

THE NECESSITY TO INTRODUCE “PLACE OF SUPPLY” RULES FROM A VAT PERSPECTIVE FOR TELECOMMUNICATION SERVICES IN SOUTH AFRICA

by

Anna Herculina Buitenweg
26023629

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Study leader:
Karl Homeier

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ABSTRACT

South Africa's VAT legislation has specific value and time of supply rules. It does not have a specific section for place of supply rules, but this is however incorporated within the various sections of the Act. Still, there is sometimes uncertainty regarding what the place of supply would be, especially when it comes to telecommunication services across borders.

Some foreign countries, like European countries, have specific place of supply rules. However, South Africa does not specify where the specific place of supply of telecommunication services should be. International roaming complicates matters as a South African resident can visit a foreign country and make calls from the foreign country to yet another country, but is then billed in South Africa at a rate including VAT at 14%. One could argue that this is not the correct treatment as it could be deemed an export of services, which would generally be zero-rated.

During the interviews it was discovered that the foreign network operator billed the South African network operator for the services rendered to the South African operator's customer in the foreign country. Some operators levy VAT on this charge at that country's VAT rate, whereas other countries' operators will levy at a rate of zero percent. However, the South African resident is levied at a charge including VAT at 14%, regardless of whether the operator was charged VAT by the foreign operator or not.

Costs of international roaming are already high and, therefore, international roaming can become very expensive for customers. The researcher suggests that the agreement be revisited and that VAT is only charged in the country where the consumption of the supplies takes place, or in the case of a service, where the service is utilized. It is however much more complex with telecommunication services as there are various networks that go through numerous countries, and can include the customer's home country.

Key words:

Value-Added tax

Melbourne Agreement

Place of supply

OPSOMMING

Suid-Afrika se BTW-wetgewing het reëls wat spesifieke waarde en tyd van lewering bepaal. Hoewel dit nie 'n spesifieke artikel het met reëls wat handel oor die plek van lewering nie, is dit egter in die verskillende artikels van die wet geïnkorporeer. Tog is daar soms onsekerheid oor waar die plek van lewering is, veral wanneer dit telekommunikasiedienste raak wat oor grense verskaf word.

Sommige lande, byvoorbeeld Europese lande, het spesifieke reëls wat plek van lewering bepaal. Suid-Afrika spesifiseer egter nie die spesifieke plek van lewering van telekommunikasiedienste nie. Internasionale selfoon swerwery kompliseer sake omdat 'n Suid-Afrikaanse inwoner die buiteland kan besoek en oproepe van daar na nog 'n ander land maak, maar steeds in Suid-Afrika gefaktureer word teen 'n koers insluitend BTW teen 14%. 'n Mens kan argumenteer dat dit nie die regte hantering is nie omdat dit 'n uitvoer van dienste geag kan word, wat gewoonlik genulkoers word.

Daar is tydens die onderhoude ontdek dat die buitelandse netwerk-operateur die Suid-Afrikaanse netwerk-operateur faktureer vir die dienste aan die Suid-Afrikaanse operateur se kliënte in die buiteland. Sommige operateurs hef BTW op hierdie koste teen die koers van daardie land se BTW, terwyl ander lande se operateurs teen 'n koers van nul persent sal hef. Die Suid-Afrikaanse inwoner word egter teen 'n koste insluitend BTW van 14% gefaktureer, ongeag of die operateur deur die buitelandse operateur teen 'n koste insluitend BTW van 0% of 'n ander persentasie gefaktureer is.

Koste van internasionale selfoon swerwery word gehef in die land waar die voorrade gebruik word, of in die geval van 'n diens, waar die diens gebruik word. Die koste kan baie hoog wees. Dit is egter baie meer kompleks met telekommunikasiedienste omdat daar verskeie netwerke is wat deur talle lande kan gaan. Dit kan moontlik in die kliënt se land van herkoms ook wees.

Sleutelwoorde:

Belasting op Toegevoegde Waarde;

Melbourne-ooreenkoms;

Plek van lewering

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1 INTRODUCTION

1.1 BACKGROUND

“Government's view of the economy could be summed up in a few short phrases: If it moves, tax it. If it keeps moving, regulate it. And if it stops moving, subsidize it” (Reagan, 2010). In the past it was easy to determine the location for the supply of telecommunications services, as the user of a telephone had a fixed phone and a billing address in the taxing country (Pataki & Urbach, 1996:91). It was thus effortless to determine the location, or put differently, the place of the supply. The supplier was obliged to levy Value Added Tax (VAT) on the services supplied, as the services were to people or businesses located in the supplier's country of residence. That is, if the country the supplier resides in imposes a VAT system and the supplier is therefore registered as a VAT vendor. Currently however, mobile phones have become such an integral part of people's lives, and because of their mobility, it is difficult to determine where actual consumption or usage of the services take place (OECD, 2006:1).

The French were one of the first nations to impose a primitive VAT system after World War II. It was imposed to “finance the operations of the European Economic Community” (Schenk & Oldman, 2007:17). Only in 1986 did New Zealand adopt a VAT system (goods and services tax (GST)), based on the European VAT style, but made it much broader in order to suit their needs. This is referred to as a modern VAT system, whereas the European system is more traditional (Krever, 2008:13-17). South Africa and other countries such as Australia, Namibia and Botswana copied this system and modified it to fulfil their own specific needs by focussing on problem areas. Japan also has a “Consumption Tax” similar to South Africa's VAT (Schenk & Oldman, 2007:18).

VAT is an indirect tax, as the tax is already included in the market price of the goods or service and it is collected by the seller. The seller then is obligated to pay this tax to the South African Revenue Service (SARS). It therefore means that VAT is levied on commodities even though the consumer has not yet received them. As a supplier in the production chain sells a raw material, the next buyer pays the VAT and the previous supplier claims the VAT back. Ultimately the consumer buys the goods/commodity but cannot claim the VAT back, unless it is for making a taxable supply (Schenk & Oldman, 2007:5).

1.2 PROBLEM STATEMENT

The VAT Act No. 89 of 1991 (hereafter referred to as the “Act”) provides for time of supply rules in section 9 and value of supply rules in section 10, but the major problem that arises with telecommunications services is deciding which country has taxing rights in respect of VAT. Many other countries have place of supply rules specifically for telecommunications services, but South Africa does not. This presents the problem of double taxation, as each country could deem the service to be rendered in their country and thus each one would be inclined to levy VAT on the supply. This could occur when a New Zealand resident visits a European country and makes use of roaming services. New Zealand determines the place of supply as being the place where the supplier is located, whereas the European countries deem the service to be rendered where the consumer is located. Thus, VAT will be levied in both New Zealand and the European country. De Wet and Du Plessis (2004:276) state that “in South Africa there are currently no policy documents, tax court decisions or relevant publications focusing on the VAT treatment of electronic commerce operations”. The same problem applies to the provision of telecommunication services.

1.3 PURPOSE STATEMENT

The main purpose of this study is to determine whether South Africa needs to consider drafting and implementing place of supply rules in order to facilitate the process of deciding which country should levy VAT when it comes to telecommunications services. When considering VAT, one must look at the time of supply of the service, the value of

supply and the place of supply. The place of supply will indicate the jurisdiction in which the supply will be Vatable. Traditionally, this was a straightforward concept and rules could easily be applied. Electronic commerce, and therefore also telecommunication services, has complicated this issue (De Wet & Du Plessis, 2004:277) of the place of supply and ultimately, the country which should charge the VAT, is not clear. An empirical study was performed by the author in order to determine how South African telecommunications service providers currently account for VAT on the supply of their services as well as an exploratory study to determine how other countries apply VAT rules to telecommunication services.

1.4 RESEARCH OBJECTIVES

The research objectives are:

- to determine how the South African VAT treatment of telecommunications services compare to that of other countries and to make recommendations based on the result of the study performed
- to determine if place of supply rules on telecommunication services are necessary for the South African VAT legislation
- to determine where the effective use and enjoyment of telecommunication services is and how the place of supply for telecommunication services is currently applied in practice in countries which have place of supply rules
- to gather knowledge on how the South African VAT policy is designed to cater for telecommunications services.

1.5 IMPORTANCE AND BENEFITS OF THE PROPOSED STUDY

South African tax practitioners employed by telecommunication service providers could have a dilemma in accounting for VAT on telecommunications services provided as South Africa does not have specific place of supply rules for telecommunication services in the Act. Cell C, MTN and Vodacom are among the providers in South Africa and they have service networks all over the country. With the advent of mobile roaming, which has become a part of everyday life for many people, especially business men and women, it now has to be decided whether these local providers should levy VAT on the use of their

networks when foreign visitors make use of them when phoning from their internationally linked cellular phones when visiting South Africa. Should the foreign visitor's home country service provider not rather be liable to levy VAT as they are the contracted service provider? Without place of supply rules, it is difficult to make a decision as to who should be the party responsible for levying VAT. This study will aim to determine whether place of supply rules need to be implemented in South Africa, or whether the current legislation is sufficient.

1.6 DELIMITATIONS

An empirical study was performed where the tax practitioners of South African telecommunication service providers were requested to participate through interviews in order to determine the difficulties they experience when cross-border services are supplied to their customers. The tax practitioners involved in calculating or reviewing the VAT liability of telecommunication service providers in other countries were not contacted as it was too time consuming and expensive to locate them and to get them to participate in the study. An exploratory study of their legislation was carried out.

Only supplies of cellular phone services, specifically international mobile roaming, was discussed. E-commerce or the provision of internet facilities are therefore not in the scope of this research study. This would make the study too broad.

When doing the comparative analysis between the different countries, and their VAT treatment in connection with telecommunication services, only certain countries with similar modern VAT systems were considered and analysed to compare their VAT treatment to that of South Africa. A few countries with a different VAT system (traditional) were also considered as it is relevant to identify the differences between the different systems.

As there is no Act or Regulation passed by South African law, the rules are not clear. The tax practitioners may thus give their own interpretations, perspectives and opinions which may not always be what was intended by the law.

The conclusion is only suggestive, not conclusive. The conclusion as to whether or not South Africa needs place of supply rules is merely an opinion and cannot be presented as a fact.

1.7 ASSUMPTIONS

The assumption was made that no person that “imports” a service into a foreign country by using his cellular phone for roaming in that country, would declare this as an imported service for VAT purposes.

It was also assumed that all participants gave correct and accurate responses that would not negatively influence the conclusion reached by this study. It was assumed that the person interviewed was an expert in the field of VAT on telecommunications and that he or she was highly qualified as they held reputable positions in the companies where he or she was employed.

It was assumed that the information obtained was from trustworthy sources and that this information could be taken as correct.

1.8 DEFINITION OF KEY TERMS

Accession: “The process of adding a country to an international agreement...” (Deardorff, 2001).

Accession country: “A country that is waiting to become a member of the European Union” (Deardorff, 2001).

Activity: “the state or quality of being active” (Dictionary.com, 2010).

Bundling: “the practice of joining related products together for the purpose of selling them as a single unit”. This usually occurs where the features of two or more products and services are such that it would be more beneficial for the consumer to purchase the

package rather than the individual offerings. An example of this would be local and long distance services when using cellphones or landlines (InvestorWords.com, 2010).

Consumption: “Expenditure during a particular period on goods and services used in satisfaction of needs and wants” (BusinessDictionary.com, 2010).

E-commerce: “Business conducted through the use of computers, telephones, fax machines...or other electronic appliances... without the exchange of paper-based documents” (BusinessDictionary.com, 2010).

Enterprise: “in the case of a vendor, any enterprise or activity which is carried on continuously or regularly by any person in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial...nature...” (Section 1 of the VAT Act (59/1991)).

Enterprise has also been defined by the Goods and Service Tax Act (55/1999) of Australia as an activity that takes place in Australia in the form of a business, or an adventure that is trade in nature. This trade must be regularly carried on.

Global Systems for Mobile Communications: This is a specific type of encoding that allows cellphones from different network operators to be able to communicate with one another. It is thus necessary to have this encoding even for local use (Cornelissen, G. 2012).

Goods and Services Tax (GST): “Goods and services tax (GST) is a tax on most goods and services in New Zealand, most imported goods, and certain imported services. GST is added to the price of taxable goods and services at a rate of 15%” (Inland Revenue, 2011).

Imported service: “A supply of services that is made by a supplier who is resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies” (Section 1 of the VAT Act (59/1991)).

International mobile roaming: “The ability for a mobile customer to make and receive voice calls, send and receive data, or access other services, when travelling outside the geographical coverage area of the home operator’s network, while using a visited operator’s network but being billed by the home operator. The user’s mobile phone number also remains the same” (International Telecommunications Union, 2008:4).

Interstate: “...existing or carried on between states, especially of the United States (US)” (AskOxford, 2010).

Inter-operator tariff: “The tariff the visited network levies on the home network for providing outgoing voice...services...to the home network’s customers” (Ministry of Economic Development of New Zealand and the Department of Broadband, Communications and the Digital Economy of Australia, 2010:4).

Intrastate: “Relating to or existing within the boundaries of a state” (The free dictionary, 2010).

Member State: “The territory of each Member State of the Community to which the Treaty establishing the European Community is applicable, in accordance with Article 299 of that Treaty” (European Union, 2006).

