SCHOOL OF ACCOUNTANCY

University of the Witwatersrand, Johannesburg

A proposal for a research report to be submitted to the Faculty of Commerce, Law and Management in partial fulfilment of the requirements for the degree of Master of Commerce

ANALYSING VAT ON IMPORTED SERVICES IN THE FINANCIAL SERVICE INDUSTRY AND THE VAT TREATMENT OF BANKING INCOME

Applicant:	Ershrin Bhagowat
Student:	399167
Supervisor:	Prof A.P de Koker
	Roy Blumenthal
Head of School:	Prof N. Padia
Degree:	Master of Commerce (Specialising in Taxation)
Date:	31 March 2015

____

Ershrin Bhagowat

____

Roy Blumenthal

TABLE OF CONTENTS

1. ABSTRACT

Value-Added Tax (VAT) on imported services in South Africa and the VAT treatment of banking income / products has been a contentious issue for a number of years in South Africa. South African companies, individual taxpayers, students and the South African Revenue Service (SARS) have difficulty to interpret whether section 7(1)*(c)* and section 14 of the Value-Added Tax Act No. 89 of 1991 is applicable to certain transactions.

The aim of the study is to discuss and analyse VAT on imported services in South Africa in order for an individual taxpayer, company and SARS to understand which section should be applied to a certain transaction. This study also aims at clearly showing the type of income / products generated in the banking industry and how VAT is treated on the types of income / products in the bank. This will give students, tax professionals in the financial industry, auditors, companies, individuals and the SARS a better understanding of how VAT is treated in the financial industry.

Key Words: SARS, VAT Act, student, taxpayer, professionals, imported services, service, zero-rated, reverse charge, products, financial institution, banks, Commissioner: South African Revenue Service (C:SARS)

2. INTRODUCTION

A large number of vendors and individuals import services. The authors opinion as to the reason why vendors and individuals import services is due to the fact that not all the services are offered locally or there is a skill shortage in South Africa, hence vendors/individuals import the service. However, you also get the individuals that import a service since it is a cheaper to purchase abroad rather than locally in South Africa. If not for the provisions in the VAT Act relating to the importation of services, some local recipients of such services would have ended up not paying the 14% VAT that would have been charged by a local supplier if the same service was purchased locally. The authors opinion is that this is the reason section 14 of the VAT Act was introduced, i.e. when a vendor/individual import services not for taxable purposes they must pay over 14% VAT to the SARS just as if a vendor/individual had to purchase a service locally from a vat vendor. The author's opinion is that the provisions of section 14 of the VAT act, will help persuade individuals to purchase locally rather than spend their money abroad.

South African Banks have a number of products offered to the market, i.e. current and saving accounts, money transfer fees, cash related services, off-site banking, credit and debit cards, fleet cards, foreign bills for collection, derivative trading, etc. Tax Professionals, SARS and auditors have difficulty in understanding the VAT treatment of these services and part of my study will explain the VAT treatment of each service, i.e. which section is applicable to the service, what VAT rate is charged, standard-rated, zero-rated or exempt, etc.

3. RESEARCH PROBLEM

3.1 The statement problem

The research will analyse and evaluate some of the provisions, i.e. section 7(1)*(a),* section 7(1)*(c)*, and section 14 of the Value-Added Tax Act, and how banks are treating income for VAT purposes. The problem encountered was that there are not too many court cases that deal with VAT on imported services in South Africa. Due to the discrepancies between tax professional, individual and the SARS in understanding how certain transactions should be treated for the VAT, the analysis will help individuals, tax professionals and the SARS to understand these principals.

3.2 The Sub-problems

3.2.1 The first sub-problem is the time of supply rules for VAT on imported services on transactions that involve connected parties. The VAT Act does not consider for when a service is imported by a connected party in South Africa in a case where there is no invoice issued to the South African party and when no payment is made by the South African party. In this case the South African party does not need to pay VAT on imported services. In this regard, this research will help define the time of supply for transactions of this nature occur.

3.2.2 The second sub-problem is when an entity that was making 100% taxable supplies, stops trading. The question that now arises is will the entity now need to account for VAT on imported services when they purchase a foreigner service.

4. RESEARCH METHODOLGY

The research method adopted is of a qualitative, interpretive nature, bases on a detailed interpretation and analysis of amongst other things, case law.

An extensive literature review and analysis will be undertaken that includes the following sources –

- Books;
- Cases;
- Electronic databases;
- Electronic resources – internet;
- Journal;
- Magazine articles;
- Publications; and
- Statutes.

5. PROPOSED CHAPTER OUTLINE

5.1 Chapter 1: Introduction

This chapter will

i. provide the author's opinion as to why Value-Added Tax (VAT) on imported services was introduced in the South African VAT Act[1];
ii. give reasons as to why individuals, tax professionals and the SARS need to know the VAT treatment of the products / services offered by a Bank; and
iii. give the sub-problems encountered.

5.2 Chapter 2: Imported Services and the VAT Act.

This chapter will

i. define an imported service;
ii. distinguish between an imported service and a local service;
iii. determine when a recipient must account for VAT, discuss the time of supply rules and value of supply;
iv. discuss the VAT impact on imported services when entities that use to make 100% taxable supplies, stop trading and import a service;
v. determine situations where imported services do not arise;
vi. discuss the judgment that was made in the case of Metropolitan Life Limited v C:SARS; and
vii. explain the Reverse Charge principal which is applicable in some other countries.

5.3 Chapter 3: VAT on imported services in the financial services industry in South Africa

This chapter will

i. determine when a financial institution needs to account for VAT on imported services;
ii. discuss the VAT implications of imported services and supplies between local branches of foreign financial institutions;

[1] Value-Added Tax Act No. 89 of 1991

iii. discuss the VAT implications on imported services on credit card payments to VISA and MasterCard; and

iv. discuss the VAT implications on recharges to connected parties in other countries[2].

.

5.4 Chapter 4: VAT treatment of general banking income in terms of the VAT Act

This chapter will discuss the types of products offered in a banking environemt and how the income is treated for VAT purposes.

5.5 Chapter 5: Summary

This chapter will conclude on the topics discussed above and will provide recommendation that should be included in the VAT Act.

[2] Badenhorst, G., 2014, email, 13 February, gbadenhorst@ensafrica.com

5.1 Chapter 1 - Introduction

i. A large number of vendors and individuals import services. The author's opinion as to the reason why vendors and individuals import services is due to the fact that not all the services are offered locally or there is a skill shortage in South Africa, hence vendors/individuals import the service. Section 14 of the VAT Act was included in order to encourage individuals and vendors from the Republic to rather buy services from local suppliers, where possible as opposed to from foreign suppliers. It would also serve as a deterrent to trade with your subsidiary company registered in another country, i.e. if section 14 was not introduced, vendors / individuals would have saved the portion of the 14% tax relating to the making of exempt supplies that they would normally pay if the service was rendered by a local vendor in South Africa.[3] The effect of the provisions of "VAT on imported services" is to level the playing field, and to ensure that the local supplier can compete with a foreign supplier without VAT giving either an unfair advantage or disadvantage. In addition, by buying services from foreign countries, means money leaving our country. This loss of money could result in an increase in inflation.

ii. South African Banks have a number of products offered to the market, i.e. current and saving accounts, money transfer fees, cash related services, off-site banking, credit and debit cards, fleet cards, foreign bills for collection, derivative trading, etc. Tax Professionals, the SARS and auditors have difficulty in understanding the VAT treatment of these services and part of my study will explain the VAT treatment of each service.

iii. The research will analyse and evaluate some of the provisions, i.e. section 7(1)*(a),* section 7(1)*(c)*, and section 14 of the Value-Added Tax Act, and how banks are treating income for VAT purposes. The problems encountered was that there are not too many court cases that deal with VAT on imported services in South Africa. Due to the discrepancies between tax professional, individuals and the SARS in understanding how certain transactions should be treated for VAT, the analysis will help individuals, tax professionals and the SARS to understand these VAT principals.

---

[3] Discussion with VAT experts Henry Harris and Rudi Grobbelaar

The first sub-problem is the time of supply rules for VAT on imported services on transactions that involve connected parties. The VAT Act does not consider for when a service is imported by a connected party in South Africa in a case where there is no invoice issued to the South African party and when no payment is made by the South African party. In this case the South African party does not need to pay VAT on imported services. In this regard, this research will help define the time of supply for transactions of this nature occur.

The second sub-problem is when an entity that was making 100% taxable supplies, stops trading. The question that now arises is will the entity now need to account for VAT on imported services when they purchase a foreigner service.

5.2 Chapter 2 – Imported Services and the VAT Act

i. Imported services means a supply of services that is made by a supplier who is a resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies[4].

Section 7(1)*(c)* of the VAT Act determines that there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax on the supply of any imported services by any person on or after the commencement date calculated at the rate of 14 per cent on the value of the supply concerned or the importation, as the case may be.

ii. The difference between imported services and local services is that a local vendor charges VAT at 14% on any service offered by him in the Republic to an individual or to another vendor provided that the service is a taxable supply. A registered vendor would then be able to recover input VAT on such supply to the extent that the service is going to be utilised in the making of taxable supplies. An imported service only applies where a vendor or individual imports services in the Republic which is going to be used for non-taxable purposes. Example, if a South African business obtains legal advice from a UK Lawyer, and that advice will be used to generate both taxable and exempt income, the South African business must account for output tax on the value of the supply received to the extent that it used such supply to make non-taxable supplies. This effectively places the South African business in the same position as if it had engaged a local South African lawyer and paid 14% VAT on the service as normal.

iii. The recipient of any imported service is required to furnish the Commissioner with a return and pay the tax within 30 days of an invoice being issued or any payment having been made by him, whichever is the earlier[5]. Provided that where the recipient is a vendor , that vendor must calculate the tax payable on the value of the imported services at the rate of tax in force on the date of supply of the imported services and must furnish the Commissioner with a return reflecting the information required for the purposes of the calculation of

[4] Section 1 defines “imported services” of the Value-Added Tax Act No.89 of 1991
[5] Section 14(1) and Section 14(2) of the Value-Added Tax No. 89 of 1991.

the tax in terms of section 14 and pay such tax to the Commissioner in accordance with section 28[6]

The author's opinion is that SARS is aware that not all individuals are aware of their duty to declare VAT on imported services. For example, when individuals download music from foreign suppliers, VAT is payable.

Section 14(2) of the VAT Act determines that a supply of imported services shall be deemed to take place at the time an invoice is issued by the supplier or recipient in respect of that supply or the time any payment is made by the recipient in respect of that supply, whichever time is earlier.

Section 14(3) of the VAT Act determines the value to be placed on the supply of the imported services shall, be the value of the consideration for the supply, as determined in terms of section 10(3) or the open market value of the supply, whichever is the greater.

iv. Assume company A is making 100% taxable supplies in 2013. Company A has been importing information technology services from the UK. Company A has a two year contract with the information technology services company. Company A is not required to pay VAT on imported services due to the fact the company makes 100% taxable supplies[7]. Company A stops trading in January 2014, however due to contract agreement still has to import services from the Information Technology company. The author's opinion is that although company A stopped trading will be accountable for VAT on imported services to the extent it makes exempt supplies. It can be argued that the company is making no supplies, i.e. no taxable and no exempt supplies, hence the net effect of the VAT on imported services will be NIL. For example, assume the information technology service is R 10 000, vat on imported services will be at 14%[8] to the extent that service is used to make exempt supplies. In our case the exempt supplies would be zero. The calculation will be R10 000 x 14/100 x 0% = 0. No VAT will be payable.

v. The tax chargeable in terms of section 7(1)(*c*), shall not be payable in respect of-

[6] Section 14(1) of the Value-Added Tax Act No.89 of 1991
[7] Section 1 definition of "imported services" of the Value-Added Tax Act No.89 of 1991
[8] Section 7(1)(*c*) of the Value-Added Tax Act No. 89 of 1991

- where the supply is chargeable with VAT in terms of section 7(1)(a). It is possible that the non-resident conducts an enterprise in SA and is a vendor. Accordingly he will levy VAT on the supply of the service. In such case, in order to avoid double taxation no VAT is payable upon importation of such service[9];

- Where the service would be exempt or zero-rated if it were rendered in South Africa (e.g. the provision of long-term insurance)[10]
- Where the supply is of an educational service by an educational institution established in an export country which is regulated by an educational authority in that export country[11]; or
- Where the supply is by a person of services as contemplated in terms of proviso (iii)(*aa*) to the definition of "enterprise" in section 1[12].

