furtherance of any enterprise

In terms of Section 7(1)(a) of the VAT Act, VAT is only applicable where goods or services are supplied by a vendor in the course or furtherance of an enterprise carried on in South Africa or partly carried on in South Africa. All supplies made and transactions entered into by a vendor must be considered to determine if these were carried out in the course or furtherance of an enterprise. The term "enterprise" is analysed in Chapter 3. The second category of taxable events that is set out in Section 7(1) refers to the levying of VAT on the importation of goods (Section 7(1)(b) of the VAT Act).

2.2.5 Importation of goods

In terms of Section 7(1)(b) and Section 13 of the VAT Act, VAT is levied on the importation of goods into South Africa and must be paid to SARS. This is applicable, regardless of whether the importer is a vendor or non-vendor. Section 7(1)(c) of the VAT Act levies VAT on any imported service. The VAT on the imported service is payable on the imported service if the South African resident is not a VAT vendor or if the South African VAT vendor will not be using the service in his taxable enterprise (Haupt, 2014:936). Imported services are analysed next.

2.2.6 Imported services

Imported services are defined in Section 1(1) of the VAT Act. The requirements in terms of the definition are: A supply of services; by a non-resident supplier or a supplier that carries on business outside the Republic; to a resident of the Republic (refer to 2.2.6.1); to the degree that such services are utilised or consumed in the Republic (refer to 2.2.6.2), other than for the making of taxable supplies.

Section 14(4) of the VAT Act determines that where a person (e.g. a head office) carries on activities outside South Africa that do not form part of the activities of any enterprise (e.g. a branch) carried on by that person in South Africa, the supplies made by such head office to its branch in South Africa will be imported services which will be subject to VAT, if the supply would have been an imported service if made to any other person.

2.2.6.1 Resident of the Republic

The term resident of the Republic, as defined in Section 1(1) of the VAT Act, includes a resident as defined in the Income Tax Act (58 of 1962) as well as any other person or other company to the extent that the “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 1 of the Income Tax Act (58 of 1962) defines resident as follows: In the case of a natural person, a resident includes a person who is “ordinarily resident in the Republic” or a person who is “not at any time during the relevant year of assessment

ordinarily resident in the Republic,” if that person meets the requirements of being physically present in South Africa for prescribed periods. In the case of a person (other than a natural person), a resident is a person “which is incorporated, established or formed in the Republic or which has its place of effective management in the Republic”. A resident excludes a person who is deemed to be exclusively resident in another country for purposes of any double taxation agreement entered into between South Africa and any other country.

The next requirement in terms of the definition of imported service is that the supply made by a non-resident to a resident of the Republic must be utilised or consumed in the Republic.

2.2.6.2 Utilised or consumed in the Republic

The meaning of the term “utilised or consumed in the Republic” is not clear (Deloitte, 2013:71; Olivier & Honiball, 2011:792). According to Deloitte (2013:71-72), the issue of whether services are rendered where they are physically provided or where the recipient of the services conducts its business, apparently depends on the nature of the services. Olivier and Honiball (2011:792-793) submitted, however, that the place where the service is provided by the supplier is unimportant and that the place where the recipient uses the supply, or benefits from the supply should be seen as the place where the service is “utilised or consumed”.

Olivier and Honiball (2011:793) further submitted that this interpretation could lead to incorrect results and that the term “utilised or consumed in the Republic” has to be defined. Services provided outside South Africa by non-residents to residents must be excluded from the proposed definition if the residents were not in South Africa at the time the service was provided (Olivier & Honiball, 2011:793).

The definition of enterprise in Section 1(1) of the VAT Act has been amended to include the supply of imported electronic services. There is a proposed further amendment of the definition of “enterprise” to include “the activities of any person who continuously or regularly supplies telecommunication services to any person who utilizes such service in the Republic;” (South Africa, 1997a; South Africa, 1997b). The effective date of the

amendment has not been proclaimed. The amendment and proposed amendment referred to in this paragraph set out the place where the specified services will be subject to VAT.

Section 14(5) of the VAT Act exempts the following supplies of services from tax on imported services: A supply that is subject to VAT at the standard rate in terms of Section 7(1)(a) of the VAT Act; a supply which if made in the Republic would be exempt in terms of Section 12 of the VAT Act or zero-rated in terms of Section 11 of the VAT; where the services are the supply of educational services rendered by foreign educational institutions to South African institutions; where the services are rendered by a non-resident employee to a South African employer; where the value of the supply of imported services does not exceed R100 per invoice.

The term “utilised or consumed in the Republic” and the exemptions set out in Section 14(5) of the VAT Act are further examined by considering relevant case law. In the *Metropolitan Life v CSARS (2008)* case, the taxpayer claimed that computer services that were acquired from a non-resident were physically rendered outside South Africa resulting in the services being zero-rated in terms of Section 11(2)(k) of the VAT Act. The taxpayer did not use the services for making taxable supplies as most of its supplies were exempt and it would have had to account for VAT on imported services unless the supply was zero-rated. The court rejected the application of zero-rating in this case. The court also held that the provisions should be given a clear meaning (Deloitte, 2013:71-72; Olivier & Honiball, 2011:792).

In the *De Beers Consolidated Mines Ltd v CSARS (2012)* case, De Beers Consolidated Mines Ltd was approached with an offer of restructuring. De Beers Consolidated Mines Ltd engaged a non-resident consulting firm as well as a South African consulting firm to enable it to advise the board of directors and the shareholders on whether the offer that was received was fair and reasonable.

In relation to the VAT implications of the services acquired from the non-resident consulting firm, it was held that although the services were obtained as a result of a requirement by law, the services were too far removed from the enterprise activities for

the purpose of making taxable supplies, to have been considered as being obtained for the making of taxable supplies in the conducting of the enterprise. The enterprise activities comprised mining and selling of diamonds. The services were considered to have been obtained for the benefit of the shareholders (Cliffe Dekker Hofmeyr, 2012).

It was held that the place of consumption was in South Africa, where the results of the consultations with the non-resident consultants were used to make decisions. Both the place where the physical services are conducted and the place where the results of the service are consumed must be considered to determine the place of consumption. In the *De Beers Consolidated Mines Ltd v CSARS (2012)* case, the supply was considered to be an imported service and VAT was payable (Cliffe Dekker Hofmeyr, 2012).

2.2.7 Persons responsible for the payment of VAT

Section 7(2) of the VAT Act determines that except as otherwise provided in the VAT Act, the following persons are responsible for the payment of the VAT:

- in respect of the supply of goods or services by a vendor who is registered for VAT, the registered vendor that is making the supplies;
- in respect of the importation of any goods into the Republic, the person who imports the goods;
- in respect of imported services, the recipient of the imported services.

2.3 REGISTRATION FOR VAT

VAT registration has opposing considerations that place SARS in a difficult position. VAT registration brings businesses into the VAT system, thereby ensuring that VAT is appropriately collected for the fiscus. Businesses register for VAT for business legitimacy and possible VAT refunds (South Africa, 2013).

VAT registration is important for VAT collections, but it also poses a risk of incorrect or fraudulent VAT refunds being claimed. SARS needs to ensure that only genuine, viable businesses enter the VAT net. This resulted in an increase in the level of proof required for VAT registration, which prevented legitimate businesses from obtaining timely VAT

registration. In view of these concerns, SARS decided to streamline VAT registration (South Africa, 2013).

SARS has introduced a single registration process for all taxes in an attempt to streamline the procedural requirements for registration (SARS, 2014a:109). The way in which registration is done, in terms of this new process, came into operation as from 12 May 2014. Provided that the person is already registered for one tax, the person may register for additional taxes on e-Filing (SARS, 2014b).

Vendors are not only registered persons, but includes any person that is required to be registered (refer to 2.2.2). It is therefore important to understand what the requirements for VAT registration in South Africa are.

2.3.1 Compulsory registration

Section 23 of the VAT Act determines that: Every person who, on or after 30 September 1991, carries on any enterprise becomes liable to register as a VAT vendor, if the value of taxable supplies made by that person exceeded R1 million in any consecutive period of 12 months (Section 23(1)(a) of the VAT Act) or will exceed R1 million in terms of a written contractual obligation (Section 23(1)(b) of the VAT Act).

The threshold of R1 million is not deemed as being exceeded if it was exceeded solely as a consequence of: the “cessation of, or any substantial and permanent reduction in the size or scale of, any enterprise carried on”; or “the replacement of any plant or other capital asset used in any enterprise”; or “abnormal circumstances of a temporary nature” (Proviso to Section 23(1) of the VAT Act).

From 1 June 2014, the supply of imported electronic services is considered to be an enterprise in terms of the definition of enterprise in Section 1(1) of the VAT Act. Section 23(1A) of the VAT Act states that every person carrying on such an enterprise will be liable to be registered at the end of the month where the total value of taxable supplies made by that person has exceeded R50 000.

In terms of Section 22(2) of the TA Act any person that is liable to register for tax must complete the necessary application for registration and submit the application to SARS not later than 21 business days from the date of liability. The person applying for registration must provide to SARS the further particulars and documents that SARS may require for registration purposes. Section 22(3) of the TA Act determines that a person that has applied for registration and that has failed to provide the particulars and documents as required by SARS, may not be regarded as having applied for registration until all the outstanding information has been provided to SARS.

Where a person carries on separate businesses, he must register when the joint taxable supplies of the businesses exceed the threshold for VAT registration in South Africa. If the businesses are conducted through separate companies or other legal persons, each separate legal person or company will be required to register when the taxable supplies of the legal person or company exceeds the registration threshold for VAT registration in South Africa (Section 23 of the VAT Act). “It is the ‘person’ who conducts the enterprise, not the ‘enterprise’, that registers for VAT” (Stiglingh, 2013:1048). Foreign companies have to register for VAT if the goods or services they provide in South Africa exceed R1 million, even if they have been in South Africa for less than 12 months (KPMG, 2013).

2.3.2 Voluntary registration

Where the turnover from taxable supplies has exceeded R50 000 in the previous 12 month period, an enterprise may voluntarily register as a vendor. If the turnover from taxable activities has not exceeded R50 000 in the preceding period of 12 months, but may reasonably be expected to exceed R50 000 within 12 months from the date of registration as a vendor, the person may voluntarily register for VAT (SARS, 2013a; Section 23(3) of the VAT Act).

In the case of a voluntary registration the person must have a fixed place of business or abode in South Africa. This is not set as a requirement for compulsory registration (Section 23(7) of the VAT Act). It is the legal person that registers for VAT and not the trading name of a business. A person’s branches may be separately registered if certain

requirements are met (Section 50(2) of the VAT Act). Each separately registered branch is considered to be a separate vendor (SARS, 2014:18).

2.3.3 Separate registration of an enterprise or branch or division

Section 50(2) of the VAT Act states that a vendor may separately register any enterprises, branches or divisions:

if each such enterprise, branch or division maintains an independent system of accounting and can be separately identified by reference to the nature of the activities carried on or the location of the separate enterprise, branch or division.

The implication of such separate registration is that each enterprise/ division/ branch is treated as a separate vendor (SARS, 2014a:18). This prevents a non-resident business from having to levy VAT on its worldwide supplies. If separately registered, only the activities of the South African branch will form part of the VAT registration (Botes, 2011:398).

2.3.4 Non-residents VAT registration

According to Deloitte (2013:25), SARS has, in recent years, indicated that some of the circumstances in which a non-resident will be regarded as carrying on an enterprise in South Africa include the following: when the non-resident receives regular rental income from the leasing of goods to a South African person or receives regular royalties for the granting of use of a trademark or intellectual property in South Africa (SARS, 1999:3).