Network: “A large system consisting of many similar parts that are connected together to allow movement or communication between or along the parts or between the parts and a control centre” (Cambridge Dictionaries, 2010).

Output tax: Output tax is payable in three instances (from a South African VAT perspective):

- on the supply of goods and services, by a vendor in the course or furtherance of an enterprise by him
- on the importation of any good into the Republic
- on the supply of any imported service into the Republic (Section 7(1) of the VAT Act (59/1991)).

Place of supply of services: “Where the service is ‘rendered,’ or, as a secondary alternative, the usual place of residence of an individual supplying the service or the company where the supplying country is legally incorporated” (Tait, 1988:371).

Republic: The Republic of South Africa, including the territorial waters (Section 1 of the VAT Act (59/1991)).

Roam: “To move about or travel, especially without a clear idea of what you are going to do” (Cambridge Dictionaries, 2010). Discussed in section 4.2.1.

Services: “Anything done or to be done, including... the making available of any facility or advantage, but excluding the supply of goods” (Section 1 of the VAT Act (59/1991)).

South African Revenue Service (SARS): SARS is the tax-collecting agency of the South African Government. It collects revenue and ensures that the law is complied with (Wikipedia, not dated).

Subscriber Identity Module (SIM) card: “The SIM holds personal identity information, cellphone number...” (Kayne, 2010).

Supplier: This is the person that is supplying the goods or the service (Section 1 of the VAT Act (59/1991)).

Tax practitioner: This would typically be the person responsible for completing and submitting the tax return of the telecommunication service provider company, or the person reviewing the VAT return.

Taxable activity: “an activity which is carried on continuously or regularly by any person in Botswana...that involves...the supply of goods or services for consideration” (Botswana VAT Act (2000)).

Taxable supply: The supply of goods or services on which VAT is chargeable as per the definition of “output tax” above (Section 1 of the VAT Act (59/1991)).

Telecommunications: “Transmitting, relaying or receiving codes, sounds or images by wire, radio or any other electromagnetic method” (Japan Consumption Tax Act 108/1988:1997).

Vendor: Any person who is required to register for VAT purposes under section 23 of the VAT Act (Section 1 of the VAT Act (59/1991)).

Value-Added Tax (VAT): It is a consumption tax, which implies that it is a tax on the purchase price for the buyer, and for the seller it is a tax that is charged only on the value added to a product by that stage of its manufacturing (Wikipedia, not dated).

Zero-rated supply: Where goods or services are charged at a VAT rate of zero percent (Section 11 of the VAT Act (59/1991)).

For purposes of this proposal, Table 1 below gives the meaning of the abbreviations utilised.

Table 1: Abbreviations used in this document

Abbreviation	Meaning
DTI	Dial Through International
GSM	Global System for Mobile Communications
GST	Goods and Services Tax
ITR	International Telecommunication Regulations
IOT	Inter-Operator Tariff
Na	Not Applicable
OECD	Organisation for Economic Co-operation and Development
Republic	The Republic of South Africa
RSA	The Republic of South Africa
SARS	South African Revenue Service
SIM	Subscriber Identity Module
States	States in the United States of America
VAT	Value Added Tax

2 INTERNATIONAL ROAMING

2.1 HOW DOES INTERNATIONAL ROAMING WORK

In order to better understand the problem of VAT on international roaming, the technical aspects of how cellphone roaming works needs to be explained. According to the definition obtained in the definition section, international mobile roaming is when a resident of one country visits another country and is able to use the same SIM in the visited country to communicate using the cellphone, without having to change his or her number.

International roaming services usually work as follows:

- When a GSM telephone is used, it will automatically detect the various available networks. If this is in the home country, it will select the operator who provided the customer with the SIM and with whom the customer has the cellphone contract. When a customer visits a foreign country, the “GSM handset detects the available networks” automatically (Sutherland, 2001:2).
- Once the visitor attempts to make a call, the visited country’s network operator searches to identify who the home country’s network operator is. In order for roaming to occur, there has to be a roaming agreement between the home country and visited country’s network operators.
- If an agreement between the two operators is in place, the visited network operator communicates with the home network to ensure whether it should allow the customer to roam or not. This would, therefore, mean that the customer has to arrange with his or her home network operator to allow roaming services before the customer visits the foreign country.
- Once the visited network receives positive confirmation that it can allow the customer to roam, it “creates a temporary subscriber record for the device. The home network updates its information to indicate that the subscriber is using the host network to ensure that any information sent to that device will be correctly routed”.
- Depending on the type of the call, calls “are routed by visited and/or international transit and/or any fixed or mobile and/or home networks”.

- The visited network will calculate its international mobile roaming charges by keeping a record and details of all calls made.
- The home operator is then billed by the visited operator for the charges incurred. This would be at the wholesale price.
- The home operator would then, in turn, charge the customer for the international roaming services at the retail price (International Telecommunications Union, 2008:4).

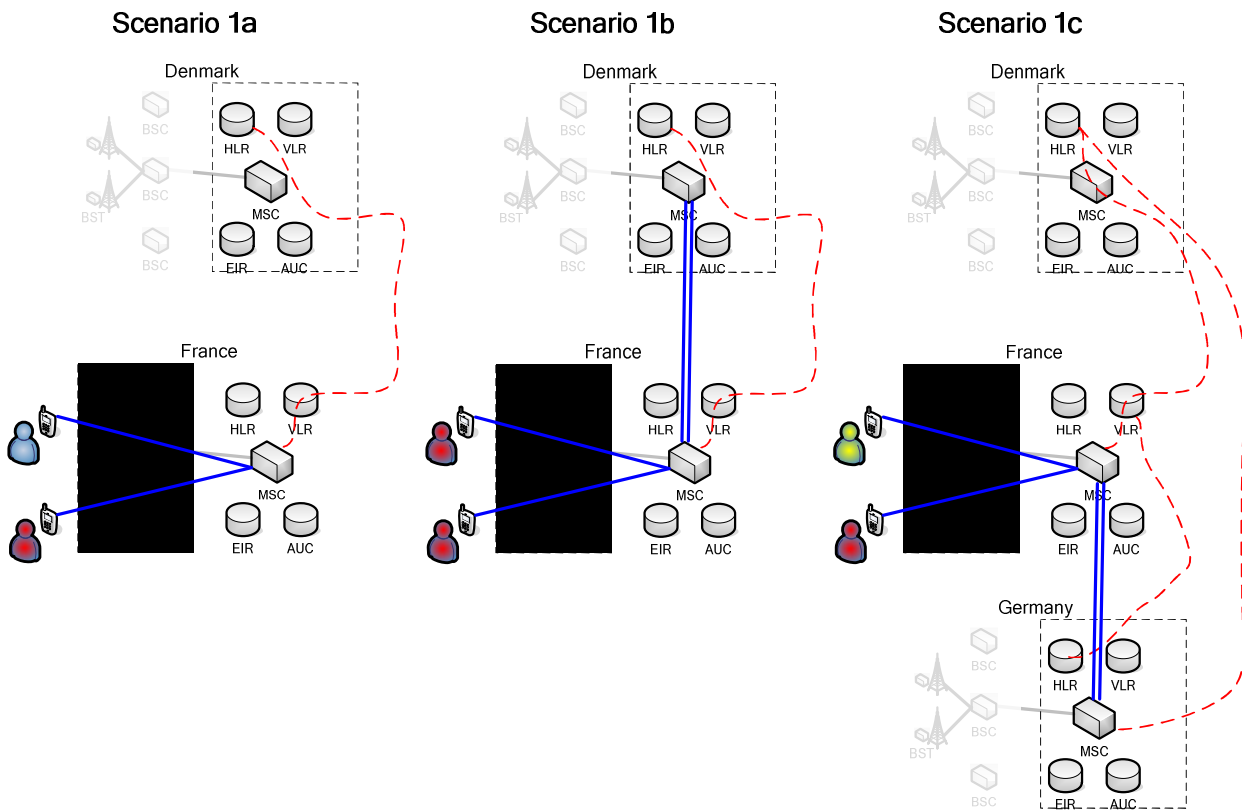
A technical explanation of international mobile roaming between two GSM networks

"In a GSM network, a call originated at a mobile device through the Base Station Subsystem (BSC) goes on to a Mobile Switching Center (MSC). The MSC contacts the Visiting Location Register (VLR). The precondition for registration by the VLR is that there is a roaming agreement between the visiting network and the user's home network. The VLR sends the location information of the mobile station to the subscriber's Home Location Register (HLR). In this way the HLR is always updated with regard to location information of subscribers registered in the network. The information sent to the HLR on GSM networks is normally the Signalling System 7 (SS7) address of the new VLR, although it may be a routing number. The MSC routes the call to a Gateway Mobile Switching Center (GMSC). The GMSC interrogates the called subscriber's Home Location Register (HLR) for a Mobile Station Roaming Number (MSRN), then uses the obtained MSRN to route the call to the correct MSC in which the called subscriber is present. The call then goes through the BSC to reach the destination device. There are always signalling communications between the visited and home operator when roaming, even when the call is routed inside a visited country."

Source: International Telecommunications Union (2008:5)

Note: In the figures below, the Danish user is Red, the French user is Blue and the German user is Yellow. Dashed red lines indicate signalling channels, and blue bold lines indicate voice channels.

Figure 1: Calls inside a visited country



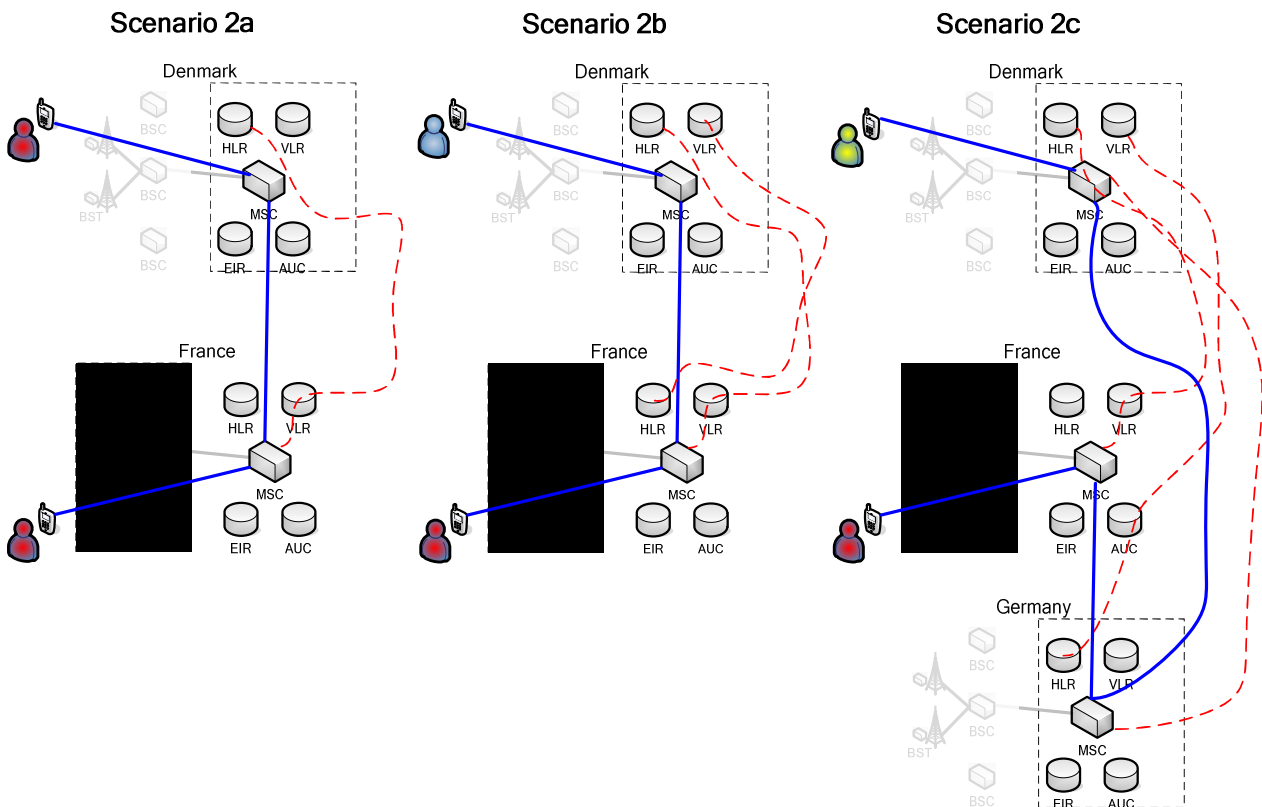
Source: Falch, Henten and Tadayoni (2007:4)

“1a) A Danish user travelling in France calls a French user staying in France. As seen, the call is routed locally in the visited country (France). The call set-up and switching are performed and maintained in France. However, even though the call is routed locally, there are signalling communications between Denmark and France. For the voice connection, one origination and one termination are deployed.

1b) A Danish user travelling in France calls another Danish user travelling in France. The call is routed to Denmark and the switching and call set-up are performed in Denmark. So apart from the origination and termination there are two international transits between France and Denmark included in order to maintain the connection. This routing method is called “tromboning”... which indicates that the voice channel is sent to the home network and back. This method is the common practice....