  (iii)(*aa*) of the definition of "enterprise" provides that the rendering of services by an employee to his employer in the course of his employment or the rendering of services by the holder of any office in performing the duties of his office, shall not be deemed to be the carrying on of an enterprise to the extent that any amount constituting remuneration as contemplated in the definition of "remuneration" in paragraph 1 of the Fourth Schedule to the Income Tax Act is paid or is payable to such employee or office holder, as the case may be.
- Where a supply of services of which the value in respect of that supply does not exceed R 100 per invoice.[13]

vi. Metropolitan Life Limited (Appellant) was a life insurance company and its main business involved the provision of life insurance to both local and international clients. Appellant, pursuant to its business, made use of various overseas consultants, business advisors and computer services. Appellant had adopted the approach that where such services, with the exception of telecommunication services, had been physically rendered outside of South Africa, no VAT was payable in terms of the Value-Added Tax Act No. 89 of 1991 and hence these international supplies stood to be zero-rated in terms of section 11(2)(*k*) of Act No. 89 of 1991.

[9] Section 14(5)(*a*) of the Value-Added Tax Act No. 89 of 1991
[10] Section 14(5)(*b*) of the Value-Added Tax Act No. 89 of 1991
[11] Section 14(5)(*c*) of the Value-Added Tax Act No. 89 of 1991
[12] Section 14(5)(*d*) of the Value-Added Tax Act No. 89 of 1991
[13] Section 14(5)(*e*) of the Value-Added Tax Act No. 89 of 1991

The South African Revenue Service (Respondent), being the Commissioner for SARS, had adopted the view that Appellant had received "imported services" as defined in section 1 of the Act and thus had raised assessment for VAT on such services to the extent that the services had been used or consumed in the Republic otherwise than for the purpose of making taxable supplies.

In VAT case 144 {The court a *quo (*see ITC 1812 (2006) 68 SATC 208 per Waglay J)} which dealt with the Life Insurance, found that the "imported services" were assessed correctly as falling under section 7 of the Act which imposes VAT at a rate of 14 per cent and that the ground for zero rating invoked by the appellant in terms of section 11(2)(*k*) of the Act was inapplicable.

The court *a quo* held that section 14(5)(*b*) applied for the following reasons: "Imported services that are made by registered vendors and which can stand to fall under section 14(5)(*b*) is a self contained provision which exclusively governs the zero-rating and exemption of those "imported services" which fall under section 7(1)(*c*) while not at the same time falling under section 7(1)(*a*). As such, section 14(5)(*b*) is exhaustive of the circumstances in which falling under section 7(1)(*c*) qualify for zero-rating and exemption. Section 14(5)(*a*) and (*b*) have formed part of the Act since its inception. Section 14(5)(*b)* was plainly intended to be the exclusive source of zero-rating and exemption for imported services otherwise chargeable under section 7(1)(*c*), since section 11(2) in its original form referred explicitly to services under section 7(1)(*a*), i.e. services rendered by registered vendors; the removal of '(*a*)' from 'section 7(1)(*a*)' in section 11(2) does not alter the role of section 14(5)(*b*) as the exclusive governing clause in respect of zero-rating and exemption of imported services which fall under section 7(1)(*c*).'

The court applied section 14(5)(*b*) of the Act, which it held was dispositive of the scope for zero rating of 'imported services'. As these services would not be zero rated if made in South Africa, they did not qualify to be zero rated in terms of the applicable provision, section 14(5)(*b*).

It is against this decision that the Appellant (Metropolitan Life Limited) made an appeal to the court.

As Mr Emslie, appeared on behalf of the Appellant, correctly submitted, the appeal is concerned exclusively with questions of law, being the interpretation of various provisions of the Act in relation to facts which are essentially common cause between the parties.

Relevant Legislation

The charging provision in the Act is section 7(1), which provides as follows:

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

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

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

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

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

The term "services" is defined as follows in section 1 of the Act:

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

The phrase "imported services" is defined as follows in section 1 of the Act:

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

Section 11(2)(*k*) of the Act provided as follows:

"Where, but for this section, a supply of services would be charged with tax at the rate referred to in section 7(1), such supply of services shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where–

….(*k*)the services are physically rendered elsewhere than in the Republic, not being telecommunication services supplied to any person who utilises such services in the Republic".

Section 14(5)(*a*) and (*b*) provided that:

"the tax chargeable in terms of section 7(1)(*c*) shall not be payable in respect of–

a) a supply which is chargeable with tax in terms of section 7(1)(*a*) at the rate provided in section 7;
b) a supply which, if made in the Republic, would be charged with tax at the rate zero per cent applicable in terms of section 11 or would be exempt from tax in terms of section 12;'.

The facts in the present dispute reveal that the services with which this appeal is concerned, are imported services in that what was involved, was the supply of services made by a supplier resident or carrying on business outside the Republic to a recipient, the Appellant, a resident of the Republic. The services were utilised or consumed in the Republic, otherwise than for the purpose of making taxable supplies. In general, imported services stand to be taxed at the rate of 14 per cent VAT in terms of section 7(1)(*c*) of the Act. The question for determining in the present case is whether another section of the Act was applicable to tax the transaction and, if so, which section.

Appellant's Argument

Mr Emslie's essential point against the unqualified application of section 7(1)(*c*) to the present transaction was that the entire scope of section 7 had been made 'subject to the exemptions, exception, deductions and adjustments provided for in this Act'. In his view, this phrase clearly included the zero rating provisions contained in section 11(2) of the Act. Accordingly, if the supply of "imported services" fell within any of the provisions of section 11(2), the tax to be levied would be at the rate of zero per cent and not at 14 per cent as provided for in section 7(1).

Mr Emslie submitted that in terms of the relevant facts the supplies fell within section 11(2)(*k*) and thus stood to be taxed at zero per cent. He further submitted that imported services were no less a supply of services than any other supply of services, the former being merely a subgroup of the latter. The application of section 11(2) was not restricted to vendors who were required to register for VAT purposes. On the plain wording of section 7(1) read with section 11(2)(*k*), the supply of these imported services stood to zero rated.

However, in the light of the finding of the court *a quo* and its reliance upon section 14(5)(*b*) of the Act, Mr Emslie went on to examine the wording and application of section 14(5) of the Act. The court a *quo* held that the kind of imported services performed in the present dispute fell exclusively within the scope of this section. By contrast, Mr Emslie submitted that imported services are to be taxed at the rate of zero per cent in terms of section 11(2)(*k*). Accordingly, if imported services were taxable in terms of section 7(1)(*c*) of the Act, section 14(5)(*a*) did not apply because there was no supply "which is chargeable with tax in terms of section 7(1)(*a*) at the rate provided by section 7". Furthermore, section 14(5)(*b*) could not apply because if the supplies have been made in the Republic they would not have been "charged with tax at the rate of zero per cent applicable in terms of section 11".

Respondents Argument

Mr Rogers who appeared together with Mr Masuku on behalf of the Respondent, referred to the amendment effected to section 11 of the VAT Act in terms of Act 27 of 1997. Prior to this amendment, section 11(2) of the Act was limited in its ambit to supplies of services referred to in section 7(1)(*a*) of the Act. That provision clearly provided that imported services would only be subject to zero-rated tax if the supply was made by a vendor. The amendment to section 11(2) replaced an earlier reference to section 7(1)(*a*) with the present phrase: "the tax at the rate referred to in section 7(1)". Prior to the amendment, Mr Rogers correctly submitted that section 7(1)(*a*) referred to the supplier of goods and services by a vendor. Hence imported services with which the present case was concerned, not having been supplied by a vendor, would not otherwise be chargeable with VAT under section 7(1)(*a*).

Mr Rogers submitted that, since section 11(2) was concerned with the zero-rating of VAT, the 1997 amendment made, in effect, a cosmetic change to the legislation in that it made better sense to refer to the rate of VAT specified in section 7(1); in particular because the rate of 14 per cent was not referred to in either subparagraphs (*a*), (*b*) and (*c*) of section 7 but only in the concluding part of the subsection. Accordingly, it was textually more accurate to refer to section 7(1), rather than to any of its subparagraphs as had been the case prior to the 1997 amendment.

Mr Rogers submitted further that it was clear that section 11 was intended to remain applicable only to goods and services supplied by vendors, otherwise chargeable under section 7(1)(*a*), notwithstanding the textual amendment. This conclusion became apparent when section 11(3) was examined in relation to the issue of imported services. This provision provides, inter alia, that where a rate of zero per cent "has been applied by any vendor under the provisions of this section", the vendor, "shall obtain and retain such documentary proof substantiating the vendors entitlement to apply the said rate under those provisions as is acceptable to Commissioner". Mr Rogers thus contended that section 11(3) provided support for his submission that it was only where goods or services are supplied by the vendor that section 11 comes into operation. If it had been intended to apply to 'imported services' rendered by a non-vendor as in the present dispute, it would have been necessary to stipulate that the recipient of the service would have had to obtain and retain the necessary documentation, a circumstance not provided for by section 11(3).

Mr Rogers submitted that section 11(2) did not apply to imported services nor did it deal with transactions canvassed in section 7(1)(*c*) of the Act. On this basis, the Act would appear to provide for the imposition of VAT at a zero-rate upon various services specified within section 11 which would otherwise fall within section 7(1)(*a*); that is the supply of services by a vendor in the course or furtherance of any enterprise carried on by him or her. Where there is a supply of imported services by any person, that is services which are covered by section 7(1)(*c*), then any relief from the imposition of the normal rate of tax of 14 per cent must be found in section 14(5)(*b*); that is the provision which provides tax relief for imported services and which section accordingly does all the regulatory work.

Conclusion

Was it right to charge VAT at 14 per cent in terms of section 7(1)(*c*) of the VAT Act or should it have been zero-rated?

With regards to the above facts, the author's opinion is that it would be right to charge VAT at 14 per cent based on the following:

1. The Appellant's argument is that imported services are to be taxed at the rate of zero per cent in terms of section 11(2)(*k*). Central to the Appellant's argument is that the "imported services" that were physically rendered "elsewhere than in the Republic" are zero-rated in terms of section 11(2)(*k*) even where they are rendered by non-vendors."
2. The difficulty in accepting this argument is the fact that section 11(2), as Respondent properly argues, is concerned with the rate of VAT and although the rate of VAT is specified in section 7(1), the rate of VAT is not mentioned in sub-paragraphs (*a*), (*b*) or (*c*) of section 7(1) but in the concluding part of the sub-section as a whole.
3. Section 11(3) thus makes it clear that only when goods or services are supplied by a vendor that section 11 applies.

For all of the above reasons the author is satisfied that the "imported services" in the present matter were correctly assessed as being chargeable with VAT under section 7(1)(*c*) and that the ground of zero-rating invoked by section 11(2)(*k*) is not applicable.

vii. When you buy services from suppliers in other countries, you may have to account for the VAT yourself - depending on the circumstances. This is called the 'reverse charge', and is also known as 'tax shift'. Where it applies, you act as if you are both the supplier and the customer - you charge yourself the VAT and then, assuming that the service relates to VAT, taxable supplies that you make, you also claim it back. So there's no net cost to you - the two taxes cancel each other out. The basis of the legislation lies in the EU harmonisation programme. The Sixth Directive provides for the exemption from VAT of certain international services supplied by the exporting person in one country and the charge to VAT by the importer in the other. The UK legislation follows this although there are some inconsistencies. The accountability to VAT by the importer is known in the UK as the reverse charge.