Deloitte (2013:25) stated that SARS' position is not clear due to the fact that the VAT Act does not contain explicit place of supply rules and SARS' position is subject to change. In VAT News 37 (SARS, 2011:2) SARS made it clear that there would be no obligation on the non-resident to register for VAT in South Africa if its activities in South Africa were totally "passive activities" and if the non-resident had no "physical presence or fixed place of business in South Africa". It was also stated in VAT News 37 (SARS, 2011:2), that the existing policy and others related to non-resident entities are being reviewed and that the existing policies would be in place until the review has been finalised.

Other examples of situations when an enterprise could be conducted by a non-resident in South Africa are:

- services supplied by a foreign company to its South African subsidiary, South African holding company or customer by the foreign company's employees
or
- importation and distribution of goods in South Africa by a foreign business
or
- the carrying of consignment stock in South Africa by a foreign business (Ernst & Young, 2011).

The income from only one supply may result in a person being liable for VAT registration (SARS, 2013b:11).

Section 23(2) of the VAT Act, requires that a non-resident that applies for VAT registration appoint a representative vendor in the Republic in terms of Section 46 of the VAT Act, and furnish the Commissioner with the particulars of the representative vendor in South Africa. The non-resident must also open an account at a South African bank and furnish the particulars of such banking account to the Commissioner. A non-resident business can carry on a VAT enterprise and register for VAT even if it does not have a permanent establishment in South Africa for income tax purposes (Ernst & Young, 2013).

The obligation of an entity to register for VAT in any country must be considered carefully. Substantial penalties and interest may be imposed on persons that are non-compliant (Ernst & Young, 2011).

2.3.5 Failure to register for VAT

The TA Act attempts to clearly and comprehensively describe the VAT registration requirements (SARS, 2014a:109). Section 22(5) of the TA Act determines that where a taxpayer has to register with SARS for tax, but does not register, SARS may register the taxpayer for applicable taxes.

Section 22 of the TA Act places the duty to register within 21 days from becoming liable to register in terms of the VAT Act on the person that is obliged to be registered. In terms of Section 234(a) of the TA Act, a person who wilfully and without just cause does not register when there is a requirement for the person to register “is guilty of an offence and upon conviction, is subject to a fine or imprisonment for a period of not exceeding two years”. Non-compliance in respect of registration requirements could attract a fixed-amount administrative penalty (SARS, 2014a:64).

2.4 INTERPRETATIONAL CHALLENGES AND UNCERTAINTIES

The interpretational challenges and uncertainties, in respect of the levying of and the registration for VAT in terms of the VAT Act, that have been identified are summarised below:

- i. In some instances it is difficult to determine if a supply is an imported service for which the recipient is liable to make payment of the VAT or whether the foreign supplier is conducting an enterprise in the Republic and is required to register as a VAT vendor in the Republic and as a result, is liable to levy the VAT (refer to 2.2.6). The term enterprise is considered in Chapter 3.
- ii. The definition of imported services (refer to 2.2.6) includes services that are utilised or consumed in the Republic. The term “utilised or consumed” is not defined in the VAT Act and it is not clear what is meant by the term (Deloitte, 2013:71; Olivier & Honiball, 2011:792). There may be various interpretations (refer to 2.2.6), including that it may be intended to refer to the place where the services are physically rendered, or where the recipient of the service conducts its business, or the place where the recipient uses the supply.
- iii. SARS stated that there would not be an obligation on the non-resident to register for VAT in South Africa if the activities in South Africa were totally “passive” activities and if the non-resident had no “physical presence or fixed place of business in South Africa”. It was also stated in VAT News 37 (SARS, 2011:2), that the existing policy and others related to non-resident entities are being reviewed and that the existing policies would be in place until the review has been finalised (refer to 2.3.4).

2.5 CONCLUSION

A person that conducts an enterprise in South Africa may voluntarily register for VAT and has to register for VAT if the requirements contained in the VAT Act and the TA Act are met. Interpretational challenges and uncertainties relating to the levying of and registration for VAT in terms of the VAT Act were identified in this chapter and are summarised in 2.4. Due to the uncertainty in respect of the meaning of “utilised” and “consumed”, Olivier and Honiball (2011:793) have submitted that legislative intervention is needed to insert a definition of “utilised or consumed in the Republic”. This will provide more certainty to determine whether a service meets the definition of imported services in the VAT Act.

It is uncertain how many foreign entities and their South African clients or suppliers are at risk because they have not registered for VAT in South Africa. Due to the increase in international investments and trade in South Africa, it is important that the risk of incorrect interpretation of the VAT registration rules be dealt with by issuing guidelines that provide clarity in respect of the conditions under which a non-resident entity is considered to be conducting an enterprise in South Africa (Botes, 2011:399).

CHAPTER 3

ENTERPRISE FOR VAT PURPOSES IN SOUTH AFRICA

3.1 INTRODUCTION

“VAT is sometimes incorrectly said to be the simplest of taxes. This could not be further from the truth. VAT is an extremely complex tax...” (Ger & McCready, 2012). Various interpretational and practical problems arise from the interpretation of the definition of “enterprise”, with regard to which activities are “partly” carried on in South Africa (Olivier & Honiball, 2011:769). There are a number of interpretational challenges and uncertainties that exist in determining if an enterprise is conducted in South Africa (Ernst & Young, 2011). VAT has to receive constant attention and focus that starts by identifying and registering all operations of a business (Grant Thornton, 2009).

The definition of “enterprise” in Section 1(1) of the VAT Act is the first point to consider when determining if a person has to be registered or may voluntarily register for VAT in South Africa (SARS, 2013a:2; SARS, 2013b:11). No VAT is applicable to the supply of goods or services by a vendor, if the supply is not made in the course or furtherance of an enterprise (Section 7(1)(a) of the VAT Act). Input tax may be deducted from output tax if the input tax is incurred for the purpose of consumption, use or supply in the course of carrying on an enterprise and as a result for the making of taxable supplies (definition of input tax in Section 1(1) of the VAT Act; Section 17 of the VAT Act). The definition of enterprise is analysed in this chapter. This addresses research objective ii as stated in 1.4.2.

3.2 DEFINITION OF ENTERPRISE

“Enterprise” is defined in Section 1(1) of the VAT Act. Paragraph (a) of the definition sets out the general test for an enterprise, whereas paragraph (b) sets out specific inclusions for an enterprise. The definition contains provisos concerning when a person shall be deemed to be carrying on or not carrying on an enterprise.

3.2.1 General test for enterprise

Section 1(1) of the VAT Act states that “enterprise” means:

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

The requirements in terms of paragraph (a) of the definition of “enterprise” are broken down and summarised as follows for purposes of the analysis to be performed in this chapter:

- enterprise in the case of any vendor means (refer to 2.2.2);
- any enterprise or activity (refer to 3.3.1);
- carried on continuously or regularly (refer to 3.3.2);
- by any person (refer to 3.3.3);
- in or partly in the Republic (refer to 3.3.4);
- in the course or furtherance of which goods or services are supplied to any other person (refer to 3.3.5);
- for a consideration (refer to 3.3.6);
- whether or not for profit (refer to 3.3.7).

3.2.2 Special inclusions in respect of enterprise

In addition to the general test in Paragraph (a) of the definition of enterprise in Section 1(1) of the VAT Act, Paragraph (b) of the definition provides for inclusions in terms of which specific persons are considered to be conducting an enterprise.

Paragraph (b)(i) refers to public authorities such as certain government departments and public entities listed in parts A and C of Schedule 3 to the Public Finance Management Act (1 of 1999). These authorities are normally not regarded as

enterprises due to the fact that they are mostly carrying out the functions of Government. To the extent that these entities are carrying on business activities which compete with other vendors, the Minister of Finance may decide that the entities should be notified to register and account for VAT (SARS, 2013a:14; SARS, 2014a:113) .

Paragraph (b)(ii) deals with the activities of any welfare organisations. These entities are regarded as enterprises to the extent that they carry on welfare activities referred to in the definition of “welfare organisation” in Section 1(1) of the VAT Act. This overrides the general requirement in paragraph (a) that goods or services must be supplied for a consideration.

When a welfare organisation makes supplies as contemplated in Section 12 of the VAT Act, those supplies remain exempt and the principle that a supply made for no consideration generally falls outside the scope of VAT, still applies. A welfare organisation must differentiate between taxable supplies made for no consideration and exempt supplies made for no consideration (SARS, 2013a:14-15).

The activities of share block companies and foreign donor funded projects, are included in the definition of “enterprise” in paragraphs (b)(iii) and (b)(v). Paragraph (b)(iv) refers to the proposed amendment to the definition of “enterprise”, to include “the activities of any person who continuously or regularly supplies telecommunication services to any person who utilizes such services in the Republic;”. The proposed amendment will be effective from a date to be fixed by the President by proclamation in the Gazette (South Africa, 1997a; South Africa, 1997b).

Paragraph (b)(vi) includes the supply of imported electronic services. The definition of “enterprise” contains certain provisos.

3.2.3 Provisos to the definition of “enterprise”

The definition of “enterprise” contains provisos (i) to (xii) which clarify if certain activities are considered to be in the course or furtherance of an enterprise or not. Anything done in respect of the commencement or termination of an enterprise will be considered to be

done in the course or furtherance of an enterprise. The following are not enterprise activities and will therefore not attract VAT:

- Services rendered by an employee (not an independent contractor) to an employer in respect of which remuneration is earned.
- Supplies by a separately identifiable branch or main business with an independent accounting system and permanently located outside the Republic.
- Private or recreational activities or hobbies that are not carried out as a business or enterprise.
- Private transactions such as, sale of household goods, personal effects or private motor vehicles.
- Exempt supplies as listed in Section 12 of the VAT Act.

The deeming provisions in Section 8 of the VAT Act deem certain transactions to be taxable supplies and certain receipts to be in respect of taxable supplies made and therefore carried on in the course or furtherance of the vendor's enterprise. The components of the definition of "enterprise" in paragraph (a) in Section 1(1) of the VAT Act as set out in 3.2.1 are analysed in 3.3. This was carried out to obtain a better understanding of when a person is conducting an enterprise in South Africa and to identify the interpretational challenges and uncertainties.

3.3 COMPONENTS OF THE DEFINITION OF "ENTERPRISE"

An enterprise in terms of the VAT Act is wider than, as well as not limited to, a permanent establishment. A non-resident entity, registered for VAT in South Africa, with a permanent establishment in South Africa has to levy VAT on all its commercial activities in South Africa (Jooma, 2012:11). The goal of VAT is to tax final consumption of goods or services that take place in South Africa, irrespective of where the goods are produced or to whom the services are supplied (Olivier & Honiball, 2011:763; SARS, 2007b).

3.3.1 Any enterprise or activity

Paragraph (a) of the definition of “enterprise” in Section 1(1) of the VAT Act, refers to an “enterprise or activity” that must be conducted. The phrase “enterprise or activity” makes the definition of enterprise very wide, resulting in most activities (subject to specific exclusions) constituting an enterprise. This phrase provides an activity-based test. The use of the term “enterprise” as part of the definition of the same term means that the ordinary meaning of the word will apply (SARS, 2013a:10). The term “activity” is not defined in the VAT Act. Therefore the ordinary meaning of “enterprise” and “activity” will be considered. These words are defined in the Oxford Dictionaries (2014):

Enterprise signifies:

- a project or undertaking, especially a bold or complex one...
- initiative and resourcefulness...
- entrepreneurial economic activity...
- a business or company... .

Activity denotes:

- the condition in which things are happening or being done...
- busy or vigorous action or movement...
- a thing that a person or group does or has done... .

