THE ROLE OF CUSTOMS AND VALUE-ADDED TAX LEGISLATION IN THE COLLECTION OF VALUE-ADDED TAX ON CROSS-BORDER TRADE IN DIGITAL GOODS

by

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Submitted in fulfilment of the requirements for the degree

LLM (Tax Law)

In the Faculty of Law,
University of Pretoria

December 2019

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ABSTRACT

Electronic commerce (e-commerce) is experiencing exponential growth which is rapidly transforming the traditional approach to international trade. The regulation and facilitation of the rising levels of e-commerce derived digital goods is undoubtedly a challenge for revenue administrations and customs administrations alike. However, it also presents opportunities for higher levels of revenue collection through increased economic activity and, as such, should be supported by e-commerce enabling legislation. Further consideration is required to ascertain whether the current legislation regulating the taxation of e-commerce will suffice, or if further amendments are required to provide for the necessary changes to enhance the tax base to be reflective of the drastic changes in the economy.

For SARS better regulation and facilitation of cross-border e-commerce transactions can provide the opportunity to generate additional revenue for Government and enhance economic growth. This can only be achieved by creating an environment whereby an appropriate level of consumer trust is established. To this effect South Africa does have laws addressing key regulatory issues regarding trade in e-commerce.[1] What remains is for SARS to determine the desired extent of levying consumption taxes on cross-border digital goods. Once it has been established, the application thereof must be aligned to guiding international tax principles to further embed the taxation of cross-border trade in digital goods in South Africa by way of continuous regulatory certainty.

[1] Budree 2017: 27-28.

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LIST OF ACRONYMS

B2B	Business-to-business transaction
B2C	Business-to-consumer transaction
B2G	Business-to-government transaction
BRICS	Brazil, Russia, India, China and South-Africa trading bloc
C2C	Consumer-to-consumer transaction
DTI	Department of Trade and Industry
e-commerce	Electronic commerce
EDI	Electronic data interchange
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICC WGEC	International Chamber of Commerce Working Group on E-Commerce
ICT	Information and communication technology
IT	Information technology
ITAC	International Trade Administration Commission
OECD	Organisation for Economic Co-operation and Development
SACU	Southern African Customs Union
SADC	Southern African Development Community
SARS	South African Revenue Service
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
VAT	Value-added tax
WCO	World Customs Organization
WTO	World Trade Organization

CHAPTER 1 - INTRODUCTION

1.1 BACKGROUND

Taxation of e-commerce is a concern for the South African Revenue Service (SARS), international agencies and tax authorities worldwide. E-commerce in general refers to: "all commercial transactions based on the electronic processing and transmission of data, including text, sound and images. This involves transactions over the Internet, plus electronic funds transfers and Electronic Data Interchange (EDI)."[2] E-commerce allows unidentified purchasers from anywhere in the world to pay obscure vendors for products that are often goods, services and licences all mixed into one.[3] The transactions are completed while ignoring national boundaries and any consequences associated with cross-border transactions.[4]

The definition of "e-commerce" is still an issue despite the term having existed since about 1994.[5] To date there has been no clear uniformly accepted definition of e-commerce.[6] The lack of uniform meaning causes many variances in predicting growth and the collection of statistics.[7] Arriving at a clear standardised legal definition of e-commerce is no easy feat. The definition of e-commerce has evolved over the years with numerous international and national organisations, working groups and departments defining e-commerce in their own respective manner.[8] It is key that South Africa develops a clear definition of e-commerce that is aligned with global norms. To successfully achieve this South Africa first needs to identify and understand its own interests and, ideally, ensure that these interests are accurately reflected in appropriate domestic policies and regulations.[9]

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[2] Davidson, *The law of electronic commerce*, 2009: 1. The definition by Davidson seeks to provide the reader with a general understanding of e-commerce whilst chapter 2 provides an detailed analyses of the various issues associated with defining e-commerce. Furthermore, "EDI is a *de facto* standard format for exchanging business data between companies computer application in a standardised form, but usually refers to as proprietary system of delivery", Department of Communications, *A green paper on electronic commerce for South* Africa, 2000: 125, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[3] Basu, *Global perspectives on e-commerce taxation law*, 2007: Preface.

[4] Basu, 2007: Preface.

[5] Basu, 2007: 14.

[6] Pinto, *E-commerce and source based income taxation*, 2003: 1. Basu, 2007: 14.

[7] Pinto, 2003: 1. Basu, 2007: 14.

[8] Budree, *E-commerce country case study: South Africa*, 2017: 7-10, available at: http://www.gegafrica.org/publications/e-commerce-country-case-study-south-africa (accessed 31 July 2018).

[9] Budree, 2017: 5.

The Internet has facilitated the establishment of a "borderless" environment which e-commerce has effectively taken advantage of. Entities are now able to trade worldwide at the mere click of a button.[10] Tax authorities are left frustrated by the "borderless" world of the Internet as they remain bound to national fiscal boundaries.[11] The continuous development of e-commerce poses a serious challenge to the traditional system where taxation is dependent on jurisdiction.[12] The trade in goods and services over the Internet knows no boundaries and will continue to evolve in ways that are difficult or impossible to predict.[13] Fortunately for SARS, where there is trade, there is always the possibility of collecting taxes and duties.[14]

Another issue is that tax laws and policies designed for the physical world often do not correlate with e-commerce, which takes place within the more intricate world of cyberspace.[15] Numerous transactions are completed simultaneously by many individuals on the Internet who are difficult to identify and trace, rendering the possibility of levying taxes and duties significantly more complicated.[16] Furthermore, the basic jurisdictional principles of most tax law systems, such as residence and source, are disguised by the complications of electronic transactions, often leaving the governments that would normally have benefitted from the taxation of these transactions out of pocket.[17]

Most of the current value-added tax (VAT) rules and provisions were developed at a time when the ability to digitise and deliver goods and services across-border were very limited.[18] This is one of the main reasons for the current problems concerning the application of consumption taxes on e-commerce. The electronic sale of tangible products does not raise any fundamental taxation issues because by applying the proper destination-based tax principle the consignment will be subjected to customs control on arrival, allowing for the levying of taxes and duties.[19] The popularity of e-

[10] Papadopoulus & Snail (eds), *Cyberlaw@SA III*: *The law of the Internet in South Africa*, 2012: 95.
[11] Basu, 2007: Preface.
[12] Basu, 2007: Preface.
[13] Department of Communications, 2000: 15, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).
[14] Papadopoulus & Snail (eds), 2012: 95.
[15] Cockfield *et al*, *Taxing global digital commerce*, 2013: 5.
[16] Papadopoulus & Snail (eds), 2012: 95.
[17] Fitzgerald *et al*, *Internet and e-commerce law: technology, law and policy*, 2007: 573.
[18] Basu, 2007: 141.
[19] Basu, 2007: 143.

commerce purchases has caused an increase in the volume of small consignments passing through customs placing strain on customs authorities resources.[20] However, if the product is intangible, ordered and delivered by electronic means, enforcement issues arise causing significant problems for taxing authorities.[21] The problems caused by fully digital e-commerce transactions, also known as direct e-commerce, are summarised as follows:

a) Exponential growth in the number of cross-border business-to-customer (B2C) transactions unsuited to current VAT systems;[22]
b) Direct e-commerce questions the classification of supplies as goods or services;[23]
c) Enforcement in lack of voluntarily compliance is based on the authority's knowledge of the identity and location of the supplier.[24]

South Africa has made numerous amendments to the *Value-Added Tax Act*[25] (VAT Act) to address the above listed issues. The scope of electronic services that are subject to VAT has been significantly broadened. The previous specific categories of "electronic services" as prescribed by regulation was amended to widen the scope of services that will qualify as "electronic services" supplied by Foreign Electronic Service Suppliers in SA.[26] The amendment removed some of the uncertainties and practical difficulties resulting from the previous definition.[27] The intention of the amendments was to reduce the risk of VAT distorting trade between foreign suppliers and domestic suppliers. The amendments have resulted in an overhaul of the VAT treatment of electronic services in South Africa.[28]

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[20] WCO, *Cross-border e-commerce framework of standards*, 2018(1): 8, available at: www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/ecommerce/wco-framework-of-standards-on-crossborder-ecommerce_en.pdf?la=en (accessed 22 November 2019).

[21] Basu, 2007: 143 & 144.

[22] OECD, *Report on the Turku Conference*, 1997: 17; Basu, 2007: 146 & 147.

[23] Hinnekens, *The challenges of applying VAT and income tax territoriality concepts and rules to international electronic commerce*, 1998: 55; Basu, 2007: 147.

[24] OECD, *Report on the Turku Conference*, 1997: 9-12; Basu, 2007: 147.

[25] Act 89 of 1991.

[26] National Treasury, *Budget Review*, 2017: 47, available at: www.treasury.gov.za/documents/national%20budget/2017/review/FullBR.pdf (accessed 6 August 2018).

[27] National Treasury, *Budget Review*, 2017: 47, available at: www.treasury.gov.za/documents/national%20budget/2017/review/FullBR.pdf (accessed 6 August 2018).

[28] Juta, *Juta's practice collection / value-added tax notes* 2018, available at: http://ipproducts.jutalaw.co.za/nxt/gateway.dll/taxl/vtlc/6/10?f=templates$fn=default.htm (accessed 5 August 2018); PricewaterhouseCoopers, *Extensive reform for suppliers of electronic services*, 2018, available at: https://www.pwc.co.za/en/press-room/extensive-reform-for-suppliers-of-electronic-services--0.html (accessed 5 August 2018).

At the same time SARS continues its efforts to implement the *Customs Control Act*[29] (CCA) and the *Customs Duty Act*[30] (CDA). Once fully implemented the CCA will cast a much bigger net across trade to enforce compliance. SARS opted to make use of a phased implementation approach to migrate to the CCA and CDA to potentially prevent causing serious disruption to trade.[31] SARS' Legal Counsel: Customs and Excise[32] offer an explanation for the phased implementation approach:

> The transition from the current legal regime to the new legal regime poses significant challenges as the CCA and CDA go beyond a mere re-enactment of existing provisions of the 1964 Act and includes, for instance, alignment of South African law with international best practice and applicable international standards such as the Kyoto Convention.

The importation of digital or intangible goods and services does still challenge the tax base because SARS will only be aware of the cross-border transaction if a declaration is made by either the VAT vendor, intermediary or client.[33] Van Zyl[34] attributes inadequate and inappropriate VAT collection mechanisms, in cross-border trade, as the main contributors to VAT fraud and the erosion of the tax base.

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[29] Act 31 of 2014.

[30] Act 30 of 2014.

[31] Theron, *New Customs Acts Programme SAAFF presentation*, 2018, available at: http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation update.aspx (accessed 7 September 2018).

[32] SARS Legal Council: Customs and Excise, *Understanding the Customs & Excise transitional provisions*, 2017: 1, available at: http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx (accessed 6 September 2018).

[33] Classen, *E-commerce and value-added tax*, in Papadopoulus & Snail (eds), 2012: 114.

[34] Van Zyl, 2014: 184; The statement is made by Van Zyl with reference to J. Alfredo Tijerina-G's (Mexico) presentation: "Applying VAT to international trade – the challenge of economic globalisation: the challenge for tax administrations" which was presented at the "First Meeting of the OECD Global Forum on VAT" which took place from the seventh to the eight of November 2012 in Paris, France. Presentation available at: http://www.oecd.org/ctp/consumptiontax/PptpresentationsessionmaterialGFonVAT.pdf (accessed 27 July 2018).

1.2 PROBLEM STATEMENT

Globally a lack of consensus is prevalent with regards to the levying of consumption taxes on the cross-border trade in digital goods. The recent amendments to the VAT Act provides for the taxation of the supply of electronic services to the Republic. This can potentially become a catalyst for the similar tax treatment of both tangibles and intangibles. The concept of digital tax is still in its infancy, however the recent amendments made to the VAT Act is reflective of SARS' intention to widen the tax base to include the providers of electronic services and digital goods. The issue that remains is for SARS to determine the desired extent of levying consumption taxes on cross-border digital goods.

1.3 RESEARCH OBJECTIVE AND RESEARCH QUESTIONS

This dissertation seeks to investigate whether current legislation and regulations surrounding e-commerce are sufficient in South Africa with regards to applying and collecting applicable taxes and duties when dealing with the cross-border trade of physical goods or digital goods. The following research questions aim to assist in achieving the stated research objective:

i) Which South-African legislation is currently applicable in determining the relevant taxes, duties and amounts incurred in cross-border e-commerce transactions?
ii) To what extent are electronic cross-border traders (resident/non-resident), in terms of existing legislation, subjected to the same type of taxes, duties and amounts as their more traditional offline counterparts?[35]
iii) Who is responsible for collecting VAT on the importation of intangible goods?
iv) What role does the CCA and CDA perform in assisting SARS in collecting taxes, duties and amounts due on cross-border e-commerce transactions?

[35] Fitzgerald *et al*, 2007: 573.

1.4 RELEVANCE

E-commerce is experiencing exponential growth, which is rapidly transforming the traditional approach to international trade.[36] On a daily basis technology is becoming increasingly more accessible and user friendly, thus expanding the reach of the Internet and its users. Convergence of technologies such as broadcasting, telecommunications and information technologies are contributing significantly to the exponential growth of e-commerce.[37] Convergence goes beyond the use of technology to develop new products and services, most of which simply gets categorised as e-commerce.[38] E-commerce challenges the traditional legal rules containing rigid or formalistic contract requirements whilst exposing the incompleteness of legal rules which have geographical limits to which technology is unaffected by.[39]

The rapid increase in cross-border data flows is described as a digital revolution.[40] The revolution is supported by the growth, in terms of global revenues, experienced by some of the top providers of digital services and/or digital products. Estimates indicate that in the period 2011 to 2017 the global revenue of Netflix (film) grew on average by 37% and Microsoft by 10% annually; whereas music streaming grew by 50%; e-books by 44% and video games 10%.[41] Amazon's revenue from international markets are reported to have grew on an average by 28% per annum in the period 2010-2016.[42]

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[36] World Customs Organization, *WCO news N° 78 October 2015*, 2015: 32, available at: http://www.wcoomd.org/en/media/wco-news-magazine/previous/wco-news-n78.aspx (accessed 31 July 2018).

[37] Department of Communications, 2000: 15, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[38] Department of Communications, 2000: 15, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019); Goode *et al*, *Transnational commercial law: international instruments and commentary*, 2012: 103.

[39] Goode *et al*, 2012: 103.

[40] Banga, *Growing trade in electronic transmissions: implications for the south*, 2019: 25.

[41] Macrotrends, *Netflix Revenue 2006-2019 | NFLX*, 2019, available at https://www.macrotrends.net/stocks/charts/NFLX/netflix/revenue (accessed 12 November 2019); Watson, *Music streaming revenue worldwide 2005-2018*, 2019, available at: https://www.statista.com/statistics/587216/music-streaming-revenue/ (accessed 12 November 2019); LPE, *The video games' industry is bigger than Hollywood*, available at: https://lpesports.com/e-sports-news/the-video-games-industry-is-bigger-than-hollywood (accessed 12 November 2019); Macrotrends, *Microsoft Revenue 2006-2019 | MSFT*, available: https://www.macrotrends.net/stocks/charts/MSFT/microsoft/revenue (accessed 12 November 2019); Banga, 2019: 11.

[42] Wischenbart, *The business of books 2017: It's all about the consumers*; 2017: 3. Banga, 2019: 11.

The e-commerce landscape remains largely unregulated. The World Trade Organization (WTO), World Customs Organization (WCO), Universal Postal Union (UPU), World Economic Forum (WEF), United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD) are but a few of the numerous international organisations that have appointed working groups on e-commerce.[43] According to Budree,[44] locally:

> A workgroup representing both public and private sector interests has been formed to investigate e-commerce in South Africa from an economic and technical perspective. Members of this workgroup include the Department of Telecommunications and Postal Services, the Department of Trade and Industry, the State Security Agency, the South African Treasury, the Financial Services Board Security, ICASA, the Government Communication and Information System, and a conglomerate of e-commerce private sector representatives.

A topic on the different working groups' agendas is the need to bridge the global digital divide.[45] International Telecommunication Union (ITU) data confirm that Internet use continues to grow globally as 4.1 billion people are using the Internet in 2019, reflecting a 5.3 per cent increase compared to 2018.[46] The digital divide is by far the largest between Africa and the rest of the world regions.[47] The latest figures published by the ITU on 5 November 2019 indicates Europe is the region with the highest Internet use (82.5 per cent), while Africa is the region with the lowest (28.2 per cent).[48] On the one hand, developed countries is nearing saturation levels, with close to 87 per cent of individuals online.[49] On the other hand, an estimated 3.6 billion people remain offline, with the majority of the unconnected living in the least developed countries (LDC)

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[43] WCO, *Work with other stakeholders*, available at: http://www.wcoomd.org/en/topics/facilitation/activities-and-programmes/ecommerce.aspx (accessed 31 July 2018).

[44] Budree, 2017: 34.

[45] According to the OECD the term "digital divide" refers to: "the gap between individuals, households, businesses and geographic areas at different socio-economic levels with regard both to their opportunities to access information and communication technologies (ICTs) and to their use of the Internet for a wide variety of activities." OECD, *Understanding the digital divide*, 2001: 5, available at: https://doi.org/10.1787/236405667766 (accessed 2 August 2018).

[46] ITU, *Measuring digital development*: *Facts and figures 2019*, 2019: 1.

[47] "By the end of 2016, only one in five people in Africa were using the Internet compared with almost one out of every two people worldwide." Mohamed Nour, *Africa bridging the digital divides*, 2017: 4, available at: http://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1146536&dswid=3675 (accessed 2 August 2018).

[48] ITU, 2019: 2; Bogdan-Martin, *New ITU data reveal growing Internet uptake but a widening digital gender divide*, 2019, available at: https://www.itu.int/en/mediacentre/Pages/2019-PR19.aspx (accessed 15 November 2019).

[49] ITU, 2019: 2; Bogdan-Martin 2019, available at: https://www.itu.int/en/mediacentre/Pages/2019-PR19.aspx (accessed 15 November 2019).

where an average of just two out of every ten people are online (only 19.1 per cent).[50] Countries with the highest proportions of people not using the Internet are situated mostly in Africa and South Asia.[51] In addition, only 17.8 per cent of households in Africa have Internet access in their homes and only 10.7 per cent of households have a computer.[52] Despite the existence of a clear digital divide, 76 of the WTO's Members agreed to start negotiating a new e-commerce framework as they are impatient with a lack of WTO rules on the explosive growth of e-commerce.[53] However, China indicated their conditional support for the initiative but stated it should also take into account the needs of developing countries.[54] Previously, following the outcomes of the 11th WTO Ministerial Conference in 2017, South Africa indicated that although e-commerce can be used for development and has many benefits, the kind of rules being proposed are not necessarily going to contribute towards development.[55] Furthermore, cross-border e-commerce has been described as highly asymmetrical in nature, very concentrated and dominated by six countries.[56]

Most of the developing countries rely heavily on consumption taxes as part of their tax incomes.[57] Developed (industrial) countries derive proportionally twice as much revenue from income tax than from consumption tax.[58] Developing countries also import more than developed countries.[59] Developed countries are usually strong exporting nations, in contrast developing countries and its citizens and companies purchase more from foreign countries than foreign countries tend to purchase from

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50 ITU, 2019: 2; Bogdan-Martin 2019, available at: https://www.itu.int/en/mediacentre/Pages/2019-PR19.aspx (accessed 15 November 2019).

51 ITU, 2019: 2; Bogdan-Martin 2019, available at: https://www.itu.int/en/mediacentre/Pages/2019-PR19.aspx (accessed 15 November 2019).

52 ITU, 2019: 7.

53 Kihara, *China and U.S. among 76 WTO members pushing for new e-commerce rules*, 2019, available at: https://www.reuters.com/article/us-davos-meeting-ecommerce/china-and-u-s-among-76-wto-members-pushing-for-new-e-commerce-rules-idUSKCN1PJ0UK (accessed 15 November 2019).

54 Kihara, 2019, available at: https://www.reuters.com/article/us-davos-meeting-ecommerce/china-and-u-s-among-76-wto-members-pushing-for-new-e-commerce-rules-idUSKCN1PJ0UK (accessed 15 November 2019).

55 Saez, *E-Commerce: Some developing countries push back on idea of new WTO Rules*, 2017, available at: http://www.ip-watch.org/2017/09/29/ecommerce-developing-countries-push-back-idea-new-wto-rules/ (accessed 15 November 2019).

56 Saez, 2017, available at: http://www.ip-watch.org/2017/09/29/ecommerce-developing-countries-push-back-idea-new-wto-rules/ (accessed 15 November 2019).

57 Basu, 2007: 191 & 192.

58 Jones & Basu, *Taxation of electronic commerce: A developing* problem, 2002: 38-42; Basu, 2007: 192.

59 Basu, 2007: 192.

them.[60] Developing countries, including South Africa, have raised concerns to the WTO about possible tariff revenue implications of the current WTO Moratorium in place, which bans levying customs duties on electronic transmissions.[61] Nonetheless, Ministers have agreed to continue the practice of not imposing customs duties on electronic transmissions at each relevant Ministerial Conference to date since 1998. The inability to tax digital goods whilst customs duties (tariffs) are enforced on physical goods crossing the border, may lead to the latter transactions becoming increasingly substituted by pure digital commerce, which is deemed in this regard as a more economical alternative.[62] In the process of doing so the tax base on physically tradable goods will be further eroded.[63] This poses a great threat to the international tax system as the erosion of the worldwide tax base can negatively impact on economic activity, economic efficiency and competitive fairness amongst vendors.[64]

1.5 RESEARCH METHODOLOGY

The approach employed is a doctrinal analysis focussing on the current South African legislation applicable to e-commerce and the taxation of cross-border e-commerce transactions. The applicable provisions will be identified and analysed to provide legal clarity.

Furthermore, once clarity is provided on the current legal provisions applicable, the comparative method is used to determine if functional equivalence exists and whether the tax neutrality principle is abided by in relation to the tax treatment of cross-border traders (resident/non-resident) of electronic services and digital goods and their more traditional offline counterparts trading cross-border in tangible services and goods. In identifying and accounting for any resemblances and dissimilarities relating to the tax treatment; working papers, commentary and guidelines by various international organisations will be considered and measured against.

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60 Basu, 2007: 192.

61 The WTO's Members agreed on 10 December 2019 to maintain the current practice of not imposing customs duties on electronic transmissions until the 12th WTO Ministerial Conference; WTO General Council, *General Council Decision*, 2019.