The reverse charge on services applies when the supplier is in a different country from you. Example, it can apply in two situations:

- Suppose you are an United Kingdom(UK) resident and your business is established in the UK and receive services from a supplier who belongs in another country, i.e. one of the services that are covered by the general rule for place of supply of services; or
- Where certain other services are provided in the UK by a supplier who belongs in another country - including some services related to land and property.

The amount of VAT payable of any service from another country is the same as the amount of VAT that would be paid if the service were supplied to you by a UK supplier for the same net amount. You must account for the value of the services in sterling, so you must convert their value into sterling if the services were priced in any other currency.

Where a service subject to the reverse charge is received, VAT must be accounted for by the recipient as if he or she had supplied it in the UK. The services must be liable to VAT at the standard rate in the UK. VAT is not due if the supply would ordinarily be taxed at the zero rate in the UK or would be exempt.

The reverse charge applies to the specified services irrespective of where the importation has its origin. This can be contrasted with the rules appertaining to the export of the reverse charge services where liability may depend on whether the supply is to a person who is established in an European Union (EU) Member State or outside the EU.

The services specified in the legislation – Value Added Tax Act (VATA) 1994 schedule 5 are described as "Services supplied where received" and are listed (*a*) to (*j*) as follows:

a) Transfers and assignments of copyright, patents, licences, trademarks and similar rights;

b) Advertising services;

c) Services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services; data processing and provision of information (but excluding any services relating to land);

d) Acceptance of any obligation to refrain from pursuing or exercising, in whole or in part any business activity or any such rights as are referred to in paragraph (a) above;

e) Banking, financial and insurance services (including reinsurance, but not including the provision of safe deposit facilities);

f) The supply of staff;

g) The letting on hire of goods other than means of transport;

h) The services rendered by one person to another in procuring for the other any of the services mentioned in paragraphs (a) to (g) above;

i) Any services not of a description specified in paragraphs (a) to (h) above when supplied to a recipient who is registered under this Act, or

j) Section 8(1) of VATA 1994 schedule 5 shall have an effect in relation to any service:

- which is of a description specified in paragraph (*i*) above, and
- whose place of supply is determined by an order under s.7(11) to be in the UK, as if the recipient belonged in the UK for the purposes of s.8(1)(*b*).

5.3 Chapter 3: VAT on imported services in the financial services industry in South Africa

i. A bank needs to account for VAT on imported services which are imported, to the extent that the bank utilises these services for purposes other than that of making taxable (VATABLE) supplies.

For example, Bank A pays a licence fee to an overseas vendor for the use of dedicated software employed for purposes of exclusively generating taxable bank charges. VAT on imported services will not be payable by the bank. However, should the software employed be utilised to generate taxable supplies(bank charges), as well as exempt supplies (interest), the bank is liable to declare and pay import VAT to the extent that it utilises the expense to earn exempt supplies.

The time of supply (i.e. when the import VAT should be accounted for) of the imported service is the earlier of the date of the issue of an invoice to Bank A by the overseas vendor or the time any payment is made by the bank.

The value of the supply is the value of the consideration for the supply (invoiced amount) or the open market value of the supply, whichever is greater. It is expected Bank A will always pay the market value. Example Bank A uses roughly 62% of its expenditure for the use of the making of exempt supplies and the other 38% is attributable to taxable supplies[14]. If Bank A pays a license fee of R200.00 to an overseas vendor and the expense cannot be attributed directly to either a taxable or exempt supply, then the calculation is as follows:

- The value of the imported services is R124.00 (i.e. 62% of R200.00).
- The import VAT is R17,36 (i.e. R124.00 x 14%)

The bank will need to account for import vat of R17,36 in its next vat return.

However, if the licence fee was R 99 then section 14(5)(*e*) of the VAT Act[15] will apply and no imported services will be applicable. Section 14(5)(*e*) determines that "*the tax chargeable in terms of section 7(1)(c) shall not be payable in respect of-*

a supply of services of which the value in respect of that supply does not exceed R100 per invoice"

---

[14] Assuming apportionment calculation in terms of section 17(1) of the VAT Act

[15] Section 14(5)(*e*) of the Value-Added Tax Act No. 89 of 1991

ii. **Legal position in South Africa (SA)**

The VAT Act provides that VAT is payable on the supply of any imported service [section 7(1)(*c*)].

In terms of section 8(9), where any vendor in carrying on an enterprise in the Republic consigns or delivers goods to an address outside the Republic or provides any service to or for the purposes of his branch or main business outside the Republic in respect of which the provisions of paragraph (ii) of the proviso of the definition of "enterprise" in section 1 are applicable, the vendor shall be deemed to supply such goods or service in the course or furtherance of his enterprise.

The above proviso provides that any branch or main business of an enterprise permanently situated at premises outside the Republic shall be deemed to be carried on by a person separate from the vendor, if-

a) the branch or main business can be separately identified; and

b) an independent system of accounting is maintained by the concern in respect of the branch or main business.

In terms of section 11(2)(*o*), services supplied as contemplated in section 8(9) (see above) by a vendor to or for the purposes of his branch or main business situated in an export country where the proviso noted above is applicable, may be zero-rated.

Section 14(4) provides that where a person carries on activities outside the Republic which do not form part of the activities of any enterprise carried on by him and in the course of such first-mentioned activities services are rendered for the purposes of such enterprise which if, rendered by anybody other than the said person, would be imported services, such services shall for the purposes of section 7(1)(*c*) be deemed to be imported services supplied and received by that person in respect of such enterprise.

Implications of SA legislation

Essentially, The South African Value-Added Tax Act No. 89 of 1991 legislation is to treat a local branch and its foreign head office (or vice versa) as separate legal entities, if –

a) the branch or main business can be separately identified; and

b) an independent system of accounting is maintained by the concern in respect of the branch or main business.

Assuming the above applies, the VAT Act stipulates that the proviso of services from the SA branch to its foreign head office is recognised as a supply for VAT purposes and is subject to VAT at the zero-rate. However, the provision of a supply by a foreign head office to its SA branch is treated as a supply for VAT purposes and is thus subject to the imported services provision, to the extent that the service will be used to make non-taxable supplies. If the services would be zero-rated or exempt if supplied in the Republic by a registered vendor, the imported services proviso falls away. The same principals apply in the opposite situation, i.e. where the head office is in the Republic and the branch is an export country.

iii. Visa and MasterCard operate computer systems that process transactions on their network by people buying products/service or withdrawing money from ATM's. Both make money by charging fees to banks that issue Visa/MasterCard branded cards.

With the above in mind, Members of the Banking Council regularly make payments to foreign credit card companies e.g. Visa and MasterCard for providing certain services. These companies have set up global agreements that allow the banks to use credit cards worldwide. They also offer system support for local networks e.g. if the members bank network is down, authorisation for purchases can be routed through the credit card company networks. Furthermore, they calculate the international interchange between local and foreign banks.

A service supplied by a non-resident or someone who carries on an enterprise outside South Africa to a resident of South Africa constitutes an "imported services" (section 1 of the VAT Act No. 89 of 1991) to the extent that the service is utilised or consumed in South Africa and to the extent that the person receiving the service does not use the service to make taxable supplies.

As member banks make both taxable and exempt supplies it is important to analyse the services supplied by the credit card companies to identify whether these services constitute imported services. The banks are therefore obliged to account for output tax on fees charged by the credit card companies to the extent that the services are used for making exempt supplies.

In order to decide whether output tax should be accounted for, the direct and immediate purpose of the expense must be determined. If it is found that the direct and immediate purpose of the expense is to generate taxable income only (i.e. inter-change fees, merchants fees), no imported services liability will arise.

It is commonly accepted that the banks ultimately earn substantial amounts of interest resulting from the use of credit cards by its own cardholders. In the case of the use of credit cards by cardholders the direct and immediate purpose of the expense is not to earn interest income as the interest income results from a second transaction between the bank and the cardholder, which is the provision of credit.

Banks receive taxable income in the form of amongst others merchant fees from it merchants and inter-change fees from other banks where its cardholder purchased goods or services from another bank's merchant. For VAT purposes the use of the debit or credit card at merchants gives rise to taxable income whereas the granting of a loan to the credit cardholder would usually give rise to exempt income. It should be noted that only where the cardholder has not paid the bank within a specific interest free period (normally 45 or 55 days)[16] would the bank enter into an exempt transaction with the cardholder(section 2(1)(*f*) read with section 12 of the VAT Act). In order for the costs incurred from the credit card companies to be directly linked to the earning of interest income the expense would need to be directly linked to the granting of a loan. It follows that to the extent that it can be said that the direct and immediate purpose of the expense is to receive taxable income from merchants (merchants fees), cardholder (cardholder fees) and other banks (inter-change fees) the expense would be wholly attributable to the making of taxable supplies. It should also be noted that an expense incurred for the direct and immediate purpose of granting an 'interest free' loan would also be directly attributable to a tax supply. To qualify for exemption, Section 2(1)(*f*), the sum of the repayments must exceed the value of the loan granted. A supply that does not qualify as an exempt or zero rated supply would be taxable at the standard rate. In this case the value of the supply of granting an interest free facility/loan would be nil as determined by section 10(23).

In certain cases banks are able to directly attribute the costs incurred in respect of the provision of interest bearing credit to the cardholder. This activity is generally carried on within the 'issuing' part of the bank's card business, which is a mixed activity, i.e. exempt and taxable supplies are

[16] The number of days is governed by Internal Card governance and approval.

made. It follows that the costs incurred in relation to the administration of the provision of credit is isolated to the issuing part of the card business.

SARS have already confirmed the claiming of full input tax deductions by banks in respect of ATM and point of sale machines on the basis that these acquisitions are used wholly to make taxable supplies. There are similarities between the cost incurred from credit card companies and, for example, ATM's , as in both cases the use of the machine or credit card may ultimately give rise to interest income for the bank where a credit facility is made available to the card holder.

iv. The South African VAT Act is not equipped to handle situations where connected parties transact between different jurisdictions and where no invoice is issued and no payment is received[17]. This can cause misunderstanding on how to apply the South African VAT law. For example, let's assume the following:

1) ABC Limited ("ABC") is a company incorporated in the United States, and is the sole shareholder of ABC Holdings Limited ("ABCHL"), a company incorporated in South Africa.
2) ABCHL is a majority shareholder of DEF Limited ("DEF"), a company incorporated in South Africa.
3) DEF holds majority shareholding in ABC Mozambique and ABC Tanzania. DEF is also the sole shareholder of HIJ Limited ("HIJ") and KLM Limited ("KLM").
4) HIJ is a company incorporated in South Africa. HIJ Limited holds the majority shareholding in the Africa Operations, ABC Mozambique, ABC Botswana, ABC Tanzania and ABC Zimbabwe.
5) HIJ is also the sole shareholder of NOP (Pty) Limited ("NOP"), a company incorporated in South Africa and a registered VAT vender.
6) KLM is a financial service provider and a registered VAT vendor. The company is incorporated in South Africa and is a subsidiary of DEF.

Let's apply the above example in 3 different scenario's which will determine the VAT consequences, where the holding company is in United States, subsidiary company in South Africa and four other African countries, Mozambique, Botswana, Tanzania and Zimbabwe also known as the African operations.