“Enterprise or activity”, normally refers to commercial activities where goods or services are supplied for a consideration. These are carried out in an organised manner like a business. The goal is to expand the business or to ensure that the business is viable. An element of risk-taking is involved and the aim is to grow or make profit or to ensure that the organisation is sustainable (SARS, 2013a:11). To meet the definition of an enterprise a continuous activity is needed and “once-off private sales” are not deemed to be supplies made, in the course of an enterprise (Stiglingh, 2013:1051).

Most countries define the term “enterprise” or “business” to describe their tax base or the circumstances in which VAT will apply to transactions (SARS, 2013a:11). “Business” is specifically included in the dictionary definition of enterprise (SARS,

2013a:11). Therefore, the ordinary meaning of business is considered. Business is defined in the Oxford Dictionaries (2014) as:

- a person's regular occupation, profession or trade...
- an activity that someone is engaged in...
- a person's concern...
- work that has to be done or a matter that has to be attended to...
- commercial activity...
- trade considered in terms of its volume or profitability...
- a commercial home or firm... .

In considering the terms and definitions, SARS concludes that supplies made for no consideration are considered to be taxable if there is a link between the supplies made for no consideration and the enterprise activities performed to make the supplies (SARS, 2013a:11). Paragraph (a) of the definition of enterprise further requires that the "enterprise" or "activity" must be conducted "continuously or regularly".

3.3.2 Carried on continuously or regularly

The term "continuously or regularly" is not defined in the VAT Act (Botes, 2011:397). The ordinary meaning of the concept is therefore considered. SARS' interpretation of the concept is that the business must be carried on all the time or at reasonably short intervals (regularly). The general interpretation by SARS of the term "continuously" is that it is ongoing and that the activity has not ceased permanently and it has not been substantially interrupted. According to SARS "regular" means that the "activity takes place repeatedly and at reasonably fixed intervals taking into consideration the type of the supply and the time taken to complete the activities associated with making the supply" (SARS, 2013a:12; SARS, 2013b:11).

It is fairly easy to determine when construction services result in the carrying on of an enterprise. To establish if the subdivision of land and the sales of the subdivided portions results in the carrying on of a VAT "enterprise" are not as easy. SARS has

supplied examples of when activities in connection with the sale of land will be considered to culminate in an “enterprise” or not, for VAT purposes (SARS, 2013b:11).

A summary of the examples includes the following:

- The subdivision of property that was inherited and the sale of a subdivided portion are considered to be a once-off transaction where property was realised to the best advantage: this is not regarded as carrying on of an enterprise.
- The subdivision and sale of land involving various steps and activities is considered to be an activity that is carried on “continuously and regularly” and, as a result, is considered to be the carrying on of an enterprise.
- A salaried employee of an estate agency conducting an enterprise outside of employment. The enterprise consisted of the buying, renovating and selling of houses. The person was seen to continuously carry on activities necessary to sell the house and therefore was considered to be conducting an enterprise although only one house was sold in a year (SARS, 2013b:11-13).

Foreign businesses holding once-off events, such as conferences, concerts, and congresses in South Africa are considered to be carrying on an enterprise in South Africa. The activities to arrange the event are considered to be conducted on a continuous basis due to the chain of activities that are undertaken to arrange the event in South Africa. This will be done in South Africa or partly in South Africa and consideration will be received in the form of entry fees or registration fees (FSP Business, 2014).

3.3.3 By any person

The definition of “enterprise” is primarily activity based and the nature of the person that conducts the enterprise is normally not important. Any type of person may conduct an enterprise. Reference is made to the activities of an association in paragraph (a) of the definition of “enterprise” in Section 1(1) of the VAT Act,. This is in order to confirm that activities of associations may qualify as enterprise activities, even if they are non-profit

associations (refer to 3.2.1). Specific rules apply to public authorities and welfare organisations (refer to 3.2.2).

The meaning of the concept of a person is important for the modern organisation because each person must be considered separately to determine if the person has to register for VAT. The VAT registration process is normally considered to be a once-off process, while the manner in which business operations are structured could result in additional enterprises that need separate registration (Grant Thornton, 2009).

There are instances where arrangements for practical purposes unintentionally result in the creation of separate persons for VAT purposes. A shared service company set up within a group to serve various group companies normally, but not necessarily, gives rise to a separate enterprise for VAT purposes. It will not give rise to a separate enterprise where it is an agent of the group of companies incurring expenses on their behalf (Grant Thornton, 2009). Joint ventures may also be separate persons because a body of persons (corporate or unincorporated) is included in the definition of “person” in Section 1(1) of the VAT Act.

3.3.4 In or partly in the Republic

The South African VAT system is not limited to supplies made or deemed to be made in South Africa. This differs from VAT systems such as New Zealand and Australia. All supplies, irrespective of where the supplies are made, could be subject to VAT if the supplies are made in the course or furtherance of an enterprise conducted in or partly in South Africa (Deloitte, 2013:24-25; Glyn-Jones, 2006).

The importation of goods from outside South Africa directly by the client or the client’s agent without any activities of the supplier in South Africa is not normally considered to be the carrying on of an enterprise in or partly in South Africa. The more activities are performed in South Africa, the more the chance of the activities resulting in an enterprise being conducted in South Africa (Deloitte, 2013:24-25; Glyn-Jones, 2006).

A foreign entity therefore needs to determine if it is carrying on “business-related activities” in South Africa. The activities do not have to be conducted from a “fixed or

permanent place in South Africa”. The entity must “supply goods or services in the course or furtherance of activities carried on in South Africa”. The place where the supplies are made is unimportant (Ernst & Young, 2011).

In terms of the Binding Private Ruling 004 of SARS, a non-resident company that sent raw materials to a manufacturer in South Africa was not regarded as conducting an enterprise in the Republic and did not have to register for VAT (SARS, 2007a). The manufacturer imported the goods on behalf of the non-resident company, processed them and exported them back to the non-resident company (SARS, 2007a). SARS however, stated in VAT News 37 (SARS, 2011:2) that there would not be an obligation on the non-resident to register for VAT in South Africa if the activities in South Africa were totally “passive” activities and if the non-resident had no “physical presence or fixed place of business in South Africa”. SARS has not issued clear guidelines in respect of the supply of intangible services in South Africa by a non-resident without a “fixed or permanent place” of business in South Africa (Schneider, 2009). To determine if a non-resident conducts an enterprise in South Africa is a “matter of degree”, and specific place of supply rules can assist in resolving such issues (Deloitte, 2013: 25).

3.3.4.1 Place of supply rules

Apart from place of supply rules, introduced in 2014 in respect of imported electronic services, South Africa does not have explicit place of supply rules (South Africa, 2013). Such rules have been introduced in many countries. This was done “to enhance legislative certainty, to avoid double taxation and to increase equality of the overall VAT and tax system” (Schneider, 2009). Place of supply rules determine which country has taxing rights. In the absence of rules of this type, the foreign supplier’s liability to register must be determined by way of interpretation (South Africa, 2013).

The liability to account for VAT on e-commerce transactions were previously placed on the importer. The compliance levels to this liability have been low. South African e-commerce suppliers are not able to compete with foreign suppliers due to inclusion of the 14% VAT in the prices (Schneider, 2009; South Africa, 2013).

Foreign suppliers of e-commerce transact over the internet with various customers in South Africa and do not have a physical presence in South Africa. The absence of specific place of supply rules in South Africa results in a foreign supplier's liability to register for VAT being determined through interpretation with no certainty. Place of supply rules were introduced in South Africa in respect of foreign suppliers of imported electronic services to South African customers in 2014; this was done in line with OECD principles (South Africa, 2013).

The cross-border supply of digital products has been addressed by the introduction of place of supply rules for imported electronic services to South African customers. There are some uncertainties in respect of the exact definition of the services that are included (Lamprecht, 2014). There are other cross-border supplies that pose VAT challenges. In the *De Beers Consolidated Mines Ltd v CSARS* (2012) case the Supreme Court of Appeal (SCA) held that services obtained by the vendor from foreign suppliers were imported services and VAT was payable (refer to 2.2.6.2). According to Badenhorst (2013) it is not always easy to determine the "place of consumption" of a service supplied by a foreign supplier. Examples given by Badenhorst (2013) to illustrate this, are: Foreign attorneys that are providing "legal services relating to legal action or compliance with foreign legislation and regulations"; services supplied in relation to "a listing on a foreign exchange" and "foreign banking and administration services in respect of funds invested offshore".

The services could benefit the vendor in South Africa. The status of the supply is, however, not determined by the ultimate benefit, but by the place where the service is actually consumed. It is further indicated by Badenhorst (2013), that the cost of surgery received by a South African resident in a foreign country, could not be subject to VAT in South Africa as an imported service, purely because the resident eventually enjoys the benefit of the surgery in South Africa.

3.3.5 In the course or furtherance of which goods or services are supplied to any other person

According to SARS (2013a:12), the phrase “in the course or furtherance of which goods or services are supplied” is the essential concept that supports the entire VAT system. There cannot be an “enterprise” if no goods or services are supplied. In terms of proviso (v) to the definition of “enterprise” in Section 1(1) of the VAT Act, supplies that are exempt under Section 12 of the VAT Act are specifically excluded from qualifying as being deemed to be carrying on an enterprise. Certain supplies of goods or services that are not made for a consideration (refer to 3.3.6), the non-enterprise activities listed in the provisos in 3.2.3, as well as supplies which are not associated with the enterprise activities, are not supplies made in the course or furtherance of an enterprise.

The *De Beers Consolidated Mines Ltd v CSARS (2012)* case confirmed that it is not conclusive that, if a person is conducting an enterprise, all supplies made by that person are subject to VAT or that all acquisitions made by that person are made for enterprise purposes. The various types of activities that are conducted by a person are to be tested against the definition of “enterprise” in Section 1(1) of the VAT Act. A person may be conducting taxable as well as non-taxable activities, in which case the non-taxable activities will not constitute an enterprise (SARS, 2013a:13).

3.3.6 For a consideration

The phrase “for a consideration” must not be interpreted narrowly. A narrow interpretation would result in all supplies made for no consideration being non-taxable. A broader test must be used and all supplies made by a person must be looked at to ascertain whether the activities meet the requirements of “enterprise activities” (SARS, 2013a:13). Consideration is defined in Section 1(1) of the VAT Act:

“consideration”, in relation to the supply of goods or services to any person, includes any payment made or to be made (including any deposit on any returnable container and tax), whether in money or otherwise, or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person, but does not include any payment made by any person as a donation to any association not for gain: Provided that a deposit (other

than a deposit on a returnable container), whether refundable or not, given in respect of a supply of goods or services shall not be considered as payment made for the supply unless and until the supplier applies the deposit as consideration for the supply or such deposit is forfeited.

The notion of consideration is one of the foundations of VAT. The definition is “very wide and includes any payment which is in respect of, in response to, or for the inducement of the supply of any goods or services”. To be deemed to be consideration for a supply, there has to be an adequate connection between the supply and the payment for the supply. An equal supply of goods or services in an exchange transaction will be seen as consideration. The recipient does not have to be the person making the payment (SARS, 2013a:15).

In the Income Tax Case (ITC) 1841 (2010) where the biggest portion of the taxpayer’s activities was made for no consideration, it was held that the taxpayer was making non-taxable supplies and therefore was not carrying on an enterprise (Deneys Reitz, 2011). The general test for an enterprise states that it is irrelevant if the supply is made for a profit or not (refer to 3.2.1).