62 Basu, 2007: 177.

63 Basu, 2007: 177.

64 Basu, 2007: 175.

1.6 LIMITATIONS OF STUDY

The focus of the dissertation is on the taxes, duties and amounts SARS imposes (or intends to) on cross-border e-commerce transactions, the current and upcoming legislation regulating how it is being enforced and the differences thereto when comparing e-commerce transactions of tangible and intangible goods and services. The taxes, duties and amounts are therefore limited to VAT, customs duties and amounts imposed on imports.

1.7 EXPOSITION

The dissertation comprises of 6 chapters. Chapter 1 introduces the research objective and the associated questions thereto. Chapter 2 explores the numerous definitions on e-commerce from a national and international perspective, whilst emphasising the importance of a generally accepted definition, especially for taxation purposes. Chapter 3 shares the legislation currently regulating e-commerce in South Africa and traces the e-commerce policy formulation process back to the Department of Communications' 1999 Discussion Paper on Electronic Commerce Policy and the Green Paper on Electronic Commerce for South Africa in 2000.

Chapter 4 analyses the taxation of e-commerce in South Africa by focussing on the VAT Act and CEA. The classification of digital goods is also discussed alongside the various collection methods impacted by the classification. Chapter 5 sets out the answer whether the CCA and CDA will enhance SARS' ability to collect VAT on cross-border trade in digital goods. Chapter 6 contains the summary of the key findings and recommendations of the dissertation.

CHAPTER 2 - DEFINING E-COMMERCE

2.1 INTRODUCTION

Arriving at a clear standardised legal definition of e-commerce is no easy feat. According to Budree,[65] the definition of e-commerce has evolved over the years with numerous international and national organisations, working groups and departments defining e-commerce in their own respective manner. Krogman and Khumalo states that:[66]

> The challenge in defining e-commerce lies in its intangible nature and the rapid changes to the environment in which it exists. Much like services trade, e-commerce adds value in non-physical form or function. Beyond its intangible nature it is also hard to classify exactly where economic activity has taken place or how value was created.

To arrive at an agreeable and unambiguous definition of e-commerce is of the utmost importance, as divergent interpretations can affect national, regional and multilateral policies guiding the regulation and treatment of an ever-increasing mode of commerce.[67] Therefore, it is key that South Africa develops a clear definition of e-commerce that is aligned with global norms. To successfully achieve this South Africa first needs to identify and understand its own interests and, ideally, ensure that these interests are accurately reflected in appropriate domestic policies and regulations.[68]

2.2 UNDERSTANDING THE CONCEPT OF E-COMMERCE

In order to comprehend the treatment of e-commerce transactions, in terms of taxes and duties, the different types of cross-border e-commerce transactions has to be understood. The transactions could either involve intangibles, data products, or tangible goods.[69] It is significant that the transaction takes place over an electronic medium, for example over the Internet or via EDI.[70] E-commerce, being one of the main applications of information technology (IT), is an integral part of the digital

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[65] Budree, 2017: 7-10, available at: http://www.gegafrica.org/publications/e-commerce-country-case-study-south-africa (accessed 31 July 2018).

[66] Krogman & Khumalo, *E-commerce in Africa: definitions, issues and the evolving international regulatory landscape*, 2016: 7, available at: http://www.gegafrica.com/publications/e-commerce-in-africa-definitions-issues-and-the-evolving-international-regulatory-landscape (accessed 31 July 2018).

[67] Krogman & Khumalo, 2016: 7.

[68] Budree, 2017: 5.

[69] Abdulkarimli, *Taxation of e-commerce*, 2015: 100.

[70] Davidson, 2009: 1.

economy (which is based on both e-commerce and IT).[71] The OECD[72] states that the digital economy is the result of "a transformative process brought by information and communication technology (ICT), which has made technologies cheaper, more powerful, and widely standardised, improving business processes and bolstering innovation across all sectors of the economy." Consequently, the digital economy is increasingly becoming the economy itself.[73]

Based on the extent to which the Internet is used in transacting, e-commerce can be described as either "indirect e-commerce" or "direct e-commerce".[74] Indirect e-commerce involves transactions where customers make use of selection, ordering and payment processes (electronic cash transfer) of retail stores or mail order firms. For example, businesses who use an electronic medium for selling, marketing, and advertising; but the delivery of the product or service takes place by way of traditional processes.[75] In South Africa, Takealot serves as an example of an indirect e-commerce retailer.[76] In contrast thereto "direct e-commerce" refers to goods and services, in digitised form, acquired directly from the Internet.[77] It can be said that tangible goods are considered as indirect e-commerce, whereas, intangible goods and data information are considered direct e-commerce.[78]

Likewise, van Zyl[79] divides online retail shopping into two main categories, namely materialised e-commerce and dematerialised e-commerce. He distinguishes these two categories from traditional transactions by way of a practical example regarding the purchasing of a book. The book can be purchased at a retail outlet at the cashiers (traditional transaction), it can be ordered online via an online store and physically delivered (materialised e-commerce) or lastly an electronic version of the book (e-book) can be accessed through the Internet (dematerialised e-commerce).[80]

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71 Amro, *Theory and practice of cross-border electronic commerce transactions*, 2016: 2.
72 OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, 2015: 11, available at: https://doi.org/10.1787/9789264241046-en (accessed 13 November 2018).
73 OECD, 2015: 11, available at: https://doi.org/10.1787/9789264241046-en (accessed 13 November 2018).
74 Basu, 2007: 18; Abdulkarimli, 2015: 100.
75 Basu, 2007: 18.
76 Budree, 2017: 19.
77 Basu, 2007: 18.
78 Abdulkarimli, 2015: 101.
79 Van Zyl, *The collection of value added tax on online cross-border trade in digital goods*, 2013: 31.
80 Van Zyl, 2013: 31.

The main distinction between materialised e-commerce and traditional transactions is that the consumer and merchant are not in each other's presence.[81] The merchant might not even be aware that the transaction is taking place due to the process being partially automated.[82] Another key difference is that materialised e-commerce mostly delays the consumers' enjoyment of the product due to longer delivery times, but consumers are often exposed to a greater variety of goods.[83] The majority of merchants have flexible shipping/delivery policies, resultantly materialised e-commerce is not restricted to geographical areas and goods can be purchased from anywhere in the world, as long as the consumer is able to connect to the online site.[84]

Dematerialisation entails completely replacing a physical (tangible) product with information/data.[85] Dematerialised e-commerce is fully automated as compared to the partial automated processes of materialised e-commerce.[86] The partial automation is due to human interaction still being required to fulfil the order, for example: packaging and shipment.[87] In the case of dematerialised e-commerce, the only human interaction required is when the consumer initiates the transaction process, in some instances even consumer initiation is redundant due to automatic software updates being self-initiated.[88]

Characteristics of dematerialised goods include instantaneous delivery, excluding instances where the file being transferred is large, heavy network traffic or the speed of the device receiving the file is substandard.[89] Van Zyl[90] notes the above factors may reduce the delivery time from instantaneous to a few minutes or hours. Even though the delivery time might be delayed, the delivery process starts immediately after the sale/transaction has been concluded. By eliminating the costs of producing physical goods, dematerialised goods become relatively cheaper and simultaneously the

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81 Van Zyl, 2013: 31.
82 Van Zyl, 2013: 31.
83 Van Zyl, 2013: 32.
84 Van Zyl, 2013: 32.
85 Lee & Whang, *Winning the last mile of e-commerce*, 2001, available at: available at: https://sloanreview.mit.edu/article/winning-the-last-mile-of-ecommerce/ (accessed 24 February 2019).
86 Van Zyl, 2013: 32.
87 Van Zyl, 2013: 32.
88 Van Zyl, 2013: 32.
89 Van Zyl, 2013: 33.
90 Van Zyl, 2013: 33.

goods can be delivered at a very diminished cost globally.[91] Physical goods can potentially attract numerous additional costs in terms of handling, loading and unloading, warehousing, shipping, returns, spoilage and damage.[92] Substituting information flows (intangible goods) for material flows (tangible goods), if possible, usually saves cost and makes sound business sense.[93] Unfortunately, "pricing does not always reflect the lower cost of production of dematerialised goods."[94]

Various electronic relationships can exist between governments, enterprises, individuals/consumers and other public and private organisations.[95] The transactions that take place between the different role players mentioned above can be categorised as types of e-commerce. The most common types of e-commerce are as follows:

- Business-to-business (B2B): According to the United Nations Conference on Trade and Development's (UNCTAD) Information Economy Report 2015, B2B transactions account for the bulk of e-commerce consisting of various specialised B2B platforms, typically catering to certain industries or value chains.[96] It involves transactions between businesses, such as manufacturers and wholesalers (such as Amazon), or between wholesalers and retailers.[97]
- Business-to-consumer (B2C): Involves sales by "pure-play"[98] e-commerce enterprises who sell directly to consumers, for example Mr Delivery, and traditional

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91 Van Zyl, 2013: 33; Lee & Whang, 2001, available at: https://sloanreview.mit.edu/article/winning-the-last-mile-of-ecommerce/ (accessed 24 February 2019).

92 Lee & Whang, 2001, available at: available at: https://sloanreview.mit.edu/article/winning-the-last-mile-of-ecommerce/ (accessed 24 February 2019).

93 Lee & Whang, 2001, available at: available at: https://sloanreview.mit.edu/article/winning-the-last-mile-of-ecommerce/ (accessed 24 February 2019).

94 Van Zyl, 2013: 33.

95 UNCTAD, *Information economy report 2015: Unlocking the potential of e-commerce for developing countries*, 2015: 3, available at: https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1146 (accessed 27 January 2019).

96 UNCTAD, 2015: 3, available at: https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1146 (accessed 27 January 2019).

97 Abdulkarimli, 2015: 100; UNCTAD, 2015: 3, available at: https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1146 (accessed 27 January 2019).

98 Investopedia defines a "pure play" as: "an investors' term for a publicly traded company that focus its resources on only one line of business. As such, the performance of its stock correlates highly to the performance of its particular industry or sector." Investopedia staff, *What is a pure play?* 2019, available at: https://www.investopedia.com/ask/answers/04/042904.asp (accessed 27 January 2019); Oxford Dictionaries defines "pure play" as: "a company that focuses exclusively on one particular market or commodity; (now also) a company whose products are available only via the Internet". Author Unknown, *Oxford English Dictionary*, 2019, available at: http://www.oed.com.uplib.idm.oclc.org/view/Entry/154843?redirectedFrom=pure-play#eid27531269 (accessed 14 February 2019).

brick-and-mortar retail/manufacturing firms that add an online sales channel, such as Apple Inc.[99] The UNCTAD[100] indicate that "[s]elling directly to consumers via ICT networks can help micro and small businesses to reach new markets, both domestically and internationally. There is a wide range of channels to reach consumers, including social networks, crowdsourcing platforms, dedicated e-commerce websites, mobile applications and more."

- Consumer-to-consumer (C2C): These transactions portray a modern version of using the classified advertising section in a local newspaper or going to an auction.[101] In essence a customer sells his assets to another customer via an intermediate website, for example eBay or Gumtree, which serves an online auction platform.[102]
- Business-to-government (B2G): The transactions are similar to B2B transactions, except that the buyer in this case is a government entity.[103] It usually entails the use of the Internet for public procurement, licensing procedures, and other government related operations.[104] In developing countries, the size of the B2G e-commerce market is still rather insignificant as government e-procurement systems still remain comparatively undeveloped.[105]

To emphasise the unique contribution data makes to the digital economy, data has often been referred to as the new oil or as being the "oil of the digital era".[106] The

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99 Abdulkarimli, 2015: 100; UNCTAD, 2015: 3, available at: https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1146 (accessed 27 January 2019).

100 UNCTAD, 2015: 3, available at: https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1146 (accessed 27 January 2019).

101 UNCTAD, 2015: 3, available at: https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1146 (accessed 27 January 2019).

102 Abdulkarimli, 2015: 100; UNCTAD, 2015: 3, available at: https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1146 (accessed 27 January 2019).

103 UNCTAD, 2015: 3, available at: https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1146 (accessed 27 January 2019).

104 WTO, *E-commerce in developing countries: opportunities and challenges for small and medium-sized enterprises*, 2013(1): 4, available at: https://www.wto.org/english/res_e/booksp_e/ecom_brochure_e.pdf (accessed 3 February 2019).

105 WTO, 2013(1): 4, available at: https://www.wto.org/english/res_e/booksp_e/ecom_brochure_e.pdf (accessed 3 February 2019).

106 MacCarthy, *Data is not the new oil or the infrastructure of the digital economy*, 2018, available at: https://www.cio.com/article/3250697/big-data/data-is-not-the-new-oil-and-it-s-not-the-infrastructure-of-the-digital-economy-either.html# (accessed 21 October 2018); Author Unknown, *The world's most valuable resource is no longer oil, but data*, 2017, available at: https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data (accessed 21 October 2018); Saez, *E-commerce: some developing countries push back on idea of new*

analogy between data and oil has however been described as misleading because data has numerous properties that are largely different and distinguishable from an exhaustible resource.[107] Bourreau *et al*[108] attributes “non-rivalry” as one of the inherent characteristics of data (as well as most intangible goods) , meaning the same data can be collected and used countless times without losing value. During the WTO’s conference on the use of data in the digital economy it was highlighted that it is not always clear where data’s value is acquired, nor the pricing thereof, as it travels across interfaces and over networks.[109] Therefore, data can exist in multiple places at once and can be created anywhere, geographical limitations does not constrain data, as many valuable data sets are widely available to the public.[110]

The growth of e-commerce, however, raises a number of challenges for policymakers and legal drafters.[111] According to Budree[112] this includes: “the need to protect the privacy and security of national data, and the need to regulate and tax transactions taking place across new and virtual channels.” Countries are pushed to explore new routes to increase the competitiveness of their domestic IT industry as competition from abroad is drastically becoming more evident, especially from far reaching ultra-successful companies such as Amazon and Alibaba.[113] Many of these issues are already being addressed on a global scale and in multinational forums *inter alia* the G20, the WCO, the WTO and the OECD.[114]

WTO Rules, 2017, available at: http://www.ip-watch.org/2017/09/29/ecommerce-developing-countries-push-back-idea-new-wto-rules/ (accessed 28 October 2019).

[107] WTO, *Conference on the use of data in the digital economy*, 2017(1), available at: https://www.wto.org/english/res_e/reser_e/datadigitaleco17_e.htm (accessed 21 October 2018); Bourreau *et al*, *Big data and competition policy: market power, personalised pricing and advertising*, 2017: 30, available at: http://www.cerre.eu/publications/big-data-and-competition-policy (accessed 21 October 2018).

[108] Bourreau *et al*, 2017: 30, available at: http://www.cerre.eu/publications/big-data-and-competition-policy (accessed 21 October 2018).

[109] WTO, 2017(1), available at: https://www.wto.org/english/res_e/reser_e/datadigitaleco17_e.htm (accessed 21 October 2018).

[110] MacCarthy, 2018, available at: https://www.cio.com/article/3250697/big-data/data-is-not-the-new-oil-and-it-s-not-the-infrastructure-of-the-digital-economy-either.html# (accessed 21 October 2018); WTO, 2017(1), available at: https://www.wto.org/english/res_e/reser_e/datadigitaleco17_e.htm (accessed 21 October 2018).

[111] Budree, 2017: 5.

[112] Budree, 2017: 5.

[113] Budree, 2017: 5.

[114] Budree, 2017: 5.

A logical starting point would be to draft an all-encompassing definition of e-commerce specific to South Africa that not only accounts for the local environment, but importantly also reflects international trends and debates.[115] One cannot begin to solve a problem if the parameter in which the problem exists is not clearly defined. To attempt to address a problem for which the parameters are not clearly defined would prove futile. Krogman and Khumalo[116] emphasise: "Nonetheless, one constant element remains: e-commerce transactions always require the exchange of data over a computer network."

2.3 EXISTING DEFINITIONS

There are numerous debates surrounding the definition of e-commerce. The technical differences have resulted in different approaches being taken on an international scale by important role-players as well as locally. However, it has been pointed out by the WCO *Framework of Standards on Cross-Border E-Commerce*, the definitions used by some international organisations and countries tend to include elements of ICT and the Internet such as: communication, initiation of transactions, cross-border movement and electronic payment.[117]

2.3.1 International Context

Budree[118] points out that the definition of electronic commerce or e-commerce has evolved over the years by referring to Andam's definition for the UN Development Programme in 2003 which was widely accepted at the time as the definitive description of e-commerce: "E-commerce is the use of electronic communications and digital information processing technology in business transactions to create, transform, and redefine relationships for value creation between or among organizations, and between organizations and individuals."[119]

115 Budree, 2017: 5.

116 Krogman & Khumalo, 2016: 7.

117 WCO, 2018(1): 7, available at: www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/ecommerce/wco-framework-of-standards-on-crossborder-ecommerce_en.pdf?la=en (accessed 22 November 2019).

118 Budree 2017: 7.

119 Andam, *E-commerce and e-business*, 2003: 6, available at: http://www.unapcict.org/resources/ictd-infobank/e-commerce-and-e-business (accessed 3 February 2019).

As far back as 2001 the OECD and its member countries attempted to define exactly what e-commerce is without creating ambiguity.[120] Ever since, the OECD (including its member countries) has been instrumental in the development of the definition of e-commerce.[121] Budree[122] describes the OECD's current definition of e-commerce as "a global and all-encompassing e-commerce definition". The definition is as follows:[123]

> An e-commerce transaction is the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments, and other public or private organisations. To be included are orders made over the web, extranet or electronic data interchange. The type is defined by the method of placing the order. To be excluded are orders made by telephone calls, facsimile or manually typed e-mail.

Unlike previous definitions of e-commerce which distinguished e-commerce based on the type of network used, the current definition is singular and all-inclusive in an attempt to increase international harmonisation on the matter.[124] Krogman and Khumalo[125] indicate that to a large extent the objective has been met as numerous international organisations[126] that use the singular-definition in their reports and studies on e-commerce. Additionally, the singular-definition of e-commerce incorporates business-to-consumer (B2C), business-to-business (B2B) and consumer-to-consumer (C2) interactions.[127]

The WTO, as one of the organisations that have a similar definition to the OECD's definition, defines e-commerce as activities involving goods and services crossing borders electronically, specifically the sale or purchase of goods or services conducted over the Internet or other computer networks.[128] The WTO further stipulates that an e-

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[120] Krogman & Khumalo, 2016: 7; OECD, *Measuring the information economy*, 2002: 89, available at: https://doi.org/10.1787/9789264099012-en (accessed 17 November 2019).

[121] Budree, 2017: 7.

[122] Budree, 2017: 7.

[123] OECD, *OECD science, technology and industry scoreboard 2011*, 2011: 184, available at: https://doi.org/10.1787/sti_scoreboard-2011-en (accessed 3 February 2019).

[124] Krogman & Khumalo, 2016: 7.

[125] Krogman & Khumalo, 2016: 7.

[126] Including UNCTAD, the International Trade Centre (ITC) and IDEAS Centre, as well as the WTO. WTO, 2013(1), available at: https://www.wto.org/english/res_e/booksp_e/ecom_brochure_e.pdf (accessed 3 February 2019).

[127] Budree, 2017: 8.

[128] WTO, *Briefing note: electronic commerce, 9th WTO Ministerial Conference*, Bali, 2013(2), available at: https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_ecom_e.htm (accessed 3 February 2019); Budree, 2017: 8.

commerce transaction could involve enterprises, households, individuals, governments and other public or private organisations, which is in line with the OECD definition.[129]

An unusual deviation is created by the WTO Work Programme on Electronic Commerce's definition of e-commerce.[130] The WTO Work Programme on Electronic Commerce states that: "Exclusively for the purposes of the work programme, and without prejudice to its outcome, the term 'electronic commerce' is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means".[131] The original intention was to offer basic principles to assist with defining e-commerce, as opposed to providing an exhaustive list of methods on how electronic transactions can be carried out.[132] The issue that arises when one attempts to list the different methods is that the definition has to be constantly updated and reviewed due to the rapid changing digital environment. There exist two schools of thought regarding the approach to follow when attempting to define e-commerce. This has been prevalent since April 2000 when OECD member countries initially endorsed two definitions of electronic transactions (electronic orders) to create internationally comparable official statistics measuring the level, growth and composition of electronic commerce transactions.[133] The definitions distinguished between a broader "electronic transaction" definition and a narrower "Internet transaction" definition.[134] According to the OECD definitions: "the method by which the order is placed or received, <u>not the payment or the channel of delivery</u>, determines whether the transaction is an Internet

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[129] WTO, 2013(2), available at: https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_ecom_e.htm (accessed 3 February 2019); Budree, 2017: 8.

[130] Krogman & Khumalo, 2016: 8.

[131] At the WTO's Second Ministerial Conference in May 1998, the *Declaration on Global Electronic Commerce* was adopted. The Declaration called for the establishment of a work programme on e-commerce, which was adopted in September 1998. The WTO indicated that four of the WTO's bodies were charged with the responsibility of carrying out the Work Programme: the Council for Trade in Services, the Council for Trade in Goods, the Council for the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the Committee on Trade and Development. WTO, *Work programme on electronic commerce*, 1998(1): 1, available at: https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/31348/T/WT/L/274.DOC (accessed 17 February 2019).

[132] Krogman & Khumalo, 2016: 8.

[133] OECD, 2002: 61, available at: https://doi.org/10.1787/9789264099012-en (accessed 19 January 2019).

[134] OECD, 2002: 89, available at: https://doi.org/10.1787/9789264099012-en (accessed 17 January 2019).

transaction (conducted over the Internet) or an electronic transaction (conducted over computer-mediated networks)."[135]

Customs organisations and other border agencies play a crucial role in the functioning of the e-commerce supply chain and therefore, a need exists for the WCO to implement a strategy to secure the legitimate movement of global e-commerce trade with minimum intervention.[136] In this regard the WCO set up a multi-stakeholder Working Group on E-Commerce (WGEC)[137] comprising of representatives from governments, the private sector, international organisations, e-commerce stakeholders and academia to develop collaborative solutions supporting the needs and expectations of all stakeholders and as result thereof the "Framework of Standards on Cross-Border E-Commerce" was developed.

For the purpose of the WCO's Framework of Standards, cross-border e-commerce is characterised as follows:[138]

"• Online ordering, sale, communication and, if applicable, payment,

• Cross-border transactions/shipments,

• Physical (tangible) goods, and

• Destined to consumer/buyer (commercial and non-commercial)."

Member Countries are encouraged to apply the same principles and standards to business-to-business (B2B) transactions, although the WCO stipulated that the Framework sets standards mainly for B2C and C2C transactions.[139] The WCO

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[135] Own emphasis added. OECD, 2002: 89, available at: https://doi.org/10.1787/9789264099012-en (accessed 17 January 2019). Krogman and Khumalo concur with the OECD principle. Krogman & Khumalo, 2016: 10.