[17] Badenhorst, G., 2014, email, 13 February, gbadenhorst@ensafrica.com

Scenario A

1) NOP incurs certain expenditure charged by ABC in the United States, as well as expenditure charged by third parties. NOP.on-charges theses expenses as well as its own salary charges to KLM.
2) NOP levies VAT at the standard rate on invoices issued to KLM for the total consideration comprising of the recharged expenses and the salary costs.
3) ABC Zimbabwe and ABC Tanzania also charge KLM for certain services rendered. These amounts are cash settled to the respective countries by KLM.
4) Support Structure (“SS”), a division of KLM also incurs certain expenditure and charges the Africa divisions within KLM for such services. No recharge or recovery is made against or from the respective countries, and the cost is borne with KLM.
5) Certain of the expenses are incurred by KLM in respect of its own operations. The expenses are primarily incurred in respect of services that are procured by KLM for the various African operations within the group. Such services include IT services, administrative services, professional services, shareholder services and support services.
6) It is KLM’s intention to recover the expenses on-charged by NOP from each of the African operations in respect of which the services are procured and the expenses incurred. However, due to circumstances such as exchange regulations, profitability, etc, it is not always possible for KLM to do so. Where KLM cannot recover expenditure from certain African operations, it bears the costs thereof itself.
7) KLM has elected to bear such costs due to the direct benefit derived therefrom. KLM’s products are being rolled out to most African countries and by assisting the various African operations; it allows KLM’s existing multinational corporate clients to be serviced across Africa due to the footprint provided by these African countries.

Scenario B

8) NOP is collapsed and all expenditure in respect of the services acquired for the benefit of the African operations from ABC and the local or foreign third party service providers are then incurred directly by KLM. KLM will accordingly contract with ABC and the local or foreign third party service

providers as principal for its own account. Where possible, KLM will then re-charge the expenses to the various African operations.

Scenario C

9) ABC renders services directly to KLM. There is no cash flow between KLM and ABC in respect of certain services, and such costs relating to the services that are not cash settled are booked to a ring fenced cost centre in the financial records of ABC for purposes of management accounting only.

10) Some of the services rendered by ABC are not for the benefit of KLM, but are requirements from ABC's perspective so as to comply with US regulatory requirements ("**non-beneficial services**"). The costs attributable to the non-beneficial services are charged by ABC to KLM, but such charges are not recognised as an expense for KLM from a South African regulatory perspective. KLM does not make any actual payment for such services as no operational benefit is derived therefrom by KLM. The charges simply represent an allocation of group costs by ABC to its group companies. The non-beneficial services charged for by ABC to the group companies can be categorised as follows:

    a) ABC shareholder services, e.g. internal audit costs, finance staff costs etc.

    b) Other Group wide costs, e.g. advertising and marketing.

11) Certain services rendered by ABC are either for the benefit of KLM or for the benefit of the four African countries ("**beneficial services**").

12) The beneficial services include:

    a) Direct or support services: KLM is not required to pay ABC in respect of such.

    b) Technology services: These include services such as use of IT Platforms, software licencing and maintenance. The cost of supplying these services to KLM and the African countries is aggregated on an annual basis and a capped amount is then payable by KLM in respect thereof.

    c) Maintenance and IT Projects

13) There is no actual cash flow between ABC and KLM for these services and the costs are merely allocated as an expense by ABC for management accounting purposes.

Application of the Law (South Africa)

Scenario A

Imported Services

14) VAT is levied in terms of section 7(1)(*c*) of the VAT Act on the supply of any “imported services” by any person.

15) The definition of “imported services” has four requirements for a service to fall within the ambit of the definition. i.e.:
    - 15.1) The services must be rendered by a supplier who is resident outside South Africa or who carries on business outside South Africa;
    - 15.2) The recipient of the services must be a resident of South Africa;
    - 15.3) The services must be utilized or consumed in South Africa; and
    - 15.4) The purpose for acquiring the services must be otherwise than for the making of taxable supplies.

Services acquired by NOP

16) NOP acquires certain services from ABC and other foreign third-party service providers (“**the non-resident suppliers**”) for onward supply to KLM. NOP re-charges the non-resident suppliers’ fees as well as its own salary costs to KLM as consideration for its services rendered to KLM. NOP levies VAT at the standard rate on invoices issued to KLM for the total consideration comprising of the recharged expenses and its salary costs.

17) As per the requirement of 15.4 above, where services are acquired from a supplier who is resident outside of South Africa for the purpose of making taxable supplies thereof, such services will not be ‘imported services’ as contemplated in the VAT Act. NOP acquires the services from the non-resident suppliers for the purpose of making fully taxable supplies thereof to KLM. The services acquired by NOP for onward supply to KLM will therefore not constitute ‘imported services’ and NOP will not be liable to account for VAT thereon.

Services acquired by KLM

18) As discussed above, VAT is levied on the supply of any “imported services” by any person.
19) KLM acquires certain services directly from ABC Mozambique and ABC Tanzania. Although certain of the services are acquired by KLM in respect of its own operations. The services are primarily acquired in respect of the various African operations.
20) KLM also pays ABC Mozambique and ABC Tanzania for the services supplied. Where KLM is unable to recover the costs of the services from the African operations, KLM bears the costs thereof itself.
21) To the extent that the services acquired by KLM for its own operations are acquired in respect of KLM’s taxable supplies, the services acquired by KLM will not compromise imported services as contemplated in the VAT Act. However, to the extent that the services acquired are in respect of KLM’s exempt supplies of financial services, such services will compromise imported services and KLM will be required to account for VAT thereon in terms of section 7(1)(*c*) of the VAT Act.
22) KLM acquires services from ABC Mozambique and ABC Tanzania for the African operations. KLM accordingly incurs expenses in respect of the services that are acquired for the various operations. KLM therefore acquires the services from ABC Mozambique and ABC Tanzania for the purposes of making taxable supplies thereof to the African operations. The requirement as set out in 15.4 above is therefore not compiled with and the services acquired by KLM for the African operations will therefore not fall within the ambit of the definition of “imported services”.
23) KLM will be required to account for VAT at the rate of zero per cent on the open market value of the services supplied to the African operations.
24) KLM procures services from NOP for the benefit of the African operations. KLM accordingly incurs expenses in respect of the services that are acquired for the various African operations. The expenses incurred from NOP that are on-charged are inclusive of VAT at the standard rate and when they are recharged to the African operations by KLM, they are charged at the rate of zero per cent. Where KLM is unable to recharge the expenses to the African operations, the services are supplied by KLM to the African operations for no consideration.

25) The definition of ‘enterprise’ contained in section 1 of the VAT Act, refers to the carrying on of an enterprise or activity in respect of which goods or services are supplied ‘for a consideration’. To the extent that no consideration is charged for a supply, the supply will not be made in the course or furtherance of an enterprise and will therefore not be a taxable supply for purposes of the VAT Act. A vendor may only make input tax deductions in respect of expenses incurred in the course of making taxable supplies.

26) SARS Interpretation Note 70[18] (“**IN70**”) considers the circumstances under which a supply for no consideration may be regarded as a taxable supply, and consequently, whether a vendor may deduct input tax on expenses incurred for the purpose of making such supplies.

27) IN70 provides that in determining whether the making of supplies for no consideration is a taxable supply, it must be clear that the activities which gave rise to the supply are conducted in the course or furtherance of the business or enterprise activities. The SARS recognises that in carrying out activities aimed at promoting a vendor’s enterprise, the vendor will sometimes make supplies for no consideration. Therefore, where a supply is made for no consideration in the context of an enterprise carried on by a vendor, it will be considered to be a taxable supply if it is directly attributable to the promotion of the vendors’ taxable product offerings which are usually supplied for a consideration.

28) KLM incurs the expenses in respect of the services procured for the African operations despite the possibility that it may not always be able to recover the amounts expended from them. In cases where KLM does not recover the cost of such services from the various African operations, KLM will be seen to be supplying such services to the African operations for no consideration.

29) KLM supplies the services to the African operations for no consideration based on the expectation that it could sell its products into the African market in return for the services supplied. KLM’s products are being rolled out to the African countries, and assisting the various African operations allows KLM’s existing corporate multinational clients to be serviced across Africa, due to the footprint provided by these African countries. Based on this reasoning, it can be substantiated that KLM’s decision to supply the

[18] Badenhorst., G cited SARS Interpretation Note 70 ‘Supplies made for no consideration’ (March 2014).

services to the African divisions for no consideration is a tactic aimed at promoting and facilitating KLM's taxable product offerings to its existing and potential future corporate clients. Alternatively, KLM could argue that it is the intention to recharge the expenses to the African operations, but there is no point in doing so if the amounts cannot be recovered as they will have to be written off in any event.

30) KLM is a registered vendor, and procures the services from NOP in the course of its enterprise activities for the purpose of making taxable supplies thereof to the African operations. KLM should accordingly be entitled to claim input tax deductions in respect of expenses incurred in making the taxable supplies to the African operations.

Scenario B

31) KLM will acquire certain services from the non-resident suppliers mainly for the benefit of its African operations. Certain of the services will also be acquired for KLM's own operations. It should therefore be considered whether the services acquired by KLM either for its own operations or for the African operations, comprise 'imported services' as contemplated in the VAT Act. We consider each of the requirements for a service to fall within the ambit of the definition of 'imported services' as set out in point 15.1,15.2,15.3 and 15.4

Supplier resident outside South Africa

32) ABC is incorporated in, and has its registered offices in the United States. ABC also carries on its business mainly outside of South Africa. The foreign third party service providers are all incorporated outside of South Africa and carry on business outside South Africa.
Accordingly, the requirement as set out in 15.1 above in Scenario A will be complied with.

Recipient a resident of South Africa

33) The recipient of the service is defined in section 1 of the VAT Act as 'the person to whom the supply is made'. If the recipient of the supply is a resident of South Africa, then the services may fall within the ambit of the definition of "imported services", otherwise not. A resident of South Africa includes a resident as defined in section 1 of the Income Tax Act, No 58 of 1962, i.e. a company incorporated in South Africa.

Services acquired for KLM's operations

34) Where the services are acquired by KLM in respect of its own operations, KLM will be the recipient thereof. KLM is a South African incorporated company. The requirements as set out in 15.2 will accordingly be complied with.

Services acquired for African operations

35) As mentioned, a recipient of services is defined as the person to whom the supply is made. The term 'supply' is broadly defined and includes performance in terms of a sale, rental agreement, instalment credit agreement, and all other forms of supply.
36) Due to of the wide ambit of the term 'supply', the person to whom a supply is made is not necessarily the person to whom goods are provided or services are performed in the contractual sense.
37) The concept of a 'recipient' as defined in section 1 of the VAT Act is however a concept that is used throughout the VAT Act. It is only the recipient of a taxable supply that may request a tax invoice from a supplier[19] and it is only a recipient who is a vendor that may deduct VAT incurred by him on the acquisition of goods or services for taxable purposes as input tax.
38) It follows that the 'recipient' of a supply as contemplated in the VAT Act would arguably be the person to whom the supply of services is contractually made and to whom an invoice will be issued, and not the person to whom the services are physically rendered.[20]
39) KLM will contract as principal and for its own account with the non-resident suppliers for the provision of the services to the African operations. KLM will make payment to the non-resident suppliers for the services physically rendered to the African operations.
40) Although the services provided by the non-resident suppliers will physically be rendered to the African operations, the contractual supply of those services will take place between KLM and the non-resident suppliers.

---

[19] Section 20(1) of the VAT Act.

[20] This is also in line with section 54(2) of the VAT Act which provides that where a supply of goods or services is made to an agent acting on behalf of a principal, the supply will be deemed to be made to the principal. The principal is the party who bears the expenditure relating the acquisition of such goods or services.

41) The author’s view is therefore arguable that KLM is the recipient of the service acquired by it for the benefit of the African operations.

Services utilized or consumed in South Africa

42) The services will only comprise “imported services” as defined if they are utilized or consumed in South Africa.