3.3.7 Whether or not for profit

The conducting of an “enterprise” is not dependent on the making of a profit. It is irrelevant whether the consideration charged for an activity covers the cost of carrying out the activity or not (SARS, 2013a:13).

3.4 INTERPRETATIONAL CHALLENGES AND UNCERTAINTIES

The interpretational challenges and uncertainties in respect of “enterprise” as defined in the VAT Act that have been identified, are summarised as follows:

- i. The first requirement of the definition of “enterprise” is that an enterprise or activity must be conducted (refer to 3.2.1). The term “activity” is not defined in the VAT Act. In terms of the dictionary meaning, an activity may be interpreted as a physical activity; furthermore, in terms of guidance supplied by SARS, it may also refer to economic activities in South Africa (refer to 3.3.1).

- ii. The second requirement of the definition of “enterprise” is that the enterprise or activity must be carried on continuously or regularly (refer to 3.2.1). It is not clear what is meant by the phrase “continuously or regularly”. The VAT Act does not define it. South African legislation does not clarify what is regarded as “continuously or regularly”. In some instances, SARS is of the view that a once-off transaction may comprise an activity which is seen as an activity carried on continuously or regularly (refer to 3.3.2)
- iii. Uncertainty exists in respect of which activities are “partly” carried on in the Republic (refer to 3.3.4). The definition of “enterprise” requires that an enterprise must be conducted in South Africa or partly in South Africa (refer to 3.2.1). There is a possibility that all supplies, irrespective of where the supplies are made, will be subject to VAT if the supplies are made in the course or furtherance of an enterprise conducted in, or partly in, South Africa (refer to 3.3.4).
- iv. Apart from imported electronic services, no specific place-of-supply rules are included in the VAT Act. This makes it difficult to determine whether a non-resident entity is carrying on an enterprise in South Africa (Botes, 2011:397). There is uncertainty about the definition of the services that are included as electronic services and there are supplies in respect of which there are uncertainty in respect of the place of consumption (refer to 3.3.4.1).

3.5. CONCLUSION

In this chapter the definition of “enterprise” was analysed; interpretational challenges and uncertainties relating to the definition were identified. These were summarised in 3.4. There is uncertainty about the type and extent of activities by a non-resident that will be regarded as the conducting of an enterprise in South Africa or partly in South Africa (Deloitte, 2013:25). It is necessary to determine, on a regular basis, if payments made by a South African business to its foreign group companies relate to foreign group activities conducted in South Africa (Ernst & Young, 2011).

In South Africa VAT is reliant on the place of the supplier’s business activities. The activities do not have to be conducted from a “fixed or permanent place in South Africa”. The entity must “supply goods or services in the course or furtherance of activities

carried on in South Africa”. The place where the supplies are made is unimportant (Ernst & Young, 2011). Foreign jurisdictions regularly consider business activities to be equal to economic activities or to the making of supplies and thereafter determine the place of the supplies (Schneider, 2009).

Due to the increase in international investments and trade in South Africa, it is important that the risk of incorrect interpretation of the VAT registration rules be dealt with by the issuing of guidelines by SARS to provide clarity in respect of the conditions under which a non-resident entity is considered to be conducting an enterprise in South Africa (Botes, 2011:399).

The requirements for registering and levying of VAT or GST in New Zealand and the information and guidance supplied in respect thereof by the EU and OECD are examined and analysed in Chapter 4. This was done to determine how the interpretational problems and uncertainties identified in Chapters 2 and 3 and summarised in 2.4 and 3.4 are dealt with by them.

CHAPTER 4

THE LEVYING OF AND REGISTRATION FOR VAT IN NEW ZEALAND, THE EU AND GUIDANCE BY THE OECD

4.1 INTRODUCTION

Developed countries may be grouped in two general categories. The first is the countries that have used the French and the European model as their basis. Such countries use reduced rates with a standard rate tax base that is limited to a certain extent. Many of these countries are members of the EU. The second category of countries, which includes New Zealand, has a much wider base at a standard rate (Charlet & Owens, 2010:944-945; OECD, 2014a:4).

VAT, as a means of taxation, is employed worldwide and international trade in goods and services has increased in a growing global economy. This has resulted in more transactions between VAT systems and an increase in the risk of double taxation or unplanned non-taxation. The OECD (2014a:4) stated that there was growing proof that tax issues requiring attention were not limited to electronic commerce. VAT could distort international trade in services and intangibles, which would create difficulties for business activity, prevent economic growth and misrepresent competition (OECD, 2014a:4). The OECD acknowledged that authorities would benefit from principles that contribute toward ensuring that VAT-systems interact consistently to facilitate, rather than distort, global trade (OECD, 2014a:4).

The objective of this chapter is to analyse the requirements for registration and levying of VAT/ GST, in New Zealand, in terms of information supplied by the EU and guidance supplied by the OECD. This is used to identify how the interpretational problems and uncertainties that have been identified in Chapters 2 and 3, and summarised in 2.4 and 3.4, are dealt with in New Zealand and in terms of information supplied by the EU as well as guidance supplied by the OECD. This is undertaken to address objective iii, as stated in 1.4.2.

4.2 NEW ZEALAND

GST, which is the same as South African VAT, was introduced in New Zealand on 1 October 1986. The equivalent concept to that of an enterprise in South Africa is a taxable activity in New Zealand (Maples, 2000:442). A person is liable to register for GST in New Zealand if the person supplies goods or services in the course of carrying on a taxable activity and the total value of the supplies exceeded \$60 000 in a 12 month period (Section 51 of the New Zealand GST Act).

GST is levied on the supply of goods and services (except for exempt supplies) made in New Zealand “by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply” (Section 8(1) of the New Zealand GST Act).

4.2.1 Levying of GST in New Zealand

The term taxable activity is defined in Section 6(1)(a) of the New Zealand GST Act as:

any activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration; and includes any such activities carried on in the form of a business, trade, manufacture, profession, vocation, association, or club.

These goods or services are referred to as “taxable supplies” (New Zealand Inland Revenue Department, 2010a). The following are excluded from taxable activity: work for salary or wages; being a company director; hobbies; private transactions or exempt supplies (New Zealand Inland Revenue Department, 2010a).

The specific components of “taxable activity” that are analysed hereafter, in order to obtain a clearer understanding of the requirements for a taxable activity to exist in New Zealand are:

- activity (refer to 4.2.1.1);
- continuously or regularly (refer to 4.2.1.2);

- whether or not for a profit (refer to 4.2.1.3);
- goods and services (refer to 4.2.1.4).
- consideration (refer to 4.2.1.5).

4.2.1.1 Activity

The definition of taxable activity in Section 6(1) of the New Zealand GST Act specifically requires that an activity must be conducted. Activity has a broad meaning and it does not have to be an economic or commercial activity (New Zealand, 1995:8). In the Newman vs CIR (1994) case, Justice Fraser 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 meaning, none of which is exactly apposite to the word in its context 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.

To be a taxable activity for GST purposes, the activity must, amongst others, be carried on continuously or regularly (New Zealand, 1995:8-9).

4.2.1.2 Continuously or regularly

The New Zealand Inland Revenue explains that an activity is “continuous” if there is “no significant cessation or interruption of the activity”. The activity is “carried on all the time.” Temporary interruptions in the activity will not generally mean that the activity is not “continuous”. To be “regular”, an activity has to be repeated at reasonably fixed intervals. In addition, the New Zealand Inland Revenue argues that continuously and regularly refers to the activity that ends with the supply of goods or services. A single supply of goods or services with an on-going background may still constitute an “enterprise” (New Zealand, 1995:9).

4.2.1.3 Whether or not for a profit

In New Zealand, a taxable activity for GST purposes will be considered to be a business for income tax purposes if the nature of the activity constitutes a business, and if an

intention of profit-making is evident from the actions of the taxpayer. The essential basis of a business is an activity conducted in an organised and logical way towards an end result (New Zealand, 1995:9). Income tax requires a profit-making intention for an activity to be a business. This is not a requirement for a taxable activity for GST purposes. These principles supplied are supported by the judgment in the Grieve v CIR (1984) case (New Zealand, 1995:9). Even in the absence of a profit there can be a consideration for the supply (New Zealand, 1995:9).

4.2.1.4 Goods and services

Goods are defined as “all kinds of personal or real property...”. Services “means anything which is not goods or money” (Section 2 of the New Zealand GST Act). The goods or services do not have to be supplied for a profit.

4.2.1.5 Consideration

The main component of a taxable activity is the supply of goods or services for a consideration (New Zealand, 1995:9). GST is charged on the taxable supply of goods or services in New Zealand, under Section 8 of the New Zealand GST Act. The GST is levied at the rate of 15%, or at the rate of 0% under: Section 11 (zero-rating of goods); or Section 11A (zero-rating of services); or Section 11B (zero-rating of telecommunications services; or Section 11AB (zero rating of some supplies by territorial authorities) (The New Zealand GST Act). The requirements for a person to register for GST in New Zealand are considered next.

4.2.2 Registration for GST in New Zealand

A person is obliged to register for GST in New Zealand if that person carries on a taxable activity and if the total value of the supplies made in New Zealand is more than \$60 000 for the previous 12 months, or is expected to exceed \$60 000 in the following 12 months, or if the turnover was less than \$60 000 but GST was included in the prices charged (New Zealand Inland Revenue Department, 2010a; Sections 51 and 51B of the New Zealand GST Act).

Voluntary registration may be carried out even if the annual turnover is below \$60 000. There is no requirement to register for GST if the turnover exceeded \$60 000 due to the ceasing of a taxable activity; or a substantial or permanent reduction in the scale of a taxable activity; or the replacement of plant or assets; or the supply of telecommunications services to non-residents that are physically present in New Zealand that are treated as being supplied in New Zealand (New Zealand Inland Revenue Department, 2010a; Section 51(1)(b) of the New Zealand GST Act).

The supplies of which the total value must be taken into account to determine if the registration threshold is exceeded, relate to supplies made in New Zealand (Section 51(1) of the New Zealand GST Act). Supplies made by a non-resident in New Zealand are not necessarily considered to be taxable supplies (New Zealand Inland Revenue Department, 2010b).

4.2.3 Non-residents and GST registration in New Zealand

The New Zealand Inland Revenue Department (2010b:4) states that the GST responsibilities of non-residents are often difficult and that the following four factors must be considered before deciding if GST registration is required. The four factors are dealt with in 4.2.3.1 to 4.2.3.4.

4.2.3.1 The resident status of the person for GST purposes in New Zealand

A resident of New Zealand for GST purposes means a resident, as determined in terms of Sections YD1 and YD2 (excluding Section YD 2(2)) of the New Zealand Income Tax Act (97 of 2007). In terms of the requirements of these sections a “company is a resident of New Zealand if it is incorporated in New Zealand; its head office is in New Zealand; its centre of management is in New Zealand or control of the company by its directors, acting in their capacity as directors, is exercised in New Zealand...”. An individual is deemed to be a resident of New Zealand if the individual has a permanent place of abode in New Zealand or if the individual is present in New Zealand for certain prescribed periods (New Zealand Inland Revenue Department, 2010b).

Notwithstanding the income tax requirements for residency, the New Zealand GST Act determines that a person is specifically deemed to be a resident of New Zealand for GST purposes in so far as that person carries on any taxable activity in New Zealand and has a fixed or permanent place in New Zealand which relates to that taxable activity or other activity. A person is also deemed to be a resident of New Zealand for New Zealand GST purposes, if that person is an unincorporated body and its centre of administrative management is in New Zealand (Section 2 of the New Zealand GST Act).