[136] WCO, 2018(1): 7, available at: www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/ecommerce/wco-framework-of-standards-on-crossborder-ecommerce_en.pdf?la=en (accessed 22 November 2019).

[137] The WGEC was established in July 2016 and given the mandate of "addressing cross-cutting issues in relation to growing e-commerce and come up with proposals for practical solutions to the clearance of low value shipments, including appropriate duty/tax collection mechanisms and control procedures that will facilitate and encourage the growth of e-commerce for the benefit of economic and social development". WCO, *Terms of reference for the Working Group on E-Commerce*, 2016, available at: http://www.wcoomd.org/en/about-us/wco-working-bodies/procedures_and_facilitation/ecommerce-working-group.aspx (accessed 20 November 2019).

[138] WCO, 2018(1): 8, available at: www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/ecommerce/wco-framework-of-standards-on-crossborder-ecommerce_en.pdf?la=en (accessed 22 November 2019).

[139] WCO, 2018(1): 8, available at: www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/ecommerce/wco-framework-of-standards-on-crossborder-ecommerce_en.pdf?la=en (accessed 22 November 2019).

Framework of Standards definition has two important characteristics which sets it apart from the norm: their definition is only applicable to cross-border transactions/shipments and it is limited to only physical (tangible) goods. The reasoning behind the limitation is unclear. It seems as if the essence of the Framework is focussed on the growing volumes of small and low-value shipments (for instance goods being delivered via express courier/parcel delivery services). However, it can be argued that the dramatic increase in cross-border digital goods and services also poses a significant risk for customs administrations, therefore the definition of e-commerce should not only be limited to physical (tangible) goods.

The WCO Cross-border E-commerce Framework of Standards definition seems to align itself to indirect e-commerce or as Van Zyl refers thereto: materialised e-commerce. This means that the transaction is initiated, ordered and finalised online through an electronic interface, but the goods/product itself is physically delivered via traditional methods. The OECD, the WTO and the WTO Work Programme on Electronic Commerce went a step further and defined e-commerce in a manner that includes not only indirect e-commerce/materialised e-commerce but also direct/dematerialised e-commerce.

2.3.2 National

The Department of Communications' 2000 *Green Paper on E-commerce in South Africa* defines e-commerce as: "[t]he use of electronic networks to exchange information, products, services and payments for commercial and communication purposes between individuals (consumers) and businesses, between businesses themselves, between individuals themselves, within government or between the public and government and, last, between business and government."[140] Budree[141] considers the definition to be broadly aligned with international discussions and also adds that it is contextually aligned to the OECD's definition of e-commerce. Similarly, the Green Paper's definition includes the numerous kinds of business activities which

[140] Department of Communications, 2000: 16, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[141] Budree, 2017: 8.

are being conducted electronically as well as indicates the different types of e-commerce transactions.[142]

Other examples of e-commerce definitions can be found scattered amongst legislation, White Papers and discussion papers published by local organisations. For instance, the South African National Integrated Information and Communications Technology (ICT) Policy White Paper, published by the Department of Telecommunications and Postal Services (DTPS) in September 2016, defines e-commerce as "transactions that take place online, where the buyer and seller are remote from each other. In the context of the white paper, it also includes the use of any ICTs, including mobile phones, to buy or sell goods and services."[143] The White Paper also defines e-services as:[144]

> services delivered via the Internet, and over mobile technology (m-services) and other ICT platforms, including not only e-commerce but also a wide spectrum of personal and government services based on the provision of knowledge, information, applications ('apps'), access to markets, entertainment, education, health care, social networks, banking, surveillance, remote control, early warning, etc.

The Electronic Communications and Transactions (ECT) Act[145] regulates South Africa's electronic transactions as part of the legislative mandate of the DTPS.[146] The ECT Act[147] refers to automated transactions, defined as "an electronic transaction conducted or performed, in whole or in part, by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person

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[142] Department of Communications, 2000: 16, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[143] DTPS, *National Integrated ICT Policy White Paper*, 2016: 171, available at: https://www.dtps.gov.za/images/phocagallery/Popular_Topic_Pictures/National_Integrated_ICT_Policy_White.pdf (accessed 3 February 2019).

[144] DTPS, 2016: 171, available at: https://www.dtps.gov.za/images/phocagallery/Popular_Topic_Pictures/National_Integrated_ICT_Policy_White.pdf (accessed 3 February 2019).

[145] Act 25 of 2002.

[146] Budree, 2017: 10; Krogman and Khumalo, 2016: 9; DTPS, 2016, available at: https://www.dtps.gov.za/images/phocagallery/Popular_Topic_Pictures/National_Integrated_ICT_Policy_White.pdf (accessed 3 February 2019). The establishment of the National DTPS was pronounced by then President Zuma following the May 2014 National Elections. The mandate of the DTPS is derived from relevant legislation, and is as follows: "To create a vibrant ICT sector that ensures that all South Africans have access to robust, reliable, affordable and secure ICT services in order to advance socio-economic development goals and support the Africa agenda and contribute to building a better world"; DTPS, *Mandates*, 2019, available at: https://www.dtps.gov.za/index.php?option=com_content&view=article&id=12&Itemid=165 (accessed 26 February 2019); ITWeb, *Department of Telecommunications and Postal Services Profile*, 2019, available at: http://pressoffice.itweb.co.za/dtps/profile.htm (accessed 26 February 2019).

[147] Sec 1.

in the ordinary course of such a natural person's business or employment".[148] According to Krogman and Khumalo[149] the DTPS's definition of automated transactions closely adheres to the guiding principles of the OECD definition of e-commerce. The principle being the indication that: "not all online activity, or exchange of data, can be seen as e-commerce or automated/electronic transactions".[150] Budree[151] also shares this view by emphasising that the DTPS's definition of automated transactions is aligned to the OECD definition.

The Ecommerce Forum Africa (EFA)[152] also proposes its own definition of e-commerce, namely: "the buying and selling of goods and services, or the transmitting of funds or data, over an electronic network, primarily the Internet and mobile telephony. These business transactions occur either business-to-business; business-to-consumer; consumer-to-consumer, or consumer-business".

Certain commonalities are prevalent across all of the above-mentioned definitions, both national and international.[153] Budree[154] concludes: "the two key points are that the medium of the transaction must be electronically over a computer network, and that the transaction must take the form of a sale or purchase of a good or service." Budree[155] also reiterates the importance of understanding the OECD[156] guiding principle which he interprets as: "the delivery of the good is not of consequence for the definition – it is the ordering or sale that is the defining factor."

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148 In accordance with Section 1 of the *ECT* Act: "transaction" means: "a transaction of either a commercial or non-commercial nature, and includes the provision of information and e-government services".

149 Krogman and Khumalo, 2016: 9.

150 Krogman and Khumalo, 2016: 9.

151 Budree, 2017: 10.

152 EFA, *Ecommerce Forum Africa Introductory Remarks to the Davis Commission on Tax*, 2015: https://ecomafrica.org/2017/wp-content/uploads/2015/08/Ecommerce-Forum-of-SA-Introductory-Remarks-to-the-Davis-Commission-on-Tax.pdf (accessed 3 February 2019); The EFA made reference to TechTarget as the source of the definition.

153 Budree, 2017: 10.

154 Budree, 2017: 10.

155 Budree, 2017: 10.

156 OECD, 2002: 89, available at: https://doi.org/10.1787/9789264099012-en (accessed 17 January 2019); Krogman and Khumalo also emphasise the importance of the OECD's guiding principle on the definition of e-commerce.

In contrast to the two key points highlighted by Budree; Krogman and Khumalo[157] deduced that the OECD definition sets out three criteria that need to be fulfilled when defining an interaction as an e-commerce transaction.

Firstly, the interaction between "enterprises, households, individuals, governments and other public or private organisations"[158] (depending on the type of e-commerce transaction) must involve a sale or purchase of goods or services.[159] The DTPS definition does abide to the initial criteria set out by the OECD principle, although it has a much broader scope with regards to the term "transaction". Section 1 of the ECT Act defines transaction as meaning "a transaction of either a commercial or non-commercial nature, and includes the provision of information and e-government services". The precise limitations of "non-commercial" transactions are unclear, but the ECT Act provides a valuable example with specific reference made to "information and e-government services".[160]

Secondly, as previously emphasised, the manner by which the order is placed or received is the critical factor with regards to the OECD definition.[161] The method of payment or the delivery channel of the goods or services is not important to determine whether the applicable transaction can be considered an e-commerce transaction or not. To satisfy the second criterion the sale or purchase of the goods or services between enterprises, households, individuals, governments and other public or private organisations must take place over a computer network which results in the receipt or placement of an order over a computer network.[162] With regards to the DTPS's definition[163] of automated transactions, the OECD principle is reflected "by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person".[164]

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[157] Krogman and Khumalo, 2016: 9.
[158] OECD, 2011: 184, available at: https://doi.org/10.1787/sti_scoreboard-2011-en (accessed 3 February 2019).
[159] Krogman and Khumalo, 2016: 9.
[160] Krogman and Khumalo, 2016: 9-10.
[161] Krogman and Khumalo, 2016: 10; OECD, 2002: 89, available at: https://doi.org/10.1787/9789264099012-en (accessed 17 January 2019).
[162] Krogman and Khumalo, 2016: 10; OECD, 2011: 184, available at: https://doi.org/10.1787/sti_scoreboard-2011-en (accessed 3 February 2019).
[163] ECT Act: sec 1.
[164] Krogman and Khumalo, 2016: 10.

Lastly, the OECD definition[165] of e-commerce explicitly excludes certain orders from qualifying as part of the definition, namely: “orders made by telephone calls, facsimile or manually typed e-mail”.[166] The reasoning being that these specific orders are not considered to be automated, nor conducted via methods specifically designed for the purpose of receiving or placing orders over a computer network (second requirement).[167] The DTPS’s definition[168] implies automation as a requirement by defining automated transactions as transactions “in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person’s business or employment”.[169]

In summary, “[f]or a transaction to be considered an e-commerce transaction the initial order process has to be automated, implying the use of an e-sales system.”[170] If the reasoning for the approach is followed the definition allows for the sale or purchase of almost anything, because “the payment and the ultimate delivery of the goods or services do not have to be conducted online” as stated in the OECD principles of the definition of e-commerce.[171] The DTPS definition again also adheres to the general principle (as identified by Krogman and Khumalo)[172] by including any “electronic transaction conducted or performed, in whole or in part” as part of the definition of automated transaction.[173] This simply means that the ordering of goods or services can be done online without it necessarily having to be a digital good or service.[174]

The following example illustrates the different type of e-commerce transactions: a physical copy of a music album can be ordered online (for instance via Takealot) and either collected or hand-delivered; a digital copy of a music album can be purchased online and downloaded to a device (for example Google Play Music); or one can subscribe online to a music streaming service which hosts the album and stream it on

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165 OECD, 2011: 184, available at: https://doi.org/10.1787/sti_scoreboard-2011-en (accessed 3 February 2019).
166 Krogman and Khumalo, 2016: 10.
167 Krogman and Khumalo, 2016: 10.
168 ECT Act: sec 1.
169 Krogman and Khumalo, 2016: 10.
170 Krogman and Khumalo, 2016: 10.
171 Krogman and Khumalo, 2016: 10; OECD, 2011: 184, available at: https://doi.org/10.1787/sti_scoreboard-2011-en (accessed 3 February 2019).
172 Krogman and Khumalo, 2016: 10.
173 ECT Act: sec 1.
174 Krogman and Khumalo, 2016: 10.

demand (for example Apple Music).[175] All three of the above mentioned instances are considered to be an e-commerce transaction, due to the purchase of goods or services (first requirement) and the ordering method which occurred over a computer network (second requirement) in the presence of an e-sales or automated system (third requirement).[176] The DTPS's definition is flexible in this regard in that it does not refer to certain goods or services; it simply requires that an electronic transaction, in whole or in part, be conducted.[177]

As explained above, there are numerous ways in which governments can define electronic transactions, but all the requirements can be simplified to a person ordering or requesting a service and the delivery or rendering of the service with minimal human input.[178]

While the OECD's defining principles of e-commerce assists a great deal in laying the foundation for an all-inclusive definition and simplifying the question as to what can be considered e-commerce, Krogman and Khumalo[179] warns that "the elements affecting e-commerce go far beyond these principles".

2.4 CONSIDERATIONS FOR TAXATION PURPOSES

> Some physical goods can be digitised, for example, reconstructed in a digital format, changing the product from tangible to intangible without compromising utility. Digitised goods can also be distributed and sold anywhere in the world, which blurs the lines between whether they should be classified as a good or service. In addition, digital products never go through customs or get taxed in the same way that their physical counterparts do.[180]

Digitised goods and services along with the rapid expansion of the Internet has facilitated the establishment of a "borderless" environment which will continue to evolve in ways that are difficult or impossible to predict.[181] To the layman the legal and tax implications associated with electronically accessing goods or services are of no concern because of the ease of merely clicking a button to complete online purchases

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175 Krogman and Khumalo, 2016: 10. The practical example originally provided by Krogman and Khumalo is very similar to Van Zyl's example distinguishing materialised e-commerce and dematerialised e-commerce from traditional transactions; Van Zyl, 2013: 31.
176 Krogman and Khumalo, 2016: 10.
177 Krogman and Khumalo, 2016: 10; ECT Act: sec 1.
178 Krogman and Khumalo, 2016: 11.
179 Krogman and Khumalo, 2016: 12.
180 Krogman and Khumalo, 2016: 11.
181 Department of Communications, 2000: 15.

and transactions. Krogman and Khumalo[182] summarises the layman's understanding of the term "electronic services":

> [c]olloquially, digital or electronic services are understood to be services, professional or otherwise, available for consumption or use via web pages, extranets and other applications, that run over the Internet or over any other web-enabled application, regardless of how the web is accessed (eg, through a mobile phone, a TV set, *et cetera*).

However, the intricate complication of conceptualising an all-inclusive definitions for intangible goods and services becomes evident when governments consider such the definitions of electronic services for tax purposes.[183] The sale of digitised goods, such as images and music online, especially create uncertainty as to whether such goods should be classified as goods or services for VAT purposes.[184]

The European Union (EU) serves as an international example where, for purposes of the European Commission, Taxation and Customs Union, electronically supplied services are defined as:[185]

> [s]ervices which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology.

Compared to domestically where SARS initially defined electronic services as:[186]

> The services listed in regulation 3 (educational services), regulation 4 (games and games of chance), regulation 5 (internet-based auction services); regulation 6 (miscellaneous services) and regulation 7 (subscription services) … where such services are supplied by means of any electronic agent, electronic communication or the internet for any consideration.

It is noteworthy the clear differences in approach to defining electronic services by the EU and SARS respectively. The EU definition is generic and broad, whereas the SARS definition is specific to the point of listing each different type of electronic service

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182 Krogman and Khumalo, 2016: 8.

183 Krogman and Khumalo, 2016: 8.

184 Classen 2012: 112.

185 European Commission, *Electronically supplied services*, 2019, available at: https://ec.europa.eu/taxation_customs/individuals/buying-goods-services-online-personal-use/buying-services/electronically-supplied-services_en (accessed 3 February 2019).

186 Regulations prescribing electronic services for the purpose of the definition of "electronic services" in section 1 of the Value-Added Tax Act, 1991; GN 37489 Government Gazette 2014:585(10160).

applicable in an exhaustive list.[187] Krogman and Khumalo[188] states: “SARS’s detailed and granular definition of electronic services does seem to cover the current possible extent of digital services”. The issue is however evident in the latter part of Krogman and Khumalo’s statement, namely “…current possible extent of digital services”.[189] The issue with naming the specific electronic services is that it can only include the current existing electronic services applicable. Technology changes rapidly and at a very fast pace resulting in the regulations governing it constantly playing catch up. By listing each specific electronically supplied service, the regulation does not allow the required “flexibility” legislation should carry in order to effectively adapt to technological changes.[190] The list of qualifying electronically supplied services were also not subjected to a regular periodic review.[191]

However, when compared to the OECD’s definition of e-commerce, the importance of regulatory certainty and international harmonisation becomes clear.[192] Resultantly, when considering definitions for taxation purpose, it can be argued that such definitions are better addressed via guiding principles.[193] The Davis Tax Committee (DTC) shares this sentiment in its recommendation that the definition of supplies qualifying as electronically supplied services should be provided in terms of “categories” as opposed to an exhaustive list.[194] The finalised “categories” must then be further explained in a guide or interpretation note.[195]

The DTC further advised that South Africa should avoid implementing rules and provisions that are not harmonised with international principles, due to the cross-border nature associated with e-commerce. For purposes of determining the treatment of e-commerce, the OECD recommendations and guidelines should be followed, where possible.[196] The DTC went as far as citing it “most imperative” that OECD

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[187] It was noted in the Davis Tax Committee’s (DTC) Final Report on VAT (DTC VAT Report) that the EU has moved from a previous exhaustive list approach to providing “categories” of services, comparable to Canada. The reason being that it better assists with addressing various types of electronic services as they change and develop. Davis Tax Committee, *Final VAT Report*, 2018: 34.

[188] Krogman and Khumalo, 2016: 9.

[189] Own emphasis added.

[190] Davis Tax Committee, 2018: 34.

[191] Davis Tax Committee, 2018: 35.

[192] Krogman and Khumalo, 2016: 9.

[193] Krogman and Khumalo, 2016: 9.

[194] Davis Tax Committee, 2018: 35.

[195] Davis Tax Committee, 2018: 35.

[196] Davis Tax Committee, 2018: 35.

principles be adhered to, singling out the importance of the principle of tax "neutrality".[197] In line with the gist of this chapter, relating to the importance of defining e-commerce, a further recommendation stated that judicial notice should be taken of other VAT jurisdictions' treatment of electronic services and application of related definitions.[198]

South Africa has taken a step forward by amending the VAT Act in 2014 to compel foreign suppliers of "electronic services" to South African residents, where payment for such services originates from a South African bank, to register as VAT vendors.[199] South Africa initially had a pro-active stance towards taxing e-commerce as the taxation of electronic services was originally implemented on the first of June 2014, ahead of other countries.[200] South Africa, as one the first countries in the world taxing electronic services in such a manner, was seen as leading the race in what could be described as the "new frontier for VAT".[201] A number of submissions were received by National Treasury at the time, raising concern that the amendment was imposing a new tax.[202] However, National treasury reaffirmed that the Regulation merely shifted the tax liability for e-services from the local recipient to the foreign supplier. The need for the amendment was due to application of VAT on imports not affording the effective enforcement on imported services or e-commerce where no border posts (or parcel delivery agents, for example the Post Office or courier company) can perform the function as collecting agents, as is the case with physical (tangible) goods.[203]

The services that are regarded as "electronic services" are however not listed in the VAT Act, but in a regulation published by the then Minister of Finance, Gordhan, on

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197 Davis Tax Committee, 2018: 35.

198 Davis Tax Committee, 2018: 35.

199 Budree, 2017: 25.

200 Grimm & Kruger, *The changing face of VAT and e-commerce in SA*, 2018, available at: https://www.webberwentzel.com/News/Pages/the-changing-face-of-vat-and-e-commerce-in-sa.aspx (accessed 12 March 2019).

201 Moodaley & Badenhorst, *New electronic services regulations: Widening the invisible VAT* net, 2018, available at: https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-2-november new-electronic-services-regulations-widening-the-invisible-vat-net.html (accessed 12 March 2019); Grimm & Kruger, 2018, available at: https://www.webberwentzel.com/News/Pages/the-changing-face-of-vat-and-e-commerce-in-sa.aspx (accessed 12 March 2019).

202 National Treasury, *Press release: Final Electronic Services Regulation published*, 2014: 1-2, available at: http://www.treasury.gov.za/comm_media/press/2014/2014032801%20-%20Press%20Release%20-%20Electronic%20Services%20Regulations.pdf (accessed 12 March 2019).

203 National Treasury, *Electronic Services Regulation: Request for public comments*, 2014(1): 1, available at: http://www.treasury.gov.za/comm_media/press/2014/2014013001%20-%20Electronic%20Services%20Regulations.pdf (accessed 12 March 2019).

28 March 2014 in the *Government Gazette*.[204] The reasoning for the definition forming part of a Regulation rather than primary legislation could be due to the ease of the legislative process of amending a regulation as compared to primary legislation.

Gordhan announced in his 2017 Budget Review that the regulations defining electronic services were being updated to broaden the scope of electronic services that are subject to VAT and to remove some uncertainties and practical difficulties resulting from the current list of services.[205] It was proposed in the 2017 Budget Review that taxable services will include cloud computing and services provided using online applications.[206] The proposed amendments to the regulations[207] were published for comment on 21 February 2018 (National Budget Speech day 2018) as well as a draft explanatory memorandum.[208] The intention was to widen the limited scope of the previous regulations in order to reduce the risk of VAT distorting trade between foreign suppliers and domestic suppliers and has resulted in an overhaul of the VAT treatment of electronic services.[209]

On the 24th of October 2018, the National Treasury published new regulations which significantly broadened the definition of "electronic services" in the VAT Act.[210] The Amended Regulation had an effective date of 1 April 2019.[211] The exhaustive list

[204] GN 37489 Government Gazette, 2014:585(10160); Juta, 2018, available at: http://ipproducts.jutalaw.co.za/nxt/gateway.dll/taxl/vtlc/6/10?f=templates$fn=default.htm (accessed 5 August 2018).

[205] National Treasury, *Budget Review*, 2017: 47, available at: www.treasury.gov.za/documents/national%20budget/2017/review/FullBR.pdf (accessed 6 August 2018).

[206] National Treasury, 2017: 47, available at: www.treasury.gov.za/documents/national%20budget/2017/review/FullBR.pdf (accessed 6 August 2018).

[207] The proposed amendments are commonly referred to as the "draft regulations".

[208] National Treasury, *Draft Explanatory Memorandum to the Regulations prescribing electronic services for the purpose of the definition of "Electronic Services" in Section 1(1) of The Value-Added Tax Act, 1991*, 2018(1), available at: http://www.treasury.gov.za/search.aspx?cx=018115738860957273853%3Aj5zowsrmpli&cof=FORID%3A11&q=Draft%20Explanatory%20Memorandum:%20Regulations%20prescribing%20electronic%20services%20for%20the%09purpose%20of%20the%20definition%20of%20%e2%80%9cElectronic%20Services%e2%80%9d%20in%20Section%201(1)%20of%20The%20Value-Added%20Tax%20Act,%201991 (accessed 16 March 2019).