1c) A Danish user travelling in France calls a German user travelling in France. This is like the 1b scenario, but here the call is sent to Germany. Also additional signalling is needed.” (Falch *et al.*, 2007:4-5)

Figure 2: Calls from a visited country to the home country



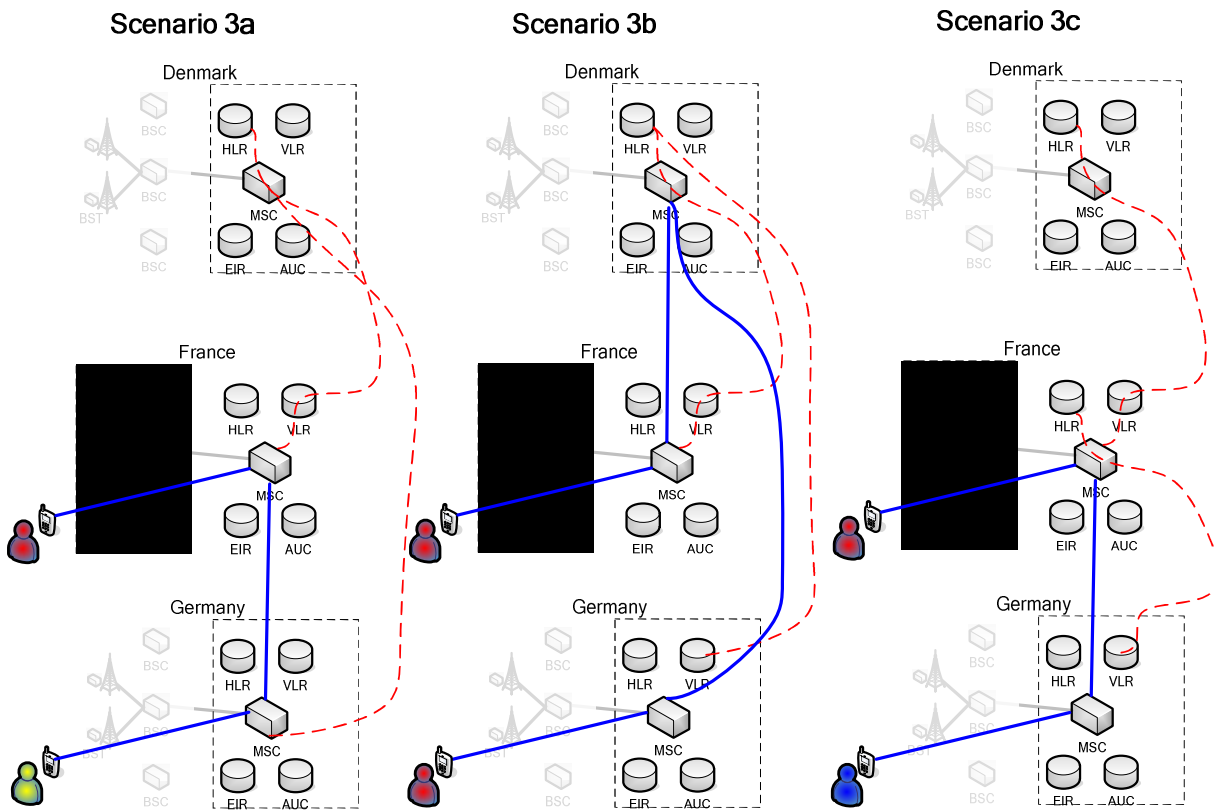
Source: Falch *et al.* (2007:5)

“2a) A Danish user travelling in France calls a Danish user staying in Denmark. The call is sent to Denmark. The call set up is performed in Denmark. There is one origination, one termination and one transit.

2b) A Danish user travelling in France calls a French user travelling in Denmark. The call set up is maintained in France. There is one origination, one termination and one transit. There is additional signalling between VLR in Denmark and HLR in France.

2c) A Danish user travelling in France calls a German user travelling in Denmark. The call is sent to Germany. The call set-up is performed in Germany. There is one origination, one termination, one transit between France and Germany and one transit between Germany and Denmark. There is additional signalling between Denmark and Germany.” (Falch *et al.* 2007:5-6)

Figure 3: Calls from a visited country to a third country



Source: Falch *et al.* (2007:6)

“3a) A Danish user travelling in France calls a German user staying in Germany. The call is sent to Germany. The call set-up is performed in Germany. There is one origination, one termination and one transit.

3b) A Danish user travelling in France calls a Danish user travelling in Germany. The call is sent to Denmark. The call set up is performed and maintained in Denmark. There is one origination, one termination, one transit between France and Denmark and one transit between Denmark and Germany.

3c) A Danish user travelling in France calls a French user travelling in Germany. The call set up is performed in France. There is one origination, one termination and one transit between France and Germany.” (Falch *et al.* 2007:6)

2.2 COSTS OF INTERNATIONAL ROAMING

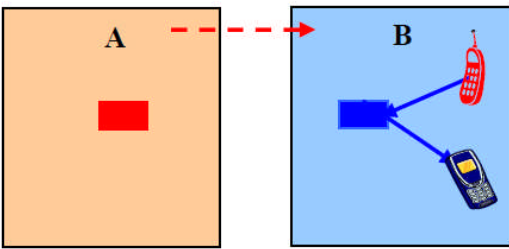
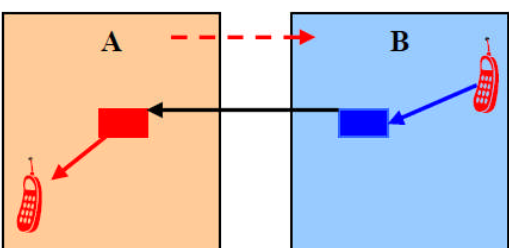
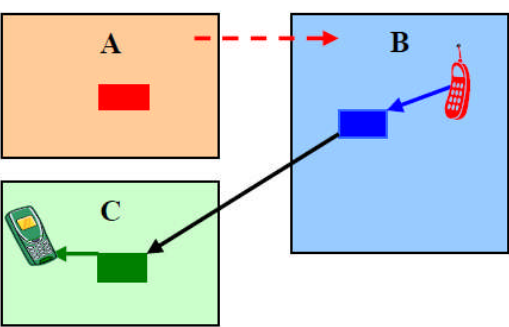
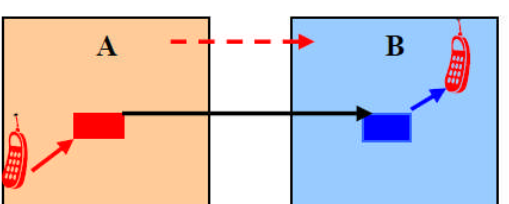
Sutherland (2010:25) concluded that it is very expensive for a local resident to roam when visiting foreign countries. He suggests that it would be cheaper to rather obtain a new SIM in the country being visited. However, this would cause inconvenience and is impractical as the user's number would change and therefore colleagues and friends would need to be advised of this new temporary number. It is already expensive to roam and since VAT is also charged in addition to all the roaming charges, this makes international roaming even more expensive. The International Telecommunication Union (2008:3) stated in 2008 that telecommunications analysts estimated that between five and ten per cent of service providers' revenue and profits are generated from international mobile roaming rates. Because of the lack of a convenient alternative to roaming a cellphone, customers unfortunately have to incur these costs no matter how high.

The wholesale costs that are typically charged between the visited operator and home operator (known as IOT) for roaming services are for (Jervelund, Karlsen & Olesen, 2007:24):

- mobile origination, which is the signal sent from the mobile phone to the network;
- mobile termination, which is the "signal to the receiver of a phone call on a mobile network";
- fixed termination, being the "signal to the receiver of a phone call on a fixed network";
- international transit, which is the "traffic between networks in different countries"; and
- roaming specific costs "such as billing and signalling".

Figure 4 below, shows that there are also retail-specific costs incurred. According to the author's view, these are the normal costs that the telecommunication service providers charge their customers.

Figure 4: Cost structure of international mobile roaming services

Call type	Cost elements	Illustration
<p>Call inside a visited country A traveler from country A goes to country B and makes a call to a subscriber of country B.</p>	Mobile origination in country B + <i>[National transit in country B]</i> + Mobile termination in country B + Roaming-specific costs + Retail-specific costs	
<p>Call from a visited country to the home country A traveler from country A goes to country B and makes a call back home to a subscriber in country B.</p>	Mobile origination in country B + International transit + Mobile or fixed termination in country A + Roaming-specific costs + Retail-specific costs	
<p>Calls from a visited country to a third country A traveler from country A goes to country B and makes a call to a subscriber in country C.</p> <p>Note that country C may or may not be in a region where international roaming prices are regulated.</p>	Mobile origination in country B + International transit + Mobile or fixed termination in country A + Roaming-specific costs + Retail-specific costs	
<p>Receiving a call in a visited country A traveler from country A goes to country B and receives a call from either of the countries.</p>	Mobile termination in country B + International transit + Roaming specific costs + Retail specific costs	

Note: In some cases, international transit services might be used several times. For example, if a subscriber of country A goes to country B and makes a call to a subscriber of country C, which is visiting country A at the moment of the call. This would lead to 1 mobile origination, 2 international transits (country A – country C, country C – country B), 1 mobile or fixed termination plus roaming-specific and retail-specific costs. For a detailed explanation please refer to Falch, M., Henten, A., Tadayoni, R. (2007), Regulation of international roaming charges: the way to cost based prices?

Source: International Telecommunications Union (2008:7)

It is clear that the costs of international roaming are high and it is therefore imperative that VAT should not be levied on supplies that may be zero-rated.

3 LITERATURE REVIEW

Legislation on VAT in a specific country was drafted in order to provide for output tax on the supply of services. Legislators however did not realise the speed at which technology would emerge (Gordhan, 2010:5) and so now, in a technology driven world, people are faced with uncertainty as to how the supply of telecommunications services should be treated.

With international mobile roaming services it is difficult to ascertain at which rate VAT should be levied. Should it be zero-rated, as is the case when a service is exported and used in another country (section 11(1)(a) of the VAT Act 89/1991:762); or should it be charged at 14 per cent as consumption takes place in the Republic of South Africa and the home supplier is located in the Republic (section 7(3)(a) of the VAT Act 89/1991:755)? Should additional VAT be accounted for when a service is imported (section 7(1)(c) of the VAT Act 89/1991:755), as is the case when a South African citizen uses the cellphone services provided by a foreign provider? When facing these problems, it is wise to search deeper and determine what the Act, and other regulations that govern the telecommunications industry, state. One should also look at the origins of VAT and how different countries treat this problem.

Hobbes (in Metcalf, 1999:75) stated that an appropriate base for VAT would be consumption: "For what reason is there, that he which laboureth much, and sparing the fruits of his labour, consumeth little, should be more charged, than he that living idly getteth little, and spendeth all he gets: seeing the one hath no more protection from the Commonwealth than the other?" This suggests that the supply of a service should be taxed where consumption takes place, however it is not that straightforward to determine this place of consumption. It could be inappropriate for place of supply rules to consider where actual consumption took place after the supply is made, as VAT is levied on consumption when it has incurred. This would particularly be the case where an airtime voucher is bought in the Republic, but the resident then uses it while in another country. European and New Zealand VAT models follow this consumption-based approach, but in certain circumstances "place of effective use or enjoyment" rules must be applied (Millar, 2008:180-181).

3.1 A CONSUMPTION TAX

Value Added Tax, as it is known in South Africa, is a “consumption tax”, which means that at every point in the chain of suppliers, a tax has to be paid on the increase in value. "It is also a value added tax, applied at each stage of the commercial chain in proportion to the value added by suppliers in that chain, and its burden is intended to be borne by the end consumers" (Millar, 2007:137).

Although the VAT is based on consumption, consumption could mean different things to different people. Sijbren Cnossen explained the "difference between the economists' view of consumption" and how it is applied for VAT purposes by stating that VAT is a tax on sales that is “collected piecemeal throughout the entire production-distribution process”. Looking at consumption from a more theoretical perspective, one could ask whether VAT should be levied at the time of the consumption activity or rather when the expenditure is incurred? Although there is not a straightforward answer, as one has to determine whether one wants to follow a theoretical or rather a more practical legal approach, Cnossen's view is that “the tax is on consumption expenditures rather than on consumption activities” (Millar, 2007:137-138). This would suggest that the supply is when (and then possibly where) the expenditure was incurred and not necessarily when (or where) the activity took place.

According to De Wet and Du Plessis (2004:282), the OECD reaffirmed that tax should be paid to the revenue authorities where the supply was consumed.

3.2 TAX IMPLICATIONS OF TELECOMMUNICATIONS IN THE DIGITAL AGE

Laws regarding taxes on telecommunications were drafted many years ago, but the legislators never anticipated the rapid technological advances that have come about. The system in place is therefore not suitable for the current telecommunications market (Palladino & Mazer, 2000:4).