An indication of the characteristics of a fixed or a permanent place as given by the New Zealand Inland Revenue Department are that it is a place of a business, for example a branch, or a factory; the place is fixed, it has an identifiable place or site and it is used in a productive manner by persons in the course of their activity. A showroom, promotional office or storage facility is specifically excluded (New Zealand Inland Revenue Department, 2010b).

4.2.3.2 Conducting of a taxable activity by a person in New Zealand

If a person's activity falls within the definition of a taxable activity (refer to 4.2.1) the person will be considered to be conducting a taxable activity in New Zealand. If this is the case, GST is levied on supplies made and GST input credits are allowed in respect of GST incurred on expenditure in New Zealand (New Zealand Inland Revenue Department, 2010b).

4.2.3.3 Time and location of supplies and services – Place of supply rules

Section 8(2) of the New Zealand GST Act deems goods and services to be supplied in New Zealand if the supplier is resident in New Zealand but outside of New Zealand if the supplier is a non-resident. The place of supply is determined by the residency of the supplier.

Despite Section 8(2), if the supplier is a non-resident of New Zealand: the supply of goods is deemed to be made in New Zealand if the goods are in New Zealand at the time of supply of the goods. The supply of services is deemed to be made in New Zealand if the services are physically performed in New Zealand by a person that is in

New Zealand at the time the service is performed (Section 8(3) of the New Zealand GST Act).

The non-resident rule as set out in Section 8(3) of the New Zealand GST Act is subject to an exception. If a supplier who is a non-resident of New Zealand makes a supply to a registered person in New Zealand for use in a taxable activity it will be deemed to have been supplied outside New Zealand unless the supplier and recipient agree that Section 8(4) will not apply (Section 8(4) of the New Zealand GST Act).

4.2.3.4 Agreements

A supply will be a taxable supply in New Zealand and GST will be charged and paid in New Zealand if a non-resident supplier and the New Zealand recipient of goods or services agree to it. This is applicable to non-resident suppliers and the goods must be in New Zealand or the services performed in New Zealand (New Zealand Inland Revenue Department, 2010b). The information supplied by the EU in respect of levying of and registration for VAT is considered in 4.3.

4.3 EU

A German citizen, Wilhelm Von Siemens, came up with the idea of VAT in the 1920's. This idea was built into a system by Maurice Lauré, former joint director of the French tax authorities (Charlet & Owens, 2010:943). The French, in 1954, were the first in the world to implement VAT; subsequently, VAT has been synchronised within the EU (Laxafoss *et al.*, 2009).

The EU consists of 28 Member States. All members apply VAT. The original six Member States of the European Commission used different forms of indirect taxation. A neutral and transparent turnover tax system was a requirement for an efficient Single Market in Europe (European Commission, 2014a). The Sixth VAT Directive was adopted on 17 May 1977, and established a uniform VAT coverage. The Sixth Council Directive (77/388/EEC) was replaced by the European Union VAT Directive, 2006/112/EC of 2006 (EU VAT Directive) on 1 January 2007. The Directive gives a

clearer overview of EU VAT currently in force. The various provisions are brought together in one piece of legislation by the Directive (European Commission, 2014b).

The Single Market was introduced in the EU on 1 January 1993, the purpose being to treat the EU as one territory. People, money, goods and services interact freely within the Single Market to encourage competition and trade as well as improved efficiency (European Commission, 2014d). EU Member States may apply a standard rate of VAT of at least 15% and one or two reduced rates of not less than 5%. The rates applied differ between Member States as well as between certain types of products. Some Member States have kept separate rules in certain regions (European Commission, 2014b; Ernst & Young, 2014a:234,241).

4.3.1 Levying of VAT and the registration for VAT in the EU

VAT in the EU is a broad-based consumption tax levied on the value added to goods and services. It is applicable in respect of almost all goods and services supplied for consumption in the EU (European Commission, 2014a). A taxable person does not charge VAT on sales made if the annual turnover is less than the threshold. The Member States apply different thresholds (European Commission, 2014a). Article 9 of the EU VAT Directive, defines a taxable person as “any person who independently carries out in any place any economic activity, whatever the purpose or results of the activity.” A taxable person for VAT purposes includes any individual, partnership, company supplying goods or services in the course of business (European Commission, 2014a). Transactions carried out by a taxable person for a consideration in an EU country are subject to VAT. “An economic activity includes any activity of producers, traders or persons supplying services” (European Union, 2011).

4.3.1.1 Supply of goods in the EU

An export refers to the supply of goods from an EU Member State to a country outside of the EU whereas an import refers to goods imported from a country outside the EU into an EU Member State. Once goods are imported into the EU, the goods may move within the EU without further payment of customs duties or further border controls (Ernst & Young, 2014a:234). Goods sold for export or services supplied to clients in an

overseas country are normally zero-rated for VAT purposes. Imports are taxed. This is done, so that EU producers and suppliers outside the EU are able to compete on equal terms on the European market (European Commission, 2014a).

The supply of goods is subject to VAT in the EU at the place where the goods are supplied (European Commission, 2014c). The supply of goods that are not transported or dispatched is taxed where the goods are situated at the time of the supply (Article 31 of the EU VAT Directive). Transported or dispatched goods are subject to VAT where the goods are situated when the transport or dispatch begins (Article 32 of the EU VAT Directive).

The sale of goods that are dispatched or transported by the supplier from one Member state to certain types of clients in another Member State that are not taxable or non-registered taxable persons in their country are referred to as distance sales. Distance sales include the sale of goods by mail-order catalogue or online internet sales (Ernst & Young, 2014a:235).

The distance sales of goods are subject to VAT in the country where the goods are situated when the dispatch or transport ends, if the supplier's annual sales exceed the threshold applicable in the Member State of the client (Article 33 of the EU VAT Directive, European Commission, 2014c). When the supplier's annual sales are below the threshold applicable in the client's Member State, the distance supply will be subject to VAT in the Country where the goods are situated when the dispatch or transport begins (Article 34 of the VAT Directive; European Commission, 2014c).

Intra-Community supply refers to goods that are supplied where both the supplier and the customer are registered for VAT: the goods are sent to another Member State to a person who supplies his VAT-number in that other Member State, and the supply is zero-rated. The VAT due in respect of the Intra-Community supply is payable by the customer in the Member State where the goods are received; this is referred to as an intra-Community acquisition (European Commission, 2014a).

4.3.1.2 Supply of services in the EU

From 1 January 2010, VAT on services is levied in the Member State of consumption. The place where the services are supplied determines the place of taxation. The nature of the service and status of the client determines the place of supply. It is necessary to distinguish between a business and a private individual who is the final user (European Commission, 2014c).

The general place of supply rules in the EU for services is:

Business to business (B2B) supply of services is subject to VAT in the country where the client's place of establishment is situated. In respect of services supplied to a fixed establishment, the place of supply will be the place where the fixed establishment of the taxable client is located. In the absence of a place of establishment or fixed establishment the place of supply is the client's permanent address or place where the client normally lives (Article 44 of the EU VAT Directive; European Commission, 2014c).

The place of supply in respect of business to consumer (B2C) services is the place of establishment of the business of the supplier. The place of supply will be where the fixed establishment of the supplier is located for services delivered from the fixed establishment of the taxable person. In the absence of a place of establishment or fixed establishment, the place of supply is the supplier's permanent address or place where the supplier normally lives (Article 45 of the VAT Directive; European Commission, 2014c).

There are exceptions where the general rules for suppliers and customers are not applicable, but specific rules apply. In terms of the said specific rules, the VAT is levied at the place of consumption. Telecommunications, broadcasting and electronic services supplied to clients are included in the exceptions (Ernst & Young, 2014a:239; European Union, 2011).

A non-EU person does not charge VAT on supplies of services made to a client who is an EU taxable person. The EU VAT is accounted for by the client at the rate applicable in the client's Member State. VAT may have to be levied by the non-EU supplier in the

non-EU country, according to legislation applicable in the country where the non-EU supplier is established. No EU VAT is levied if the client is not established in the EU, with the exception of the application of “electronic services” or the “use and enjoyment” provision (Ernst & Young, 2014a:239). Double taxation could occur if one of the parties to a transaction is a non-EU person. To assist in avoiding non-taxation or double taxation, there are additional rules that may apply. These additional rules may tax a service that is “used and enjoyed” in the EU or, not tax a service “used and enjoyed” outside the EU (Ernst & Young, 2014a:240; European Union, 2011).

Apart from a few exclusions, effective from 1 January 2010, the use and enjoyment provisions apply to any service. There may be a requirement for a non-EU supplier of a service taxed in the EU, in terms of the “use and enjoyment” provisions, to register in each of its non-taxable client’s Member States. The different countries have their own requirements for VAT registration (Ernst & Young, 2014a:240).

The VAT rules applicable to electronic services until 1 January 2015 are:

The place of supply is the place where the suppliers are established, irrespective of where the client is located, for EU suppliers (B2C) making supplies of telecommunications, broadcasting and electronic services. The place of supply for supplies made by Non-EU Suppliers, supplying B2C supplies of telecommunications, broadcasting services, is where the supplier is established, this is subject to the use and enjoyment provisions (Deloitte, 2014).

From 1 January 2015, new rules will be introduced in respect of the place of supply of B2C supplies of electronic services in the EU. In terms of these new rules, the B2C supplies of telecommunications, broadcasting and other electronically supplied services made by suppliers in the EU to non-taxable EU clients will be considered to be supplied in the EU Member State of the recipient of the service (Deloitte, 2014). A “one-stop” scheme is available to EU suppliers to meet their VAT obligations in their Member Country. The “one-stop” scheme allows suppliers to meet their VAT obligations in respect of the different Member Countries in their resident country (Deloitte, 2014; Ernst & Young, 2014a:241).

4.4 OECD

The OECD was established in 1961. South Africa is not a member but has observer status (Olivier & Honiball, 2011:269-270). The OECD issued International VAT/ GST Guidelines (the Guidelines) as a global standard to deal with issues of double taxation and unintentional non-taxation due to variations in the application of VAT in global trade. These were endorsed by the second OECD Global Forum on VAT held in Tokyo on 17 and 18 April 2014 (Ernst & Young, 2014b; OECD, 2014a:4; OECD, 2014b).

Authorities are independent with respect to the design and application of their laws. The purpose of the Guidelines is therefore not to provide detailed prescriptions for national legislation. Rather, they identify objectives and propose ways for realising them. The goal of the Guidelines is to reduce doubt and the risks of double taxation and unintentional non-taxation resulting from variations in the manner in which VAT is applied to cross-border transactions. The Guidelines provide assistance to policy makers that could be used as a point of reference (OECD, 2014a:4).

The Guidelines issued by the OECD are in a draft form because they are developed using a nothing-is-approved-until-everything-is-approved-approach. The Guidelines constitute the international standard for the application of VAT/ GST to global trade as it has already been approved by the OECD Committee on Fiscal Affairs. They currently consist of three chapters. The completed Guidelines will be presented for endorsement at the next meeting of the Global Forum in November 2015 (Ernst & Young, 2014b; OECD, 2014b).

4.4.1 International VAT/ GST Guidelines issued by the OECD

The Guidelines furnish principles in respect of the application of VAT to the most general types of international transactions, focusing on trade in services and intangibles (Ernst and Young, 2014b; OECD, 2014a).