[209] Juta, 2018, available at: http://ipproducts.jutalaw.co.za/nxt/gateway.dll/taxl/vtlc/6/10?f=templates$fn=default.htm (accessed 5 August 2018); PriceWaterhouseCoopers, *Extensive reform for suppliers of electronic services*, 2018, available at: https://www.pwc.co.za/en/press-room/extensive-reform-for-suppliers-of-electronic-services-0.html (accessed 5 August 2019).

[210] GN 429 Government Gazette 2019: 645(42316); Moodaley & Badenhorst, 2018, available at: https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-2-november-new-electronic-services-regulations-widening-the-invisible-vat-net.html (accessed 12 March 2019).

[211] GN 429 Government Gazette 2019: 645(42316).

specifying the applicable e-services have been removed and the amended regulations now define "electronic services" to include "any services supplied by means of an electronic agent, electronic communication or the [I]nternet for any consideration".[212] Sequentially the amended regulations make reference to definitions as provided by the ECT Act[213] for the terms "electronic agent", "electronic communication" and "[I]nternet". A limited number of services provided by means of the above are excluded from the definition of electronic services, namely regulated educational services, telecommunication services and certain intra-group transactions.[214]

The desired effect of the definition is that the services that fall within the ambit of the definition are essentially automated, involve minimal human intervention and are impossible to complete in the absence of information technology.[215] Accordingly, virtually all services that are supplied by way of electronic means are now considered "electronic services", the exception being the three general exclusions mentioned above. The new definition has substantially increased the reach of the Regulations and may now include the supply of the following services: cloud computing, software subscription services, online training, online data storage, broadcasting services, online advertising services, online reservation services, streaming services, online consulting and podcasts to name but a few.[216]

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[212] GN 429 Government Gazette 2019: 645(42316); Moodaley & Badenhorst, 2018, available at: https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-2-november-new-electronic-services-regulations-widening-the-invisible-vat-net.html (accessed 12 March 2019).

[213] Sec 1.

[214] Moonsamy, *New VAT regulations for electronic services to take effect in April 2019*, 2018, available at: http://www.polity.org.za/article/new-vat-regulations-for-electronic-services-to-take-effect-in-april-2019-2018-11-30 (accessed 13 March 2019); Moodaley & Badenhorst, 2018, available at: https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-2-november-new-electronic-services-regulations-widening-the-invisible-vat-net.html (accessed 12 March 2019).

[215] National Treasury, *Explanatory Memorandum to the Regulations prescribing electronic services for the purpose of the definition of "Electronic Services" in Section 1(1) of The Value-Added Tax Act, 1991*, 2018(2): 5, available at: http://www.treasury.gov.za/search.aspx?cx=018115738860957273853%3Aj5zowsrmpli&cof=FORID%3A11&q=Draft%20Explanatory%20Memorandum:%20Regulations%20prescribing%20electronic%20services%20for%20the%09purpose%20of%20the%20definition%20of%20%e2%80%9cElectronic%20Services%e2%80%9d%20in%20Section%201(1)%20of%20The%20Value-Added%20Tax%20Act,%201991 (accessed 16 March 2019); Moonsamy, available at: http://www.polity.org.za/article/new-vat-regulations-for-electronic-services-to-take-effect-in-april-2019-2018-11-30 (accessed 13 March 2019).

[216] Moonsamy, available at: http://www.polity.org.za/article/new-vat-regulations-for-electronic-services-to-take-effect-in-april-2019-2018-11-30 (accessed 13 March 2019); Moodaley & Badenhorst, 2018, available at: https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-2-november-new-electronic-services-regulations-widening-the-invisible-vat-net.html (accessed 12 March 2019); Mphela, *New regulations imposing VAT on electronic services in South Africa*, 2018, available at:

Various reputable Multinational companies, such as Facebook, Google and Twitter for example, will bear the brunt of the impact as they currently have access to the market and provide the majority of the online services to South Africans.[217] These companies are now legally obligated to register as VAT vendors with the South African Revenue Service (if they aren't already registered as VAT vendors) and pay the 15 per cent output VAT or face the consequences of non-compliance which could lead to incurring interest and penalties or even prosecution.[218]

The importation of digital or intangible goods and services does however still challenge the tax base because SARS will only be aware of the importation if you are a registered VAT vendor or client.[219] Van Zyl attributes inadequate and inappropriate VAT collection mechanisms, in cross-border trade, as the main contributors to VAT fraud and the erosion of the tax base.[220]

The 2016 South African National Integrated ICT Policy White Paper[221] is seen as a key document attesting to the South African government's perspective on e-commerce. In essence the White Paper addresses the potential and numerous benefits that the digital transformation of the public sector holds.[222] The promotion of readily available digital services will create further opportunities for digital entrepreneurship and the introduction of new innovative digital goods and services.[223]

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https://www.rsm.global/southafrica/news/new-regulations-imposing-vat-electronic-services-south-africa (accessed 13 March 2019).

[217] Mphela, 2018, available at: https://www.rsm.global/southafrica/news/new-regulations-imposing-vat-electronic-services-south-africa (accessed 13 March 2019).

[218] Mphela, 2018, available at: https://www.rsm.global/southafrica/news/new-regulations-imposing-vat-electronic-services-south-africa (accessed 13 March 2019). The tax and legal implications of the amended regulations relating to the definition of "electronic services" will be further analysed in the following chapters.

[219] Classen, 2012: 114.

[220] Van Zyl, 2014: 184; The statement is made by Van Zyl with reference to J. Alfredo Tijerina-G's (Mexico) presentation: "Applying VAT to international trade – the challenge of economic globalisation: the challenge for tax administrations" which was presented at the "First Meeting of the OECD Global Forum on VAT" which took place from the seventh to the eight of November 2012 in Paris, France. Presentation available at: http://www.oecd.org/ctp/consumptiontax/PptpresentationsessionmaterialGFonVAT.pdf (accessed 27 July 2018).

[221] DTPS, 2016, available at: https://www.dtps.gov.za/images/phocagallery/Popular_Topic_Pictures/National_Integrated_ICT_Policy_White.pdf (accessed 3 February 2019).

[222] Budree, 2017: 10.

[223] Budree, 2017: 10.

The intended approach adopted for transforming South Africa into a digital society is based on three key pillars highlighted in the White Paper:

- ensuring the digital transformation of government;
- providing all citizens with digital access to improve their quality of life; and
- using digital inclusion to ensure that all South African citizens benefit from the digital economy and knowledge society.[224]

The actions taken towards achieving the above-mentioned steps will increase demand for Internet access and boost e-commerce growth.[225] The South African Government needs to take active steps and set the foundation for achieving the three key pillars mentioned in the 2016 South African National Integrated ICT Policy White Paper.[226]

[224] Budree, 2017: 11; DTPS, 2016, available at: https://www.dtps.gov.za/images/phocagallery/Popular_Topic_Pictures/National_Integrated_ICT_Policy_White.pdf (accessed 3 February 2019).

[225] Budree, 2017: 11.

[226] DTPS, 2016, available at: https://www.dtps.gov.za/images/phocagallery/Popular_Topic_Pictures/National_Integrated_ICT_Policy_White.pdf (accessed 3 February 2019).

2.5 REGIONAL DEVELOPMENTS

Establishing a firm national position on the definition of e-commerce and the taxation thereof should be a priority. Thereafter, a similar stance should be regionally promoted by South Africa, as a key member, of the Southern African Customs Union (SACU) and Southern African Development Community (SADC). The implementation of regional frameworks on e-commerce and the reform of outdated policies and legislation can be the key to regional growth. In 2014 the WCO, the SACU Secretariat, the five Customs Administrations of the SACU Region (Botswana, Lesotho, Namibia, Swaziland {now known as Eswatini} and South Africa) and the Swedish International Development Cooperation Agency (Sida) embarked on a partnership to support effective implementation of the five-year SACU Regional Customs Modernisation Programme.[227] The partnership came to be known as the WCO-SACU Connect Project.[228]

The Project has achieved tangible results in its four focus areas: Information Technology (IT) Connectivity, trade partnerships, risk management and enforcement as well as Customs legislative reform.[229] One of the key achievements has been the development of the SACU regional framework for Customs systems interconnectivity and electronic exchange of trade data, based on the WCO Data Model and the Globally Networked Customs (GNC) concept.[230] As a result, real-time customs-to-customs data/information exchange has been made possible.

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[227] WCO, *WCO and SACU region celebrate successful conclusion of the regional Customs Modernization Programme*, 2018(2), available at: http://www.wcoomd.org/en/media/newsroom/2018/december/wco-and-sacu-region-celebrate-successful-conclusion-of-the-regional-customs-modernization-programme.aspx (accessed 5 March 2019).

[228] WCO, 2018(2), available at: http://www.wcoomd.org/en/media/newsroom/2018/december/wco-and-sacu-region-celebrate-successful-conclusion-of-the-regional-customs-modernization-programme.aspx (accessed 5 March 2019).

[229] WCO, 2018(2), available at: http://www.wcoomd.org/en/media/newsroom/2018/december/wco-and-sacu-region-celebrate-successful-conclusion-of-the-regional-customs-modernization-programme.aspx (accessed 5 March 2019); SACU, *SACU-WCO Customs Development Programme*, 2019, available at: http://www.sacu.int/show.php?id=472 (accessed 6 March 2019).

[230] WCO, 2018(2), available at: http://www.wcoomd.org/en/media/newsroom/2018/december/wco-and-sacu-region-celebrate-successful-conclusion-of-the-regional-customs-modernization-programme.aspx (accessed 5 March 2019); FTW Online, *SACU Customs modernisation achieves tangible results*, 2018, available at: http://www.ftwonline.co.za/article/187830/Sacu-Customs-modernisation-achieves-tangible-results/55 (accessed 6 March 2019). The WCO Data Model is an initiative of the WCO to simplify and standardise data requirements of cross-border regulatory agencies including customs. It is a set of carefully combined data requirements that are mutually supportive and updated on a regular basis. In other words it is a universal language for cross-border data exchange. WCO, *WCO Data Model*, 2019(1), available at: http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/data-model.aspx (accessed 6

The legal basis for information exchange was created by ratifying Annex E to the SACU Agreement on Mutual Administrative Assistance[231] to allow for the automatic exchange of information (Article 7) and the advance exchange of information (Article 8). The regional legal framework, Annex E, provides that Member States of SACU may enter into an mutual arrangement should they wish to implement the automatic exchange of customs information between them.[232] Annex E also stipulates that such arrangements should ensure the protection of data exchanged (Article 23), in particular personal information (Article 24).[233] In accordance with the definition provided by Annex E, information "means any data, whether or not processed or analysed, any documents, reports, and other communications in any format, including electronic, or certified or authenticated copies thereof".[234] The definition is very wide and inclusive of information in any form or format.

A historic milestone was achieved on the 14th of June 2018, Kingon, Acting Commissioner of SARS and Masilela, Commissioner General of the Swaziland Revenue Authority (SRA)[235] signed the "Arrangement for the Automatic Exchange of Customs Information between the South African Revenue Service and the Swaziland Revenue Authority on the basis of the Annex E to the SACU 2002 Agreement", in Pretoria, South Africa.[236] This arrangement enabled SARS and the SRA to

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March 2019); United Nations Economic Commission for Europe (UNECE), *WCO Data Model – Trade Facilitation Implementation Guide*, 2019, available at: http://tfig.unece.org/contents/wco-data-model.htm (accessed 6 March 2019). The GNC concept is a standardised way for Customs authorities to exchange information (Customs-to-Customs). WCO, *Globally Networked Customs Concept Frequently Asked Questions*, 2012, available at: http://www.wcoomd.org/~/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/gnc/gnc_faq_en.pdf?db=web (accessed 6 March 2019).

[231] SACU, *Annex E to the SACU Agreement on Mutual Administrative Assistance*, 2011, available at: http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2017-04%20-%20SACU%20Agreement.pdf (accessed 18 March 2019).

[232] SACU, 2011, available at: http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2017-04%20-%20SACU%20Agreement.pdf (accessed 18 March 2019); Liza, *WCO East & Southern African (ESA) Regional Office for Capacity Building Newsletter*, 2018: 8, available at: https://www.wcoesarocb.org/6483-2/ (accessed 7 March 2019).

[233] SACU, 2011, available at: http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2017 04%20-%20SACU%20Agreement.pdf (accessed 18 March 2019); Liza, 2018: 8, available at: https://www.wcoesarocb.org/6483-2/ (accessed 7 March 2019).

[234] Annex E: Article 1.

[235] Now known as the Commissioner General of the Eswatini Revenue Authority (SRA).

[236] Liza, 2018: 7, available at: https://www.wcoesarocb.org/6483-2/ (accessed 7 March 2019). The Arrangement signed between SARS and SRA has since become the model bilateral arrangement to facilitate regional automatic exchange of information. Elago, *Official handover of the outcomes of the WCO-SACU Connect Project*, 2018: 6, available at: http://www.sacu.int/docs/speeches/2018/sp1116a.pdf (accessed 7 March 2019).

incrementally implement the IT connectivity component and by the end of 2018 SARS and the SRA entered into live data exchange.[237]

On the 23rd and 24th October 2018 the WCO and the SADC Secretariat held a joint meeting of SADC Heads of Customs in Harare, Zimbabwe.[238] The aim of the meeting was to explore the possibility of entering into an SADC-wide regional project to establish IT connectivity and facilitate data exchange similar to what was achieved by SARS and the SRA in the context of the WCO-SACU Connect Project.[239] Based on the outcomes of the meeting it looks likely that a "WCO-SADC Connect Project" is on the cards.

South Africa also forms part of the Brazil, Russia, India, China and South-Africa trading bloc (BRICS), which includes some of the most powerful emerging economic powers, whom have acted quicker in addressing the issue with a view to harness the potential of e-commerce for enhancing development.[240] Resultantly a BRICS E-Commerce Working Group was established in 2017 to serve as a body to coordinate inter-government cooperation on e-commerce in agreed areas and further implement the BRICS regulatory framework for e-commerce Cooperation.[241]

The 10th BRICS Summit was held from the 25th to 27th of July 2018 in Johannesburg, under the theme "BRICS in Africa: Collaboration for Inclusive Growth and Shared Prosperity in the 4th Industrial Revolution".[242] Recalling the Johannesburg Summit's

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237 Liza, 2018: 7, available at: https://www.wcoesarocb.org/6483-2/ (accessed 7 March 2019). WCO, 2018(2), available at: http://www.wcoomd.org/en/media/newsroom/2018/december/wco-and-sacu-region-celebrate-successful-conclusion-of-the-regional-customs-modernization-programme.aspx (accessed 5 March 2019).

238 WCO, *WCO and SADC region agree on a capacity-building roadmap for IT connectivity*, 2018(3), available at: http://www.wcoomd.org/en/media/newsroom/2018/november/wco-and-sadc-region-agree-on-a-capacity-building-roadmap-for-it-connectivity.aspx (accessed 7 March 2019).

239 WCO, *WCO and SADC region agree on a capacity-building roadmap for IT connectivity*, 2018(3), available at: http://www.wcoomd.org/en/media/newsroom/2018/november/wco-and-sadc-region-agree-on-a-capacity-building-roadmap-for-it-connectivity.aspx (accessed 7 March 2019).

240 Krogman and Khumalo, 2016: 33.

241 Krogman and Khumalo, 2016: 34; BRICS, *7th Meeting of the BRICS Trade Ministers Statement*, 2017: Para 9, available at: https://brics2017.org/english/Documents/Meetings/201708/t20170831_1824.html (accessed 4 March 2019); BRICS, *Annex IV*: *BRICS E-commerce Cooperation Initiative*, 2017, available at: https://www.brics2017.org/wdfj/201708/t20170831_1827.html (accessed 4 March 2019). The focus areas of the BRICS Members, based on guiding principles, objectives and priorities for cooperation, include to further implement the Framework and to jointly enhance enterprise cooperation, information exchange and capacity building.

242 BRICS, *10th BRICS Summit Johannesburg Declaration*, 2018: 1, available at: www.dirco.gov.za/docs/2018/brics0726.pdf (accessed 3 February 2019).

focus, the respective Heads of State welcomed the establishment of the Digital Economy Working Group within the framework of BRICS Business Council, as well as commending the establishment of the BRICS Partnership on New Industrial Revolution (PartNIR).[243] The respective Head of States proclaimed: [t]he PartNIR aims at deepening BRICS cooperation in digitalisation, industrialisation, innovation, inclusiveness and investment, to maximise the opportunities and address the challenges arising from the 4th Industrial Revolution.

2.6 CONCLUSION

The suggested point of departure, as expressed throughout this chapter, is for the South African Government to standardise the definition of e-commerce and electronic services and affirm legal certainty as to the tax treatment thereof. Having multiple definitions scattered across legislation, white papers and discussion papers without serving an intended specific purpose is nonsensical.

E-commerce is an ever-increasing mode of commerce, thus the importance of regulatory and legal certainty alongside definitive tax treatment cannot be over emphasised. It is most imperative to remain aligned with international principles and guidelines, as stressed by the Davis Tax Committee. A positive indication of progress is the legislative amendment to the definition of “electronic services”. It is unfortunate that the term “digital goods” has not received the same amount of attention as compared to “electronic services” considering differentiating the one from the other is already a very complex exercise.

On a regional front South Africa is entering the exciting but relatively unknown space with regards to the cross-border automatic exchange of customs information (data) in an attempt to curb tax and duties avoidance. This begs the question as to whether our own interests with regards to the digital economy and continued digitalisation is currently accurately reflected in appropriate domestic policies, regulations and legislation? The following chapter seeks to provide an answer thereto.

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[243] BRICS, 2018: 10 & 16, available at: www.dirco.gov.za/docs/2018/brics0726.pdf (accessed 3 February 2019).

CHAPTER 3 - SOUTH AFRICAN LEGISLATION REGULATING E-COMMERCE

3.1 INTRODUCTION

Issues relating to taxation, consumer protection, data protection, privacy and other legal issues have the ability to either impede or encourage e-commerce.[244] In order to achieve and maintain a "healthy" balance between over- and under-regulation of e-commerce these issues need to be addressed with a firm policy and approach which will ascertain regulatory certainty.[245] The aforementioned issues are well known, wide spread and not unique to South Africa. E-commerce transactions have succeeded in attracting interest among policymakers around the world, especially with regards to tax implications.[246] Van der Merwe[247] states: "Many governments, including the South African, have issued reports or discussion documents on the tax aspects of e-commerce."

Chapter Three seeks to analyse the formulation process of South Africa's e-commerce policy as well as government's crucial role therein, especially considering the e-commerce policy formulation process was not completed as originally intended. An overview of the current South African legislation, international laws and principles that either directly or indirectly, regulates and governs e-commerce in South Africa is also provided.

3.2 INCOMPLETE E-COMMERCE POLICY FORMULATION PROCESS

The origin of South Africa's e-commerce policy formulation can be traced back to the Department of Communications' 1999 Discussion Paper on Electronic Commerce Policy.[248] The Discussion Paper intended to serve as a starting point for national policy discussions concerning the development, benefits, infrastructure and regulation of e-commerce in South Africa.[249] The many policy issues surrounding e-commerce were

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244 Budree, 2017: 22.

245 Budree, 2017: 22.

246 Van der Merwe, *VAT and e-commerce*, 2003: 372.

247 Van der Merwe, 2003: 372.

248 Budree, 2017: 22; Department of Communications, *Discussion paper on electronic commerce policy*, 1999, available at: http://www.dpsa.gov.za/dpsa2g/documents/acts®ulations/frameworks/e-commerce/ecomm-paper.pdf (accessed 10 April 2019).

249 Department of Communications, 1999: 1, available at: http://www.dpsa.gov.za/dpsa2g/documents/acts®ulations/frameworks/e-commerce/ecomm-paper.pdf (accessed 10 April 2019).

discussed both from a general point of view and from a South African perspective which ultimately laid the foundation on how best to formulate a "coherent policy strategy".[250]

The Discussion Paper proved successful in setting in motion policy discussions on e-commerce and what followed is the publication of the Green Paper on Electronic Commerce for South Africa (Green Paper) by the Department of Communications in November 2000.[251] The Green Paper is described as: "essentially a consultative document designed to raise questions on issues that need to be addressed by the Government policy formulation process".[252] The questions and issues raised are mainly targeted at two distinct audiences, namely: subject matter experts (professionals) and individuals and enterprises that regularly make use of e-commerce to communicate, produce, sell and deliver.[253] The Green Paper is primarily aligned to the norm while controversial societal issues are discussed in depth and giving members of the public or interest groups the opportunity to respond and provide input.[254]

Several key policy issues raised in the Green Paper include development and access to information and communication technologies (ICTs), taxation, customs duties, jurisdiction and liability, security and privacy, protection of intellectual property, content development and regulation.[255] The above-mentioned policy issues are mainly a result of the rapid expansion of e-commerce and the convergence of technologies brought forward by digitisation.[256]

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[250] Inputs to the Discussion Paper include extensive documents produced by four government task groups (aligned to the action plan of the OECD), inputs from consultants as well as a legal due diligence investigation regarding potential barriers presented by South Africa's statutory laws and common law. Department of Communications, 1999: 1, available at: http://www.dpsa.gov.za/dpsa2g/documents/acts®ulations/frameworks/e-commerce/ecomm-paper.pdf (accessed 10 April 2019).

[251] Department of Communications, 2000, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[252] Department of Communications, 2000: 18, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[253] Department of Communications, 2000: 11, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[254] Roux, *Public policy-making and policy analysis in South Africa amidst transformation, change and globalisation: Views on participants and role players in the policy analytic procedure*, 2002: 424.

[255] Department of Communications, 2000: 12 & 18, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[256] Department of Communications, 2000: 18, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

Holistically, the issues and uncertainties raised revolve around the validity, legal effect and enforceability of transactions conducted through electronic means.[257] The Green Paper emphasises as a main concern the priority that must be afforded to issues with regards to personal information in order to safeguard public interest and asserts any regulatory regime South Africa adopts must be consistent as well as compatible with international frameworks.[258]

The Green Paper successfully built on the preceding Discussion Paper on Electronic Commerce by identifying and defining key e-commerce policy issues; elaborating and expanding on the legal implications of the issues identified whilst taking cognisance of South Africa's distinct requirements to enable an apt legal foundation for the promotion of e-commerce.[259] Included in the Green Paper is an overview of the policy formulation process indicating the documents published and the desired publication period (at the time) for the required succeeding documentation as part of the legislative process:[260]

- Discussion Paper (published July 1999),
- Green Paper (published October 2000),
- White Paper (2nd quarter 2001) and
- Specific legislation (3rd or 4th Quarter 2001).