If an efficient VAT system is in place, this would prevent people from preferring one item or service above another purely because of the tax burden. This could have a negative effect on society as customers are reluctant to purchase a specific make of goods or service simply because they prefer the cheapest option, for instance, the one on which the least amount of VAT is levied. When looking at consumption it is noticed, that to a certain extent, telecommunication services are price inelastic, meaning that no matter how high the costs are to use the service, even the poor will have to pay this price because the service is a necessity to them (Palladino & Mazer, 2000:9).

The tax structure of services could be evaluated through either using satellites or through local area cable networks. The customers could then consider which one has the least amount of taxes imposed on it and then use that service if it is a necessity to them, as they cannot afford to pay expensive prices (Palladino & Mazer, 2000:9).

Compliance issues relating to correct taxing of services are evident with the provision of telecommunications services. In most circumstances even the telecommunication service provider companies are not reaching consensus as to who should impose tax. A report by the Federation of Tax Administrators in the United States of America indicated that there are forty-four states that tax intrastate telephone services and twenty-one states tax interstate telephone services. Having to decide whether sales tax (VAT) must be levied on calls made using prepaid airtime is also a problem. Some states are of the opinion that VAT must be levied as soon as the airtime card is purchased. This may result in exempt services being taxed. In a South African context, this would be where a South African citizen purchases a prepaid phone card from a South African service provider, but then goes on holiday to another country. The user may still be within reach of the signal provided by the South African network operator and make phone calls while in the foreign country, especially where the same network provider is also in the foreign country. Consumption therefore takes place outside South Africa and should be charged at zero per cent VAT as it is an export of a service, but 14 per cent was levied as the VAT was levied on the purchase as the place of actual consumption was unknown to the seller at the time of the purchase. Another possibility is that a citizen could also still be in his home country and make a long distance call to another country. In some countries, this would be a zero-rated supply as it is seen as an export of services. Others see it as a local supply

as the caller is in his home country, regardless of where he is phoning to. Again, one will have to look at which country applies which criteria as to where consumption is deemed to take place and who should charge VAT (Palladino & Mazer, 2000:10-11).

3.3 TYPES OF USERS

Before one can apply rules of where and how much VAT must be levied, one first has to identify the persons that make use of the services. According to Paltridge, Otsuka and Díaz-Pinés (2009:46), the different users that make use of roaming services can be classified into two categories. The first is the “outbound” user. This is where the user makes use of a SIM card of the tax authority’s home country, but uses this SIM card in another country. This would typically be the situation where a South African citizen has a mobile phone contract with, for example MTN, but activates roaming on his phone when visiting a foreign country and then makes calls from the foreign country. He is thus able to make phone calls from his holiday destination. The second is the “inbound” user. This is where a person uses his SIM card in the tax authority’s home country in question, but the SIM card is from a services provider of another country (the user in question’s home country).

3.4 IMPORTED SERVICES AND SECTION 11(2)(K)

According to section 7 of the Act, VAT needs to be paid on the importation of services by any person. Section 11(2)(k) on the other hand, allows the zero-rating to apply to services that are physically rendered elsewhere than in the Republic.

3.4.1 ITC 1812 and Metropolitan court cases

In ITC 1812 [(2006) 68 SATC 208] the vendor, a life-insurer, made use of international consultants. He believed that he could apply the s11(2)(k) zero-rating as he did not receive a service that was physically rendered in South Africa. In this case, the court held that s7(1)(c) had to be applied for the importation of a service, rather than the service being zero-rated in terms of s11(2)(k). This is because the Commissioner contended that the vendor received imported services that are not used for the purposes of making taxable

supplies as the supply of long term insurance is a financial service in terms of section 2(1)(i) and therefore constitutes an exempt supply. Although telecommunication services are not exempt, a similar situation occurs with telecommunication services provided to non-residents visiting South Africa and receiving network services in South Africa. The service is consumed in South Africa for purposes other than for the making of taxable supplies and therefore it is an importation of a service on which import tax should be levied.

In the Metropolitan Life Case [(2008) 70 SATC 162], there was also a dispute as to whether the zero-rating of s11(2)(k) could be applied, or whether s14(5)(b) of the VAT Act was applicable whereby the service could not be zero-rated. The Company is a life insurance company that provides life insurance to both local and international clients. It was held that both these sections could possibly be applied to this situation, but that one must look at the intention of the legislature and whether VAT at 14 per cent needed to be applied. The reasoning behind this is that the provision of life insurance is an exempt supply and therefore not in the making of taxable supplies. Therefore the zero-rating could not be applied. This case shows that legislation can be interpreted in different ways, one whereby one can charge VAT at 0%, and another where the rate of 14% needs to be applied.

According to De Wet and Du Plessis (2004:280), s11(2)(k), being since zero-rating is the basis of for services rendered physically elsewhere, it was amended to ensure that telecommunication services to persons using these services in the Republic would be required to pay VAT at 14% and not at 0%. Even though the satellite used is possibly located in a country other than South Africa, telecommunication services are not zero-rated if they are used in South Africa, regardless of where the supply physically takes place. This is according to the Explanatory Memorandum [on the Taxation Laws Amendment Bill, 1997], and is discussed below in 3.4.2.

3.4.2 Call back telecommunication services

The Explanatory Memorandum [on the Taxation Laws Amendment Bill, 1997] specifically mentions that residents who make use of "call back" telecommunication services instead

of using the local telecommunications services, have to account for VAT as this would constitute an imported service (SARS, 1997:9).

An American company called Rapid Link (previously DTI) operates a business whereby a South African resident can call them, but then ends the call immediately the call goes through. DTI then calls the person back and the original caller dials the number of the non-resident he wants to contact. DTI forwards the call and the user is billed in dollars at the end of the month. As DTI is an American company, no VAT is levied in South Africa as the supplier is not a resident. However, as DTI is supplying services in the Republic, they should register as VAT vendors as soon as they make taxable supplies in excess of R1,000,000 in any twelve month period in terms of the enterprise definition.

SARS offered an clarification in its explanatory memorandum when this was a newly inserted section in the Act. SARS said that it specifically wants to levy VAT on these types of transactions by including suppliers of call back services under the definition of an enterprise. None of the non-vendors that make use of these services declares the consumption (and in effect importation of the service) and thus do not pay VAT. The liability is now moved to the supplier to ensure that the VAT is paid to SARS. This seems to be exactly how the International Telecommunication Regulations suggest how telecommunication services are taxed, “in the country where the services are used” (SARS, 1997:9).

3.5 WHEN A SUPPLIER IS LIABLE TO LEVY VAT

3.5.1 South Africa

Section 7 of the VAT Act (89/1991), inter alia, states that output VAT must be levied by a vendor on the supply of services by him/her in the furtherance of any enterprise carried on by her/him in the Republic. According to the definition, this would suggest that if a non-resident regularly supplies services to persons in South Africa, the non-resident may have to register as a vendor. De Wet and Du Plessis (2004:279) stated that if any person, even if he/she is a non-resident, supplies telecommunication services to anyone who utilises such services in the Republic, that person is deemed to be carrying on an enterprise and

should thus register as a VAT vendor in South Africa. In addition, should a person supply services in excess of R1,000,000 in any twelve month period that person is deemed to be carrying on an enterprise. According to Niemand, De Swardt and Wiid (2011:35), the requirement that a person registers as a vendor is not dependent so much on where the supply of the service is made, but rather on “the place of the supplier’s business activities”. The difficulty is to determine whether an activity is being carried on, or not. The Act does not provide a definition of activity and the dictionary’s definition mentions a “conscious” act. If an Australian citizen uses his/her phone for roaming and comes to visit South Africa, he/she will be using South African networks in order to obtain a signal, but will be billed for his/her calls in Australia. The telecommunication providers from Australia do not know when a person will be visiting another country and therefore the Act is not a conscious decision to supply a service in another country. Even though the billing supplier is not in the Republic, the service is consumed here and the network of the Republic service providers is used.

In order to prevent other interpretations and arguments which would exempt suppliers from being liable for VAT, the Act was amended in 1997 to include “the activities of any person who continuously or regularly supplies telecommunication services to any person who utilizes such services in the Republic” as part of the definition of an enterprise to ensure that non-residents supplying telecommunication services to residents of the Republic are charged with VAT. However, amendment of the Act will only come into effect from a date to be proclaimed. Since 1997, no date has yet been proclaimed. Franck (2012) is of the view that there is no intention for (Section 1(b)(i)(iv) of the VAT Act (59/1991) to ever be enacted. At this stage it just causes confusion.

As Marco Gregg said, “As far as law is an expression of the ever changing society, any Code, sooner or later would prove itself inadequate to the purpose of legal certainty and simplification it is aimed at.” Justinian, a Roman Emperor, wanted to rewrite the Roman legal system in order to create a text that will never require any amendments or modifications (2010:1). Circumstances and situations do however change, therefore acts need to be amended and updated to keep up with technology.

3.5.2 New Zealand

Section 8(2) of the Goods and Services Tax Act (141/1985), inter alia, states that “goods and services shall be deemed to be supplied in New Zealand if the supplier is resident in New Zealand, and shall be deemed to be supplied outside New Zealand if the supplier is a non-resident”. The place of supply is thus driven by the residency of the supplier. Section 8(6) is, however, particularly applicable to telecommunication services and overrides 8(2). It states that these services are deemed to be “supplied in New Zealand if the supplier is a non-resident and a person, physically in New Zealand, initiates the supply from a telecommunications supplier, whether or not the person initiates the supply on behalf of another person”. Therefore, the place of supply is determined where the consumer is located. Section 8(7) goes on to state that section 8(6) is not applicable if the supplies are made between telecommunication service providers. According to the technical explanation given in Chapter 2, it is evident that with international roaming, the service provider in the country being visited by the consumer charges the consumer’s home country service provider for services supplied to the consumer. The transaction therefore, takes place between telecommunication suppliers and the normal rule of the place of supply being where the supplier is located. The uncertainty though, is who the supplier is, as the home country’s operator still bills its customer and is still involved when roaming takes place as the call passes through its network as indicated in Chapter 2. The foreign operator also provides a service as it supplies the network to the consumer to enable him to make calls.

3.5.3 Australia

According to Millar (2007:150-151), one of the major differences between the Australian GST and the United Kingdom’s VAT Act is that Australia does not have deeming provisions, but the United Kingdom occasionally deems something to be a supply where there is possible uncertainty. According to Millar, section 1 of the United Kingdom VAT Act of 1994, inter alia, states that the person who makes the supply of goods or a service is liable to pay the VAT at the time of the supply.

Section 9-5 of the Australian Goods and Services Tax Act (55/1999), inter alia, states that a taxable supply occurs where a supply is made for consideration and it is made in the course or furtherance of an enterprise and this supply must also be connected with Australia.

According to sections 9-20 and 195-1 of the Australian Goods and Services Tax Act (55/1999), an enterprise is seen as a regular activity carried on continuously and with trading taking place. In keeping with section 9-25, “an enterprise is carried on in Australia if the enterprise is carried on through a permanent establishment”. Again the problem arises as to what exactly this “activity” entails. Foreign telecommunication service providers are not necessarily carrying on business through permanent establishments. This could mean that VAT does not have to be levied on these foreign supplies.

The next problem to consider is whether the supply is connected to Australia. To what extent must it be connected and to what exactly does this connection imply? Section 9-25 of the Australian Goods and Services Tax Act (55/1999) gives situations of where goods are being supplied. If the goods are made available to the recipient in Australia, the recipient is deemed to be connected to Australia. A supply of goods is also connected to Australia if the goods are removed from Australia or brought to Australia. These rules are only applicable to goods. The fifth subsection provides for “supplies of anything else”, which would typically include services. If “the anything else is done in Australia” or “the supplier makes the supply through an enterprise that the supplier carries on in Australia”, the supply would be deemed to take place in Australia. Thus, if a foreigner is visiting Australia and makes phone calls from his cellular phone that has been activated for roaming, the service is being used in Australia and therefore the supply would be driven by the recipient who uses or enjoys a service. The Australian operator would be liable to pay VAT if the supply is enjoyed or used in Australia.

In section 13-5 of the Australian Goods and Services Tax Act (55/1999), it is interesting to note that importation of goods are mentioned and that VAT must be paid as soon as goods enter the country for home consumption. No mention is however, made about services that are imported into Australia.

3.5.4 Botswana

According to section 2 of Botswana's Value Added Tax Act of 2000, a taxable supply is where goods and services are supplied in the course or furtherance of a taxable activity. Section 16 requires that "every person who carries on a taxable activity" must register as a taxpayer. A taxable activity is described in section 5 as "an activity which is carried on continuously or regularly by any person in Botswana, or partly in Botswana". The same problem arises as to what exactly this "activity" entails. It needs to be determined whether the occasional use of networks by foreigners constitutes an activity carried on in Botswana.

Botswana, similarly to South Africa, only has time and value of supply rules and no place of supply rules. Therefore, the general principles of VAT are applied. Jitsing and Stern stated that in Botswana, tax on goods is based on the destination-based principle, which means that VAT is levied at the place where consumption takes place (2008:10). The taxation principle on services is that if services are imported but not for the making of taxable supplies, VAT should be levied on these imports.