In respect of the neutrality principle the OECD has given six Guidelines. These, numbered 2.1 to 2.6, are (OECD, 2014a:10-13):

- The burden of value added taxes themselves should not lie on taxable businesses except where explicitly provided for in legislation.
- Businesses in similar situations carrying out similar transactions should be subject to similar levels of taxation.
- VAT rules should be framed in such a way that they are not the primary influence on business decisions.
- With respect to the level of taxation, foreign businesses should not be disadvantaged or advantaged compared to domestic businesses in the jurisdiction where the tax may be due or paid.
- To ensure that foreign businesses do not incur irrecoverable VAT, countries may choose from a number of approaches. These include: the operation of a system of applying for direct refunds of local VAT incurred, making supplies free of VAT, enabling refunds through local VAT registration, shifting the responsibility on to locally registered suppliers or customers and granting purchase exemption certificates.
- Where specific administrative requirements for foreign businesses are deemed necessary, they should not create a disproportionate or inappropriate compliance burden for the businesses.

The OECD supplied five Guidelines in respect of the determination of the place where cross-border supplies of services and intangibles will be subject to VAT. According to the destination principle, that is applied to determine the place of supply of services and intangibles, VAT is levied in the country of final consumption of the services or intangibles (Guideline 3.1). This supports neutrality in the VAT system with respect to global trade (Ernst and Young, 2014b; OECD, 2014a:24).

Guideline 3.2 of the Guidelines, deals with the application of the destination principle (Guideline 3.1) for B2B supplies. Guideline 3.2 determines that according to the main rule (the general principle) for the application of the destination principle for B2B supplies, the place of taxation for globally traded services or intangibles will be the country in which the client is situated (Ernst and Young, 2014b; OECD, 2014a:25). Guideline 3.3 states that for the application of Guideline 3.2, the business agreement is usually used to establish the client's identity (OECD, 2014a:25).

The application of the main rule to a legal entity with establishments in more than one country can be challenging. The rule in Guideline 3.4 is that the place of taxation is the country where the business using the service or intangible is located. In applying the principle in Guideline 3.4, there are three approaches that may be appropriate: the direct-use approach, the direct-delivery approach and the recharge method (OECD, 2014a:27-28).

The Guidelines recognise that the place of taxation of services and intangibles cannot always be decided in terms of the main rule (OECD, 2014a:41). Guideline 3.5 determines the conditions under which a specific rule may be adopted. The first condition occurs where the consideration of the client location does not achieve a suitable outcome with regard to: neutrality, efficiency of compliance and administration, certainty and simplicity, effectiveness and fairness. Secondly, where an alternative other than the location of the client, results in a much better outcome if decided in terms of the criteria of the first condition (Ernst and Young, 2014b; OECD, 2014a:42).

4.5 CONSIDERATION OF TREATMENT OF INTERPRETATIONAL CHALLENGES AND UNCERTAINTIES

The interpretational challenges and uncertainties in respect of an enterprise and the levying of and registration for VAT in South Africa that are summarised in 2.4 and 3.4 are considered next. This is done in terms of the requirements for the levying of and registration for GST/VAT in New Zealand and information and guidance in respect thereof as supplied by the EU and the OECD:

In respect of 2.4:

- i. It is difficult to determine whether a supply is an imported service or whether the foreign supplier is carrying on an enterprise in South Africa for which it has to register, levy and pay VAT to SARS. Attempting to determine if an enterprise is conducted in South Africa raises the same interpretational problems listed in 3.4 (i to iv). Refer to comments below in respect of 3.4 that contain the consideration of these interpretational problems.

- ii. The requirements for an imported service in South Africa include the requirement that the service must be used or consumed in South Africa. Without specific place of supply rules, it is difficult to determine, in terms of the definition of imported service, when a service is consumed or utilised in South Africa (refer to 2.2.6.2). Refer to comment (iv) in respect of 3.4 for consideration of place of supply rules.
- iii. SARS has stated that there would be no obligation on the non-resident to register for VAT in South Africa if its activities in South Africa were totally “passive” and if the non-resident had no “physical presence or fixed place of business in South Africa”. The New Zealand Inland Revenue provides an indication of the characteristics indicative of a fixed or permanent place (refer to point 4.2.3.1).

In respect of 3.4:

- i. The term “activity” (refer to 3.3.1) is not defined in the VAT Act. In New Zealand, the New Zealand authorities have stated that the term “activity” (refer to 4.2.1.1), denotes a broad meaning and it need not necessarily be an economic or commercial activity. The term has also been considered in a New Zealand court case, in which context it was held to mean “a course of conduct or series of acts which a person has chosen to undertake or become engaged in.” In the EU, a taxable person is defined “as any person who independently carries out in any place any economic activity, whatever the purpose or results of the activity” (refer to 4.3.1).
- ii. “Continuously or regularly” is not defined in the VAT Act (refer to 3.3.2). In New Zealand, the meaning of the phrase “continuously or regularly” is explained in an information bulletin which has been issued, where it is stated that the phrase refers to the activity that ends with the supply of goods or services (refer to 4.2.1.2).
- iii. Activities partly carried on in South Africa: The threshold for compulsory registration in New Zealand is taxable supplies exceeding \$60 000 (refer to 4.2.2). Supplies in New Zealand that are taken into account to determine whether a person exceeded the registration threshold only cover supplies made in New Zealand (refer to 4.2.2). In South Africa, supplies made in South Africa as well as

supplies made from an enterprise or activity conducted partly in South Africa are taken into account (refer to 3.3.4). To determine if a non-resident conducts an enterprise in South Africa is a matter of degree, and place of supply rules will help to gain certainty as to where a supply is made (refer to 3.3.4).

- iv. Apart from the place of supply rule, in respect of imported electronic services, South Africa does not have specific place of supply rules. New Zealand has place of supply rules for GST purposes as does the EU, for VAT. In the EU, in terms of the destination principle, the general place of supply rule, for a supply to a business, is that VAT is levied where the recipient is located or where the service is physically rendered. If a supply is made to a non-registered person, the place of supply is based on the origin principle (refer to 4.3.1.1 and 4.3.1.2). Each country determines its own registration threshold. The OECD issued the Guidelines in respect of the place of supply for B2B supplies of services and intangibles and the application of the destination principles (refer to 4.4.1).

4.6 CONCLUSION

GST is levied in New Zealand on the supply of goods or services effected in that country by a registered person in the course of carrying on a taxable activity (refer to 4.2). This is similar to the requirement for the levying of VAT in South Africa (refer to 2.2). The equivalent term for “taxable activity” (refer to 4.2.1) that is used in New Zealand with regard to the New Zealand GST Act, in the VAT Act in South Africa, is the term “enterprise” (refer to 3.2). In the EU, VAT is applicable in respect of almost all goods and services supplied for consumption in the EU. Transactions carried out by a taxable person, for a consideration, in an EU country are subject to VAT (refer to 4.3.1).

The term “enterprise” in South Africa and the term “taxable activity” in New Zealand both refer to an activity, carried on continuously or regularly, in terms of which goods or services are supplied for a consideration, whether or not for a profit. In the case of South Africa, the definition of enterprise also refers to the fact that the enterprise must be conducted in South Africa or partly in South Africa. In New Zealand this is not referred to as part of the definition of taxable activity. However, for purposes of

determining if the threshold for compulsory registration has been exceeded in New Zealand; the supplies made refer to supplies made in New Zealand (refer to 4.2.2).

The OECD issued Guidelines in respect of the neutrality principle. The goal of these is to reduce doubt and risks of double taxation and unintentional non-taxation resulting from variations in the way that VAT is applied to cross-border transactions (refer to 4.4). Guidance is needed to determine with certainty when an enterprise is conducted in South Africa for VAT purposes.

CHAPTER 5

CONCLUSION, RECOMMENDATIONS AND IDENTIFICATION OF FUTURE RESEARCH AREAS

5.1 INTRODUCTION

The main objective of this study was to interpret the term, enterprise, for South African VAT purposes. Secondary objectives were identified to sufficiently address the main objective. Chapter 2 identified and explored the requirements for the levying of and registration for VAT in terms of the VAT Act and identified interpretational challenges and uncertainties. In Chapter 3, the definition of enterprise was analysed and interpretational challenges and uncertainties experienced were identified. In Chapter 4 the requirements for registration and levying of VAT in New Zealand and in terms of information supplied by the EU and guidance supplied by the OECD were analysed. Chapter 4 also identified how the interpretation problems and uncertainties identified in Chapter 2 and 3 are dealt with in New Zealand as well as in terms of information and guidance supplied by the EU and the OECD.

This chapter summarises the results of the research conducted and concludes if the research objectives have been met in order to address the research question. It also contains recommendations with respect to the research question and makes suggestions for future research.

5.2 ACHIEVEMENT OF RESEARCH OBJECTIVES AND CONCLUSIONS REACHED

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

- i. To identify and explore the requirements for the levying of and registration for VAT in terms of the VAT Act and to identify interpretational challenges and uncertainties.

Chapter 2 provided information confirming that vendors levy and collect VAT on taxable supplies as agents for SARS. In respect of the levying of VAT, the following information was provided. The term supply is very widely defined and covers almost all types of supplies. Within the VAT Act, there are certain deemed supplies that assist in avoiding confusion concerning whether a transaction is a supply or not. VAT is levied if the supply is made in the course or furtherance of an enterprise conducted in, or partly in, South Africa. VAT is levied on the importation of goods into South Africa whether the importer is a vendor or not.

The South African resident recipient of imported services is liable to account for VAT on imported services that are utilised or consumed in the Republic. This will be applicable where the resident receiver of the service is not registered for VAT or is registered for VAT but the services are used for non-taxable purposes. The information provided in Chapter 2 indicated that there is uncertainty in respect of the interpretation of the term “utilised or consumed in the Republic”. The information also confirmed that there is uncertainty as to whether the term refers to the place where the service is physically rendered or where the recipient conducts its business and uses or benefits from the service. In the *De Beers Consolidated Mines Ltd v CSARS* (2012) case, it was held that the place of consumption was in South Africa where the results of the consultations with the non-resident consultants were used to make decisions. Information in Chapter 2 showed that legislative intervention is needed to assist in obtaining clarity in respect of the meaning of the term “utilised or consumed in the Republic”.

Chapter 2 also provided information in respect of the VAT registration requirements contained in the VAT Act. The information provided makes it clear that there is a compulsory registration for VAT if a person carries on an enterprise in South Africa and if the supplies exceed R1 million in a 12-month period or if the supplies will exceed the R1 million in a 12-month period in terms of a written agreement. The information further specified that there is a compulsory registration if imported electronic services are supplied and the total value of the

supplies exceeds R50 000. A person may also voluntarily register for VAT if certain requirements are met.

Information provided in Chapter 2 indicated the existence of ongoing uncertainty in respect of non-resident businesses that receive royalties from South African clients and the requirement for them to register for VAT. SARS initially stated that non-resident businesses receiving royalties have to register for VAT in South Africa but later stated that for a non-resident business there would be no obligation on the non-resident to register for VAT in South Africa if its activities in South Africa were totally “passive activities” and if the non-resident had no “physical presence or fixed place of business in South Africa”. It was stated in VAT News 37 (SARS, 2011:2), that the existing policy and others related to non-resident entities were under review and that the existing policies would remain in place until the said review has been finalised.

- ii. To analyse the definition of enterprise and to identify the interpretational challenges and uncertainties experienced.

Chapter 3 provided information about the definition of enterprise that is provided in Section 1(1) of the VAT Act indicating that the definition contains a general test, inclusions and provisos. The analyses of the components of the definition of enterprise provided information revealing interpretational problems and uncertainties that exist, which must be addressed through guidance and interpretation by SARS, to provide clarity.

In respect of the general definition of enterprise, as defined in Section 1(1) of the VAT Act, the information disclosed the following:

The phrase “enterprise or activity” that forms part of the definition of enterprise makes the definition very wide. The term activity is not defined in the VAT Act. Most activities will constitute an “enterprise”. Activity may be interpreted to refer to physical activities or commercial activities in South Africa. Commercial activities may result in non-residents being treated as conducting an enterprise in South

Africa, which may result in a requirement for them to register for VAT in South Africa, even if they have no physical presence in South Africa.