The process however never developed beyond the compilation and publication of the Green Paper by the Department of Communications. Resultantly, the sought after all-inclusive e-commerce bill, intended to govern e-commerce in South Africa, never materialised. Van der Merwe[261] criticised the Green Paper for mainly identifying problem areas and for the lack of specific legislative changes proposed. Van der Merwe[262] does however sympathise that the South African government is not isolated

[257] Department of Communications, 2000: 12, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[258] Department of Communications, 2000: 18, 25 & 26, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019). The view with regards to maintaining compatibility with international frameworks is supported and strongly emphasised by Davis in the Davis Tax Committee final report. Davis Tax Committee, 2018: 35.

[259] Department of Communications, 2000: 15, 19 & 26 available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[260] Department of Communications, 2000: 19, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[261] Van der Merwe, 2003: 372.

[262] Van der Merwe refers to Canada, Ireland, Netherlands, New Zealand and the United Kingdom as examples. The above mentioned countries have all, at the time, issued reports or discussion documents on the tax aspects of e-commerce without the reports or discussions necessarily leading to the enactment of specific legislation; Van der Merwe, 2003: 372.

in the struggles it faces with regards to the drafting of legislative solutions for the tax issues caused by e-commerce.

3.3 THE ROLE OF GOVERNMENT IN POLICY FORMULATION

The onus is on Government to drive the policy formulation process forward by creating an environment that is conducive to conducting business online and increasing consumer confidence.[263] The role of Government is to provide support by setting policy and regulatory frameworks appropriate to the Information and Communications Technologies (ICT) sector.[264] A inherent quality of e-commerce is its borderless nature and as such the most feasible way to resolve the issues that arise is on a multilateral level. In executing its role, it is advised that Government should not work in isolation but rather engage other countries on bilateral or multilateral levels to remove common felt barriers that hinder upon the free flow of electronic products and services across jurisdictions.[265]

The above further emphasises the pivotal role of Government in developing the enabling conditions to successfully bolster the growth of e-commerce, stimulate a stable environment and to realise tangible results aligned to the full economic potential e-commerce offers. Full commitment and participation from Government is an absolute requisite to fully optimise and exploit the benefits of e-commerce. Government is the only capable and permissible role player to drive the policy formulation process forward in the creation of enabling regulatory frameworks.

Roux expresses a similar view: "The formulation of public policy rests, in practice, mainly with the legislative institutions at the different levels (spheres) of government and administration, political functionaries, leading public officials, pressure groups and interest groups."[266] The functionality of a policy can be greatly impeded when the

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[263] Department of Communications, 2000: 15, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[264] Department of Communications, 2000: 15, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019). ICT is a generic term for technologies that provide access to information via telecommunications. The Tech Terms Computer Dictionary describes it as similar to Information Technology (IT), but with the primary focus on communication technologies. Christensson, *ICT Definition*, 2010, available at: https://techterms.com/definition/ict (accessed 8 June 2019). The Green Paper states the term ICT is used to express "the convergence of information of information technology and communications". Common examples include the Internet, wireless networks and cell phones.

[265] Department of Communications, 2000: 16, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[266] Roux, 2002: 429.

required authorisation is lacking. Roux states that it can be argued that policy only becomes significant after legislation has been passed.[267] With regards to the Green Paper, in the grand scheme of things, the premature ending of the desired policy process (as laid out in the Green Paper itself) did little to halter the course of action being set in motion. The aftermath of the Green Paper is of true significance as it led to the shared realisation that digital transformation is taking place at an unprecedented pace and major changes is required in terms of South African legislation to accommodate such transformation.

Anderson[268] defines policy as "a proposed course of action of a person, group, or government within a given environment providing obstacles and opportunities which the policy was proposed to utilize and overcome in an effort to reach a goal or realize an objective". The Department of Communications, in this regard, arguably successfully identified goals, stated specific objectives, defined the legislative environment at the time (both from a national and international perspective) and suggested a course of action to be implemented to realise the set objectives. For all intents and purposes, a national policy on e-commerce was thereby established in line with the definition of policy by Anderson.

In summary, public policy states the proposed course of action of government and it is important to note is that the course is never stagnant and is continuously subject to the effect of environmental change and influence.[269] Public policy also provides a clear indication on what actions government prioritises and, as Roux[270] states, "incorporates, or implies, the authoritative allocation of values for the whole society". Policy should have the adaptability to both relate and adapt to the immediate environment it functions in and the issues society are faced with at that point in time.[271] Examples factors that specifically influenced the formulation of the e-commerce policy

[267] Roux, 2002: 421.
[268] Anderson, *Public policymaking: An introduction*, 1997: 9. The definition by Anderson is based on the work of political scientist Carl J. Friedrich. Andersons's definition of "policy" as a function is preferred by Roux. Roux, 2002: 424 & 425.
[269] Roux, 2002: 425.
[270] Roux, 2002: 425.
[271] Roux, 2002: 425.

are globalisation, digitisation and rapid increase in use of ICT's which greatly forms part of the 4th industrial revolution phenomenon.[272]

Legal and regulatory issues are identified in the Green Paper as being central to the policy, whilst one of the main focus areas is the need to establish rules that will govern electronic commerce.[273] It is important to note that while the policy itself is a "dynamic phenomenon", which adapts according to need, the identified objectives thereof are static.[274] Establishing a regulatory framework to govern e-commerce can therefore be deemed as a fixed objective undertaken by government.

3.4 E-COMMERCE ENABLING LEGISLATION

Policy documents inform legislative reforms, a clear understanding of the policy and all applicable legislation is critical in terms of effecting change.[275] Ncube[276] appropriately states: "It is thus important to consider whether or not the policy framework is comprehensive and meaningful and whether or not it has led to an appropriate regulatory framework."

[272] The first chapter of the Green Paper makes specific reference to the significant impact of globalisation, digitisation and ICT's. Department of Communications, 2000: 16, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[273] Department of Communications, 2000: 10 & 11, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[274] Roux, 2002: 425.

[275] Ncube, 2012: 3, available at: http://www.etransactionslaw.uct.ac.za/ (accessed 1 July 2019).

[276] Ncube, 2012: 3, available at: http://www.etransactionslaw.uct.ac.za/ (accessed 1 July 2019).

3.4.1 National Laws

There is no single overarching law that prescribes the regulation of e-commerce in South Africa,[277] nonetheless a growing body of subject relevant legislation exists.[278] What follows is a brief summary of the current South African legislation deemed to regulate trade in e-commerce. To actively partake in e-commerce, a form of electronic communication is required, it is therefore essential that laws and regulations are in place to protect such electronic communications.

First and foremost, the *Constitution of the Republic of South Africa* of 1996 protects the right to privacy (section 14) and the right of access to information (section 32). To give effect to the constitutional right of access to information the *Promotion of Access to Information Act*[279] (PAIA) was enacted.[280] Likewise, the *Protection of Personal Information* (POPI) *Act*[281] gives effect to the constitutional right to privacy and promotes the protection of personal information. It is recognised that the right to privacy includes a right to protection against the unlawful collection, retention, dissemination and use of personal information.[282] The POPI Act places the obligation on all businesses that handle personal information to put measures in place to protect that information. The Act regulates the flow of personal information across the borders of South Africa and provides for the rights of persons regarding unsolicited electronic communications and automated decision making.[283]

The right to privacy is subject to justifiable limitations that are aimed at protecting other rights and important interests.[284] For example, under certain circumstances it is justifiable for authorised persons to intercept any communication. The *Regulation of Interception of Communications and Provision of Communication-Related Information Act*[285] (RICA) is primarily aimed at the interception and monitoring of communications

[277] Budree, 2017: 24.
[278] Papadopoulus & Snail (eds), 2012: 4-6; Budree 2017: 22-24.
[279] Act 2 of 2000.
[280] Preamble to *Promotion of Access to Information Act* 2 of 2000.
[281] Act 4 of 2013.
[282] Preamble to *Protection of Personal Information Act* 4 of 2013.
[283] POPI Act: chapter 8.
[284] Preamble to *Protection of Personal Information Act* 4 of 2013.
[285] Act 70 of 2002.

and the provision of communication-related information within the borders of South Africa.[286]

The *Electronic Communications Act*[287] (ECA) was promulgated to promote convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors and to provide a legal framework for the convergence of all technological sectors. The above mentioned ECA works hand-in-hand with the *Independent Communications Authority of South Africa* (ICASA) *Act*[288], which established a juristic person to be known as the Independent Communications Authority of South Africa.[289] The authority is established to regulate broadcasting, postal services and electronic communications.[290]

Lastly and most notably is the *Electronic Communications and Transactions* (ECT) *Act*,[291] which has removed much of the uncertainty that existed about the validity and enforceability of electronic transactions.[292] The ECT Act provides for consumer protection, protection of personal information, security measures with regard to data messages and e-signatures, as well as regulating cybercrime.[293] The ECT Act has been identified as the legislation mainly regulating e-commerce.[294]

[286] Section 1 of RICA defines communication-related information as: "any information related to an indirect communication which available in the records of a telecommunications service provider and includes switching, dialling or signalling information that identifies the origin, destination, termination, duration, and equipment used in respect, of each indirect communication generated or received by a customer or user of any equipment, facility or service provided by such a telecommunication service provider and, where applicable, the location of the user within the telecommunication system".

[287] Act 36 of 2005.

[288] Act 13 of 2000.

[289] ICASA Act: sec 3(1).

[290] Preamble to *Independent Communications Authority of South Africa Act* 13 of 2000.

[291] Act 25 of 2002.

[292] Eiselen, *E-commerce*, in Van der Merwe (ed), *Information and communications technology law*, 2016: 220; Coetzee, *The Electronic Communications and Transactions Act 25 of 2002: facilitating electronic commerce*, 2004: 520- 521; Faria, *e-Commerce and international legal harmonization: time to go beyond functional equivalence?* 2004: 554-555.

[293] Coetzee, 2004: 521.

[294] Ncube, 2012: 3, available at: http://www.etransactionslaw.uct.ac.za/ (accessed 1 July 2019).

3.4.2 International Law and Principles

International agreements and model laws can inform and impact domestic legislation in three different manners:[295]

a) International agreements can be incorporated into domestic legislation thereby allowing for direct application.
b) Section 232, contained in Chapter 14, of the *Constitution of the Republic of South Africa* of 1996 (hereinafter "the Constitution") states: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." The provision empowers Customary international law to be directly binding upon citizens of the Republic.
c) Section 233 of the Constitution states: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." Every court must thus allow for recourse to international law when interpreting domestic law.

3.4.2.1 UNCITRAL Model Law on Electronic Commerce (1996)

Chapter III of the ECA Act deals with facilitating electronic transactions and is based on the United Nations Commission for International Trade Law (UNCITRAL) Model Law on Electronic Commerce which was published in 1996.[296] The purpose of the Model Law on Electronic Commerce (MLEC) is to:

> enable and facilitate commerce conducted using electronic means by providing national legislators with a set of internationally acceptable rules aimed at removing legal obstacles and increasing legal predictability for electronic commerce. In particular, it is intended to overcome obstacles arising from statutory provisions that may not be varied contractually by providing equal treatment to paper-based and electronic information. Such equal treatment is essential for enabling the use of paperless communication, thus fostering efficiency in international trade.[297]

The main purpose of the principles is to ensure that laws intended for the physical environment fairly facilitate the digital environment by affording legal validity in an

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[295] Ncube, 2012: 3, available at: http://www.etransactionslaw.uct.ac.za/ (accessed 1 July 2019).
[296] Eiselen, 2016: 154-155.
[297] UNCITRAL, *Model Law on Electronic Commerce*, 1996, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html (accessed 24 May 2018).

equal manner, as far as possible.[298] The principles are as follows: non-discrimination, media and technology neutrality, functional equivalence and party autonomy.[299] The ECT Act has also adopted the principles contained in the UNCITRAL MLEC in response to the legal challenges of e-commerce in South Africa.[300] The MLEC contains an important underlying principle, which guides the interpretation and application of its various provisions, namely that of functional equivalence.[301]

The principle is based on attributing the same legal consequences and requirements to both electronic and traditional communications (paper-based contracting) and transactions without creating any advantage for one or the other.[302] Eiselen[303] expresses the thought that: "in law it should make no difference what mode of communication is used by the parties: the requirements for and consequences of the communications should be the same or similar, the principle of media neutrality."

Based on the above mentioned laws the conclusion can be drawn that most key regulatory issues of e-commerce is catered for in current South African legislation.[304] However although South Africa, through the ECT Act, adopted the MLEC approach of ensuring functional equivalence between electronic and paper-based transactions;[305] the question beckons if cross-border e-commerce traders (resident/non-resident), in terms of existing legislation, are subjected to the same type of taxes, duties and amounts as their more traditional offline counterparts?[306]

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[298] Ncube, *Electronic Transactions Law: Lecture 2. Enabling electronic transactions: basic principles*, 2012: 1, available at: http://www.etransactionslaw.uct.ac.za/ (accessed 1 July 2019).

[299] Ncube, 2012: 1, available at: http://www.etransactionslaw.uct.ac.za/ (accessed 1 July 2019).

[300] Eiselen, 2016: 156; Coetzee, 2004: 501-521.

[301] The functional equivalent principle is based on: "an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques." UNCITRAL, *Guide to enactment of the UNCITRAL Model Law on Electronic Commerce*, 1996: 20, available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html (accessed 24 May 2018); Eiselen, 2016: 155; Faria, 2004: 531-533.

[302] Eiselen, 2016: 220; Faria, 2004: 531; Coetzee, 2004: 502.

[303] Eiselen, 2016: 155.

[304] Budree lists the key regulatory issues regarding trade in e-commerce that is covered by current South African legislation as: law on electronic communications, law on online consumer protection, law on electronic authentication and electronic signatures, law on protection of personal information, free flow of cross-border transfer of information by electronic means, laws on unsolicited commercial electronic messages and law against cybercrime. Budree, 2017: 27-28.

[305] Coetzee, 2004: 502.

[306] Fitzgerald *et al*, 2007: 573.

3.4.2.2 OECD Ottawa Conference on E-commerce (1998)

The OECD is an international body with the principal aim of establishing tax guidelines to assist in the developing of clear tax rules and legal initiatives for uniform international tax principles and the promotion of policies that will improve the social and economic well-being of people around the world.[307] At the Ottawa Conference on e-commerce in 1998,[308] it was agreed that the same principles that governments apply to taxation of conventional commerce should equally apply to e-commerce, namely: neutrality, efficiency, legal security, simplicity, equity, and flexibility.[309]

For current purposes the focus will be on the neutrality principle, which states that: "taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation."[310]

Considering the statements above, the question is posed whether taxes and/or duties should be levied on imported cross-border digital (intangible) goods and services? If the answer is proven to be yes; who is responsible for collecting the above-mentioned VAT and/or duties? Lastly, how will the responsible party enforce the payment and collection thereof?

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[307] Van Zyl, *The OECD international VAT/GST guidelines on cross-border trade in digital goods – new developments since the Ottawa Conference (1998) on Restoring Tax Neutrality: notes and comments*, 2013: 187 & 214.

[308] The OECD's Committee on Fiscal Affairs (CFA) published the Taxation Framework Conditions at the Ottawa conference entitled: "A Borderless World – Realising the potential of Electronic Commerce". The Taxation Framework Conditions were welcomed by Ministers and Business and have since been generally accepted by most countries as providing a sound basis for ongoing work on the taxation of e-commerce. OECD, *Taxation and electronic commerce: implementing the Ottawa Taxation Framework Conditions*, 2001: 10, available at: https://doi.org/10.1787/9789264189799-en (accessed 21 June 2018).

[309] OECD CFA, *Electronic commerce: Taxation Framework Conditions*, 1998: 4-7, available at: https://www.oecd.org/ctp/consumption/1923256.pdf (accessed 3 August 2018); Van der Merwe, *VAT and e-commerce*, 2003: 387;.

[310] OECD CFA, 1998: 4, available at: https://www.oecd.org/ctp/consumption/1923256.pdf (accessed 3 August 2018).

3.5 CONCLUSION

The chapter established that South Africa's e-commerce policy was initiated by the 1999 Discussion Paper and further developed and enhanced by the 2000 Green Paper.[311] The intent was to publish the white paper in 2001, but matters did not progress accordingly, resulting in the white paper not being published and the policy therefore being informed mainly by the two existing documents.[312]

Key policy issues were raised in the Green Paper, including development and access to information and communication technologies (ICTs), taxation, customs duties, jurisdiction and liability, security and privacy, protection of intellectual property, content development and regulation.[313] Holistically, the issues and uncertainties raised revolve around the, validity, legal effect and enforceability of transactions conducted through electronic means and the protection of personal information.

Although South Africa does not have a singular law regulating e-commerce there are various pieces of legislation protecting, enabling and regulating electronic transactions of which the ECT Act is the most applicable. It is noteworthy that the ECT Act is based on principles contained in the UNCITRAL Model Law on Electronic Commerce which was published in 1996. Most key regulatory issues identified is addressed in current South African legislation with the exception of issues relating to taxation and jurisdiction.

Lastly, important questions were raised with regards to the tax treatment of e-commerce, the entity responsible for collection and the ability to successfully collect what is due to the State. Digital transformation is taking place at an unprecedented pace which necessitates continuous change in public policy and *modus operandi*. Public institutions ought to be dynamic entities and success should be measured based on adaptability and effective response to the impact of the "forces" of change.[314]

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[311] Department of Communications, 2000: 19, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[312] Ncube indicates, in addition to the 1999 Discussion Paper and the 2000 Green Paper, there are several other policy documents which impact upon electronic transactions, for example, the National Integrated ICT Policy White Paper (2016) and the National Cyber Security Policy Framework for South Africa (2012).
Ncube, *Electronic Transactions Law: Lecture 1. Introduction to electronic transactions law*, 2012: 2 & 3, available at: http://www.etransactionslaw.uct.ac.za/ (accessed 1 July 2019).

[313] Department of Communications, 2000: 12 & 18, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019).

[314] Roux, 2002: 419.

With regards to SARS in particular, the fiscus requires the Administration to operate productively and render quality services to the public, effectively formulate policies for change and on a continuous basis assess or analyse such policy initiatives.[315]

[315] Roux, 2002: 419.

CHAPTER 4 – SOUTH AFRICA'S SOLUTION TO OVERCOME THE BARRIERS OF TAXING DIGITAL GOODS

4.1 INTRODUCTION

> Taxation requires the definition of a tax base, that is, either a flow or a stock of wealth to which the public sector can lay partial claim. In the recent past, income accruing to both persons and companies has been found a convenient base for a high proportion of total taxation. However, many have argued that use of consumption or expenditure as a tax base would be more satisfactory and could overcome some of the problems associated with income taxes.[316]

The South African Government is presented with an opportunity to potentially expand its tax base. In order to achieve this, one must define, incorporate into the tax base and regulate the taxation of digital goods. This is by no means an easy feat. The levying of taxes and duties is governed by the various tax Acts and collected by SARS. In fulfilling its mandate and achieving the set objectives, SARS is responsible for the administration of a number of Acts,[317] including the *Customs and Excise Act* (CEA)[318] and the VAT Act.

This chapter provides an overview of the application of VAT and customs duties in South Africa on the cross-border trade of goods and/or services. Furthermore, it contains a critical analysis of the impact of digitalisation and the increase in e-commerce transactions and the disruptive impact thereof on the application and collection of those taxes due. The role between customs duties and VAT is analysed as well as the impact of differentiating between goods and services for tax purposes. In addition, this chapter seeks to provide insight into how cross-border digital goods are defined and how taxes and duties due are imposed and collected.

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316 Margo Commission, *Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa*, 1986: 69.

317 Part 1 and Schedule 1 to the *South African Revenue Services Act* 34 of 1997 (the SARS Act); Colesky, 2014: 46.

318 Act 91 of 1964.

4.2 BRIEF OVERVIEW OF SARS AND THE APPLICATION OF VAT AND CUSTOMS DUTIES

SARS is South Africa's tax collecting authority, established in terms of section 2 of the *South African Revenue Service Act* 34 of 1997 (the SARS Act).[319] The core objective of SARS is to collect revenue and ensure control over the import, export, manufacture, movement, storage or use of certain goods.[320] By virtue of the legislative objectives, SARS is responsible for administering the South African tax system and customs service.[321] The SARS Act establishes SARS as an autonomous organ of state, simply put, it is outside the public service, but within the public administration. Consequently, although South Africa's tax regime promoted and co-ordinated by the National Treasury, it is administered managed by SARS.[322]

Traditionally a distinction is made between direct and indirect taxes, direct taxes relate to persons and their individual circumstances and indirect taxes relate to things/objects.[323] Indirect taxes are collected when transactions involve objects, therefore rendering it impossible to differentiate between the particular needs and circumstances of persons.[324] The characteristic therefore necessitates indirect taxes being subjected to flat rates.[325] In contrast, the rates of direct taxes can be made dependent on the characteristics of the person being taxed.[326] The "ability to pay" principle can therefore be applied by taxing those of greater material means more heavily than those of lesser means.[327]

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[319] SARS Act: sec 2; SARS, *About Us*, 2019, available at: https://www.sars.gov.za/About/Pages/default.aspx (accessed 1 September 2019).

[320] SARS Act: sec 3.

[321] SARS, *About Us*, 2019, available at: https://www.sars.gov.za/About/Pages/default.aspx (accessed 1 September 2019).

[322] SARS, *About Us*, 2019, available at: https://www.sars.gov.za/About/Pages/default.aspx (accessed 1 September 2019).

[323] Margo Commission, 1986: 69.

[324] Margo Commission, 1986: 69.

[325] Margo Commission, 1986: 69.

[326] Margo Commission, 1986: 69.

[327] Margo Commission, 1986: 69. The "ability to pay" principle forms part of, what is colloquially known as, the "canons of taxation". The canons were identified by Smith in 1776 and comprise of equity, certainty, convenience and efficiency. Smith explains the canon of equity as follows: "The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state." Smith, *An inquiry into the nature and causes of the wealth of nations*, 1776, available at: https://www.marxists.org/reference/archive/smith-adam/works/wealth-of-nations/book05/ch02b.htm (accessed 11 November 2019).