3.5.5 Namibia

Section 6 of the Namibian VAT Act (10/2000), inter alia, states that VAT at 15 per cent is payable on all taxable supplies by registered persons, as well as on the importation of any goods or services. Like the Botswana VAT Act, section 4 of the Namibian VAT Act describes a taxable activity as "an activity which is carried on continuously or regularly by any person in Namibia, or partly in Namibia...that involves...the supply of goods or services to any other person for consideration". The same difficulties are thus faced in Namibia as in South Africa and Botswana as there is uncertainty as to where the activity takes place, who is liable for VAT and what exactly constitutes an activity. Likewise as in Botswana, the general principles of VAT are applied as there is no place of supply rules in Namibia. Jitsing and Stern stated that in Namibia, tax on goods is based on the destination-based principle, which means that VAT is levied at the place where consumption takes place (2008:10).

3.6 PLACE OF SUPPLY RULES IN OTHER LEGISLATION

When it comes to the supply of goods, it is easy to determine the place of consumption, as it is at the place where the goods are consumed, but with the supply of services: “to find a place of consumption of a service is somehow as frustrating as the pursuit of the tortoise by Achilles, as described in the Zeno’s paradox” (Greggi, 2010:2). South Africa does not have place of supply rules and this poses “uncertainty as to whether the business activities of a non-resident are ... conducted in South Africa” (SARS VAT News, 2011).

Cross-border use of cellular phones has become so easy through roaming that countries needed to design specific rules regulating the tax on such use. Countries using the European model introduced place of supply rules and considers the “place of effective use and enjoyment”, whereas countries under the New Zealand-type model have no specific rules. The only consideration is the location of the initiator of the supply. The initiator would be the person that controls the start of the supply. If the person cannot be identified, it will be the person who pays for the service. If this person cannot be identified, the initiator would be “the person who contracts for the supply” (Millar, 2008:213-214).

3.6.1 Determining the place of supply

In order to overcome the problem of where VAT is chargeable, some countries in addition to time and value of supply rules, have place of supply rules. One of these countries is Belgium. VAT is only charged on the supply of services that take place in Belgium. There are four criteria that the supply of service must be measured against in order to determine the place of supply (Bucket, 1990:36):

- place where goods are located
- place where the service is executed
- place where the service is used
- place where the customer is located.

In the case where none of these criteria can be applied, one must look at the place of establishment of the supplier (Bucket, 1990:36). If the supplier is based in Ireland and not

in Belgium, the service is deemed to have been supplied in Ireland and VAT must therefore be levied in Ireland. For a supplier to be based in Ireland, he needs to have an establishment in the country (Bucket, 1990:90). Other countries that have place of supply rules are the United Kingdom, Luxembourg, Spain, Italy and the Netherlands.

It would greatly simplify matters if all the countries could apply the same principles. The Australian Government looked at two factors when their policy was formulated. Their view is that VAT should not be levied on residents that are out of the country but making use of the Australian service providers, as the users are not in the country when consuming these services. Similarly, they do not want to tax foreigners that are visiting the country and making use of the foreigner's home country's service providers in Australia, as the service provider is not Australian, even though Australian networks are used. It is however inconsistent with Australia's treaty obligations under the International Telecommunication Regulations (ITRs) (Paltridge *et al.* 2009:50). "Where, in accordance with the national law of a country, a fiscal tax is levied on collection charges for international telecommunication services, this tax shall normally be collected only in respect of international services billed to customers in that country, unless other arrangements are made to meet special circumstances" (International Telecommunications Union, 1989:11). Australia therefore has "other arrangements" by which there is a decision not to levy VAT on either foreigners roaming in Australia, or locals roaming in other countries.

A contrasting view is that of India. As inbound users enjoy the service of another country in India, the consumption takes place in India and local networks are being used in order for them to be able to communicate. This would mean that the service must be subject to VAT in India (Paltridge *et al.* 2009:50).

It is mostly outbound users that make use of international mobile roaming services who are taxed in their home country. This is because of where the supply actually comes from. Another option that may be considered is where the "use and enjoyment" actually takes place. However, there is also no consensus reached in this regard. France, on the other hand, prefers to look at residency in order to determine where use and enjoyment takes place. If the user is from France, he is taxed on calls made even if he is outside of France at the time of the call. The United Kingdom looks at the "pure" use and enjoyment. They

are of the opinion that if a resident is out of the country and makes a call from the other country, the service is used in the other country and therefore not subject to VAT in the United Kingdom (Paltridge *et al.* 2009:50).

Since each country formulates their own policy about when VAT will be levied on the supply of telecommunication services, it is very possible that two countries will charge VAT on one call made by a customer, resulting in double taxation. The Organisation for Economic Co-operation and Development's (OECD) Model Tax Convention has articles in place to prevent double taxation (OECD, 2008:10).

The OECD has the task of developing a method of taxation that would be fairest to all countries, bearing in mind that most countries have some sort of a VAT system in place and their service charges anyhow include VAT, but they apply different rules when calculating it. This is exactly where the problem lies (Paltridge *et al.* 2009:46). "Taxation at the place of consumption should, from an international point of view, lead to an equivalent burden of consumption taxes on the same products in the same market and international consensus should therefore be sought on the circumstances under which supplies are held to be consumed in a jurisdiction" (De Wet & Du Plessis, 2004:282).

There are some countries, like Australia, that do not charge GST on outbound nor inbound users. Chile and India on the other hand charge VAT on both inbound and outbound users. Norway, Spain and the Netherlands apply VAT only to outbound users. Other countries, like Israel, have a very complex method in which they only tax certain types of outbound roaming. Israeli residents that are out of their country are taxed when a call is received from their country, but they are not taxed on calls they make to their home country, or any other country, when outside their home country. Canadian users, who are outside their country, are taxed on calls they make to users inside Canada, but are not taxed on calls they receive from Canada. Countries like Austria and Slovenia do charge VAT on certain calls, but if these calls are taxed and there is another country with a comparable VAT system that also charges VAT, the tax charges are redeemable (Paltridge *et al.* 2009:46-49).

There are some countries that charge an additional tax over and above the VAT charged. Turkey charges a “Special Communications Tax” of 25% as well as VAT at 18%, but these rates are only applied to inbound users if their country has applied taxes to roamers from Turkey. From this it is clear that taxes are very complex when it comes to telecommunications (Paltridge *et al.* 2009:46-49).

Table 2 below is a summary of the taxes payable by the different countries and the different methods they apply when levying VAT.

Table 2: Taxes on mobile roaming

	Tax rate (%)	Outbound SIM card holders	Inbound SIM card holders
OECD Countries			
Australia	10	No	No
Austria	20	Yes	Yes for non European Union Countries
Belgium	21	Yes	No
Canada	0 to 15.5	Yes	Only local/national calls within Canada. International calls are not taxed.
Czech Republic	19	Yes	No
Denmark	25	Yes	No
Finland	22	Yes	No
France	19.6	Yes	No
Germany	19	Yes	No
Greece	19	Yes	No
Hungary	20	Yes	No
Iceland	24.5	Yes	No
Ireland	24.5	Yes	No
Italy	21	Yes	No
Japan	5	No	Only local/national calls within Japan. International calls are not taxed.
Korea	10	Yes	No
Luxembourg	15	Yes	No
Mexico	15	Yes	No
Netherlands	19	Yes	No

	Tax rate (%)	Outbound SIM card holders	Inbound SIM card holders
New Zealand	12.5	Yes	No
Norway	25	Yes	No
Poland	22	Yes	No
Portugal	20	Yes	No
Slovak Republic	19	Yes	No
Spain	16	Yes	No
Sweden	25	Yes	No
Switzerland	7.6	Yes	No
Turkey	43	Yes to the margin of the Turkish operator.	No unless the foreign country applies tax to Turkish roamers
United Kingdom	15.0	Yes for European Union (EU) area and No for rest of World.	No
United States	0-36	Yes for calls originating or termination in the US. No for local roaming calls made in foreign countries.	Yes depending on the State in which the user is roaming.
Accession candidate countries			
Chile	19	Yes	Yes
Estonia	18	Yes	No
Israel	15.5	Yes for calls received but not for making calls	Yes
Russia	18	Yes	Yes
Slovenia	20	Yes	Yes. The rate applies to roamers from outside the EU are and to calls made to non-EU countries.
Enhanced engagement countries			
Brazil	Up to 44.2	Yes	No
China	Na	Na	No
India	10.3	Yes	Yes
Indonesia	10	Yes	Yes
South Africa	14	Yes	No

Source: Paltridge *et al.* (2009:48)

3.6.2 The OECD

With the ease which international transactions can be done cross-border activities are popular. Many businesses and individuals purchase goods and services from foreign countries. The difficulty comes in where countries between, in which the trading takes place, implement different tax systems. The OECD is an organisation that is successful in “developing practical solutions to international tax issues” (OECD, 2003:3). There are, however, many countries which are not members of the OECD, like South Africa (OECD, not dated (c)). This means that these countries do not have to adhere to the rules of the OECD, which makes trading more difficult as uniform rules are not in place. However, although South Africa is not a member of the OECD, it does follow the OECD principles.

Goods sold have a physical presence, but just like e-commerce, telecommunication services also render something that does not have a physical presence and place of consumption is therefore not easy to determine (OECD, 2003:11).

There are two general approaches that are followed to account for international services and intangibles: the European approach and the New World approach. Under the European approach, the legislator wanted to ensure that the supply is taxed in the country where it is consumed and thus developed the "place of supply" rules. This was because most services were consumed in the country where the supplier was, thus there was no uncertainty as to where VAT was levied. Over the last 25 years many "exceptions to this basic rule" were added to the European law so that services are now taxed either where the services are conducted or in the country where the customer is, but mostly the rule is to levy VAT in the country where the supplier is. It is also not an easy task to insert a separate section in an act just for telecommunication services, as it could lead to conflict if not all countries apply these rules of determining the place of supply (OECD, not dated (a):3).

The New World approach, on the other hand, does not take into account what type of service is rendered to determine the “place of supply”. It is thus not necessary under this system to have a "separate tax category for e-commerce supplies". Countries implementing this system rather let the place of supply, "export and import rules operate

together to determine if consumption of a service is considered to have taken place in that country's tax jurisdiction". Either the "pure consumption test" is used to determine the place of actual consumption, or an approximate of where actual consumption occurs. Under this system, all "services delivered electronically and services delivered in a traditional manner are treated equally". There are, however, problems with approximating a place of taxation as the concepts are not precise and therefore, open for interpretation. The following countries have adopted the New World approach: South Africa, Canada, Australia, Japan and New Zealand (OECD, not dated (a):4).

Because of the complexity of telecommunications services where customers travel out of their country of residence, "significant problems arise due to the application of different rules" that different countries apply. It is suggested that uniform consumption tax rules are designed for these services (OECD, not dated (a):5).

Bundling of products causes a problem in that the calls are made by customers locally and over long distances and across the borders of countries. Australia has avoided this bundling problem, relating to mobile telecommunication services, by taxing the supplier "where the recipient is located at the time of the supply" and where consumption takes place. This is how all other supply of services are also taxed. A supply through a mobile communication device that allows access to telecommunications services and is able to download information will have the same VAT consequences for both parts of the supply. The supply need not be unbundled (OECD, not dated (a):5).

Japan does not have specific rules for telecommunications services and has a broad-based low rate policy, meaning that it applies a low rate of VAT to a wide range of products. This means that they rarely experience problems when it comes to "domestic bundling and double or unintentional non-taxation", but cross-border transactions are not addressed. Although it would be easier to apply a simple, low rate VAT system in one country, the likelihood of multiple rates, when it comes to cross-border activities, remains for the foreseeable future (OECD, not dated (a):5-6).

The OECD is of the view that in order to ensure a fair and consistent VAT system when telecommunications are supplied across borders, all transactions should be taxed at the

place of local consumption. This could mean that suppliers must register and collect tax in the countries "where their non-business customers reside", but this places a large administrative burden on the suppliers as the customer's residency must be determined on every single transaction that takes place (OECD, not dated (a):8). This is impractical, especially when it comes to telecommunication services which are used by a large number of people, but not necessarily regularly used by them.

3.6.3 The Mobile Telecommunications Sourcing Act

Section 117 of the Mobile Telecommunications Sourcing Act (2000) of the United States, *inter alia*, states that the source rules that are applied in the States will be that the customer's home service provider shall be deemed to provide the service and they therefore have to levy the VAT. Regardless of where the service originates, the tax is charged at the rate applicable to the customer's place of primary use and no other taxing jurisdiction may impose any taxes.

Section 122 of the Mobile Telecommunications Sourcing Act (2000), *inter alia*, states that in order to establish the place of primary use, the service provider must look at the residential street address given in the contract by the customer. This is most likely where the customer will be most of the time and where he will be making use of the services.

Canning (1999) recognized that sourcing rules are too complex and that uniform sourcing rules for transactional taxes should be formulated. Sometimes it is difficult for a service provider to establish in which state a call is made from or in which it is received. This is especially a problem where the cellular geographic service area overlaps different states. It is then problematic as it is not clear whether the call was from within the State or outside the State (Pataki & Urbach, 1996:92). In South Africa it is also problematic as some reception towers are so close to the borders that users may still have signal in neighbouring countries like Botswana from the South African networks and are therefore able to use their phones even though they are physically in Botswana.