43) The words "utilized" and "consumed" are not defined in the VAT Act and, consequently, regard must be had to the ordinary meaning of those words within the context in which they are used in the VAT Act.

44) The word "utilized" is defined in *The Concise Oxford Dictionary* 9th Ed (1995) 1546 as "make practical use of; turn to account; use effectively"

45) The word "consumed" is defined in the same publication as, *inter alia,* "use up". Thus, the place where the services supplied to KLM were "utilized" or "consumed" is the place where such services were effectively used by KLM.

46) In the recent Supreme Court of Appeal (“**SCA**”) case in the matter between the *Commissioner for SARS v De Beers Consolidated Mines Limited* [2012] ZASCA 103, the court considered *inter alia*, the meaning of the phrase ‘utilized and consumed in the Republic’ in determining whether certain services utilized by De Beers Consolidated Mines Ltd (“**DBCM**”) constituted imported services for purposes of the VAT Act.

47) De Beers required the services of independent financial advisors to consult and advise its board on whether a proposed restructuring transaction to be entered into was fair and reasonable. De Beers accordingly engaged the services of NM Rothschild and Sons Ltd (“**NMR**”), a London-based advisory service company as its independent financial advisors.

48) SARS argued, *inter alia*, that the services acquired from NMR constituted imported services on which VAT was leviable as it was not consumed by DBCM in the course of making taxable supplies. DBCM however argued that the services acquired from NMR was not imported services as contemplated in the VAT Act in that the place of consumption of such services was outside South Africa.

49) DBCM contended that since a number of meetings at which advice was received from NMR took place outside South Africa, VAT could, at the very least, not be imposed in respect of the proportion of the services

related to those meetings. The court, in considering the place of consumption of the NMR services held however as follows:

- "What is required is a practical approach to that question. DBCM was a South African company, with its head offices situated in Johannesburg. That is where the Independent Committee of Directors ("ICD") met initially and resolved to acquire the services of NMR and the local service providers. That is where the full board of DBCM finally met to receive and approve the recommendation by the ICD. The s311 scheme of arrangement, without which the transaction could not have been executed, was approved and implemented in South Africa. The fact that some meetings were held with NMR outside of the country can hardly be used to justify the conclusion that the services were not consumed in South Africa. On the contrary, the compelling conclusion is that NMR's services were consumed in South Africa".

50) It is important to note that the SCA noted that the facts of the case are unique and are hardly likely to be duplicated, and that the conclusions reached by the SCA are based on the curious facts of this particular case.

Services acquired for KLM's operations

51) The services acquired by KLM for its own operations will be rendered to KLM in South Africa, and will be in respect of its business conducted in South Africa. The services acquired by KLM in respect of its own South African operations will therefore be utilised and consumed by KLM in the Republic.

Services acquired for African operations

52) KLM acquires certain services from the non-resident suppliers for onward supply to the African operations. The type of services acquired includes IT services, administration services, professional services, shareholder services and support services. The nature of the services is of the type that while contractually supplied to KLM, is then physically rendered by the non-resident suppliers to the African operations.

53) The services that are rendered by the non-resident suppliers take place physically outside of South Africa and are rendered directly to the African operations. The services provided by the non-resident suppliers are therefore practically made use of, or used effectively, outside of South

Africa, i.e. they are utilized outside of South Africa. The services are further used up, i.e. consumed, outside South Africa.

54) The author's view is therefore arguable that the services supplied by the non-resident suppliers are consumed where the services are physically performed, and where the business to which they directly relate are located. The services supplied by the non-resident suppliers are physically performed outside of South Africa to the African operations located outside South Africa. The services acquired from the non-resident suppliers can therefore be said to be consumed outside of South Africa.

55) In the *De Beers* case the court held that a practical approach should be adopted in analysing the facts in order to determine the place of consumption of services. In the *De Beers* case, the company's board of directors took advice on whether the consortium's offer was fair and reasonable. The advice was contemplated in South Africa and a decision based on the advice was taken in South Africa. The court accordingly held that the advice, i.e. the NMR service, was utilized in South Africa.

56) Although not explicitly stated by the court in the *De Beers* case, and while we are not in agreement with this interpretation, we mention for sake of completeness, that the *De Beers* judgement may also be interpreted on the basis that services will be considered to be utilized or consumed in the Republic, if the recipient derives the benefit thereof in South Africa.

57) Even if this interpretation of the case is accepted, it remains that KLM does not derive the benefit of the type of services rendered by the non-resident suppliers. Due to the nature of the services being supplied, the African operations derive the direct benefit thereof when the services are physically rendered to them outside of South Africa. KLM only derives an indirect benefit therefrom, namely the ability to service their existing corporate clients across Africa.

58) Based on a practical analysis of the facts, it is arguable that the services provided by the non-resident suppliers are not utilized or consumed by KLM in South Africa but that they are utilized and consumed in the countries where the non-resident suppliers render their services, and where the African operations derive the benefit thereof.

59) However, at odds with the discussion above is the OECD's Draft International VAT Guidelines issued for public comment during February 2013 ("**the Draft Guidelines**"). Although the Draft Guidelines are only in draft form and are not binding on South Africa, it nevertheless serves to

provide some guidance and an indication as to the VAT treatment arising from the cross-border supply of services between businesses.

60) The Draft Guidelines are generally premised on the principle that the jurisdiction in which a customer is located has the taxing rights over internationally traded services. The 'customer' is determined with reference to the business agreement entered into in respect of the supply. In illustrating the application of these principles, the Draft Guidelines considers the example where services are acquired from an external supplier by an establishment for its other establishments located in another jurisdiction. The costs of acquiring the services are borne by the establishment entering into the business agreement with the supplier and are subsequently recharged to the establishment using the services. In this instance the Draft Guidelines attributes the taxing rights to the jurisdiction in which the customer, being the establishment that entered into the business agreement, is located. The establishment / customer is required to account for the tax via the reverse-charge mechanism available in their jurisdiction. The same treatment will apply where a customer acquires services from a supplier to be rendered directly to a third party located in a different jurisdiction.[21] The customer will be liable to account for tax on the supply via the reverse-charge mechanism.

61) If the approach suggested by the Draft Guidelines is followed, KLM will be required to account for VAT on imported services in respect of the services acquired from the non-resident supplier for the African operations. The approach adopted by the Draft Guidelines is however are not binding on South Africa and does not provide a definitive view as to what constitutes imported services, and when such services will be subject to VAT in South Africa.

62) As discussed it is arguable that the services provided by the non-resident suppliers are not utilized or consumed by KLM in South Africa but that they are utilized and consumed in the countries where the non-resident suppliers render their services, and where the African operations derive the benefit thereof.

63) It therefore remains that the requirement as set out in 15.3 above would not be complied with and that the services supplied by the non-resident

[21] Badenhorst., G cited OECD International VAT/GST Guidelines (Draft consolidated version) February 2013 at Chapter 3 pg 28.

suppliers to KLM would accordingly not constitute imported services for purposes of the VAT Act.

64) Should the SARS however take the view that the services are utilized or consumed in South Africa for whatever reason, we would need to determine whether it is arguable that the services are utilized or consumed by KLM for the purpose of making taxable supplies.

Otherwise than for the purpose of making taxable supplies

65) The services which are utilized or consumed in South Africa will comprise "imported services" if the services were acquired otherwise than for the purpose of making taxable supplies, i.e. where services are found to be utilized or consumed in South Africa, such services will be considered to be imported services to the extent that such services are acquired for the purpose of making non-taxable supplies.

66) KLM is a financial service provider and provides exempt financial services as contemplated in section 2 of the VAT Act. KLM however also makes taxable supplies, including, *inter alia*, the supply of services to group companies.

Services acquired for KLM's operations

67) To the extent that the services acquired by KLM for its own operations are acquired in respect of KLM's taxable supplies, the services acquired by KLM will not comprise imported services as contemplated in the VAT Act. However, to the extent that the services acquired are in respect of KLM's exempt supplies of financial services, such services will comprise imported services and KLM will be required to account for VAT thereon in terms of section 7(1)(*c*) of the VAT Act.

Services acquired for African operations

68) KLM will procure services from the non-resident suppliers for the African operations. KLM accordingly incurs expenses in respect of the services that are acquired for the various African operations. Although it is always KLM's intention to recharge the expenses to the African operations, where it is not feasible to do so, KLM will bear the costs thereof and will then have made a supply for no consideration to the African operations.

69) KLM may on supply the services to the African operations for no consideration based on the expectation that it could sell its products into

the African market in return for the services supplied. KLM’s products are being rolled out to most African countries, and assisting the various African operations allows KLM’s existing corporate multinational clients to be serviced across Africa, due to the footprint provided by these African countries. Based on this reasoning, it can be substantiated that KLM’s decision to supply the services to the African divisions for no consideration is a tactic aimed at promoting and facilitating KLM’s taxable product offerings to its existing and potential future corporate clients. Alternatively, KLM could argue that it is the intention to recharge the expenses to the African operations, but there is no point in doing so if the amounts cannot be recovered as they will have to be written off in any event.

70) In such case the requirement as set out in 15.4 is not complied with and therefore, even if it is found that the services acquired are utilized or consumed in South Africa, such services are acquired for the purposes of making taxable supplies and will therefore not fall within the ambit of the definition of “imported services”.

Scenario C

Non-beneficial services

71) ABC allocates certain costs to KLM in respect of group services carried out by ABC in order to comply with United States regulatory requirements. These services include shareholder services and other group costs such as marketing and advertising costs. KLM derives no direct benefit from such services and therefore, even though the cost thereof is accounted for as an expense in KLM’s accounting records, KLM does not make any payment to ABC in respect thereof.

72) As mentioned, VAT is payable by the recipient of an imported service. An imported service is a service supplied by a non-resident supplier or a supplier who carries on business outside South Africa; to a South African resident recipient; where such services are utilized or consumed in South Africa otherwise than for the making of taxable supplies.

73) The New Zealand Inland Revenue Departments' Guidelines for recipients of Imported Services[22] considers the tax implications arising from corporate recharges and cost allocations between related parties as in the case of KLM. The New Zealand Goods and Services Tax legislation contains specific 'place of supply' rules in terms of which a cost allocation is treated as a supply of services by a non-resident to a resident. The resident acquiring the deemed service will therefore be required to account for tax on imported services via the reverse-charge mechanism

74) The New Zealand 'Goods and Services Tax' regime has formed the basis of the South African VAT Act. Thus, although not binding in South Africa, it serves a persuasive value and provides some guidance on the interpretation and application of similar VAT principles in that jurisdiction.

75) Despite the similarities between South African VAT and New Zealand's Goods and Services Tax, the South African Vat Act does not contain any place of supply rules similar to that contained in New Zealand's legislation. It must therefore be considered whether the services supplied by ABC as a group service, will comprise 'imported services' as contemplated in the VAT Act.

76) ABC, a non-resident, supplies services to KLM as the South African recipient of such services. The first two requirements for an imported service as set in 15.1 and 15.2 above are therefore met.

77) The shareholder services and the cost allocation in respect of the marketing and advertising services are rendered by ABC in the United States in respect of the Group of companies as a whole and not exclusively to KLM. Such services are not only physically carried out in the United States, but are also applied in the United States for the benefit of ABC. The types of services rendered by ABC are not required by KLM in South Africa. The service is provided by ABC to KLM in order to satisfy United States regulatory requirements.

78) The requirement as set out in 15.3 above would therefore not be complied with. The non-beneficial services supplied by ABC to KLM would accordingly not constitute imported services for purposes of the VAT Act. Should the SARS however take the view that the services are utilized or consumed in South Africa for whatever reason, we would need to

---

[22] Badenhorst., G cited New Zealand Goods and Services Tax Guide Commentary *'Guidelines for recipients of Imported Services'* (October 2004) CCH 19 – 450 at pages 9 – 12.

determine whether it is arguable that the services are utilized or consumed by KLM for the purpose of making taxable supplies.