SARS administers a wide range of legislation in terms of Part 1 and Schedule 1 to the SARS Act, including the CEA and VAT Act. Customs duties and VAT are both examples of indirect taxes as they are levied on transactions rather than on persons. Indirect taxes have the advantage of being relatively simple to administer, whilst having the capability of being applied to a wide basis, potentially enabling low rates to be levied.[328] Lastly, indirect taxes lend themselves for use in certain policy areas as Governments make use of taxation to encourage or discourage certain economic decisions.[329] The South African Government has an established history using selective indirect taxes as policy instruments.[330] The justification for charging users indirect taxes is to be found in the benefit principle, meaning the payments corresponds to the benefits received.[331]

4.2.1 History of Consumption Tax in South Africa

Prior to VAT South Africa enforced a General Sales Tax (GST) system.[332] GST came into existence on 1 July 1978 following the recommendations of the Franzsen Commission of Enquiry into Fiscal and Monetary Policy in South Africa.[333] The promulgation of the *Sales Tax Act*[334] represented a substantial tax reform. Swart[335] indicates at the time: "[t]he introduction of a general sales tax was necessitated by the steady decline during the last few decades of the proportionate contribution of indirect

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[328] Margo Commission, 1986: 70.

[329] Margo Commission, 1986: 70.

[330] SARS imposes selective corrective taxes on industries that generate external costs. Indirect taxes are levied to internalise external costs, for example charging environmental levies preventing under-pricing and overproduction by factories generating electricity by using non-renewable (fossil) fuels and environmentally hazardous (nuclear) sources; or charging fuel levies on fuel to internalize the costs associated with damage by heavy traffic to public roads. Margo Commission, 1986: 70; SARS, *Electricity generation*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/Excise/Environmental-Levy-Products/Pages/Electricity%20Generation.aspx (accessed 21 September 2019); SARS, *Petroleum products*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/Excise/Fuel-Petroleum-Products/Pages/Petroleum%20Products.aspx (accessed 21 September 2019).

[331] Margo Commission, 1986: 70.

[332] The term should not be confused with the Goods and Services Tax ("GST") adopted in a number of countries such as New Zealand and Australia. The Davis Tax Committee describes South Africa's GST system as a local retail sales tax, although colloquially known as the general sales tax or GST. Davis Tax Committee, *Final Report on VAT*, 2018: 12. Furthermore, in terms of section 5(1) of the *Sales Tax Act* 103 of 1978 the tax was to be known as the "sales tax". Swart, *Tax law: The Sales Tax Act 103 of 1978*, 1978: 543.

[333] Franzsen Commission, *First Report of the Commission of Enquiry into Fiscal and Monetary Policy in South Africa*, 1968: paras 203 & 204; Van Zyl, 2013: 52.

[334] 103 of 1978.

[335] Swart, 1978: 543.

taxes to total tax revenue, and by the steady increase in the state's demands for revenue".

GST was levied as a singled stage collection system in South Africa in terms of the *Sales Act Tax* on specified end-consumer transactions at a uniform initial rate of 4 per cent.[336] In other words GST was imposed at the final point of sale on: (1) the sale of goods, (2) the rendering of a limited number of services to final consumers and on (3) capital and intermediate goods acquired by businesses.[337] Van Zyl[338] criticises the system as being open to abuse due to tax only being levied in the last stage of the production-distribution chain. He explains "[r]etailers, in their capacity as final consumers, were able to avoid paying GST by merely producing proof of their business status when making purchases".[339] The main concerns raised at the time in respect of GST included: evasion (due to the cascading effect of the system), drastic erosion of the sales tax base due to general exemption of food items and the exclusion of most services.[340]

Following the Margo Commission (1986),[341] Government released a White Paper in 1988 indicating its intention to replace the single stage collection GST system with a VAT system.[342] With effect from 30 September 1991, VAT was to be charged at a rate of 10 per cent as a broad-based indirect tax on the domestic consumption of goods and services.[343] The introduction of VAT is described by Silver and Beneke[344] as "one of the most significant tax developments ever to take place in South Africa". The importance of implementing the VAT system far exceeded the implementation of its predecessor GST.[345] The VAT system was given the significantly complicated task to effectively undo and remove the cascading inherent in the GST system.[346] Many

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336 *Sales Tax Act* 103 of 1978: sec 5(a)-(h); Swart, 1978: 543; Silver & Beneke, *Deloitte VAT Handbook*, 2013: 3 & 4; Van Zyl, 2014: 52.

337 Davis Tax Committee, 2018: 12.

338 Van Zyl, 2014: 52.

339 Van Zyl, 2014: 52.

340 Morden, *Value Added Tax South Africa: 1991 – 2011 presentation to the Standing Committee on Finance*, 2011: 3, available at: https://pmg.org.za/files/docs/110323VATSA.pdf (accessed 22 September 2019).

341 Margo Commission, 1986: 69 & 70.

342 Morden, *VAT rating on books: National Treasury briefing*, 2011, available at: https://pmg.org.za/committee-meeting/12785/ (accessed 22 September 2019).

343 Van Zyl, 2014: 53; Huxham & Haupt, *South African VAT - the book*, 1991: 1; Go *et al*, *An analysis of South Africa's Value Added Tax*, 2005: 2.

344 Silver & Beneke, 2013: 3.

345 Silver & Beneke, 2013: 3.

346 Huxham & Haupt, 1991: 1.

experts were sceptical that the granting of input credits and amounts will largely neutralise the additional tax generated by the VAT systems' wider base.[347] Therefore there was pressure placed on the successful introduction of the new VAT system. The initial VAT rate (10 per cent) was significantly higher than the initial rate of GST (4 per cent), also a far broader range of goods and services are taxed under the VAT system in comparison to GST.[348]

When the VAT Act[349] was promulgated on 12 June 1991, no provisions were made to exclude, or zero-rate, any goods or services.[350] Following numerous successful public protests for the inclusion of additional zero-rated basic food items, the VAT rate resultantly increased to 14 per cent in 1993.[351] South Africa has experienced a steady increase in the rate of GST (initially) and VAT (subsequently) as is evident below:

Tax Type	Effective Date	Rate (Per cent)
GST	03/07/1978	4
GST	01/03/1982	5
GST	01/09/1982	6
GST	01/02/1984	7
GST	01/07/1984	10
GST	25/03/1985	12
GST	08/05/1989	13
VAT	30/09/1991	10
VAT	07/04/1993	14
VAT	01/04/2019	15

Table 1: Trends in GST and VAT[352]

[347] Huxham & Haupt, 1991: 1.
[348] Silver & Beneke, 2013: 3.
[349] Act 89 of 1991.
[350] Morden, *VAT rating on books: National Treasury briefing*, 2011, available at: https://pmg.org.za/committee-meeting/12785/ (accessed 22 September 2019).
[351] Morden, 2011, available at: https://pmg.org.za/committee-meeting/12785/ (accessed 22 September 2019); Davis Tax Committee, 2018: 13.
[352] South African Reserve Bank, *Tax Chronology of South Africa: 1979-2015*, 2015: 24.

GST and VAT are both consumption based taxes, in other words an immediate tax levied on consumption.[353] However, the important difference between GST and VAT is that GST is levied against the final consumer (single stage collection), not against an intermediate stage entity, whereas with VAT, tax is imposed at each stage of the production and distribution process (multi-stage collection).[354]

The DTC describes the South African VAT system as a good example of a "modern" VAT, especially due to the relatively few exemptions, zero-ratings and exclusions.[355] The VAT Act is largely based on the principles of the New Zealand Goods and Services Tax (NZ GST) system, as provided for in the *New Zealand Goods and Services Tax Act*, 1985 (NZ GST Act).[356] Nonetheless, an important difference in application is that the NZ GST Act contains explicit place of supply rules, which have not been included in the South African VAT Act.[357] Schneider[358] and Zulch[359] reason that at the time of the promulgation of the VAT Act in 1991, South Africa was largely isolated from the rest of the world, therefore there was no real need for place of supply rules.

The core characteristics of the South African VAT system are significant when discussing issues largely caused by online cross-border transactions involving goods and/or services. The South African VAT system follows the destination principle.[360] The DTC[361] explains: "the total tax paid in relation to a supply is determined by the rules applicable in the jurisdiction of its consumption and therefore all revenue accrues to the jurisdiction where the supply to the final consumer occurs".

VAT is levied at the standard rate, currently 15 per cent, on the domestic consumption of goods and services. This includes the final consumption of imported goods and

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[353] De Wet & Du Plessis, *Indirect Taxation: VAT*, in *Cyberlaw@SA – The law of the Internet in South Africa*, 2000: 257; Janse van Rensburg, *An explorative study: Place of supply rules for Value-Added Tax in South Africa*, 2011: 15.

[354] Janse van Rensburg, 2011: 15.

[355] Davis Tax Committee, 2019: 12.

[356] Janse van Rensburg, 2011: 17; Zulch, *South African Value-Added Tax: Place of supply rules for cross border supplies of services – a comparative analysis with Chapter 3 of the OECD's International VAT/GST Guidelines*, 2017: 27.

[357] Janse van Rensburg, 2011:17; Zulch, 2017: 27.

[358] Schneider, *Place of supply rules in the South African Value-Added Tax system*, 2000: 1.

[359] Zulch, 2017: 27.

[360] Davis Tax Committee, 2018: 12.

[361] Davis Tax Committee, 2018: 12.

services.[362] There is a limited range of goods and services which are exempt or subject to VAT at the zero rate.[363] SARS applies the standard rate as a default if there is no exemption or zero-rating provision that is applicable to the supply or the importation in question.[364] Sections 11 and 12 of the VAT Act lists the zero-rated supplies and exempt supplies, whilst sections 13 and 14 provides for exemptions and exclusions relating to the importation of goods and imported services.[365]

The import in itself, not the nature, location nor jurisdiction of the supplier, gives rise to the taxability.[366] Imports, whether goods or services, into the Republic are therefore subject to VAT irrespective whether the importer is registered for VAT or not.[367] On the other hand, registration is crucial in the case of supplies made within the Republic.[368] VAT will only be charged if the supply is made by a registered vendor in the course of carrying on an enterprise.[369] Consequently, any and all supplies by persons who are either not registered or whom are not carrying on an enterprise are free of VAT.[370]

Exports are zero-rated in terms of section 11 of the VAT Act, thereby freeing exports (or non-South African consumption) from tax and adhering to the destination principle.[371] The destination principle is advantageous as exports are encouraged and the competitiveness thereof unaffected due to no VAT being payable.[372] The DTC

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362 Schneider, 2000: 55.

363 For example, exports and certain basic foodstuffs are taxed at the zero rate of VAT. Certain goods are also exempt when supplied in, or imported into South Africa. SARS Legal Counsel, *Taxation in South Africa*, 2019: 73, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019).

364 SARS Legal Counsel, *Taxation in South Africa*, 2019: 75, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019).

365 Schedule 1 to the VAT Act further provides a list of specific exemptions and the relevant rebate item numbers of the qualifying goods. SARS Legal Counsel, *Taxation in South Africa*, 2019: 75, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019).

366 Schneider, 2000: 55.

367 Huxham & Haupt, *Notes on South African income tax*, 1995: 547; Schneider, 2000: 55.

368 Huxham & Haupt, 1995: 547.

369 Huxham & Haupt, 1995: 547.

370 Huxham & Haupt, 1995: 547.

371 Schneider, 2000: 55.

372 Davis Tax Committee, 2018: 12. The effect of zero-rating is to make the supply completely free of VAT. The most important category of zero-rated supplies are exports as all goods exported are effectively zero-rated. Therefore, exporters do not have to charge VAT on their sales, making the goods less expensive for their customers. Another advantage is that even though the tax charged on zero-rated supplies is nil, the vendor may reclaim the input tax, paid by the vendor, from SARS. Huxham & Haupt, 1991: 92-94.

found widespread consensus that the destination principle is preferable to the origin principle from both a theoretical and practical standpoint.[373] Following the destination principle, revenue accrues to the country of import where final consumption occurs.[374]

The South African VAT system is designed to tax consumption, meaning full and immediate input tax deductions are in general allowed in respect of capital expenditure.[375] The VAT that must be paid to SARS is determined on the credit-invoice method,[376] in other words calculated on the difference between the tax on sales (output tax)[377] and the tax on purchases (input tax)[378] in a tax period, substantiated by valid tax invoices.[379] In the case of the input tax exceeding the output tax in a tax period, SARS will refund the difference to the vendor.[380] The above-mentioned features enhance tax neutrality by permitting registered vendors a credit for the tax paid on purchases from registered suppliers against the tax payable on sales.[381] Thereby the tax is limited to the value added at each stage of production and distribution.[382]

4.2.2 Brief History of Customs Duties in South Africa

Colesky[383] traces the roots of the first customs duties[384] imposed to 1678 in the Cape of Good Hope ("Cape"). At the time the Cape was a permanent settlement functioning

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373 Davis Tax Committee, 2018: 12.

374 Davis Tax Committee, 2018: 12.

375 Schneider, 2000: 55.

376 VAT Act: sec 15(1). Also known as the subtractive method. SARS Legal Counsel, *Taxation in South Africa*, 2019: 74, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019).

377 Output tax refers to the VAT charged under section 7(1)*(a)* of the VAT Act by a vendor on supplies of goods and services made by that vendor. Section 1(1) of the VAT Act.

378 Input tax, in relation to a vendor, means tax charged under section 7 of the VAT Act and payable in terms of that section by (i) a supplier on the supply of goods or services made by that supplier to the vendor; or (ii) the vendor on the importation of goods by that vendor; or (iii) the vendor under the provisions of section 7(3). Section 1(1) of the VAT Act.

379 Section 16 of the VAT Act prescribes the calculation of tax payable by a vendor in respect of each tax period during which he has carried on an enterprise in respect of which he is registered or is required to be registered in terms of section 23 of the VAT Act. Schneider, 2000: 55. SARS Legal Counsel, *Taxation in South Africa*, 2019: 74, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019).

380 VAT Act: sec 16(5) & 44.

381 Cnossen, *The technical superiority of VAT over RST*, 1987: 424; Schneider, 2000: 55.

382 Cnossen, 1987: 424.

383 Colesky, *A comparative study on customs tariff classification*, 2014: 27.

384 Generally speaking, customs duties (also referred to as tariffs) can be defined as a financial charge or tax on imported goods, due because of their importation; Van Den Bossche & Zdouc, *The law and policy of the World Trade Organization*, 2013: 420.

as a halfway station for the Dutch multinational company, the *Vereenigde Oost-Indiese Compagnie* ("VOC").[385] Initially no customs functions were performed at the Cape as all goods imported were for the benefit of the VOC and all goods exported were on VOC ships.[386] Furthermore, strict prohibitions were imposed by the VOC from the outset on private trade with the indigenous inhabitants, local trade and exports.[387] The imposition of local trade restrictions by the VOC resulted in illegal trade and smuggling.[388]

As a counter measure to the financial loss suffered by the VOC due to smuggling, it was decided to impose customs duties.[389] The first customs tariff and customs duties were implemented in 1678 and levied as an import duty on selected imported goods sold privately.[390] According to Colesky[391] the customs duties levied were equivalent to the losses sustained by the VOC. Goods were free from further control measures after landing at the Cape, or being shipped therefrom, as long as the applicable customs duties were paid.[392] The import duties imposed in 1678 are consequently known as the origin of customs control measures, as they are known today, in South Africa. It was the first formal provision imposed to collect customs duties and by extension prevent smuggling and protect trade.[393]

The origin of customs control measures in South Africa is due to the inability of the Fiscal[394] to ensure adherence to restrictions, imposed by the Company, on illicit trade

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385 The decision to establish a halfway station, according to Theal, followed a report issued by survivors (who were rescued after their ship sunk at the Cape in 1647) in which the favourable conditions of the Cape were highlighted. The VOC is known as the world's first multinational company. The company was established by consolidating all the small trading associations in one great company by means of a charter, containing 46 clauses, dated at The Hague on 20 March 1602. The VOC effectively monopolised trade with Asia at the time. Theal, *The beginning of South African History*, 1902: 316; Colesky, 2014: 25.

386 Colesky, 2014: 25.

387 Theal, *Compendium of South African history and geography*, 1877: 63; Colesky, 2014: 26 & 27.

388 Colesky, 2014: 27.

389 Colesky, 2014: 27.

390 The selected imported goods on which customs duties were imposed included: brandy, arack, Rhenish wine, French wine, rum, tobacco, pipes, rice and sugar. Theal, *History of South Africa before 1795*, 1916: 242 & 243; Colesky, 2014: 27 & 28.

391 Colesky, 2014: 27.

392 Colesky, 2014: 28.

393 Colesky, 2014: 28.

394 The Fiscal was an officer in the service and under the authority of the VOC. Duties of the Fiscal included performing financial functions, serving as public prosecutor, investigator of offences and crimes. As smuggling continued to prosper along with non-adherence to trade restrictions, the additional responsibility to prevent illicit trade and smuggling was added to the duties of the Fiscal. Gie, *Geskiedenis van Suid-Afrika of ons* verlede, 1924: 106; Visagie, *Regspleging en reg aan die Kaap van 1652 tot 1806*, 1969: 46 & 47; Colesky, 2014: 27.

and smuggling. This resulted in the first customs duties being imposed in South Africa.[395] The circumstances leading to customs duties being imposed can be described as somewhat ironic. Generally, high customs duties lead to smuggling as a way of avoiding paying said duties, whereas lowering duties results in less smuggling.[396] Contrary to the general rule, the high levels of smuggling lead to the VOC imposing customs duties as a counter measure.[397] Someone had to facilitate and ensure the collection of customs duties whilst countering illicit trade, subsequently in March 1688 the position of Independent Fiscal[398] was created in South Africa.[399] The Independent Fiscal had extensive powers and privileges at the time; permission had to be obtained from the official prior to goods being landed or shipped (including presenting the official with samples); furthermore the official had free access to all accounts and documents, including ships' cargoes, whilst the official was entitled to keep all duties collected as a legitimate perquisite of the role.[400] The retaining of duties collected by the Independent Fiscal emphasises that at the time customs duties were not imposed for revenue collection, but rather the protection of trade.[401]

The first Act regulating customs matters was the Customs Tariff Act[402] passed in 1855 in the Cape Colony.[403] Initially, the main objective of the Act was revenue collection, based on a simplistic tariff, therewith gradually increasing the tariff rates until 1892. After which the tariff rates constituted a more protective tariff, based on higher rates payable on commercial commodities.[404] De Kock[405] indicates the protective tariff as mainly for the benefit of the British commercial policy at the time. "Local industrial

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[395] Colesky, 2014: 28.
[396] Colesky, 2014: 28.
[397] Colesky, 2014: 28.
[398] Gie, 1924: 106 & 107; Colesky, 2014: 28.
[399] Theal, *History of South Africa before 1795*, 1909: 361; Spilhaus, *The first South African and the laws which governed them*, 1949: 2; Colesky, 2014: 28.
[400] The duties of the Independent Fiscal far exceeded those of the Fiscal. Although preventing illicit trade and smuggling was the responsibility of the Fiscal, it excluded the collection of customs duties. Gie, 1924: 106 & 107; Mentzel, *A geographical and topographical description of the Cape of Good Hope*, 1921: 141; De Kock, *Selected subjects in the economic history of South Africa*, 1924: 82; Theal, *Records of the Cape Colony*, 1897: 244; Colesky, 2014: 27 & 29.
[401] Colesky, 2014: 28 & 29.
[402] Act 1 of 1855.
[403] De Kock, 1924: 304.
[404] De Kock, 1924: 304; Bruwer, *Protection in South Africa*, 1923: 62 & 67; Colesky, 2014: 33.
[405] De Kock, 1924: 302; Colesky, 2014: 33.

protection was initially not that important, as not too many industries had been established", explains Colesky.[406]

Rapid expansion and an ever-growing European influence eventually divided South Africa into four distinct parts. The four parts consisted of two British Colonies, namely the Cape of Good Hope and Natal; and two Boer Republics, namely the Orange Free State and Transvaal.[407] The repercussions for customs purposes were extreme as it introduced new borders that hampered trade.[408] Each one of the four governments were further divided by their own objectives and policies.[409] Colesky[410] explains: "[e]ach government imposed its own duties on imports and exports for its own reasons, namely for revenue purposes or protection of trade, or both".

The Cape of Good Hope, Natal, Orange Free State and Transvaal became provinces of the Union of South Africa in 1910.[411] The unification of the British Colonies and Boer Republics in 1910 brought an end to numerous obstructions and difficulties associated with having to trade across four borders as trade was being hampered by the different procedures, levies, fees, duties and taxes payable between the four territories.[412] A customs union was the ideal mechanism to standardise customs operations and avoid duplication of similar procedures.[413]

After the unification of South Africa in 1910, further alignment was required with neighbouring countries especially with regards to customs affairs to promote and facilitate trade in the region.[414] To achieve this the Southern African Customs Union (SACU) was concluded between South Africa and the then territories of Basutoland (now Lesotho) and Swaziland (now eSwatini), and the Bechuanaland Protectorate (now Botswana).[415] The Republic of Namibia became the fifth member of SACU after obtaining its independence in 1990.[416] The agreement required the territories to

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[406] Colesky, 2014: 33 & 34.
[407] Colesky, 2014: 34.
[408] Colesky, 2014: 34.
[409] Colesky, 2014: 34.
[410] Colesky, 2014: 34.
[411] Muller *ed*, 1993: 312; Colesky, 2014: 36.
[412] Smit *et al*, *Economics – A Southern African perspective*, 1996: 61; Colesky, 2014: 37 & 38.
[413] Colesky, 2014: 37.
[414] Colesky, 2014: 37.
[415] The countries are formally known as: The Kingdom of Lesotho, the Kingdom of eSwatini and the Republic of Botswana. Colesky. 2014: 38.
[416] Colesky, 2014: 37.

maintain a tariff similar to what existed in South Africa; free movement of goods between member countries once customs duties is paid; and lastly the distribution of revenue collected amongst members in accordance with the a fixed revenue sharing formula.[417]

The *South Africa Act* of 1909[418] made provision for free trade and a national uniform policy was adopted, whilst ports, harbours and railways were transferred to the newly established Union Government.[419] Furthermore the *Customs Tariff Act*[420] was promulgated in 1914, providing a selection of semi-protective duties in South Africa.[421] The *Customs and Excise Act*[422] (CEA) was assented to on 27 July 1964 and formally came into effect on the 1st of January 1965.[423]

De Wulf[424] and Colesky[425] indicate that during the 1990's, as a way of improving the efficiency and effectiveness of revenue collection, some countries merged their customs departments with other internal revenue collecting departments. The most important reason for merging tax and customs administrations is to enhance effectiveness via integrated revenue collections and services to alleviate the compliance burden on taxpayers.[426] Such integration also improves government's ability to keep track of taxpayer information as many of the same taxpayers would be

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[417] Preamble to the *1910 Southern African Customs Union (SACU) Agreement* available at: https://www.sacu.int/show.php?id=564 (accessed 27 September 2019); McCarthy, *The Southern African Union: A report prepared for the Central Economic Advisory Service*, 1985: 2; Colesky, 2014: 38.