Potential solutions as identified by the background study and status report include:

- considering the telephone number(s) called to or from;

- taking into account the billing address of the customer to determine where the user primarily uses the phone;
- bearing in mind the geographic location of the mobile telephone switching office in order to establish the place where the call was made from or made to (Pataki & Urbach, 1996:92).

A major concern with regards to taxing cellphone roamers is deciding who the vendor is who would be liable for the VAT. From one perspective, there is a “serving carrier” who would be the vendor in the country from where the roamer is calling. The “home carrier” is only seen as the billing agent as it is not providing any service. The other perspective is that the home carrier is a “vendor who has purchased a service for resale to the roaming customer”. If the serving carrier is the vendor when considering cellphone roaming, the issue that arises is that the serving carrier concerned must know at which rate the user’s local jurisdiction would charge VAT. The home carrier must also be informed about, and be up to date with what roaming charges it may charge. For this reason, it must be decided which company will charge the VAT (Pataki & Urbach, 1996:93-94).

3.6.4 The European Union

Du Toit (1999:21) noted that South Africa does not have specific place of supply rules as was incorporated into the legislation of the EU countries. “Place of supply rules” have been built into the other sections of the South African VAT law, such as the zero-rating of supplies, when services are rendered to persons outside the Republic. Where the EU’s basic rule for place of supply focuses more on the location of where the supplier is located, South African legislation focuses on a combination of where the service is rendered as well as where the recipient of the service is located. This results in double taxation that cannot always be reclaimed if South Africans receive services from the EU, as the EU levies VAT because the supply is made from there and South Africa also levies VAT because it also provided a service, even though it is a roaming service, to the resident.

Since 1997 possible problems arising concerning the supply of telecommunication services have been identified. Dawes (1997:39-40) announced that changes would be made to the EU legislation by moving the place of supply for telecommunication services from the

supplier's country to the country where the consumer is located, in other words, where the use and enjoyment of the service happen. This would also mean that non-EU suppliers need to register for VAT if they supply telecommunication services to consumers in the EU. A concern raised in this regard is that there is no specific definition for "use and enjoyment", which poses the problem that the different member states could attach different meanings to these words. The biggest concern relates to that of call-back services and telephone cards that can be used globally. The question raised is whether VAT will be levied only on EU residents, or whether non-EU residents that are in the EU for holiday or business will also be liable for VAT when using telephone cards. Once again it is noted that there are no black and white rules or guidelines as to who is liable to pay VAT, or where.

Dawes and Burnes (2001:19) both stated that there is agreement that under the European Union Sixth VAT Directive, EU states cannot levy VAT on digital services provided by non-EU suppliers to EU private individuals. It is however a possibility that they could require these non-EU suppliers to register locally for services they supply to these individuals, as the "use and enjoyment" will be taking place in the EU. Burnes states that these "use and enjoyment" rules are applied to the provision of telecommunication services as well. The overall intention of the OECD and the EU is ultimately to tax services where these services are consumed. This would involve:

- EU suppliers levying VAT on supplies to all EU individuals
- Non-EU suppliers having to register for VAT on supplies to EU individuals
- suppliers having to register for VAT and levy VAT on supplies to individuals in those jurisdictions when they fall into other jurisdictions.

"All services should be taxed where consumed, with the place of consumption being the usual place of residence of the customer. This is a compromise. Ideally, the service should be taxed where the service is consumed, rather than where the customer lives" Burnes (2001:19).

The European Commission (2000) has written that, "E-commerce is, by its nature, a truly global process and no tax jurisdiction, acting in isolation, can resolve all the issues it

raises...the successful administration thereof...will...depend on...achieving an international consensus". The same is applicable to the provision of telecommunication services as the service is also provided across borders.

The principle of a destination-based tax is applied to the tangible assets that are brought into or used in the EU. The problem however arises on the consumption of intangible products, such as the use of telecommunication services, especially when these services are provided by unregistered traders and the service is provided to consumers and non-registered traders. This type of problem was not envisaged when the legislation was drawn up and the collection of taxes dependent on the honesty of the traders. The US however, has experience that the traders do not pay. It is also not possible to require the supplier of the service to levy VAT based on the location of the consumer, as the supplier does not always know where the consumer is located. The satellites could be located anywhere in the world and therefore pin-pointing where the consumer is located is unfeasible.

Originally, the rules for levying VAT were that when services were supplied to unregistered traders and households, the place of supply would be where the supplier is located. This meant that whenever services were imported into the EU, there was no VAT levied as the supplier was from a non-member state. Similarly, when the suppliers in the EU exported services to other countries, based on the principle of taxing where the supplier is located, these suppliers had to levy VAT and this gave them a competitive disadvantage. In 1999, the EU amended its directive to exempt telecommunications services supplied by EU suppliers to customers outside the EU, and to levy VAT on non-EU based suppliers that provide services to EU customers. However, when telecommunication services are provided to customers in other EU member states by EU suppliers, VAT charged by the member state in which the supplier is, continues to be applied (McLure, 2003:754-759).

A study was performed in 2007 by the International VAT Association, whereby they estimated VAT fraud to be between €60 billion and €100 billion annually for all the member states of the EU. Because of this, the VAT Package was introduced, which will be implemented over a period from 2010 to 2015. The basic place of supply rule of services rendered is that VAT is levied in the country where the supplier is located. The VAT

Package will change this as follows: If a supply of services is made from one business to another, the place of supply would be where the *customer* is located. Where a service is supplied from a business to a consumer, the basic rule will still apply in most cases, signifying that the place of supply would be where the *supplier* has his place of business. However, there are certain exceptions to this rule, and the provision of telecommunication services is one of these exceptions, whereby the place of supply, when these services are supplied to consumers, would also be where the *customer* is located (Squires & Cranwell, 2007:71).

“From 1 January 2015, the rules applicable to digitised services supplied at a distance will change...Telecom...services will be deemed to be supplied where the customer is established, has his usual address or is resident...and the same rules will apply alike to non-EU service providers and EU service providers”. Non-EU service providers will have to register as VAT vendors in one of the member states, but the VAT that will be charged and based on the rate of the member state in which the customer is located (Woolich, 2009:31).

The fact that suppliers now only need to register in one EU country for VAT could seem like a big simplification as they only need to account to one member state. The problem that will, however, be experienced is that VAT will have to be charged country by country, depending on the location of the consumer. This could result in major financial impact for the suppliers as well as have a huge impact on their systems (Walsh & Hallsworth, 2008:51).

The introduction of the Council Directive 2006, section 22, states that “all telecommunications services consumed within the Community should be taxed to prevent distortion of competition in that field”. Therefore, when telecommunications services are supplied to taxable persons, be it to persons in the Community or in other countries, these persons must be taxed “at the place where the customer for the services is established”.

The general rule for the place of supply of services, as written in article 43, is focussed on the supplier and therefore one has to look at the place where the supplier has his fixed establishment. If he does not have a fixed establishment, one then needs to consider

where he has his permanent address and where he usually resides. However, article 56 provides the exceptions to the general rule of which the provision of telecommunication services is one (article 56 (i)). Here it is determined that if a customer receives the supply of telecommunication services, the place of supply will be where the customer resides, has his fixed place of establishment or has his permanent address. Articles 58(b) and 59 ultimately state that the supply will be taxed in the European Union if the effective use and enjoyment of the service takes place within a member state.

3.6.5 Canada

The original Canadian legislation was drawn up with only the basic rules for local and long-distance services in mind, but with the way in which telecommunication services have evolved, this legislation seems outdated and is not that easy to apply in the current situation. Tax authorities themselves are in the dark as to what the tax implications are regarding telecommunication services. Some provinces apply what is called the “two-out-of-three rule”, which means that if two of the three following conditions fall within one jurisdiction, the service will be taxed in the jurisdiction area:

- where the service starts
- where the service ends
- where the customer or the telecommunication facility is located.

Because even the government is in the dark about exactly what rules to apply for the levying of VAT on telecommunication services, the suppliers that have to apply the rules do not know when to levy VAT. “There are significant risks associated with indirect taxation within the telecommunications industry and errors can be costly” (Feist & MacFarlane, 2001:42:46).

The same competitive disadvantage that the EU faces, is faced by the GST-registered suppliers in Canada when providing telecommunication services to persons not located in Canada itself. The zero-rating of telecommunication services is limited to supplies to persons that carry on a business of supplying telecommunication services. Looking at it from a consumption perspective, most users are not providing telecommunication services and can thus not enjoy the benefits of a zero-rating. The Department of Finance suggested that a possible solution to this problem would be to restrict the services that are all

included under the definition of telecommunication services and broadening the application of the zero-rating to include non-registered non-residents (Canadian Department of Finance, 2005:658).

3.7 CONCLUSION

“Telecommunications tax policies should promote, not stifle, economic growth in the digital age” (Palladino & Mazer, 2000:22). Taxing authorities must be careful that they do not become so greedy in order to get as much money from tax as possible that they kill a good international relationship. A global system should be developed where the rendering of telecommunication services will be taxed and VAT levied on a reasonable basis.

Looking at all of the above, it can be concluded that, although VAT systems are in place in many countries, there are still uncertainties as to where the place of supply is, especially South Africa, which does not have specific place of supply rules. Therefore, an empirical study was conducted in order to determine whether the tax practitioners of the telecommunication service providers in South Africa feel that there are sufficient acts or regulations to determine when VAT should be levied on the supply of international cellphone roaming services.

4 RESEARCH DESIGN AND METHODS

Secondary data was collected from the acts of different countries, and articles on telecommunications regarding problems experienced by practitioners when having to account for VAT on telecommunications services. This was done in order to determine how different countries approach the VAT treatment of telecommunication services and if they also experience difficulties as to whom should levy VAT.

Subsequently, questionnaires were sent to tax practitioners and interviews conducted with them to reach a conclusion as to whether South African legislators need to consider bringing in “place of supply” rules or whether there is sufficient guidance on determining the place of supply of telecommunications services, or when to levy VAT on international services. Tax practitioners were asked (amongst other questions) exactly what difficulties they experienced when having to determine the VAT liabilities of telecommunication service providers. Questionnaires were sent in order for the interviewee to prepare and an interview was subsequently held by the researcher with the tax practitioner.

A representative from National Treasury as well as SARS was also considered for interview, if deemed necessary, after the interviews with the tax practitioners were conducted. If it became evident from the interviews with the tax practitioners that there was still considerable uncertainty regarding the VAT treatment on international telecommunication services, these representatives would be interviewed in order to gain an understanding of the aim of the legislation that was drafted or other regulations that are in place to address this problem. Based on the results from the interviews with the tax practitioners, there was no further uncertainty regarding the VAT treatment on international telecommunication services and further interviews were deemed unnecessary.

4.1 DESCRIPTION OF INQUIRY STRATEGY AND BROAD RESEARCH DESIGN

The research was an empirical, exploratory, applied, cross-sectional, qualitative research based on primary as well as secondary data. The terms are defined below.

4.1.1 Empirical study

The researcher collected new data by means of interviews (Babbie & Mouton, 2001:75).

4.1.2 Exploratory study

Exploratory study is a method used to determine what is happening and to get new insights. Questions are asked to assess a problem and to see the situation in a new light (Robson in Saunders, Lewis & Thornhill, 2007: 133).

4.1.3 Applied study

The research will be of relevance to tax practitioners addressing the crucial issue of who the VAT liability should accrue to (Saunders, Lewis & Thornhill 2007: 591).

4.1.4 Cross-sectional study

Particular facts will be studied at a particular times (Saunders, Lewis & Thornhill 2007: 148). Although VAT on telecommunications has been a problem since 1997 (SARS, 1997:9), the problems experienced currently are being examined.

4.1.5 Qualitative study

Non-numerical data was used (Saunders, Lewis & Thornhill, 2007:609). The answers from the questionnaires and interviews are not numerical and consist of answers that needed analysis.

4.1.6 Non-experimental study

The study was not quantitative. A causal relationship under controlled conditions was not investigated (Mouton, 2001:155).

4.1.7 Primary and secondary data

Data was specifically collected through interviews in order to complete the research project (primary) (Saunders, Lewis & Thornhill, 2007:607). Data that has been collected by others for another purpose was also analysed (secondary) (Saunders, Lewis & Thornhill, 2007:613).

4.2 SAMPLING

4.2.1 Study of other countries' VAT systems to analyse for comparative purposes

As mentioned in the background section, there are two types of VAT systems: a traditional system and a modern system. As the traditional system does have place of supply rules and the modern system does not, countries under both these VAT systems were analysed to determine the extent of uncertainty as to who should be liable for VAT on cross-border supplies of telecommunication services.

The European Union countries' VAT system was studied as European countries apply the traditional VAT system. They are also subject to the rules of the OECD, which tries to harmonise global systems (OECD, not dated (b)), especially when it comes to cross-border activities and countries that apply different rules to determine tax liabilities. Japan has a similar VAT system to the European countries (Sawamura, 2008:2) and its treatment of VAT was, therefore, also considered in the analysis of the traditional system analysis.