79) KLM makes exempt supplies of financial services as well as other taxable supplies. On the basis that the services are of no benefit to KLM, it is doubtful that KLM may argue that it was acquired for the purpose of making taxable supplies. To the extent that the non-beneficial services are however attributable to the making of taxable supplies, it would not constitute imported services and no VAT would have to be accounted for thereon. However, to the extent that the services are not attributable to the making of taxable supplies, i.e. if they are attributable to the making of exempt financial services, the services would constitute imported services and VAT based on the open market value of the supply would have to be accounted for thereon by KLM[23]. KLM would accordingly be required to apportion the cost of acquiring the services based on a ratio of exempt to taxable supplies to the extent necessary. However, the time when VAT is payable on imported services is the time an invoice is issued or when payment is made for the supply, whichever is earlier[24]. Therefore, if ABC never issues an invoice and KLM never makes payment, the time when the VAT is payable is never triggered.

Beneficial services

80) ABC provides KLM and the other African entities with certain direct and support services, with certain technology services which compromise the use of its IT platforms as well as software licencing and maintenance.

81) It should therefore be considered whether these beneficial services acquired by KLM both for its own benefit and for the benefit of the African entities comprise "imported services" as contemplated in the VAT Act. We consider below each of the requirements for a services to fall within the ambit of the definition of "imported services as mentioned in 15.1, 15.2, 15.3 and 15.4 above.

82) ABC, a non-resident supplier, will be supplying the beneficial services to KLM. As discussed, the recipient of a supply is the person to whom the supply is contractually made and not the person to whom the services are physically rendered. The Beneficial services supplied to KLM and the African entities are being supplied in terms of the Agreement entered into

[23] Section 14(3) of the VAT Act.
[24] Section 14(2) of the VAT Act.

between ABC and KLM, and then DEFL. KLM is accordingly the South African recipient of the beneficial services supplied by KLM The first two requirements as set out at 15.1 and 15.2 above are therefore met.

83) The services will only comprise “imported services” if they are utilized or consumed in South Africa.

84) KLM is a South African registered company, and where the services are acquired by KLM for use in respect of its South African operations, and the benefit thereof is derived in South Africa, then the beneficial services acquired by KLM for use in its South Africa operations are utilized and consumed in South Africa.

85) Where the services are however acquired by KLM for the benefit of the African entities, and the services are physically rendered offshore and for the benefit of African entities to whom the services are rendered, it is my view that the services provided by ABC for the benefit of the African entities are not utilised and consumed by KLM in South Africa, but that they are utilised and consumed in the country where ABC rendered its services and where the benefit thereof is derived. The beneficial services acquired for purposes of the African entities would therefore not constitute imported services as contemplated in the VAT Act.

5.4 Chapter 4 - VAT treatment of general banking income in terms of the VAT Act.

The VAT treatment of banking services is governed in terms of the Value-Added Tax Act (Act No. 89 of 1991). A list of these services is documented and agreed between the Banking Association of South Africa (BASA) and South African Revenue Service (SARS). This list is updated periodically after consultation between the two parties.
The table below details a list of the general banking services offered by a bank, the agreed VAT treatment, as well as the relevant section(s) from the VAT Act, broken up into the major categories within the bank. Please note that taxable supplies includes standard and zero rated supplies, and that zero rated supplies takes preference over exempt supplies[25].

General Banking Services

Zero-Rated in terms of section 11(1) & (2) where these sections are applicable.

ACTIVITY NATURE OF FEE	VAT STATUS	SECTION OF THE ACT
DEPOSIT ACCOUNTS		
1.1 <u>Current / Savings Deposit Accounts</u>		
• Base Fee	Taxable at 14%	7(1)(*a*)
• Subscription Fee	Taxable at 14%	7(1)(*a*)
• Early Redemption Fee	Taxable at 14%	7(1)(*a*)
• Transaction Service Fee	Taxable at 14%	7(1)(*a*)
• Balance Below Minimum Fee	Taxable at 14%	7(1)(*a*)
• Teller Withdrawal Fee	Taxable at 14%	7(1)(*a*)
• Transfer / Payment at Counter Fee	Taxable at 14%	7(1)(*a*)
• Bank Cheque Fee	Taxable at 14%	7(1)(*a*)
• Deposit Fee	Taxable at 14%	7(1)(*a*)
• Replacement Card / Book / Pin Fee	Taxable at 14%	7(1)(*a*)
• Electronic Funds		

[25] In terms of section 12(a) of the Value-Added Tax Act No. 89 of 1991

Transfer Fee:		
o ATM Withdrawal Fee	Taxable at 14%	7(1)(*a*)
o Account Payment Fee	Taxable at 14%	7(1)(*a*)
o Inter-account Payment Fee	Taxable at 14%	7(1)(*a*)
• Sale of Cheque Books:		
o Cheque Forms	Taxable at 14%	7(1)(*a*)
o Cheque Books	Taxable at 14%	7(1)(*a*)
o Counter Cheques	Taxable at 14%	7(1)(*a*)
o Cheque Book Covers	Taxable at 14%	7(1)(*a*)
o Cheques Issued by Machine	Taxable at 14%	7(1)(*a*)
• Sale of Deposit Books:		
o Standard (Non-MICR Encoded)	Taxable at 14%	7(1)(*a*)
o Special (MICR Encoded)	Taxable at 14%	7(1)(*a*)
• Authorisations to Cash Cheques:		
o Encashment Fee	Taxable at 14%	7(1)(*a*)
o Encashment Facility Set-Up Fee	Taxable at 14%	7(1)(*a*)
• Certificate Fees:		
o Balance of Account	Taxable at 14%	7(1)(*a*)
o Auditors Confirmation	Taxable at 14%	7(1)(*a*)
• Fee for Cheques Deposited but Returned Unpaid	Taxable at 14%	7(1)(*a*)
• Fee for Post Dated Cheques	Taxable at 14%	7(1)(*a*)
• Fee for Guaranteed Cheques	Taxable at 14%	7(1)(*a*)
• Cashing Cheques / Clearance Fee	Taxable at 14%	7(1)(*a*)
• Fee for Stop Orders /	Taxable at 14%	7(1)(*a*)

Debit Orders (Account Holder)		
• Fee for Unpaid Items – Electronic Transfers	Taxable at 14%	7(1)(*a*)
• Bank Statement Charges:		
o Prepared in Duplicate Fee	Taxable at 14%	7(1)(*a*)
o Replacement Fee	Taxable at 14%	7(1)(*a*)
o Statement Storage Fee	Taxable at 14%	7(1)(*a*)
o Provisional Statements Fee	Taxable at 14%	7(1)(*a*)
o Balance Enquiry Fee	Taxable at 14%	7(1)(*a*)
o Mini Statement Fee	Taxable at 14%	7(1)(*a*)
• Voucher Retention Charges:		
o Storage Fee	Taxable at 14%	7(1)(*a*)
o Reference / Copies Fee	Taxable at 14%	7(1)(*a*)
o Retrieval Fee	Taxable at 14%	7(1)(*a*)
o Paid Vouchers – Uplifted Fee	Taxable at 14%	7(1)(*a*)
o Dispatched with Statements Fee	Taxable at 14%	7(1)(*a*)
• Dishonours:		
o Representation Fee	Taxable at 14%	7(1)(*a*)
o Unpaid Fee	Taxable at 14%	7(1)(*a*)
o Notification Fee	Taxable at 14%	7(1)(*a*)
• Unauthorised Overdraft Fee	Taxable at 14%	7(1)(*a*)
• Declined Transaction Fee	Taxable at 14%	7(1)(*a*)
• Excess Item Fee (per item paid for unauthorised overdraft)	Taxable at 14%	7(1)(*a*)
• Monthly Maintenance	Taxable at 14%	7(1)(*a*)

Fee		
• Stop Payment Fee	Taxable at 14%	7(1)(*a*)
• ATM Stop Card Fee	Taxable at 14%	7(1)(*a*)
• Account Opening Fee	Taxable at 14%	7(1)(*a*)
• Closure of Accounts Fee	Taxable at 14%	7(1)(*a*)
• Photocopy Fee	Taxable at 14%	7(1)(*a*)
• Sundry Fee	Taxable at 14%	7(1)(*a*)
• Bank Statement Reconciliation Fee:		
o Entry Charges	Taxable at 14%	7(1)(*a*)
1.2 <u>Money Transfer Services</u>		
• Consolidated Payment Fee	Taxable at 14%	7(1)(*a*)
• Credit Transfer Fee	Taxable at 14%	7(1)(*a*)
• Tele-fax Transfer Fee	Taxable at 14%	7(1)(*a*)
• Telegraphic Transfer Fee	Taxable at 14%	7(1)(*a*)
• Swift Transfer Fee	Taxable at 14%	7(1)(*a*)
1.3 <u>Cash Related Services</u>		
• Fee for Provision of Change	Taxable at 14%	7(1)(*a*)
• Fee for Cash / Coin Handling	Taxable at 14%	7(1)(*a*)
• Cheque Encashment Fee:		
o Under Letter of Credit	Taxable at 14%	7(1)(*a*)
o Travellers Cheques / Foreign Drafts	Taxable at 14%	7(1)(*a*)
o Money & Postal Orders	Taxable at 14%	7(1)(*a*)
• Fee for Safe Custody of Cash:		
o After Hours – In Locked Bags / Deposit Envelopes	Taxable at 14%	7(1)(*a*)

o Night Safes	Taxable at 14%	7(1)(*a)*
1.4 <u>Off-Site Banking</u>		
• Electronic Funds Transfer Fee	Taxable at 14%	7(1)(*a*)
• Cash / Coin Handling Fee	Taxable at 14%	7(1)(*a*)
• Safe Custody of Cash Fee	Taxable at 14%	7(1)(*a*)
• Rentals Fee	Taxable at 14%	7(1)(*a*)
1.5 <u>Electronic Banking</u>		
• Electronic Payment Services:		
o Electronic payment – details on disk / tape	Taxable at 14%	7(1)(*a*)
o Electronic payment – details supplied by batch	Taxable at 14%	7(1)(*a*)
o Data Capture Fee	Taxable at 14%	7(1)(*a*)
o Late Data Fee	Taxable at 14%	7(1)(*a*)
o On-Site Assistance Fee	Taxable at 14%	7(1)(*a*)
o Stop Payment Fee	Taxable at 14%	7(1)(*a*)
o ACB Clearing Charges Fee	Taxable at 14%	7(1)(*a*)
o Default Cheque Fee	Taxable at 14%	7(1)(*a*)
• Electronic Off-Site Banking:		
o User Charge	Taxable at 14%	7(1)(*a*)
o Account Payments & Transfer Fee	Taxable at 14%	7(1)(*a*)
o Magtape Charge	Taxable at 14%	7(1)(*a*)
• Electronic Direct Credits:		
o Fee for additions / deletions, alterations	Taxable at 14%	7(1)(*a*)

to schedule and loading (including magtapes)		
o Consolidated payment / netting of accounts fee	Taxable at 14%	7(1)(*a*)
• Electronic Direct Debits:		
o Fee for forwarding authorities to other Banks	Taxable at 14%	7(1)(*a*)
o Stop Order Fee	Taxable at 14%	7(1)(*a*)
o Standing Payment Order Fee	Taxable at 14%	7(1)(*a*)
o Stop Order Amendment Fee	Taxable at 14%	7(1)(*a*)
1.6 <u>Charges to Central Government Accounts</u>		
• Service Fee	Taxable at 14%	7(1)(*a*)
• Charge per Deposit Slip Handled	Taxable at 14%	7(1)(*a*)
• Charge per Cheque Listed on Deposit Slip	Taxable at 14%	7(1)(*a*)
• Cash Deposit Fee	Taxable at 14%	7(1)(*a*)
• Charge for Post-Dated Cheques Deposited	Taxable at 14%	7(1)(*a*)
1.7 <u>Zero-Rated Services</u>		
• Any fee / commission / interest / discount charged to a non-resident	Zero-Rated	11(2)(*l*)
• Any fee / commission / discount charged for service physically rendered outside the Republic	Zero-Rated	11(2)(*k*)