[418] Section 136 provided: "There shall be free trade throughout the Union, but until Parliament otherwise provides the duties of custom and of excise leviable under the laws existing in any of the Colonies at the establishment of the Union shall remain in force."

[419] De Kock, 1924: 128 & 129; Basson, *Regte op invoere as instrument van die ekonomiese politiek: 'n Historiese en analitiese beskouing*, 1988: 475; Colesky, 2014: 38.

[420] Act 26 of 1914.

[421] De Kock, 1924: 129; Colesky, 2014: 38. The first Union Customs Tariff Act was a direct outcome of the Cullinan Commission report. It contained a number of protective duties, but, in the main, the tariff had a revenue bias. It is clear a policy of protection had not been adopted, instead the raising of revenue was the primary principle of the Act. Such is evident when considering Section 8 of the Act: if the price to import into South Africa was less than the current value for home consumption in the country of export, then a duty equal to the difference was to be levied. Lumby, *The customs tariff and the development of secondary industry in South Africa with special reference to the period 1924-1939*, 1974: 36-38.

[422] Act 91 of 1964. The CEA is currently still in force.

[423] SARS, *Legislative Framework*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/Pages/Legislative-Framework.aspx (accessed 20 September 2019).

[424] De Wulf, *Human resources and organizational issues in customs*, in De Wulf & Sokol (eds), *Customs Modernization Handbook*, 2005: 38.

[425] Colesky, 2014: 39.

[426] World Bank, *Integration of revenue administration: A comparative study of international experience*, 2010: 3.

registered or required to be registered for more than one tax product, for example as a VAT vendor and importer.[427] South Africa is a prime example thereof, Colesky[428] explains: "Cabinet approved in 1995 that the Directorate of Customs and Excise was to amalgamate with the Directorate of Inland Revenue into the newly established South African Revenue Service ("SARS")". The Constitution[429] expressly provides that the collection of revenue resorts with SARS.[430] Since 1996, Customs and Excise formed an integral part of SARS with administrative autonomy granted by Cabinet.[431] The CEA consists of 122 sections incorporated into 12 Chapters, as well as Schedules to the Act, and is administered by the Commissioner in terms of the SARS Act.[432] The purpose of the CEA is:[433]

> To provide for the levying of customs and excise duties and a surcharge; for a fuel levy, for a Road Accident Fund levy, for an air passenger tax, an environmental levy and a health promotion levy; the prohibition and control of the importation, export, manufacture or use of certain goods; and for matters incidental thereto.

SARS embarked on a customs modernisation programme to improve and modernise customs functionalities and operations via system enhancements, as well as drafting new legislation.[434] The drafting of new Bills[435] commenced during 2003 and the *Customs Duty Act* (CDA)[436] and the *Customs Control Act* (CCA)[437] was only published in the Government Gazettes in July 2014.[438] However, the new Customs Acts will only become effective on a date yet to be announced by the President.[439]

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427 World Bank, 2010: 3.

428 As recommended by the Katz Commission. Minister of Finance, *National Budget Speech by Liebenberg*, 1996, available at: https://www.gov.za/budget-speech-1996-minister-finance-mr-cf-liebenberg-13-march-1996 (accessed 27 September 2019). Colesky, 2014: 39.

429 Sec 214(1) of the Constitution, 1996.

430 SARS Act: sec 3; Colesky, 2014: 39.

431 Minister of Finance, *National Budget Speech by Manuel*, 1997, available at: https://www.gov.za/national-budget-speech-trevor-manuel-minister-finance-12-march-1997 (accessed 27 September 2019).

432 SARS, *Legislative Framework*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/Pages/Legislative-Framework.aspx (accessed 20 September 2019).

433 Preamble to the CEA 91 of 1964.

434 Colesky, 2014: 40.

435 Namely Customs Control Bill and Customs Duty Bill. SARS, *New customs legislation update*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx (accessed 20 September 2019).

436 Act 30 of 2014.

437 Act 31 of 2014.

438 SARS, *New customs legislation update*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx (accessed 20 September 2019); Colesky, 2014: 51 & 52.

439 The President of the Republic of South Africa. SARS, *New customs legislation update*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-

4.3 ROLE BETWEEN VAT AND CUSTOMS DUTIES

The mandate of SARS is prescribed in the SARS Act[440] which, obliges the organisation to perform the following core responsibilities in an effective and efficient manner, amongst others:

- First and foremost, collect all duties that are due to the state;[441]
- ensure compliance with legislation administered by the Commissioner;[442]
- provide a customs service that will maximise revenue, protect our borders as well as facilitate trade;[443] and
- advise the Ministers of Finance and Trade and Industry.

The core functions of an administration are prioritised depending on numerous factors impacting on the specific country. In general, developing countries place a higher reliance on revenue collection, whereas developed focus to a larger extent on protection as they are not as dependent on revenue collection as some developing countries.[444] Regardless of other external factors, the customs functions should be performed in a manner that ensures an acceptable balance is achieved between collection, protection and trade facilitation.[445]

The collection of customs revenue is dependent on the general level of trade on an international scale, which is subject to numerous external forces, in most cases beyond the control of individual governments and local administrations tasked with revenue collection.[446] Government expenditure requires funding which in turn necessitates the provision of funding and to that effect SARS performs the role of collecting agency for the National Revenue Fund by collecting the revenue required to

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update.aspx (accessed 20 September 2019). Chapter 5 will focus on the impact of the CDA and CCA and critically analyse whether it will enhance SARS' collection capability in terms of VAT collection on digital goods.

[440] Section 3 & 4; SARS, *Strategic plan 2016/17 – 2020/21*, 2016: 10.

[441] Revenue collection remains the primary focus of most Customs administrations; Ireland, *WCO trends and patterns report: a capacity building estimate*, 2007: 6.

[442] Listed in schedule 1 of the SARS Act.

[443] Collection, protection, and trade facilitation are aligned with the five core responsibilities of a customs administration as determined by the WCO, namely: revenue collection, national security, community protection, trade facilitation and collection of trade statistics. Ireland, 2007: 6; Colesky, 2015: 44.

[444] Van Den Bossche & Zdouc, 2013: 425; Colesky, 2014: 55.

[445] Colesky, 2014: 55.

[446] Surtees, *An historical perspective of income tax legislation in South Africa, 1910 to 1925*, 1985: 21; Colesky, 2014: 56.

fund government programmes and objectives, for instance the National Development Plan (NDP) 2030.[447]

SARS imposes certain duties and taxes on cross-border goods and services as part of their customs mandate of collecting revenue, protecting the local economy and facilitating trade, amongst other responsibilities executed by SARS. Customs duties and VAT are imposed on imported goods, whilst VAT is also levied on the cross-border supply of services.[448] SARS levies the following duties and taxes on imported goods:[449]

- Customs duties;[450]
- Anti-dumping, countervailing and safeguard duties;[451] and
- VAT.[452]

Goods exported from South Africa do not attract any customs duties; similarly the exportation of goods or services from South Africa do not generally attract VAT due to these exports being zero-rated.[453] Details pertaining to the collection of customs duties and VAT on cross-border transactions involving either the importation of goods or services are further discussed below.

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447 Colesky, 2014: 56; SARS, *Strategic plan 2016/17 – 2020/21*, 2016: 19.

448 Ockhuis, 2016: iv.

449 SARS Legal Counsel, *Taxation in South Africa*, 2019: 80, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019).

450 Customs duties may include additional *ad valorem* duties on certain luxury or non-essential items as listed in Section B of Part 2 of Schedule 1 of the CEA.

451 Section 55 of the CEA makes provision for anti-dumping, countervailing and safeguard duties on imported goods of which are levied on goods considered to be "dumped" in South Africa as well as subsidized imported goods. Schedule 2 of the CEA specifies the goods which are liable (in addition to any other duty payable in terms of the CEA) for appropriate anti-dumping, countervailing or safeguard duties provided for in respect of such goods. The rate imposed will depend on the result of investigations into pricing and export incentives in the country of origin; SARS Legal Counsel, *Taxation in South Africa*, 2019: 80, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019).

452 Section 7(1) of the VAT Act makes provision for levying VAT on the importation of goods and services into the Republic.

453 Silver, 2017: 71. See paragraph 4.2.1 above.

4.3.1 Customs Duties

Customs duties are imposed by the CEA.[454] The CEA[455] defines "customs duty" to mean "any duty leviable under Part 1 of Schedule No. 1 or Schedule No. 2 on goods imported into the Republic". The duties are usually calculated as a percentage of the value of the goods (*ad valorem*) in accordance with the rate provided in the applicable Schedule to the CEA.[456] Additional *ad valorem* excise duties are levied on a wide range of luxury or non-essential items imported into or manufactured in South Africa (examples include perfumes, firearms and air conditioning machines) as listed in Section B of Part 2 of Schedule 1 of the CEA.[457]

The accurate determination of the customs treatment of goods is largely centred on three core technical customs criteria.[458] The three core criteria, known as the customs trilogy, consist of the following:[459]

- Tariff classification;[460]
- Origin of the goods;[461] and
- The value of the goods for customs purposes (the customs value).[462]

The customs trilogy enables a country to meet its local and international obligations.[463] The WTO shares the same sentiment towards the importance of the customs trilogy and acknowledged that the three criterion are required to make a determination on customs duties.[464] The CDA lists tariff classification (Chapter 6 of the CDA), customs

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[454] Section 39.
[455] Section 1.
[456] SARS Legal Counsel, *Taxation in South Africa*, 2019: 79, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019). There are however instances where the duty is expressed as a specific rate (cents per unit), for example, per kilogram, per liter, meter, *et cetera* (based on the volume of the good). Meat, fish, tea, certain textile products and certain firearms attract rates of duty calculated either as a percentage of the value or as cents per unit.
[457] See SARS Executive: Excise Audit Enforcement, *Ad Valorem Excise Duty - External Policy*, 2018: 3.
[458] Colesky, 2014: 70 & 71.
[459] Colesky, 2014: 70 & 71; SARS Legal Counsel, *Taxation in South Africa*, 2019: 80, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019).
[460] CEA: sec 47.
[461] CEA: sec 46.
[462] CEA: sec 65, 66, 67, 72 and 73.
[463] De Wulf, *Strategy for customs modernization*, in De Wulf & Sokol (eds), 2005: 8; Colesky, 2014: 71.
[464] Van Den Bossche & Zdouc, 2013: 453; Colesky, 2014: 71.

value (Chapter 7 of the CDA) and origin of the goods (Chapter 8 of the CDA) as the key factors to make a customs duty assessment.[465]

4.3.1.1 Tariff Classification:

Tariff classification is the process whereby any imported or exported commodity is categorised according to an applicable commodity code, known as the tariff code.[466] The tariff code is directly linked to the rate of duty payable on the specific commodity and whether it will attract additional duties or levies.[467]

In South Africa goods are classified according to the *International Harmonised Commodity Description and Coding System*, generally referred to as the "Harmonised System" (HS).[468] The HS is multipurpose international product nomenclature developed by the WCO and governed by the *International Convention on the Harmonized Commodity Description and Coding System,*[469] to which South Africa is a contracting party.[470]

The verification and classification of imported or exported goods are specifically governed by section 47(9) of the CEA and the General Rules[471] for the interpretation of the HS. The policy on the tariffs applicable on importation into the Republic is set by the International Trade Administration Commission (ITAC) under the authority of the Department of Trade and Industry (DTI), while the enforcement thereof is the responsibility of SARS Customs, on behalf of the Minister of Finance.[472] The correct

[465] CDA: sec 80.

[466] To assist in determining an applicable commodity code, the following should be considered: 1) what is it; 2) how is it made; or what is it used for. SARS Executive: Process Solutions Customs & Support Services, *Tariff Classification – External Directive*, 2014: 3.

[467] SARS Executive: Process Solutions Customs & Support Services, 2014: 3.

[468] The HS comprises of about 5 000 commodity groups; each identified by a six-digit code known as subheadings (international standard). WCO, *What is the Harmonized System (HS)?*, 2019, available at: http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx (accessed 05 October 2019). South Africa has in Schedule 1 expanded the international tariffs to eight-digit code subdivisions (local standard) which must be declared. SARS Executive: Process Solutions Customs & Support Services, 2014: 3

[469] See WCO, *What is the Harmonized System (HS)?*, 2019, available at: http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx (accessed 5 October 2019).

[470] The *International Convention on the Harmonized Commodity Description and Coding System* is concluded at Brussels on 14 June 1983. South Africa became a contracting party on 25 November 1987 and implemented the HS on 1 January 1988; Colesky, 2014: 94.

[471] The general rules for the interpretation of Schedule 1 are contained in the General Notes of Schedule 1 to the CEA 91 of 1964.

[472] The policy on tariffs include: increases, reductions, rebates and drawbacks of duty and are implemented by making amendments to Schedule 1 Part 1 of the CEA 91 of 1964. SARS Legal Counsel, *Taxation in South*

classification of goods is important to ensure the collection of revenue as prescribed under the appropriate tariff subheading, enforcing prohibitions and restrictions on applicable goods and accurately compiling trade statistics.[473]

4.3.1.2 Origin

Origin and the rules thereto set out the requirements and criteria to determine how a particular product is said to originate from a certain place.[474] The origin of a product is used at the time of importation to determine:

- If restrictions apply to the goods;
- If the goods will receive preferential tariff treatment;
- Import duty payable and whether the goods are subject to any anti-dumping, countervailing and safeguard duties and measures; and
- For the compilation of trade statistics.[475]

The responsibility rests with SARS Customs to ensure that the correct country of origin is declared in accordance with the general provisions of section 46 of the CEA. In terms of section 46 goods shall be considered originating in a country, if:

a) at least 25 per cent of the production cost of those goods, determined in accordance with the rules, is represented by materials produced and labour performed in that country;[476]
b) the last process in the production or manufacture of those goods has taken place in that country;[477] and
c) such other processes as the Commissioner may, at the request of ITAC, by rule prescribe in respect of any class or kind of goods.[478]

Section 46 provides for the determination of the origin of goods with the exception of those goods traded under an agreement contemplated in sections 49 and 51 of the CEA as these specific agreements can supersede the general rules of origin. SARS administers a number of trade agreements, protocols or parts or provisions thereof

Africa, 2019: 79, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019); Colesky, 2014: 53 & 58.

473 Colesky, 2014: 73.
474 Colesky, 2014: 71.
475 Van Rensburg, *Guide to understanding preferential rules of origin*, 2008: 6.
476 CEA: sec 46(1)(*a*).
477 CEA: sec 46(1)(*b*).
478 CEA: sec 46(1)(*c*).

and other international instruments which are enacted into law when published by Notice in the Gazette.[479]

4.3.1.3 Valuation

Customs administrations must determine the value of the imported goods to be able to calculate the customs duty due.[480] Valuation is the process of applying the different methods used to determine the customs value of goods for customs purposes.[481] The determination of customs value of any commodity is prescribed by the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (GATT)[482] governed by the WTO which sets out six valuation methods.[483] The GATT is incorporated into the CEA almost *verbatim*.[484] In terms of section 74A(1) of the CEA the interpretation of sections 65, 66 and 67 is subject to the Agreement on Implementation of Article VII of the GATT.

The CEA defines six methods of valuation which must be strictly applied in sequential order,[485] namely the:[486]

1) Transaction value method [section 66(1) read with section 67];[487]
2) Identical goods value method [section 66(4)];
3) Similar goods value method [section 66(5)];

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479 CEA: sec 49. Schedule 10 to the CEA contains Agreements or Protocols or other parts or provisions thereof as contemplated in section 49(5) of the CEA. SARS Legal Counsel, *Taxation in South Africa*, 2019: 79, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019).

480 Most customs duties are applied *ad* valorem; Van Den Bossche & Zdouc, 2013: 457.

481 Colesky, 2014: 72.

482 General Agreement on Tariffs and Trade 1994. The original GATT (GATT 1947) entered into force on 1 January 1948 with 23 founding members, including the Union of South Africa that signed the agreement on 13 June 1948. Following the substantive changes negotiated in the Uruguay Round of trade negotiations the provisions of the GATT 1947 were incorporated into the GATT 1994. GATT 1994 is an integral part of the World Trade Organization established on 1 January 1995. WTO, *Fiftieth anniversary of the multilateral trading system*, 1998, available at: https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm (accessed 7 October 2019).

483 SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 4; SARS Legal Counsel, *Taxation in South Africa*, 2019: 83, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019).

484 Colesky, 2014: 90.

485 The single exception to the sequential rule is the deductive method and the computed value method which may be reversed at the request of the importer in terms of Section 66(6) of the CEA. SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 7 & 8.

486 SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 7.

487 Section 66(1) states the transaction value of any imported goods shall be the price actually paid or payable for the goods. The transaction value method is the primary method and must be applied whenever the conditions as prescribed are fulfilled.

4) Deductive value method [section 66(7)];
5) Computed value method [section 66(8)]; and
6) Fall-Back value method [section 66(9)].[488]

In South Africa the point of valuation is the Free on Board (FOB)[489] contract of sale.[490] Sections 66(11) and 67(4) of the CEA defines the port or place of export in the country of exportation for the purposes of sections 66(7)(*a*)(ii), 66(8)(*d*), 67(1)(*e*) and 67(2)(*a*). Accordingly, all costs, charges and expenses up to the point where the goods are loaded onto a ship or other vehicle, are dutiable.[491] The FOB price forms the basis for the calculation of duties, levies and taxes, allowing for certain deductions (for example: interest charged on extended payment terms)[492] and additions (for example: insurance, loading, unloading, handling and associated charges)[493] to be effected.[494]

International Commercial Terms (INCOTERMS) are internationally recognised as indispensable evidence of the importer's and supplier's responsibilities for delivery under a sales contract and simplifies international trade by making use of universal trade terms which provides clarity and predictability to business.[495] For specific INCOTERMS to apply on a transaction, it must be incorporated into the contract of sale by specifying that the contract is governed by the specific INCOTERMS so desired.[496]

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488 The fall-back method, being one of the other five methods applied more flexibly, can only be applied if all the previous methods have been exhausted and cannot be used; SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 7.

489 FOB is one of the International Commercial Terms (INCOTERMS) which are standard trade definitions most commonly used in international sales contracts and published by the International Chamber of Commerce (ICC). INCOTERMS are international rules for the interpretation of trade terms and aim to define the liabilities of parties as clearly and precisely as possible. INCOTERMS are internationally recognised as indispensable evidence of the importer's and supplier's responsibilities for delivery under a sales contract. SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 5 & 50.

490 CEA: sec 66(11) & 67(4).

491 SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 18.

492 Section 67(2)(*b*) provides for deductions from the price actually paid or payable for the goods, if identified separately from the balance of the price actually paid or payable for the goods.

493 Section 67(1)(*e*) provides for additions to the price actually paid or payable for the goods, to the extent that they are not already included in the price.

494 SARS Legal Counsel, *Taxation in South Africa*, 2019: 83, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf (accessed 21 September 2019).

495 SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 5; ICC, *Incoterms® Rules*, 2019, available at: https://iccwbo.org/resources-for-business/incoterms-rules/ (accessed 2 October 2019).

496 SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 5.

4.3.1.4 Collection of Customs Duties

The collection of customs duties is performed through a system whereby traders declare imported goods to SARS Customs.[497] Importers and exporters and their clearing or registered agents must be registered or licensed as prescribed in the Rules to the CEA,[498] before submitting a Customs Clearance Declaration (CCD) to SARS Customs.[499] The declaration is made on what is commonly referred to as an SAD500.[500] Every importer or exporter of goods must lodge a CCD when goods are imported into or exported from South Africa, except when exempted by Rule.[501]

Declarants make a self-assessment with the transaction documentation and submits the CCD to Customs either electronically[502] or manual (hard copy).[503] The EDI gateway validates the CCD submitted by the declarant and Customs replies with a Customs Clearance Status Response Code (CUSRES) message.[504] For each and every inbound electronic submission by a declarant to Customs, it will result in one or more CUSRES message.[505]

The declaration is assed electronically via EDI by performing system validations to verify, amongst other, the correctness of key fields and the completion of mandatory fields.[506] If the CCD is found not valid, the declaration system will send a CUSRES 6,

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[497] Colesky, 2014: 56.

[498] Rule 59A.03(1)*(a)*(i) of the Rules to the CEA 91 of 1964.

[499] SARS Group Executive: Customs Branch, *Clearance Declaration – External Policy*, 2019: 5. There is an exception to the general rule for importers and exporters of non-commercial goods, they are excluded from registration, provided that imports and exports are limited to three per year, each consignment is less than R50 000 and the goods are declared for either home consumption, temporary export or export. Rule 59A.03(1)(a)(iii) of the Rules to the CEA 91 of 1964.

[500] SAD is an acronym for single administrative document. For Customs purposes a declaration is the act whereby a person indicates (on a SAD500 form) the wish to place goods under a given Customs procedure such as importation, exportation, *et cetera*. SARS, *Glossary*, 2019, available at: https://www.sars.gov.za/Pages/Glossary-D.aspx (accessed 3 October 2019).

[501] SARS Group Executive: Customs Branch, *Clearance Declaration – External Policy*, 2019: 4.

[502] Any person who wishes to communicate with the Commissioner via EDI must be registered in terms of section 101A with SARS for this purpose and submit an application in terms of section 101A for electronic communication for the purposes of Customs and Excise procedures; SARS Group Executive: Customs Branch, *Clearance Declaration – External Policy*, 2019: 23.

[503] A client who does not have access to electronic submission channels (EDI) must visit a Customs Branch Office and request the capture and submission of the CCD by a Customs Officer on behalf of the client; For more information on manual submissions see SARS Group Executive: Customs Branch, *Clearance Declaration – External Policy*, 2019: 23 - 25.

[504] SARS Group Executive: Customs Branch, *Clearance Declaration – External Policy*, 2019: 24.

[505] Els, *Completion of Declarations - External Manual*, 2019: 65, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Manuals/SC-CF-04%20-%20Completion%20of%20declarations%20-%20External%20Manual.pdf (accessed 10 November 2019).

[506] SARS Group Executive: Customs Branch, *Clearance Declaration – External Policy*, 2019: 25.

which is an rejection message indicating that the declarant has to submit a new CCD.[507] Declarants must monitor the receipt of CUSRES messages, as the code will indicate not only the status, but also what the follow-up course of action will be.[508]

Once a CUSRES 1 (release status) is received the goods may be released or exported if the declarant has made payment, it is a prerequisite that the amount of duty and tax due is paid or deferred[509] in order for goods to be released.[510] Customs duties and VAT are payable in accordance with section 39(1)(*b*) of the CEA at the time of importation.[511] Payments for customs duties and VAT can be completed through eFiling, Electronic Funds Transfer (EFT), cash and cheque payments.[512] Credit and/or debit cards can only be used for payment of duties and/or VAT for travellers. Schedule 1 and 2 of the CEA determines the rates at which customs duties are imposed, whilst Schedule 3, 4 and 5 provide for rebates, refunds and drawbacks of customs duties.[513]

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[507] All valid CCD submitted via EDI receive a Movement Reference Number (MRN) that must be reflected or quoted on all correspondence to SARS Customs; SARS Group Executive: Customs Branch, *Clearance Declaration – External Policy*, 2019: 25.