New Zealand was investigated as South Africa "panel-beat" their VAT system in order to find a system that is suitable for South Africa. Australia's system was also analysed as its VAT system was implemented after that of South Africa. It was also adapted from New Zealand. Botswana and Namibia used the South African VAT system as a basis to draft their VAT legislation and were therefore, also included in the study to determine if they have additional rules for telecommunication purposes.

4.2.2 South African telecommunication service providers' tax practitioners

Since the study was done to determine whether South African telecommunication service providers' current tax practitioners (but specifically cellphone providers) feel that the legislation is sufficient, these tax practitioners were requested to express their views. Since there are only a limited number of cellular network operators in South Africa – Vodacom, MTN, Cell C, 8ta and Virgin Mobile – all the providers' tax practitioners were approached. These service providers are representative of the whole group of suppliers of cellphone telecommunication services.

Since each service provider has several tax practitioners involved, the main person responsible for each service provider's VAT was approached to complete the questionnaire and to conduct the interview.

4.2.3 National Treasury representative involved in drafting the VAT Act

An interview with a senior ex-SARS employee, who was extensively involved with the drafting of the VAT legislation, was considered. Based on the results of the interviews with the tax practitioners, the interview was deemed unnecessary.

4.3 DATA COLLECTION

4.3.1 Methods of data collection

Case study: Detailed knowledge of a focused area (VAT on telecommunications services, specifically on international roaming services) is required. By using a case study, the telecommunication service providers were required to state how they levy VAT on cross-border supplies of telecommunication services (Hofstee, 2009:123).

The case study was used for a qualitative study which aimed to give an in-depth description of a small number of cases (Mouton, 2001:149). There are only a small

number of telecommunications service providers in South Africa and therefore this was deemed effective.

Data was collected by means of a questionnaire and subsequent interviews held by the researcher. The limitations of this method are discussed below under interview. The advantages are that in-depth insights from the tax practitioners were collected (Mouton, 2001:150). The case study was used to examine the interpretations and views of the tax practitioners.

Comparative analysis: A comparison between the VAT systems relating to “place of supply” under the traditional VAT system or “effective use or enjoyment” under the modern VAT system was conducted. The comparison was analysed to determine the difference and similarities between the two systems and the difference in treatment between the different countries (Hofstee, 2009:124).

The limitation is that appropriate cases for comparability were not selected (Mouton, 2001:155). This was overcome by careful planning and selecting a variety of countries under different VAT systems.

Historical studies: These were used in order to find background information on where VAT originates (Hofstee, 2009:125-126).

The limitation is that the understanding and judgement of the researcher and historian differ in theoretical perspectives. To overcome this, data collected was studied carefully and the context determined and kept in mind while reading and analysing it (Mouton, 2001:171).

Action research: Active participation was required from the tax practitioners in order to determine whether South Africa’s VAT system is sufficient in providing guidelines on when to account for VAT on the supply of telecommunication services. This is an invaluable source of information as these are the people that need to apply the Act. If there are any uncertainties as to the application of the Act, these are the people that identify it and struggle to apply it. There are only a small number of participants who need to be able to apply these laws and as they were involved in the study, the result is more conclusive (Hofstee, 2009:127-128).

The limitation of this method is that there is a low degree of control (Mouton, 2001:151). It was possible that the representatives would not be that keen to help or that they would feel manipulated by the way the questions were structured. The questions were therefore, well prepared and structured. Timelines were set as to when feedback was required. The advantage was, that because the tax practitioners themselves would be unsure about the exact accounting for VAT on telecommunication services, they would also benefit from this study. They would therefore be more than willing to help (Mouton, 2001:151).

Secondary data analysis: Work from previous researchers was analysed in order to gain an understanding of the problem areas identified thus far. The analysis also gave an indication of how the VAT law, or determination of the place of supply, was interpreted in instances where it was unclear (Hofstee, 2009:128-129).

The advantage is that time was saved because existing data, which had already been analysed, was collected and compared with other information collected. The disadvantage was, however, that the original objectives and points of focus of the first researcher could be different to what was required for purposes of this study (Mouton, 2001:165). While analysing the data, the context and purpose of the first researcher's study was kept in mind.

The secondary data for purposes of comparing the treatment of VAT on telecommunication services was collected from various sources including books, legislation and web articles.

4.3.2 The interview

A verbal, face-to-face, interactive and conversational interview was performed by the researcher where specific questions were asked of the tax practitioners (see Appendix A for questions that were asked). It was a semi-structured interview where most questions had only limited options as answers. The interviewees were however also requested to comment on what they perceived the difficulties to be and therefore some open-ended questions were also asked (Saunders *et al.* 2009:320).

A questionnaire was drawn up with all the questions. This was approved by the supervisor before the interview was conducted to ensure that all questions necessary to complete this study were covered and also to ensure their quality. No further pre-testing was done. Each interview lasted about 45 minutes. A separate appointment was made with each interviewee at a convenient date and time. There were no problems with time constraints as only a few people were interviewed.

The limitations of the interviews were that:

- the interviewer's emphasis on matters could manipulate or influence the view of the interviewee,
- the interviewees would possibly not fully understand the complexity of the situation, and
- the measurement of the results were not standardised (Mouton, 2001:150) as each person interviewed could provide a long answer and not a simple yes or no.

To overcome these problems, the interviews and questions were well prepared and well structured. When the answers were analysed, the possibility of bias was kept in mind in order to determine if there were any biased answers.

The advantage was that first hand information and insight was gained from the people who struggle with the application of the Acts and regulations.

4.4 DATA ANALYSIS

While conducting the interviews, answers were recorded on paper. After all the interviews with the tax practitioners were conducted, the answers to the questions asked were compared and graphs drawn up in order to illustrate where the tax practitioners agree or disagree with one another. The major uncertainties and problems were also identified regarding the levying of VAT on cross-border telecommunications services and these situations were explained in the results below. The questions were analysed by the researcher by comparing each question's answer obtained from all tax practitioners interviewed.

5 RESULTS

5.1 INTRODUCTION OF THE RESULTS

The results have been presented in pie graphs where such graphs were suitable. Where a longer answer or explanation was given by the respondent, this was elaborated on in the results below. The aim of this study was to determine whether all the South African telecommunications service providers receive/give the same VAT treatment and to determine whether the tax practitioners agree with this treatment or if the rules should be clarified.

5.2 ANALYSIS OF THE RESULTS

As there are very few market players in the cellphone industry, no specific reference was made in this section to the source, being the person that was interviewed. A reference to all sources was made in the list of references. Respondents from the following telecommunication companies were interviewed:

- Cell C
- MTN
- Vodacom.

Virgin Mobile was approached, but it was determined that they are a mobile virtual network operator, which means that they do not have their own networks. Virgin Mobile would buy bulk airtime from the other network operators and re-sell this airtime to its customers. Thus, the normal VAT of 14% is charged from the selling operator to Virgin Mobile and therefore there are no complications as to how to account for the VAT on the transactions. The normal VAT rules of the Republic are applied in that a supply is made in the Republic and there is no uncertainty as the rules in this regard are clear (Section 7(1)(a) of the VAT Act (59/1991)).

An interview was also not possible with 8ta because of time pressure they experienced. This did not, however, influence the results from the study as they are still very new to the market and only have a small market share.

Table 3: South African wireless market

Operator	Subscribers ('000)	Market Share (%)
Vodacom	31,727	49.1
MTN	22,033	34.1
Cell C	9,150	14.2
8ta	1,350	2.1
Virgin Mobile	370	0.6
Total	64,630	100

Source: Business Monitor International (2012:37)

From discussions with the tax practitioners, it was evident that the main act or regulation applied in calculating the VAT on telecommunications comes from paragraph 6.1.3 of the Melbourne Agreement, which reads “Where, in accordance with the national law of a country, a fiscal tax is levied on collection charges for international telecommunication services, this tax shall normally be collected only in respect of international services billed to customers in that country, unless other arrangements are made to meet special circumstances” (International Telecommunications Union, 1989:11). This results in RSA operators charging their customers for international roaming services at a rate inclusive of VAT at 14%, but foreign operators visiting South Africa and using RSA networks, are charged at a rate of 0%. This implies that the place of consumption is ignored; the actual place of billing determines the VAT charged on the international roaming transactions. Although this is how all the South African telecommunications service providers seem to account for the VAT on the transactions, it was mentioned by a respondent that South African VAT law is in fact more based on the destination-based principle, which means that VAT is being levied where the goods or services are consumed. Theory and practice therefore contradict each other.

It was noted from the discussion, that there are many countries that apply the principles of the Melbourne Agreement, which is also known as the International Telecommunications Regulation. This is also confirmed by Johnson (2010:8) who stated that there are 178 countries that are a party to the Melbourne Agreement. Refer to Annexure B for details of which countries are parties to this agreement. The case studies presented to the respondents were mostly from the perspective of a RSA resident visiting a foreign country,

but the situation of a foreigner visiting the Republic and using South African networks was also looked at.

In order for the visitor to be able to roam on the foreign country's network, there has to be an agreement between the South African network operator and the foreign country's network operator as was explained in Chapter 2. Therefore, the foreign network operator will invoice the RSA operator for services rendered to the RSA operator's customer and this would usually be at a rate of 0%. This is regardless of the foreign operator being in the same group of companies as the South African network operator or whether it is a completely separate network from the RSA operator. There are, however, instances where the RSA operator is charged at the VAT rate of the foreign country for the services provided by the foreign operator to the South African customers. In certain instances it is possible that the RSA operator can then reclaim the VAT that was charged by the foreign operator from the foreign country's revenue service. If the reclaim is however not successful, this would result in the RSA network operator paying VAT for the service to the foreign operator as well as the RSA customer paying VAT to the RSA operator. Taking a view from the perspective of when a foreigner uses South African networks, RSA charges the foreign operator for international roaming services at a rate of 0% VAT. The treatment would not differ if the foreign operator is in the same group of companies as the RSA operator, or if the operator was in a different group of companies.

There is no difference in treatment from the foreign operator whether the call is made by the visitor to his home country, the country he is visiting or a third country which is not his home country or the country he is visiting. Therefore the foreign operator will charge VAT at either 0% or the VAT rate, irrespective of where the call is made to.

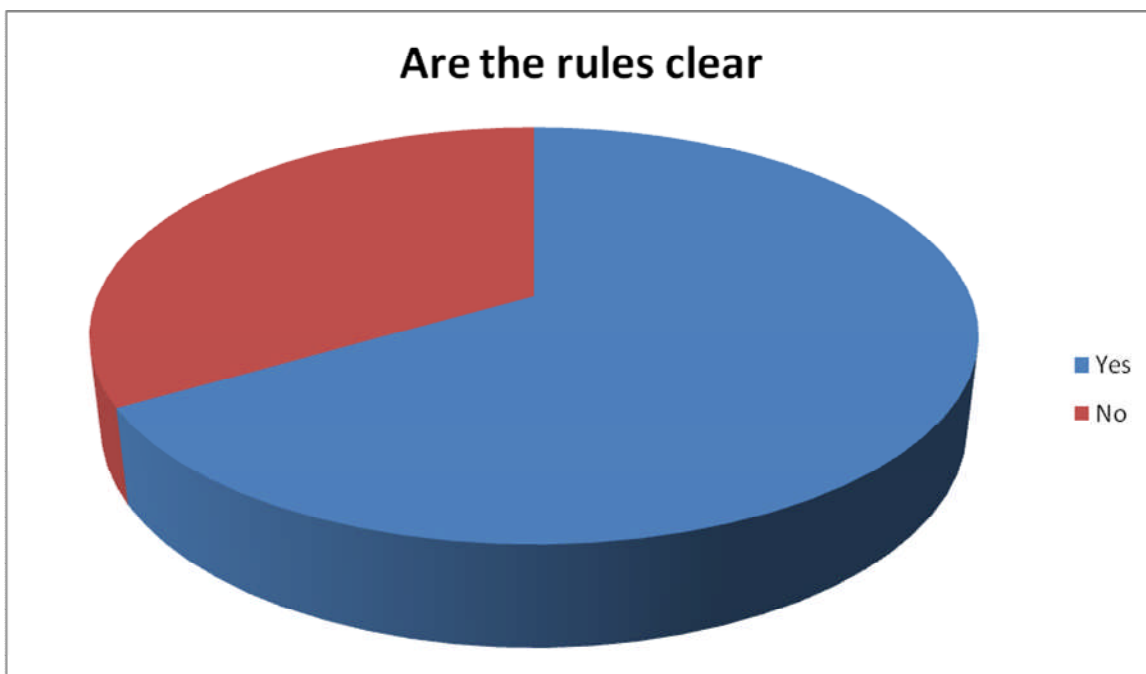
From the discussions with the service providers, it was noted that the foreigner's service provider in his home country is charged for the international roaming services provided to a foreigner visiting RSA and using the RSA operator's network. The RSA operators charge VAT at 0% to these foreign operators.

From the discussions with the service providers, it is evident that the tendency is still to deem the place of supply as the preferred place where the home country's supplier is located, rather than where the customer is located when consuming the service. When a RSA resident located in the Republic makes a call from his cellphone to a person located outside of South Africa, the VAT on this service would be 14%. This is in accordance with charging VAT based on consumption. The person is located in RSA at the time the service is rendered and thus the supply is consumed in RSA. This is also in line with section 7 of the VAT Act (59/1991) that requires VAT to be levied whenever a service is supplied by a vendor.