1.8 <u>Credit / Debit Cards (Including SMART CARDS)</u>		
• Credit Card:		
o Authorisation Fees	Taxable at 14%	7(1)(*a*)
o Cash Withdrawal Fee	Taxable at 14%	7(1)(*a*)
o Cardholder Fee (including renewal)	Taxable at 14%	7(1)(*a*)
o Merchants Discount (including Interchange Fee)	Taxable at 14%	7(1)(*a*)
- Taxable with effect from 1 March 1999		
- Prior to 1 March 1999 – Exempt in terms of s(2)(1)(c)		
o Transaction Fee	Taxable at 14%	7(1)(*a*)
o Statement Fee	Taxable at 14%	7(1)(*a*)
o Government Stamp Duty on Debit Entries	Non-Supply	
o Call Back Charge	Taxable at 14%	7(1)(*a*)
o Cash Withdrawal Fee	Taxable at 14%	7(1)(*a*)
o Lost Card Protection Fee	Taxable at 14%	7(1)(*a*)
• Debit / Cheque Card:		
o Transaction Charge	Taxable at 14%	7(1)(*a*)
o Card Fee	Taxable at 14%	7(1)(*a*)
o Lost Card Protection Fee	Taxable at 14%	7(1)(*a*)
o Cash Withdrawal Fee	Taxable at 14%	7(1)(*a*)
o Government Stamp Duty on Debit Entries	Non-Supply	
• Smart Card:		
o Card Issue Fee	Taxable at 14%	7(1)(*a*)
o Transaction Fee	Taxable at 14%	7(1)(*a*)

• Interbank Fees:		
o Fee for maintaining their accounts and processing their transactions	Taxable at 14%	7(1)(*a*)
• Imprinter / Dial Terminal:		
o Rentals	Taxable at 14%	7(1)(*a*)
o Transaction Fee	Taxable at 14%	7(1)(*a*)
• Membership Fees:		
o Loyalty Programme	Taxable at 14%	7(1)(*a*)
• Income Cheque Verifier Fee	Taxable at 14%	7(1)(*a*)
• Insurance Lost Card Fee	Taxable at 14%	7(1)(*a*)
• Card Linkage Fee	Taxable at 14%	7(1)(*a*)
• Interest Charge	Exempt	12(*a*) & 2(1)(*f*)
• Copy Voucher Fee	Taxable at 14%	7(1)(*a*)
• Commission Travellers Cheques	Taxable at 14%	7(1)(*a*)
• Card Stop Fee	Taxable at 14%	7(1)(*a*)
• Outstanding Balance Life Assurance:		
o Premium	Exempt	12(*a*) & 2(1)(*i*)
o Agents Commission	Taxable at 14%	7(1)(*a*)
1.9 <u>Fleet Card</u>		
• Fleet Card:		
o Fixed Card Fee	Taxable at 14%	7(1)(*a*)
o Variable Transaction Fee	Taxable at 14%	7(1)(*a*)
o Interest Charge	Exempt	12(*a*) & 2(1)(*f*)
1.10 <u>Private Label Cards</u>		
• Merchants Discount (Commission)	Taxable at 14%	7(1)(*a*)
• Discount or Premium in	Exempt	12(*a*) & 2(1)(*c*)

respect of a Debt Security Cession		
• Card Fee	Taxable at 14%	7(1)(*a*)
• Transaction Fee	Taxable at 14%	7(1)(*a*)
• Statement Fee	Taxable at 14%	7(1)(*a*)
• Insurance Lost Card Fee	Taxable at 14%	7(1)(*a*)
• Interest Charge	Exempt	12(*a*) & 2(1)(*f*)
• Card Stop Fee	Taxable at 14%	7(1)(*a*)
• Outstanding Balance Life Assurance:		
o Premium	Exempt	12(*a*) & 2(1)(*i*)
o Agents Commission	Taxable at 14%	7(1)(*a*)
• Lost Card Replacement Fee	Taxable at 14%	7(1)(*a*)
1.11 <u>Bills Negotiated or Collected Within RSA</u>		
• Acceptance Fee	Taxable at 14%	7(1)(*a*)#
• Discount	Exempt	12(*a*) & 2(1)(*c*)
• Negotiation Fee	Taxable at 14%	7(1)(*a*)#
• Collection Fee	Taxable at 14%	7(1)(*a*)#
• Extension / Roll Over Fee	Taxable at 14%	7(1)(*a*)#
• Endorsement Fee	Taxable at 14%	7(1)(*a*)#
1.12 <u>Foreign Bills for Collection</u>		
• Outwards (Exports)		
o Documentary Collection Fee	Taxable at 14%	7(1)(*a*)#
o Clean Collection Fee	Taxable at 14%	7(1)(*a*)#
o Direct Collection Fee	Taxable at 14%	7(1)(*a*)#
o Extension / Roll Over Fee	Taxable at 14%	7(1)(*a*)#
o Transfer of Proceeds Fee	Taxable at 14%	7(1)(*a*)#

o Negotiation Fee	Taxable at 14%	7(1)(*a*)#
o Endorsement Fee	Taxable at 14%	7(1)(*a*)#
o Establishment	Taxable at 14%	7(1)(*a*)#
• Inwards (Imports)		
o Documentary Collection Fee	Zero-Rated	72*
o Clean Collection Fee	Zero-Rated	72*
o Extension / Roll Over Fee	Zero-Rated	72*
o Consignments to Bank(s) Order Fee	Zero-Rated	72*
o Acceptance and Return Fee	Zero-Rated	72*
o Swift / Telex etc. Message Fee	Zero-Rated	72*
o Establishment Fee	Zero-Rated	72*
1.13 <u>Letters of Credit Outwards (for Imports)</u>		
• Establishment Fee	Taxable at 14%	7(1)(*a*)#
• Drawings:		
o Negotiation Fee	Taxable at 14%	7(1)(*a*)#
o Payment Fee	Taxable at 14%	7(1)(*a*)#
o Acceptance Fee	Taxable at 14%	7(1)(*a*)#
o Deferred Payment Fee	Taxable at 14%	7(1)(*a*)#
• Amendments:		
o Extension of Maturity Date Fee	Taxable at 14%	7(1)(*a*)#
o Increase in Amount Fee	Taxable at 14%	7(1)(*a*)#
o Other Amendments Fee	Taxable at 14%	7(1)(*a*)#
• Cancellation / Utilised Fee	Taxable at 14%	7(1)(*a*)#
• Discrepancies Fee	Taxable at 14%	7(1)(*a*)#
• Payment Fee	Taxable at 14%	7(1)(*a*)#
• Transferring Fee	Taxable at 14%	7(1)(*a*)#
• Bulk Commission	Taxable at 14%	7(1)(*a*)#

Charge		
• Swift / Telex etc. Message Fee	Taxable at 14%	7(1)(*a*)#
1.14 <u>Letters of Credit Inwards (for Exports)</u>		
• Advising Fee	Zero-Rated	72*
• Confirmation Fee	Zero-Rated	72*
• Drawings:		
o Negotiation Fee	Zero-Rated	72*
o Payment Fee	Zero-Rated	72*
• Discount	Exempt	12(*a*) & 2(1)(*c*)
• Amendment Charges:		
o Extension of Maturity Date Fee	Zero-Rated	72*
o Increase in Amount Fee	Zero-Rated	72*
o Other Amendments Fee	Zero-Rated	72*
• Reimbursement Charges Fee	Zero-Rated	72*
• Discrepancy Charges Fee	Zero-Rated	72*
• Cancellation / Unutilised Charges Fee	Zero-Rated	72*
• Payment / Negotiation Fee	Zero-Rated	72*
• Transfer Fee	Zero-Rated	72*
• Swift / Telex Fee	Zero-Rated	72*
• Acceptance Fee	Zero-Rated	72*
• Document Handling Fee	Zero-Rated	72*
• Miscellaneous Fee	Zero-Rated	72*
• Bulk Commission Charge	Zero-Rated	72*
• Bank Cheque Charge	Zero-Rated	72*
1.15 <u>Currency Accounts</u>		
• Service Charge	Taxable at 14%	7(1)(*a*)

1.16 <u>Offshore Loans (e.g. Euro finance)</u>		
• Interest – Resident Account	Exempt	12(*a*) & 2(1)(*f*)
• Interest – Non Resident Account	Zero-Rated	11(2)(*l*)
• Service Charge	Taxable at 14%	7(1)(*a*)
1.17 <u>Derivatives Trading</u>		
• Brokerage Fee	Taxable at 14%	7(1)(*a*)
• Buying and Selling of Derivatives	Exempt	12(*a*) & 2(1)(*k*)
• Supply of Underlying Commodity	Taxable at 14%	7(1)(*a*)
• Supply of Underlying Commodity – Schedule 2 of the VAT Act	Zero-Rated	11(1)(*g*) / (*j*)
1.18 <u>Foreign Exchange Branch / Dealing</u>		
• Fee for Swift / Telegraphic Transfer Outward	Taxable at 14%	7(1)(*a*)
• Fee for Using a Foreign Cheque	Taxable at 14%	7(1)(*a*)
• Fee for Using Travellers Cheques	Taxable at 14%	7(1)(*a*)
• Fee for Swift / Telegraphic Transfer Inward	Taxable at 14%	7(1)(*a*)
• Fee for Bills Negotiated	Taxable at 14%	7(1)(*a*)
1.19 <u>Mortgage Loans</u>		
• Initiation Fee	Taxable at 14%	7(1)(*a*)
• Administration Fee	Taxable at 14%	7(1)(*a*)
• Release of Sectional Title Units Fee	Taxable at 14%	7(1)(*a*)
• Release of Bonded	Taxable at 14%	7(1)(*a*)

Property / Collateral Fee		
• Second Bond in respect of Third Party Fees	Taxable at 14%	7(1)(*a*)
• Registration of Servitude, Consolidations & Sub-Divisions fee	Taxable at 14%	7(1)(*a*)
• Re-advance Fee	Taxable at 14%	7(1)(*a*)
• Initiation Fee	Taxable at 14%	7(1)(*a*)
• Variation Fee	Taxable at 14%	7(1)(*a*)
• Facility Fee:		
o Application Fee	Taxable at 14%	7(1)(*a*)
o Agreement Fee	Taxable at 14%	7(1)(*a*)
o Establishment Fee	Taxable at 14%	7(1)(*a*)
• Capped Interest Rate Option (Derivative)	Exempt	12(*a*) & 2(1)(*k*)
1.20 <u>In Relation to Lending by Bank</u>		
• Securitisation of Debt Security	Exempt	12(*a*) & 2(1)(*c*)
• Securitisation Fee	Taxable at 14%	7(1)(*a*)
• Preparation and Completion of Securities Fee	Taxable at 14%	7(1)(*a*)
• Release of Securities Fee	Taxable at 14%	7(1)(*a*)
• Guarantee Fee	Taxable at 14%	7(1)(*a*)
• Property Loans Fee	Taxable at 14%	7(1)(*a*)
• Modifications (including priority) of Securities Fee	Taxable at 14%	7(1)(*a*)
• Asset Inspection by Bank of Security Fee	Taxable at 14%	7(1)(*a*)
• Bank Nominee	Taxable at 14%	7(1)(*a*)