The definition of enterprise in Section 1(1) of the VAT Act further requires that the enterprise or activity must be conducted “continuously or regularly”. The concept of “continuously or regularly” is not defined in the VAT Act in South Africa. Uncertainty therefore exists as to when an activity is continuously or regularly conducted in South Africa.

The consequence of the enterprise or activity having to be carried on in, or partly in, South Africa, means that the South African VAT system is not limited to supplies made or deemed to be made in South Africa. This means that all supplies, irrespective of where the supplies are made, could be subject to VAT if they are made in the course or furtherance of an enterprise conducted in, or partly in, South Africa. The more activities are undertaken in South Africa, the greater the chances are that the activities will result in an enterprise being conducted in South Africa

The information in Chapter 3 further demonstrated that apart from the place of supply rule in respect of imported electronic services, South Africa has not devised explicit place of supply rules. The absence of specific place of supply rules in South Africa results in a foreign supplier’s liability to register for VAT being determined through interpretation with no certainty. In line with OECD principles, SARS introduced place of supply rules in respect of imported electronic services. There is a proposed change to the definition of enterprise to include telecommunication services continuously or regularly rendered to any person who uses the services in South Africa. The effective date of the proposed change to include the telecommunication services is pending.

- iii. To analyse the requirements for the levying of and registration for VAT or GST in New Zealand and in terms of information supplied by the EU and guidance supplied by the OECD in respect thereof. To identify how the interpretational problems and uncertainties that have been identified in Chapter 2 and 3 are dealt

with, in New Zealand, in terms of information supplied by the EU and guidance supplied by the OECD.

The information supplied in Chapter 4 illustrated that in New Zealand a taxable activity is an activity that is carried on continuously or regularly and that it does not have to be an economic or commercial activity. The term was dealt with in New Zealand case law and may be referred to for guidance. The phrase “continuously and regularly” is explained by the New Zealand Inland Revenue as an activity that is “continuous” if there is no significant interruption of the activity and that an activity is “regular” if it is repeated at regular fixed intervals. The activity referred to results in the supply of goods or services, rather than the actual supply of those goods or services.

The information supplied in Chapter 4 similarly dealt with registration for GST in New Zealand which is the same as VAT in South Africa. The information confirmed that a person is liable to register for GST in New Zealand if that person supplies goods and services in the course of carrying on a taxable activity and if the total value of supplies exceeded \$60 000 in a 12 month period. GST is levied on the supply of goods and services in the course or furtherance of a taxable activity conducted by that person with reference to the value of the supply. Only supplies made in New Zealand must be taken into account to determine if the registration threshold has been exceeded.

New Zealand has stipulated place of supply rules that are driven by the place of residence of the supplier. Generally, supplies made by a resident of New Zealand are considered to be made in New Zealand while supplies made by a non-resident supplier are considered to be made outside of New Zealand. Supplies are seen as supplied in New Zealand where the goods are in New Zealand or the service is actually made in New Zealand, at the time of the supply.

In the EU, VAT is levied on most goods and services bought or sold for use in the EU. VAT is levied on transactions in the EU by an EU taxable person for a consideration. The requirements to be a taxable person in the EU are that there

has to be an economic activity that is conducted anywhere, irrespective of the goal or outcome of the activity. The threshold for registration for VAT differs according to the member state. The EU has devised place of supply rules. The broad place of supply rule in the EU is that VAT is charged where the recipient is located or the service is physically rendered.

The OECD issued International VAT/ GST Guidelines. These guidelines supply principles for the treatment for VAT purposes of the most general types of global transactions and focus on trade in services and intangibles. The intention of the guidelines is to reduce uncertainty and risks of double taxation and unintentional non-taxation as a result of variations in the application of VAT in international trade. The OECD supplied place of supply guidelines in respect of cross-border treatment of services and intangibles. The principle is that VAT should be levied where the final consumption occurs, in order to maintain neutrality within the VAT system. In respect of B2B supplies, the Guidelines determine that the main rule is that the country where the client is located has taxing rights over globally traded services or intangibles. The Guidelines further determine that a Guideline may be changed where the main rule does not lead to neutrality, efficiency of compliance and administration, certainty and simplicity, effectiveness and fairness and where application of the alternative will lead to a better result.

5.3 RECOMMENDATIONS

To provide more certainty in respect of the interpretation of the term “enterprise” for VAT purposes in South Africa it is recommended that the following items be clarified in the VAT Act or through guidance issued by SARS:

- The term “activity”: to determine exactly what is meant by the term and when an activity is conducted in South Africa. “Activity” is not defined in the VAT Act and it may be interpreted as referring to physical activities or commercial activities. The term activity has been considered in New Zealand case law which may be referred to for guidance, to be taken into consideration in defining the term, or in guidelines issued to provide clarity as to the meaning of the term “activity”.

- The term “continuously or regularly”: to determine when an enterprise or activity will meet this requirement. This term is not defined in the VAT Act and uncertainty exists as to when an enterprise or activity is conducted continuously or regularly. New Zealand Inland Revenue has explained the term “continuously or regularly”, and that explanation can be taken into account to assist in defining the term or in guidelines to be issued.
- New Zealand and the EU have laid down place of supply rules and the OECD has issued Guidelines that provide principles for the VAT treatment of the most general types of international transactions. Place of supply rules enhance legislative certainty, increase equality in the VAT system and avoid double taxation. These place of supply rules of New Zealand and the EU and Guidelines issued by the OECD can be taken into consideration for guidance to provide certainty in respect of the following interpretational problems and uncertainties:
 - To determine when an enterprise or activity is conducted in South Africa or partly in South Africa.
 - To determine when a service is utilised or consumed in South Africa.
 - To provide certainty in respect of the treatment of the supply of intangibles (passive activities).

This will provide certainty and clarity regarding when an enterprise is conducted in South Africa; when a person is required to register for and to levy VAT in South Africa and where a supply takes place.

5.4 SUGGESTIONS FOR FUTURE RESEARCH

Possible topics for future research that have been identified during the investigation for this study:

In this study, the interpretational challenges and uncertainties relating to the definition of enterprise were identified and considered, but specific supplies with interpretational challenges and uncertainties, such as the treatment of the specific transactions identified in 3.3.4.1 and the uncertainties in respect of the exact definition of the services included as part of imported electronic services, were not considered. Further

research may be conducted to consider the treatment of specific transactions for which interpretational problems and uncertainties exist and more countries could be included in the study.

The other categories of the consequences of the definition of enterprise, such as: when input is incurred for the purpose of use, consumption or supply in the course of carrying on an enterprise and as a result claimable as input tax have not been dealt with as part of this study. A comparison could also be made between when an expense is claimable as input tax to when an expense is deductible for income tax purposes.

5.5 CONCLUSION

VAT is levied on the consumption of goods or services in South Africa. The definition of enterprise for VAT purposes is an important one in the VAT Act. There are a number of interpretational problems and uncertainties that exist in respect of the definition of enterprise. Some of these have been dealt with in the definition of enterprise, by the introduction of a place of supply rule in South Africa, in respect of imported electronic services and the proposed inclusion in respect of telecommunications services.

The tax principles set down by Adam Smith are the fundamentals of every effective tax system, one of which is that tax must be certain and not arbitrary. It is therefore important that clarity and certainty are provided in respect of interpretational problems and uncertainties, such as when an enterprise is conducted in South Africa or partly in South Africa.

The focus of this study was to interpret the term enterprise for South African VAT purposes and to identify the interpretational problems and uncertainties relating thereto. In this study interpretational challenges and uncertainties in relation to the term “enterprise” have been identified. These interpretational problems and uncertainties are related to the fact that there is no clear guidance in respect of the meaning or interpretation for certain terms used in the definition of enterprise in Section 1(1) of the VAT Act. Further guidance for interpretation is needed for the following terms: activity, continuously and regularly, partly in South Africa, place of supply in respect of services and when services are utilised or consumed in South Africa. It may be concluded that

enterprise for South African VAT purposes has been interpreted and interpretational challenges and uncertainties in relation thereto, for which guidance is needed, have been identified.

It is recommended that clarity be provided by the issuing of guidelines as to the interpretation of the definition of enterprise in Section 1(1) of the VAT Act. This must be done to reduce the risk of incorrect interpretation and to give a clear indication as to when entities are considered to be conducting an enterprise in South Africa.

REFERENCES

Acts **see** South Africa.

Acts **see** New Zealand.

Badenhorst, G. 2013. The VAT challenges of cross-border supplies.
<http://www.thesait.org.za/news/146080/The-VAT-Challenges-Of-Cross-Border-Supplies.htm> Date of access: 10 Aug. 2014.

Business Dictionary. 2014. Primary data.
<http://www.businessdictionary.com/definition/primary-data.html> Date of access: 28 Apr. 2014.

Botes, M. 2011. South African VAT and non-resident business. *International VAT monitor* November/December 2011.
http://empcom.gov.in/WriteReadData/UserFiles/file/No_6%20A-5.pdf Date of access: 24 Mar. 2014.

Butler, E. 2011. The condensed wealth of nations and the incredibly condensed theory of moral sentiments. United Kingdom (Research) Ltd.
<http://www.adamsmith.org/sites/default/files/resources/condensed-WoN.pdf> Date of access: 27 Jul. 2014.

Charlet, A. & Owens, J. 2010. An international perspective on VAT. *Tax notes international*, 59(12):943-945. <https://www1.oecd.org/ctp/consumption/46073502.pdf>
Date of access: 3 Sep. 2014.

Clegg, D. & Wiid, E. 2013. LexisNexis concise guide to VAT. 19th ed. Durban: LexisNexis.

Cliffe Dekker Hofmeyr. 2012. Value-added tax 2108. Input VAT on professional fees. *Integritax Newsletter*, 156 (September).

https://www.saica.co.za/integritax/2012/2108._Input_VAT_on_professional_fees.htm

Date of access: 27 Jul. 2014.

Court Cases **see** New Zealand.

Court Cases **see** South Africa.

Deloitte. 2013. Deloitte VAT handbook. 9th ed. Durban: LexisNexis.

Deloitte. 2014. EU: Place of supply changes- overview of new rules.

<http://www2.deloitte.com/global/en/pages/tax/articles/eu-2015-place-of-supply-changes-overview-of-new-rules.html> Date of access: 19 Aug. 2014.

Deneys Reitz. 2011. Value-added tax 1945. Is evangelism an enterprise? *Integritax Newsletter*, 140 (April).

http://www.saica.co.za/integritax/2011/1945._Is_evangelism_an_enterprise_.htm Date of access: 13 Aug. 2014

Ernst & Young. 2011. Value-added tax 1956. A foreign entity's liability to register. *Integritax Newsletter*, 1956 (May).

http://www.saica.co.za/integritax/2011/1956_A_foreign_entitys_liability_to_register.htm

Date of access: 15 Mar. 2014.

Ernst & Young. 2013. Global tax alert: South African permanent establishments face further scrutiny.

[http://www.ey.com/Publication/vwLUAssets/South_African_permanent_establishments_face_further_scrutiny/\\$File/2013G_CM3493_South%20African%20permanent%20establishments%20face%20further%20scrutiny.pdf](http://www.ey.com/Publication/vwLUAssets/South_African_permanent_establishments_face_further_scrutiny/$File/2013G_CM3493_South%20African%20permanent%20establishments%20face%20further%20scrutiny.pdf) Date of access: 25 Feb. 2014.