When a customer registered on a South African network is located in RSA and makes a call to a person located outside RSA, the South African service provider charges the customer at a price including VAT at 14%.

The respondents did not all feel that the rules are clear on how VAT should be calculated on international roaming services.

Figure 5: Are the rules clear to calculate VAT on transactions involving roaming?



Although all the rules in the South African VAT law are not that clear, the Melbourne Agreement is clear on when to levy what VAT. There are, therefore, rules and regulations in place that make application clear.

Other sections in the current RSA VAT legislation mentioned by the respondents during the interviews (VAT Act (59/1991)) were:

- S11(2)(k): A service can be zero-rated if the services are physically rendered elsewhere than in the RSA. The argument by the respondent in favour of SARS not allowing roaming services to be zero-rated from RSA operators to its customers, were that even though the customer is located outside the Republic when visiting a foreign country and utilising international roaming, there are still voice channels passing through the equipment located in the Republic as illustrated in Chapter 2.
- S11(2)(l)(iii): A service to a non-resident can be zero-rated provided that the service is not rendered to this person when he is physically located in the Republic. This section is however not applied in telecommunication services, as the non-residents are visiting the Republic and are present in the Republic at the time the international roaming services are provided to them. Their home country operators are still charged for the services rendered at a rate of zero percent in terms of the Melbourne Agreement. The respondent was, therefore, of the opinion that there is no clear guidance in section 11 regarding the place of supply. The burden of proof remains with the supplier to prove why a rate of zero percent is applicable. In the case of telecommunications services, it would be because the Republic is a party to the Melbourne Agreement.
- Definition of an enterprise: it must be kept in mind that it is not only local suppliers that are required to register as VAT vendors when they supply services partly or wholly in the Republic in excess of the threshold of R1,000,000. Foreigners supplying goods or services in excess of the threshold should also register for VAT in the Republic. This would have the effect that foreign network operators may have to register as VAT vendors in South Africa should they supply services in the Republic exceeding the threshold of R1,000,000. This definition could therefore be seen as a form of a place of supply rule.

Definition of imported services: VAT should be charged on imported services by any person to the extent that services are not utilised in the Republic for making taxable supplies. When a person visits a foreign country and makes use of the foreign network in the foreign country, the service could be deemed to be imported as the service is provided by a non-resident to a resident to be used for purposes other than making taxable supplies in the case of a person that goes on holiday to this foreign country. Although the service is consumed in the foreign country, a portion of the process takes place in the Republic when a call is made as is illustrated in Chapter 2. This is also why the RSA operators charge a rate including 14% VAT on international roaming services to its customers.

5.3 SUMMARY

In summary, it can be said from the information gained during the interviews, that there is no uncertainty as to how to treat VAT on international mobile roaming, because of the Melbourne Agreement which guidelines South Africa follows. If a foreigner uses South African networks when visiting the Republic, the RSA operator charges the foreign operator at a rate of 0% VAT. Depending on the legislation of the country being visited by the RSA resident, VAT is charged either at 0% or at the country's VAT rate. The RSA operator then in turn charges its customers for the services at a rate including VAT at 14%.

6 CONCLUSION

6.1 INTRODUCTION

The VAT laws of different countries following different types of VAT systems differ and sometimes there are not clear cut place of supply rules in these VAT acts. There might be situations where there is some form of VAT law that could possibly regulate the place of supply of telecommunication services, but that application in practice differ from these rules. The aim of this chapter is to give a final summary of what the main findings of the research were, to make recommendations to the research problems identified and also to make recommendations for future research.

6.2 MAIN FINDINGS OF THE STUDY

From the literature study it is evident that countries deem the place of supply of telecommunication services differently. Some deem the place of supply to be where the customer is located, while others deem the place of supply to be where the supplier of the services is located. The effective use and enjoyment therefore also differ from country to country depending on whether the use depends on the supplier or the customer. Some countries do not even have specific place of supply rules for telecommunication services which they can apply. The countries do not all adhere to the same laws or agreement, but most countries have signed the Melbourne Agreement, which states: “Where, in accordance with the national law of a country, a fiscal tax is levied on collection charges for international telecommunication services, this tax shall normally be collected only in respect of international services billed to customers in that country, unless other arrangements are made to meet special circumstances” (International Telecommunications Union, 1989:11). Although the South African VAT act has a paragraph on the supply of telecommunication services, this never came into effect as the date of promulgation was never announced. From the interviews conducted, it was gathered that South African telecommunications services providers follow the Melbourne Agreement. They zero-rate the supply of international roaming services to foreigners that visit the Republic, which is contrary to the normal VAT rules that a service is subject to VAT if it is rendered to a non-resident who is in the Republic at the time the service is

supplied. The converse is when a resident customer pays VAT at 14% for international mobile roaming charges when the resident visits a foreign country and makes calls while located outside of the Republic. It may be argued that the foreign network operators still “contact” the local operators to ensure that the customer may roam, but the bulk of the service is rendered by the foreign operator as the South African resident uses their foreign network to make calls when located in that foreign country. This is, therefore, contrary to the normal VAT rules that a service is zero-rated when a service is exported. It can thus be concluded that South Africa does have place of supply rules in the form of the Melbourne Agreement that are sufficient for telecommunication services. Nevertheless some recommendations were also made.

6.3 CONCLUSION

Therefore it can be concluded that many countries have many different VAT laws, but ultimately a lot of these countries follow the Melbourne Agreement and thus the provisions made for the place of supply of telecommunication services in their VAT Acts are irrelevant as the rules of the Melbourne Agreement should be followed.

6.4 RECOMMENDATIONS BASED ON THE RESULTS OF THE STUDY

From the above, it is clear that the VAT treatment on international mobile roaming is different to the normal practice known to South Africans with regards to VAT charged on other types of services rendered. Since South Africa is a party to the Melbourne Agreement, it is considered acceptable that foreign operators are charged at a rate of zero percent VAT for international mobile roaming services supplied to foreign customers. However, since the costs of international mobile roaming are already so high and the Melbourne Agreement states that “other arrangements [can be] made”, it is strongly advised that SARS and National Treasury reconsider the VAT levied on international charges to resident customers by rather levying VAT at 0% on these charges. This will then be in line with other services, which are zero-rated if it is provided to customers outside the borders of South Africa.

6.5 RECOMMENDATIONS FOR FURTHER RESEARCH

The main focus of this research was to determine the place of supply and VAT charged particularly on international mobile roaming and calls made to and from foreign countries. There is however, uncertainty as to where the place of supply is for e-commerce services in general. Technology makes it very easy to obtain information and services on line. Nonetheless it is unclear where these services are consumed, where they originate from and who is liable for levying VAT on these services.

Further study can be done on specifically which countries are parties to the Melbourne Agreement, whether their revenue services departments are actually aware that they are a party to the agreement and whether they apply the rules as per the Melbourne Agreement. As the Melbourne Agreement does give room for the country to make "other arrangements", a more in depth study can be done by conducting interviews with tax authorities in different countries to determine what arrangements they apply.

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Appendix A - Questionnaire

1. Interview: Tax practitioners of telecommunications service providers

1. What is your job designation?

Tax Manager

Tax Consultant

Tax Clerk

Other (Please specify)

2. Do you calculate your company's monthly VAT returns?

Yes

No

3. Do you review your company's monthly VAT returns?

Yes

No

4. Are there any acts or regulations in South African law governing the 'place of supply' of the roaming services?

Yes

No

5. If yes, which Act or Regulation indicates what the place of supply of a roaming telecommunication service is (also include the section of the relevant Act or Regulation)?

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.....

6. If yes to 4.) above, please provide a brief explanation of your understanding of the Acts or Regulations as to where the "place of supply" of roaming services would be:

The location of the supplier providing roaming services in the foreign country being visited

The location of the supplier in the customer's home country with whom the customer has his/her cellphone contract

The location of the customer when using the roaming services

Other comments:

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7. If your answer to 4.) above was no, does your company have specific rules or regulations to determine where the place of supply of roaming services are?

- Yes
- No

8. If yes, could you please provide me with a copy of these rules?

9. Do you apply the guidance in South African law or your company regulations, to determine the place of supply when calculating or reviewing your VAT liability?

- Yes
- No

10. If not, why not?

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11. When a foreigner (someone that is not resident in South Africa) visits South Africa and makes use of your network towers, who do you charge for the roaming service provided to this foreigner?

- Foreigner
- Foreigner's service provider in his home country

12. Is this charge inclusive of VAT at:

- 14%
- 0%

13. When a customer that is registered on your network visits a foreign country, and makes a call from say Botswana to a person located in Botswana, does the Botswana service provider (assuming that it is a service provider that is not in your group ie you are MTN and they are Orange) then charge you for the service at a rate:

- with VAT
- without VAT

14. Would the treatment be different if the foreign service provider is in your group (ie you are MTN South Africa and they are MTN Botswana)?

- Yes
- No

15. If yes, does the Botswana service provider (in your group) then charge you for the service at a rate:
with VAT
without VAT
16. Do you then in turn charge your customer as mentioned in 13 – 15 above at a rate:
with VAT
without VAT
17. When a customer that is registered on your network visits a foreign country, and makes a call from say Botswana to a person located in South Africa, does the Botswana service provider (not in your group) then charge you for the service at a rate:
with VAT
without VAT
18. Would the treatment be different if the foreign service provider is in your group (ie you are MTN South Africa and they are MTN Botswana)?
Yes
No
19. If yes, does the Botswana service provider (in your group) then charge you for the service at a rate:
with VAT
without VAT
20. Do you then in turn charge your customer as mentioned in 17-19 above at a rate:
with VAT
without VAT
21. When a customer that is registered on your network, makes a call from their GSM phone in South Africa to a person in a foreign country, do you charge the customer for the call at a rate:
with VAT
without VAT
22. Are the rules clear to calculate the VAT on transactions involving roaming?
Yes
No
23. If no, please provide a brief explanation of the difficulties or uncertainties that you experience

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24. Are there any possible solutions to these difficulties that you experience that you could suggest?

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25. If at all possible, would you be able to provide me with the total charge (exclusive of VAT if applicable) to your customers for the period 1 March 2011 to 29 February 2012 for international calls made while the customer was outside of South Africa?

Appendix B

Countries that signed the Melbourne Agreement for telecommunications regulation

Albania	Central African Rep.	Gambia	Lesotho	Papua New Guinea	Peru
Algeria	Chad	Georgia	Liechtenstein	Paraguay	Switzerland
Andorra	Chile	Germany	Lithuania	Philippines	Syrian Arab Republic
Argentina	China	Ghana	Luxembourg	Poland	Tajikistan
Armenia	Colombia	Greece	Madagascar	Portugal	Tanzania
Australia	Comoros	Guatemala	Malawi	Qatar	Thailand
Austria	Congo (Rep. of the)	Guinea	Malaysia	Romania	The Former Yugoslav Rep. of Macedonia
Azerbaijan	Costa Rica	Guinea-Bissau	Maldives	Russian Federation	Togo
Bahamas	Côte d'Ivoire	Guyana	Mali	Rwanda	Tonga
Bahrain	Croatia	Haiti	Malta	Saint Kitts and Nevis	Trinidad and Tobago
Bangladesh	Cuba	Honduras	Marshall Islands	Saint Lucia	Tunisia
Barbados	Cyprus	Hungary	Mauritania	Saint Vincent and the Grenadines	Turkey
Belarus	Czech Rep.	Iceland	Mauritius	Samoa	Turkmenistan
Belgium	Dem. People's Rep. of Korea	India	Mexico	San Marino	Tuvalu
Belize	Dem. Rep. of the Congo	Indonesia	Micronesia	Sao Tome and Principe	Uganda
Benin	Denmark	Iran (Islamic Republic of)	Moldova	Saudi Arabia	Ukraine
Bhutan	Djibouti	Ireland	Monaco	Senegal	United Arab Emirates
Bolivia	Dominica	Israel	Mongolia	Serbia	United Kingdom
Bosnia and Herzegovina	Dominican Rep.	Italy	Morocco	Seychelles	United States
Botswana	Ecuador	Jamaica	Mozambique	Singapore	Uruguay
Brazil	Egypt	Japan	Myanmar	Slovakia	Uzbekistan
Brunei	El Salvador	Jordan	Namibia	Slovenia	Vanuatu
Darussalam	Equatorial Guinea	Kazakhstan	Nepal (Republic of)	South Africa	Vatican
Bulgaria	Eritrea	Kenya	Netherlands		Venezuela
Burkina Faso		Korea (Rep. of)	New Zealand		
Burundi		Kuwait	Nicaragua		
Cambodia		Kyrgyzstan	Niger		
Cameroon		Lao P.D.R.	Nigeria		

Canada Cape Verde	Estonia Ethiopia Fiji Finland France Gabon	Latvia Lebanon	Norway Oman Pakistan Panama	Spain Sri Lanka Sudan Suriname Swaziland Sweden	Viet Nam Yemen Zambia Zimbabwe
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Source: Johnson (2010:8)