Company Activity Fee		
1.21 <u>Loans</u>		
• Interest	Exempt	12(*a*) & 2(1)(*f*)
• Commitment Fee	Taxable at 14%	7(1)(*a*)
• Unutilised Renewal Fee	Taxable at 14%	7(1)(*a*)
• Documentation Fee	Taxable at 14%	7(1)(*a*)
• Early Termination		
o Interest Adjustment	Exempt	12(*a*) & 2(1)(*f*)
1.22 <u>Bankers Acceptances</u>		
• Dealing Profit	Exempt	12(*a*) & 2(1)(*c*)
• Trading in Bankers Acceptances	Exempt	12(*a*) & 2(1)(*c*)
• Discount on Face Value	Exempt	12(*a*) & 2(1)(*c*)
• Commission	Taxable at 14%	7(1)(*a*)
1.23 <u>Structuring</u>		
• Structuring Fee	Taxable at 14%	7(1)(*a*)
• Commitment Fee	Taxable at 14%	7(1)(*a*)
• Breakage Fee	Taxable at 14%	7(1)(*a*)
• Unwinding Fees	Taxable at 14%	7(1)(*a*)
1.24 <u>Gold Loans</u>		
• Loan of Gold	Exempt	12(*a*) & 2(1)(*f*)
• Lending Fee (Interest)	Exempt	12(*a*) & 2(1)(*f*)
• Sale of Gold to Repay Loan	Taxable at 14%	7(1)(*a*)
1.25 <u>Instalment Credit Agreements ("ICA")</u>		
• ICA : Cash Value	Taxable at 14%	7(1)(*a*)
• ICA: Finance Charges	Exempt	12(*a*) & 2(1)(*f*)
• Document Fee	Taxable at 14%	7(1)(*a*)
• Early Termination		
o Interest Adjustment	Exempt	12(*a*) & 2(1)(*f*)
o Penalty Fee	Taxable at 14%	7(1)(*a*)
• Interest on Late Instalment	Exempt	12(*a*) & 2(1)(*f*)
• Cession of Debt	Exempt	12(*a*) & 2(1)(*c*)

Security		
1.26 <u>Rental Agreements</u>		
• Rentals	Taxable at 14%	7(1)(*a*)
• Documentation Fee	Taxable at 14%	7(1)(*a*)
• Penalty Interest / Additional Rental (Early Termination)	Taxable at 14%	7(1)(*a*)
• Subsidy from Motor Dealer / Manufacturer	Taxable at 14%	7(1)(*a*)
1.27 <u>Motor Finance Services</u>		
• Management Fee	Taxable at 14%	7(1)(*a*)
• Documentation / Administration Fee	Taxable at 14%	7(1)(*a*)
• Cost Recoveries:		
o Fees Recovered in Repossessions	Taxable at 14%	7(1)(*a*)
o VAT Repossession Costs	Taxable at 14%	7(1)(*a*)
o Irrecoverable Tracing Fee	Taxable at 14%	7(1)(*a*)
• Subsidies from Motor Dealers / Manufacturers	Taxable at 14%	7(1)(*a*)
1.28 <u>Motor Dealer Transactions</u>		
• Direct Deals by Motor Dealer to Bank:		
o Purchase of Asset	Taxable at 14%	7(1)(*a*)
o Dealer Commission (Motor Dealer to account for Output Tax	Taxable at 14%	7(1)(*a*)
• Discounted Deals by Motor Dealer to Bank:		
o Acquisition of ICA	Exempt	12(*a*) & 2(1)(*c*)
o Premium in respect of	Exempt	12(*a*) & 2(1)(*c*)

ICA		
o Discount in respect of ICA	Exempt	12(*a*) & 2(1)(*c*)
o Acquisition of Rental Agreement	Taxable at 14%	2(4)(*b*) & 7(1)(*a*)
1.29 <u>Short Term Money Market Transactions</u>		
• Trading (as Principal)	Exempt	12(*a*) & 2(1)(*c*)
• Brokerage Fee	Taxable at 14%	7(1)(*a*)
• Collection Fee in respect of Dividend, Interest, Coupon	Taxable at 14%	7(1)(*a*)
1.30 <u>Government Stock, Treasury Bills and Other Capital Market Transactions</u>		
• Trading (as Principal)	Exempt	12(*a*) & 2(1)(*c*)
• Brokerage Fee	Taxable at 14%	7(1)(*a*)
• Collection Fee in respect of Dividend, Interest, Coupon	Taxable at 14%	7(1)(*a*)
1.31 <u>Debentures</u>		
• Trading (as Principal)	Exempt	12(*a*) & 2(1)(*c*)
• Brokerage Fee	Taxable at 14%	7(1)(*a*)
• Coupon Collection Fee on behalf of Third Parties	Taxable at 14%	7(1)(*a*)
1.32 <u>Underwriting</u>		
• Share, Debenture Transaction Fee	Taxable at 14%	7(1)(a)
• Acquisition of Debt, Equity and participatory Securities at a Discount	Exempt	12(*a*) & 2(1)(*c*)(*d*)
1.33 <u>Banking</u>		
• Settlement Charge for Transfer of Funds	Taxable at 14%	7(1)(*a*)

• Communication – Fax Charge Duplicate Statements	Taxable at 14%	7(1)(*a*)
• Commission on Foreign Currency Trade	Taxable at 14%	7(1)(*a*)
• Bank Marking Cheque Fee	Taxable at 14%	7(1)(*a*)
• Statements Fee	Taxable at 14%	7(1)(*a*)
• Transaction Service Fee	Taxable at 14%	7(1)(*a*)
• Transfer of Funds Fee	Taxable at 14%	7(1)(*a*)
1.34 <u>Property in Possession (PIP's)</u>		
• Sale of PIP's	Taxable at 14%	7(1)(*a*)
• Rental Income - Residential	Exempt	12(*c*)
• Rental Income – Other than Residential	Taxable at 14%	7(1)(*a*)
• Occupational Interest / Rental - Residential	Exempt	12(*c*)
• Occupational Interest / Rental – Other than Residential	Taxable at 14%	7(1)(*a*)
1.35 <u>Income Tax Fee</u>		
• Advising on Income Tax Fee	Taxable at 14%	7(1)(*a*)
• Preparing Tax Returns Fee	Taxable at 14%	7(1)(*a*)
1.36 <u>Economic Services</u>		
• Advisory Tapes Fee	Taxable at 14%	7(1)(*a*)
• Economic Comment Fee	Taxable at 14%	7(1)(*a*)
1.37 <u>Investment Service</u>		
• Portfolio Management (Discretionary & Non-		

Discretionary)		
o Initial Structuring Fee	Taxable at 14%	7(1)(*a*)
o Management Fee	Taxable at 14%	7(1)(*a*)
o Profit Margin – For Own Account	Exempt	12(*a*)&2(1)(*c)(d)(f)*
o Management of Superannuation Schemes Fee	Taxable at 14%	7(1)(*a*)
1.38 <u>Insurance Services</u>		
• Long Term (Life Insurance)		
o Life Insurance (Premiums)	Exempt	12(*a*) & 2(1)(i)
o Reinsurance Life Insurance (Premiums)	Exempt	12(*a*) & 2(1)(*i*)
o Brokerage Commission Insurance or Reinsurance	Taxable at 14%	7(1)(*a*)
• Short Term		
o Brokerage Commission	Taxable at 14%	7(1)(*a*)
o Premium Collection Fee	Taxable at 14%	7(1)(*a*)
o Insurance Premiums	Taxable at 14%	7(1)(*a*)
o Travel Insurance : Local	Taxable at 14%	7(1)(*a*)
o Travel Insurance : International	Zero-Rated	11(2)(*d*)
1.39 <u>Safe Custody Services</u>		
• Rentals of Safety Deposit Boxes	Taxable at 14%	7(1)(*a*)
1.40 Payroll Services Fee (Bureau)	Taxable at 14%	7(1)(*a*)
1.41 Fee for Power of Attorney	Taxable at 14%	7(1)(*a*)

* - Where an instruction is received from a foreign bank, the resident bank will not be in a position to establish whether the foreign bank's client is a "resident of the Republic" as defined in section 1 of the VAT Act. A direction is therefore made in

terms of section 72 to allow these services to be supplied at the zero rate (Refer to above table).

- Where the non-resident is not in the Republic at the time the services are rendered, the zero rate may apply provided the provisions of sections 11(2)(*l*) and 11(3) are complied with (Refer to above table).

The above will show you the different type of products offered by financial institutions in terms of general banking services and help understand how VAT is treated in terms of general banking income, i.e. what is standard rate, zero-rated and exempt supplies.[26]

[26] The list of service is documented and agreed between BASA and SARS.

5.5 Chapter 5 - Summary

In summary some legislation in the Value-Added Tax Act No. 89 of 1991 is still not clearly defined and is often left to the interpretation of the vendor / individual. This is due to certain aspects of the VAT Act being so broad which leads to court battles between SARS and the vendors on the interpretation of the VAT Act.

It is recommended that in real terms there should be a standard VAT Act that all countries should comply with. Tax experts, SARS officials from around the world, representing their country should make recommendation of what they think should be in the Act, thereby making one Act which is applicable to all vendors/ individuals. However, I understand this will not be practical.

The author recommends that the wording in Section 14 state as a general rule, “in a situation where there is cause to believe section 11(2)(*k*) and section 14 could be applicable to a certain transaction, that section 14 will over rule it”. By doing this, the vendor will know VAT is payable and will help clear SARS legislation on this matter.

In conclusion researching the above topic has really opened my understanding of the implications of importing services into the Republic by a vendor or non-vendor. The case study (Metropolitan Life Limited Vs Commissioner for South African Revenue Service) clearly pointed out that tax should be considered in context. It was a really interesting case. The discussion in that case, clearly showed the difference in application of section 11(2)(*k*) and section 14.

In addition by researching the type of services offered by a bank to customers and the VAT treatment of general banking income as well as which sections of the VAT Act is applicable to those services has enhanced my understanding of how banking income is treated in the bank. It highlighted the intricacies and difficulties you encounter when dealing with VAT on financial services and emphasised the variety of services offered by the bank.

6. REFERENCE LIST

6.1) Books

Deloitte., 2013, VAT Handbook 9th-edn.

Lexis-Nexis., 2011/2012, Indirect Tax Handbook, LexisNexis, Durban

Lexis-Nexis., 2013/2014, Professional Tax Handbook, 23rd edn, LexisNexis, Durban

Mervyn, D., 2012, The vat treatment of imported Services, Siber Ink, Johannesburg.

6.2) World Wide Web

Gov.UK, The reverse VAT charged, viewed on 26 March 2015, from https://www.gov.uk/vat-imports-acquisitions-and-purchases-from-abroad

Gov.UK, The reverse VAT charged, viewed on 19 February 2010, from www.hmrc.gov.uk/VAT/managing/international/imports/importing.htm.

Leeds Business Consultants, Imports and purchases from abroad, viewed 17 February 2010, from http://leedsbusinessltd.com/vatplam.html.

Leeds Business Consultants, VAT Planning and Compliance, viewed 26 March 2015, from http://leedsbusinessltd.com/vatplam.html.

6.3) Court Cases

Metropolitan Life Limited V C:SARS, (70 SATC 162), viewed on 20 February 2010, from www.sars.gov.za/home.asp?pid=6723.

Commissioner for SARS V De Beers, 2012, 503/2011, ZASCA 103

6.4) Other References

Badenhorst, G., 2014, email, 13 February, gbadenhorst@ensafrica.com

1. Author: Badenhorst, G
2. Date (year): 2014,
3. Identifier: email,
4. Date: 13 February,
5. Address: gbadenhorst@ensafrica

Grobbelaar, R., 2010, email, 15 February, rudig@absa.co.za

1. Author: Grobbelaar, R
2. Date (year): 2010,
3. Identifier: email,
4. Date: 15 February,
5. Address: rudig@absa.co.za

6.5) Statutes

Value-Added Tax Act No. 89 of 1991