Ernst & Young. 2014a. Worldwide VAT, GST and sales tax guide 2014: European Union. <http://www.ey.com/Publication/vwLUAssets/Worldwide-VAT-GST-and-sales-tax->

guide-2014/\$FILE/Worldwide-VAT-GST-and-sales-tax-guide-2014.pdf Date of access: 31 Aug. 2014.

Ernst & Young. 2014b. OECD international VAT/GST guidelines endorsed. <http://taxinsights.ey.com/archive/archive-articles/oecd-international-vat-gst-guidelines-endorsed.aspx> Date of access: 4 Oct. 2014.

EU VAT Directive (European Union VAT Directive). 2006. Council Directive on the common system of value added tax on VAT 2006/112/EC of 2006. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02006L0112-20130815&qid+1395832458549&from=EN> Date of access: 13 Sep. 2014

European Commission-Taxation and Customs Union. 2014a. General overview: What is VAT. http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/index_en.htm Date of access: 1 Sep. 2014.

European Commission-Taxation and Customs Union. 2014b. VAT history in the EU. http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/vat_history_en.htm Date of access: 1 Sep. 2014.

European Commission-Taxation and Customs Union. 2014c. Where to tax. http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/vat_on_services/index_en.htm Date of access: 4 Oct. 2014.

European Commission. 2014d. 20 years of the single market together for new growth. http://ec.europa.eu/internal_market/20years/singlemarket20/facts-figures/what-is-the-single-market_en.htm Date of access: 12 Sep. 2014

European Union. 2011. Common system of value added tax (VAT) ('the VAT Directive'). http://europa.eu/legislation_summaries/taxation/l31057_en.htm Date of access: 20 Sep. 2014.

FSP Business. 2014. What does the VAT law say about foreign companies holding events in South Africa? <http://fspbusiness.co.za/articles/vat/what-does-vat-law-say-about-foreign-companies-holding-events-in-south-africa-3398.html> Date of access: 19 Mar. 2014.

Ger, B. & McCready, S. 2012. SCA unearths hard truths for VAT vendors. *Derebus*, 74:57-58. <http://saflii.org/za/journals/DEREBUS/2012/74.html> Date of access: 4 Aug. 2014.

Glyn-Jones, A. 2006. What is next in the continuing saga of VAT? <http://www.thesait.org.za/news/102815/What-Is-Next-In-The-Continuing-Saga-Of-VAT.htm> Date of access: 6 Apr. 2014.

Grant Thornton. 2009. VAT enterprises are redefined by the modern business world. <http://www.gt.co.za/publications/e-vatline/2009/07/e-vatline-vat-enterprises-are-redefined-by-the-modern-business-world/> Date of access: 10 Aug. 2014.

Haupt, P. 2014. Notes on South African income tax. 33rd ed. Roggebaai: Hedron Publishers.

Hofstee, E. 2011. Constructing a good dissertation. Sandton: EPE.

Jooma, A. 2012. Taxation of projects in South Africa. *International WTS Journal*, 2:11. http://www.wts.com/en/img/International_WTS_Journal_Africa.pdf Date of access: 6 Aug. 2014.

KPMG. 2013. SARS to make it easier for foreign companies to do business in South Africa. <http://www.kpmg.com/za/en/issuesandinsights/articlespublications/tax-and-legal-publications/pages/sars-foreign-companies-doing-business.aspx> Date of access: 11 Jul. 2014.

Lamprecht, I. 2014. New South African VAT laws 'favour foreigners'. *The Citizen*, 9 Jun. <http://citizen.co.za/192220/new-south-african-vat-laws-favour-foreigners/> Date of access: 11 Oct. 2014.

Laxafoss, J., Morabito, J., Smith, P. 2009. VAT 101- and introduction to the Value-Added Tax affecting relocation services. <http://www.worldwideerc.org/resources/mobilityarticles/pages/1009-smith.aspx> Date of access: 1 Sep. 2014.

Maples, A.J. 2000. GST and an "enterprise": a consideration of trade in the context of the subdivision of land. *Journal of Australian Taxation*, 3(6):440-466. <http://www.heinonline.org.nwulib.nwu.ac.za/HOL/Page?handle=hein.journals/jouaustx3&id=440> Date of access: 18 Aug. 2014.

McKerchar, M. 2008. Philosophical paradigms, inquiry strategies and knowledge claims: applying the principles of research design and conduct to taxation. *eJournal of Tax Research*. <http://austlii.edu.au/au/journals/eJTR/2008/1.html> Date of access: 21 Mar. 2014.

Moss-Holdstock, C. 2013. VAT registration of foreign business. http://www.thesait.org.za/news/132114/vat_registration_of_foreign_business.htm Date of access: 15 Mar. 2014.

Mouton, J. 2013. How to succeed in your master's & doctoral studies: a South African guide and resource book. 18th ed. Pretoria: Van Schaik Publishers.

New Zealand. 1984. *Grieve v CIR* (6 NZTC 61,682).

New Zealand. 1985. New Zealand Goods and Services Tax Act 141 of 1985. <http://www.legislation.govt.nz/act/public/1985/0141/latest/whole.html> Date of access: 16 Mar. 2014.

New Zealand. 1994. *Newman v CIR* (16 NZTC 11,233).

New Zealand. 1995. IRD tax information bulletin Volume 7 No 3.
<https://www.ird.govt.nz/resources/5/8/587831804ba388068a56bf9ef8e4b077/tib7-03.pdf>
Date of access: 4 Aug. 2014.

New Zealand. 2007. New Zealand Income Tax Act 97 of 2007.
<http://www.legislation.govt.nz/act/public/2007/0097/latest/DLM1512301.html> Date of access: 21 Sep. 2014

New Zealand Inland Revenue Department. 2010a. Who needs to register? (Registering for GST). <http://www.ird.govt.nz/gst/gst-registering/register-who/> Date of access: 19 Aug. 2014.

New Zealand Inland Revenue Department. 2010b. Goods and Services tax (GST)(Tax basics). <http://www.ird.govt.nz/yoursituation-bus/bus-aust-nz/tax-basics/gst/#03> Date of access: 18 Aug. 2014.

OECD (Organisation for Economic Co-operation and Development). 2014a. OECD international VAT/GST guidelines. <http://www.oecd.org/ctp/consumption/international-vat-gst-guidelines.pdf> Date of access: 22 Apr. 2014.

OECD (Organisation for Economic Co-operation and Development). 2014b. OECD Global Forum on VAT Tokyo, 17-18 April 2014: Statement of outcomes on the OECD international VAT/ GST guidelines. <http://www.oecd.org/ctp/consumption/statement-of-outcomes-on-vat-gst-guidelines.pdf> Date of access: 22 Apr. 2014.

Olivier, L. & Honiball, M. 2011. 5th ed. International tax: a South African perspective. Cape Town: Siber Ink.

Oxford Dictionaries. 2014. Activity.
<http://www.oxforddictionaries.com/definition/english/activity> Date of access: 3 Aug. 2014.

Oxford Dictionaries. 2014. Business.

<http://www.oxforddictionaries.com/definition/english/business> Date of access: 3 Aug. 2014.

Oxford Dictionaries. 2014. Enterprise.

<http://www.oxforddictionaries.com/definition/english/enterprise> Date of access: 3 Aug. 2014.

Oxford Dictionaries. 2014. Supply.

<http://www.oxforddictionaries.com/definition/english/supply> Date of access: 14 Jul. 2014.

Routio, P. 2005. Arteology: Normative Point of View

<http://www2.uiah.fi/projects/metodi/178.htm> Date of access: 13 Oct. 2014

SARS (South African Revenue Service). 1999. VAT News 13.

<http://www.sars.gov.za/AllDocs/Documents/VATNews-Archive/LAPD-IntR-VATN-Arc-2013-13%20-%20VATNews%2013%20December%201999.pdf> Date of access: 7 Apr. 2014.

SARS (South African Revenue Service). 2007a. Binding private ruling: BPR 004.

<http://www.sars.gov.za/AllDocs/LegalDoclib/Rulings/LAPD-IntR-R-BPR-2012-04%20-%20Definition%20Enterprise%20Exemption%20Goods%20Importation.pdf> Date of access: 7 Aug. 2014.

SARS (South African Revenue Service). 2007b. The supply of goods and/or services by the travel and tourism industry. Pretoria. (Interpretation note no. 42).

<http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-42%20-%20Supply%20Goods%20Services%20Travel%20Tourism%20Industry.pdf> Date of access: 10 Aug. 2014.

SARS (South African Revenue Service). 2011. VAT News 37. Business activities of non-residents. <http://www.sars.gov.za/AllDocs/Documents/VATNews-Archive/LAPD->

IntR-VATN-Arc-2013-37%20-%20VATNews%2037%20February%202011.pdf Date of access: 7 Apr. 2014.

SARS (South African Revenue Service). 2013a. Supplies made for no consideration. Pretoria. (Interpretation note no.70).

<http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2013-03%20-%20IN70%20Supplies%20made%20for%20no%20consideration.pdf> Date of access: 23 Mar. 2014.

SARS (South African Revenue Service). 2013b. VAT 409 - guide for fixed property and construction. <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G03%20-%20VAT%20409%20Guide%20for%20Fixed%20Property%20and%20Construction%20-%20External%20Guide.pdf> Date of access: 13 Apr. 2014.

SARS (South African Revenue Service). 2014a. VAT 404- guide for vendors.

<http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors%20-%20External%20Guide.pdf> Date of access: 21 Jul. 2014.

SARS (South African Revenue Service). 2014b. Changes to tax & customs registration. <http://www.sars.gov.za/ClientSegments/Pages/Changes-to-Tax-Registration.aspx> Date of access: 2 Jun. 2014.

Schneider, F. 2009. Business Law & Tax Review: SA's VAT place of supply rules are not very specific. *Business Day*. 11, 10 Aug.

http://www.ens.co.za/newsletter/briefs/11_08_090101r1108LAW_AL_11.pdf Date of access: 4 Aug. 2014

South Africa. 1962. Income Tax Act 58 of 1962.

South Africa. 1991. Value-added Tax Act 89 of 1991.

South Africa. 1997a. Taxation Laws Amendment Act 27 of 1997.

South Africa. 1997b. Taxation Laws Amendment Act, 1997. (Notice 916).
Government gazette, 18113:18, 4 Jul.

South Africa. 2001. National Educare Forum v Commissioner for South African Revenue Service (64 SATC 289).

South Africa. 2005. British Airways PLC v Commissioner for South African Revenue Service (67 SATC 167).

South Africa. 2008. Metropolitan Life v Commissioner for South African Revenue Service (70 SATC 162).

South Africa. 2010. Income Tax Case No. 1841 72 SATC 3.

South Africa. 2011. Tax Administration Act 28 of 2011.

South Africa. 2012. Commissioner for South African Revenue Service v De Beers Consolidated Mines Ltd (503/2011) [2012] ZASCA 103.

South Africa. 2013. The explanatory memorandum on the taxation laws amendment bill, 2013. <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2013-02%20-%20Explanatory%20Memorandum%20Taxation%20Laws%20Amendment%20Bill%20013.pdf> Date of access: 8 Aug. 2014.

Stiglingh, M. 2013. Value-added tax (VAT). (*In Stiglingh., ed. Silke: South African income tax 2014. 16th ed. Durban: LexisNexis. p. 1035-1119).*

Taylor, D. 2009. The literature review: a few tips on conducting it. www.writing.utoronto.ca/advice/specific-types-of-writing/literature-review Date of access: 21 Mar. 2014.

Taxation Laws Amendment Act **see** South Africa.