[508] Els, 2019: 68, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Manuals/SC-CF-04%20-%20Completion%20of%20declarations%20-%20External%20Manual.pdf (accessed 10 November 2019).

[509] SARS Customs offers a deferment facility to existing registered Customs clients (in terms of section 59A of the CEA) to defer payment of Customs duties and VAT for up to thirty (30) days on a deferment account. SARS Group Executive: Customs Operations, *Deferment - External Policy*, 2019: 3; Colesky, 2014: 56.

[510] Release times are dependent on whether the declaration is selected for a customs-related intervention, for example a request for additional supporting documentation (CUSRES 31) or a physical inspection of the shipment (CUSRES 2). Declarations selected for intervention will not be released immediately, instead the applicable CUSRES message will be sent indicating the type of intervention and what might be required of the declarant. Once SARS Customs has completed the applicable customs related intervention and has established the CCD submitted satisfies all requirements, the status of the CCD will be updated to CUSRES 1 (release status). The majority of declarations submitted are however released automatically within minutes after they are submitted. Colesky, 2014: 56. For a complete list of CUSRES messages and response statuses, see Els, 2019: 65-68, available at: https://www.sars.gov.za/AllDocs/OpsDocs/Manuals/SC-CF-04%20-%20Completion%20of%20declarations%20-%20External%20Manual.pdf (accessed 10 November 2019).

[511] Section 10 of the CEA defines when goods shall be deemed to have been imported into the Republic.

[512] Credit and/or debit cards can only be used for payment of duties and/or VAT for travelers; SARS, *Customs Payments*, 2019: https://www.sars.gov.za/ClientSegments/Customs-Excise/DutiesTaxes/Pages/Customs-Payments.aspx (accessed 03 October 2019).

[513] Colesky, 2014: 56.

4.3.2 Standard Application of VAT

In South Africa, VAT is levied on the following:[514]

a) The supply of goods and services by a registered VAT vendor[515] in the furtherance of an enterprise in the Republic. The VAT vendor making the supplies must collect VAT as the deemed taxable entity.[516]
b) The importation of goods into the Republic, whereas the person importing such goods shall be deemed the taxable entity charged with the burden of collecting tax.[517] The importer of the goods is responsible for declaring the goods to SARS Customs and paying the appropriate taxes for the release of the goods. VAT will be levied and collected by SARS Customs Officials or agents appointed by SARS Customs.[518]
c) The supply of imported services; in which case the recipient of the service (or vendor in the case of the recipient being a vendor) must submit a return to the Commissioner, calculate the tax payable on the value of the imported services and pay VAT thereon in terms of section 14(1) of the VAT Act.[519]

VAT is calculated at the standard rate of 15 per cent (currently) on the value of most supplies made and importations but there is a limited range of goods and services which are exempt or subject to VAT at the zero rate.[520] For purposes of the dissertation the focus will primarily be on VAT being imposed on the cross-border supply of digital goods.

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[514] VAT Act: sec 7(1); Inputs were taken from Classen 2012: 111 and Van Zyl 2014: 156.
[515] Section 1 of the VAT Act defines a "vendor" as: "any person who is or is required to be registered under this Act".
[516] VAT Act: sec 7(2).
[517] VAT Act: sec 7(2).
[518] Van Zyl 2014: 156.
[519] VAT Act: sec 7(2).
[520] Section 11 of the VAT Act deals with zero rated supplies and section 12 of the VAT Act deals with exempt supplies.

4.3.2.1 Distinguishing between goods and services for purposes of the VAT Act

The VAT Act distinguishes between VAT levied on the importation of goods and on the supply of imported services.[521] The commonality is both related to importation and VAT being levied on the transactions accordingly. The manner in which VAT is levied and the accompanying treatment and collection thereof differs immensely depending on whether goods or services are being dealt with.[522] Van Zyl[523] points out the main reason for the extremely difficult task of correctly classifying electronically supplied goods (digital goods) is due to the current VAT legislation being drafted and designed for application on tangible goods and predominantly physically rendered services. The drafting pre-dated the current e-commerce and digital transformation phenomenon.

As discussed in Chapter 2, the updated Regulations[524] amended the definition of "electronic services" to widen the scope of services that will qualify as "electronic services" supplied by foreign suppliers of electronic services in South Africa. For the purposes of the definition of "electronic services" in section 1(1) of the VAT Act "electronic services" means "any services supplied by means of an electronic agent, electronic communication or the [I]nternet for any consideration".[525] Electronic services are therefore services supplied by non-residents to residents of South Africa, the supply being dependent on information technology, automated, and involving minimal human intervention.[526] However, SARS Legal Counsel[527] forewarns that electronic services should still be distinguished from those services that, by their nature, are not electronic services, as in the case of a product being merely delivered or communicated by electronic means.

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[521] Section 13 of the VAT Act deals with the collection of tax on importation of goods, whilst section 14 deals with the collection of value-added tax on imported services.

[522] Van Zyl, 2013: 60.

[523] Van Zyl, 2013: 60.

[524] GN 429 Government Gazette 2019: 645(42316).

[525] The ECT Act further defines each one of the three means of supply.

[526] SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 4, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

[527] For example, where the foreign supplier of a service and a South African client communicate via electronic mail, the communication in itself does not necessarily qualify as the supply of "electronic services" *per se*. SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 4, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

The definition of "goods" in section 1(1) of the VAT Act clearly only makes provision for tangible goods and excludes any goods in digital form, as "goods" are defined as:

> corporeal movable things, fixed property, any real right in any such thing or fixed property, and electricity, but excluding –
> (a) money;
> (b) any right under a mortgage bond or pledge of any such thing or fixed property; and
> (c) any stamp, form or card which has a money value and has been sold or issued by the State for the payment of any tax or duty levied under any Act of Parliament, except when subsequent to its original sale or issue it is disposed of or imported as a collector's piece or investment article.

4.3.2.2 Collection of VAT on imported goods

SARS Customs Officers control the entry of goods into the Republic and, as stated above,[528] goods will not be released from customs control before they have been declared and any customs and/or excise duties (if any) and VAT have been paid thereon.[529] The importer must pay VAT on the importation of goods to SARS Customs.[530] This includes a vendor importing the goods or his clearing agent. The VAT paid to SARS Customs by a vendor in the course of making taxable supplies may be deducted as input tax by the vendor, subject to certain requirements as contained in section 16(2) of the VAT Act.[531]

Section 13(2) of the VAT Act importantly states that the value that must be attributed to goods imported into South Africa for the collection of tax in terms of the VAT Act should be the value thereof for customs duty purposes, plus any non-rebated duty levied in terms of the CEA, in respect of the importation of such goods, plus 10 per

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[528] See paragraph 4.3.1.4.

[529] CEA: sec 38 & 39; SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 104, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pd (accessed 15 October 2019).

[530] VAT Act: sec 7(2).

[531] The vendor making the deduction must be in possession of the following documentation: an CUSRES 1 (release status) message; a valid bill of entry (SAD500 and/or any other document that might be prescribed by the CEA); the receipt number indicating payment of such tax (receipt as issued on eFiling). SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 104, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pd (accessed 15 October 2019).

cent[532] of the said value.[533] Furthermore, to calculate VAT on imported goods, the added tax value (ATV) needs to be determined first. The ATV is the sum of: the customs value as calculated in terms of section 66 of the CEA, an increasing factor of 10 per cent[534] of the value (mark-up), plus all non-rebated duties.[535]

The calculation for determining the amount of VAT payable on the importation of goods entails:

"[(Customs Value + 10% thereof) + (any non-rebated duties levied on the goods)] x 15%

= [ATV] x 15%

= VAT payable".[536]

The correctness of the ATV calculation is therefore crucial as it has a direct impact on the amount of VAT due to SARS.

4.3.2.3 Collection of VAT on imported services

In the case of imported services, the responsibility of declaring and paying VAT to SARS is shifted to the recipient of the imported services.[537] VAT is levied at the standard rate on the supply of imported services, subject to any exemptions[538] which may apply.[539] Supplies of imported services are only subject to VAT if such supplies

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[532] The 10% upliftment amount seeks to take into account the transport and insurance costs which is used for calculating the ATV and does not necessarily represent an amount payable to SARS; SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 105, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pd (accessed 15 October 2019). The 10% upliftment on the customs value is applicable when goods are imported from a country outside the SACU. Therefore, if goods have their origin in any of the BLNS countries (Botswana, Lesotho, Namibia or eSwatini), the 10% will not be added to the calculation and the same applies when goods are exported to any of the BLNS countries; SARS, *Duties and taxes for importers*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/DutiesTaxes/Pages/Duties-and-Taxes-for-Importers-.aspx (accessed 29 September 2019).

[533] SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 33.

[534] BLNS are an exception to the rule. See footnote 236 above. SARS, *Duties and taxes for importers*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/DutiesTaxes/Pages/Duties-and-Taxes-for-Importers-.aspx (accessed 29 September 2019).

[535] SARS Group Executive: Customs Operations, 2014: 33.

[536] SARS, *Duties and taxes for importers*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/DutiesTaxes/Pages/Duties-and-Taxes-for-Importers-.aspx (accessed 29 September 2019).

[537] VAT Act: sec 7(2); SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 106, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf (accessed 15 October 2019); Ockhuis, 2016: iv.

[538] VAT Act: sec 14(5).

[539] VAT Act: sec 7(1)(c).

meet the requirements of the definition of imported services. “Imported services” is defined as:[540]

> 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.

Accordingly, the recipient is required to pay VAT to SARS on the importation of any services which exceed R100[541] and are acquired wholly or partly for non-taxable (private) purposes.[542] Further instances in which a resident recipient is required to account for VAT on imported services include:

- The recipient is not a registered vendor;
- The recipient is a vendor, but the imported services are wholly or partly for making exempt supplies; or
- The recipient is a vendor but the imported services are applied for private purposes.[543]

A non-vendor recipient of imported services must complete and submit a VAT215 (declaration in respect of imported services) together with the payment of the applicable VAT within 30 days calculated from the earlier of the date the invoice is issued or payment is made.[544] Provided that where the recipient is a vendor, the VAT on imported services must be calculated and declared in field 12 of the VAT201 and pay such amount to SARS.[545]

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[540] VAT Act: sec 1(1).

[541] VAT Act: sec 14(5)(e).

[542] SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 107, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf (accessed 15 October 2019).

[543] SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 107, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf (accessed 15 October 2019).

[544] VAT Act: sec 14(1); SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 29, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019); SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 108, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf (accessed 15 October 2019).

[545] VAT Act: sec 14(1); SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 29, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019); SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 108, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf (accessed 15 October 2019).

4.3.2.4 Collection of VAT on the supply of electronic services

The definition of an "enterprise" according to section 1(1) of the VAT Act includes the supply of electronic services by a person from a place in an export country, provided at least two of the following criteria are met:

- The recipient of those electronic services is a resident of the Republic;
- any payment to that person in respect of such electronic services originates from a bank registered or authorised in terms of the *Banks Act*, 1990;[546] or
- the recipient of those electronic services has a business address, residential address or postal address in the Republic.[547]

The definition of an "enterprise" also includes the activities of an intermediary who facilitates the supply of electronic services.[548]

In terms of the registration requirements for persons making supplies in the course of an enterprise the compulsory registration threshold applies. The compulsory registration threshold contained in section 23(1A) of the VAT Act provides every person (including an intermediary) who supplies electronic services (in the course of an enterprise) who is not registered becomes liable to be registered at the end of any month where the total value of taxable supplies made by that person exceeded R1 million in any consecutive 12-month period.

To summarise the above, a foreign supplier of electronic services (including an intermediary) that exceeds the compulsory VAT registration threshold and meets any two out of the three requirements (as contained in the definition of "enterprise") is

[546] Act 94 of 1990.

[547] VAT Act: sec 1(1) definition of an "enterprise" at paragraph (b)(vi).

[548] Alongside the amendment of the definition of "enterprise" a new definition of "intermediary" was inserted in section 1(1) of the VAT Act to mean: " a person who facilitates the supply of electronic services supplied by the electronic services supplier and who is responsible for issuing the invoices and collecting payment for the supply"; *Rates and Monetary Amounts and Amendment of Revenue Laws Act* 21/2018: sec 8(1). An intermediary can also be described as a "platform" or "electronic marketplace" that enables, by electronic means, transactions between buyers and sellers; SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 15, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

required to register[549] as a vendor and account for VAT in respect of electronic services supplied to South African customers.[550]

It is compulsory for VAT registered Foreign Electronic Services Suppliers to register for eFiling and to make use thereof for the submission of VAT201 declarations.[551] Vendors are obligated to complete and submit VAT201 declarations (also referred to as a return) to SARS at the end of every tax period.[552] The return reflects the calculations of output tax, input tax, as well as other legitimate deductions.[553] The difference between the amounts can either result in the vendor having to pay SARS the difference or the vendor being entitled to a refund of the difference.[554] Returns must be submitted together with the VAT payment on or before the 25th day of the following month after the end of the specific tax period.[555]

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[549] Foreign suppliers of electronic services liable to register must complete a VAT101 form (Value-Added Tax Registration Application) which can be downloaded from the SARS website. After completing and signing the VAT101 form, it must be emailed together with the supporting documents to SARS at eCommerceRegistration@sars.gov.za. The Foreign Electronic Services Supplier is required to register as an eFiler to enable the supplier to file returns and make VAT payments from outside South Africa. The Commissioner will process the VAT101 form and determine the date from which a Foreign Electronic Service Supplier is required to commence charging South African VAT at the standard rate. SARS, *Foreign suppliers of electronic services – External Guide*, 2019: 4, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/VAT-REG-02-G02%20-%20Foreign%20Suppliers%20of%20Electronic%20Services%20-%20External%20Guide.pdf (accessed 15 October 2019); SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 16, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf (accessed 15 October 2019).

[550] VAT Act: sec 1(1) & 23(1A); SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 13, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

[551] SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 80, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf (accessed 15 October 2019).

[552] SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 80, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf (accessed 15 October 2019).

[553] SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 80, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf (accessed 15 October 2019).

[554] SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 80, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf (accessed 15 October 2019).

[555] Section 28 of the VAT Act prescribes the due dates for submitting VAT returns to SARS and making the accompanying VAT payments. The due date for submission to SARS is also indicated on the return itself. SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 82, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf (accessed 15 October 2019).

In the case of the supply of electronic services, the Foreign Electronic Service Supplier or in certain instances, the intermediary (which may be a resident or a non-resident) are required to levy and collect VAT.[556] The definition of an "enterprise" in terms of the VAT Act has been broadened in this regard to include the activities of an intermediary. Similar to any other vendor, Foreign Electronic Service Suppliers and intermediaries have to perform certain duties and comply with certain responsibilities, these include ensuring:

- VAT is charged and collected on taxable transactions,
- returns are submitted,
- payments are made on time, and
- tax invoices (including any other specifically prescribed documents)[557] are issued.[558]

Section 54(2B) of the VAT Act states that a supply of electronic services shall be deemed to be made by an intermediary and not by the principal, if such supply is supplied by an intermediary, who is acting on behalf of another person who is the principal for the purposes of that supply, and:

- the intermediary is a vendor;
- the principal is not a resident of the Republic and is not a registered vendor; and
- the electronic services are supplied or to be supplied by the principal to a person in the Republic.[559]

The supply of electronic services to recipients in South Africa may therefore be subject to VAT, either because:

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[556] SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 13, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

[557] For more information on what must be contained on a tax invoice, credit or debit note for the supply of electronic services by an electronic services supplier, see SARS Senior Manager: Indirect Taxes, *Binding General Ruling 28: electronic services*, 2016.

[558] SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 13, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

[559] SARS Legal Counsel indicate the electronic services can be supplied through an intermediary platform or online marketplace on behalf of the principal; SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 16, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

- the Foreign Electronic Service Supplier is required to register as the compulsory registration threshold contained in section 23(1A) of the VAT Act is exceeded (also applies to an intermediary);[560]
- the Foreign Electronic Services Supplier voluntarily registered for VAT in South Africa; or
- the intermediary, being a vendor, will be required to account for VAT on supplies made by the non-registered Foreign Electronic Services Supplier.[561]

A foreign supplier of electronic services might not be registered for VAT in South Africa due to the following reasons:

- no application is made to register for VAT in South Africa, regardless of exceeding the compulsory registration threshold which mandates the supplier to register as a vendor;[562] or
- the compulsory registration threshold has not been exceeded, therefore it is not required to register as a vendor.[563]

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[560] In the case of the intermediary exceeding the VAT compulsory registration threshold whilst acting on behalf of a non-VAT registered principal, the intermediary becomes liable to register and account for such VAT in its own capacity, whilst failure by the intermediary to register as a VAT vendor constitutes an offence. SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 14, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

[561] The intermediary remains liable to account for VAT on supplies of imported electronic services until the Foreign Electronic Services Supplier (principal) becomes registered for VAT in South Africa and accounts for VAT incurred on their own VAT return. SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 13 & 14, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

[562] If the Foreign Electronic Services Supplier (principal) exceeded the compulsory registration threshold and failed to register as a VAT vendor in South Africa, the supplier may be guilty of an offence. The supplier still remains liable to register and account for VAT on electronic services supplied by submitting a VAT return, even if the VAT on those supplies has been accounted for on a return submitted by an intermediary (agent). SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 14, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

[563] SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 14, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

4.4 CONSIDERATIONS FOR THE CLASSIFICATION OF DIGITAL GOODS

The efficient and effective collection of VAT imposed on the cross-border supply of "digital goods" remains a challenging administrative burden for revenue authorities.[564] Section 7(2) of the VAT Act determines who is responsible for paying the VAT levied on a transaction. The responsibility can either be imposed upon a vendor who supplies goods and services for the furtherance of an enterprise, an importer of goods or a recipient of imported services; depending on the type of transaction.

4.4.1 Prior to the Publication of the Electronic Services Regulations, 2014

Prior to the publication of the original Electronic Services Regulations in 2014,[565] the VAT Act provided for the inbound supply of electronic services to be taxed under the provisions of "imported services".[566] In terms of these provisions, in certain instances, the onus was on the domestic recipient of these services to declare VAT on the services received. They would also bear the responsibility for payment of VAT due to SARS (reverse-charge mechanism).[567] The intangible nature of digital goods effectively rendered them invisible to tax authorities as digital goods do not pass through physical borders as compared to physical goods.[568] Subjecting physical goods to customs control is a powerful mechanism for tax authorities as it greatly assists in effective revenue collection as customs can withhold the physical release of goods pending payment of taxes and duties due.[569] In the case of the "importation" of digital goods and electronic services there is no customs control measures in place to

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564 Ockhuis, 2016: iv.

565 The Regulations came into effect on 1 June 2014; GN R.221 Government Gazette 2014: 585(37489).

566 National Treasury, 2018(2): 4, available at: http://www.treasury.gov.za/search.aspx?cx=018115738860957273853%3Aj5zowsrmpli&cof=FORID%3A11&q=Draft%20Explanatory%20Memorandum:%20Regulations%20prescribing%20electronic%20services%20for%20the%09purpose%20of%20the%20definition%20of%20%e2%80%9cElectronic%20Services%e2%80%9d%20in%20Section%201(1)%20of%20The%20Value-Added%20Tax%20Act,%201991 (accessed 15 October 2019).

567 National Treasury, 2018(2): 4, available at: http://www.treasury.gov.za/search.aspx?cx=018115738860957273853%3Aj5zowsrmpli&cof=FORID%3A11&q=Draft%20Explanatory%20Memorandum:%20Regulations%20prescribing%20electronic%20services%20for%20the%09purpose%20of%20the%20definition%20of%20%e2%80%9cElectronic%20Services%e2%80%9d%20in%20Section%201(1)%20of%20The%20Value-Added%20Tax%20Act,%201991 (accessed 15 October 2019).

568 National Treasury, 2018(2): 4, available at: http://www.treasury.gov.za/search.aspx?cx=018115738860957273853%3Aj5zowsrmpli&cof=FORID%3A11&q=Draft%20Explanatory%20Memorandum:%20Regulations%20prescribing%20electronic%20services%20for%20the%09purpose%20of%20the%20definition%20of%20%e2%80%9cElectronic%20Services%e2%80%9d%20in%20Section%201(1)%20of%20The%20Value-Added%20Tax%20Act,%201991 (accessed 15 October 2019).

569 See paragraph 4.3.1.4 above for more information.

perform the function of collecting agents which is why the responsibility for declaring and paying VAT to SARS was shifted to the recipient of imported services.[570] Yet, placing the onus on the recipient was not a very effective collection mechanism as SARS was primarily dependent on the honesty of the recipient.[571] National Treasury[572] shared the view that: "[t]he heavy reliance on recipients declaring VAT on imported services in South Africa (as in most jurisdictions) was problematic since it could not be monitored for compliance and collection purposes." Fortunately, as of 1 June 2014 the Electronic Services Regulations,[573] including the subsequent amendments and additions to the Regulations, effectively shifted the onus of declaring and paying VAT to SARS on certain imported electronic services from the domestic recipient to the supplier of electronic services situated in an export (foreign) country.[574] There is however the possibility that the registration requirement might deter foreign suppliers of electronic services from conducting business in South Africa. The registration requirement and added responsibility in terms of declaring and paying VAT to SARS can be viewed as an extra burden which creates additional "red tape" from a business perspective. However, there are a small group of multinational companies whom already, to a large extent, dominate the "electronic services" industry. It can be assumed that it would be in such companies' interest to comply with national legislation.

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570 Ockhuis, 2016: iv.

571 Ockhuis, 2016: iv; Kabwe, Consumption tax collection models in online trade in digital goods, 2017: 44; Van Zyl, 2014: 126 & 198.

572 National Treasury, 2018(2): 3, available at: http://www.treasury.gov.za/search.aspx?cx=018115738860957273853%3Aj5zowsrmpli&cof=FORID%3A11&q=Draft%20Explanatory%20Memorandum:%20Regulations%20prescribing%20electronic%20services%20for%20the%09purpose%20of%20the%20definition%20of%20%e2%80%9cElectronic%20Services%e2%80%9d%20in%20Section%201(1)%20of%20The%20Value-Added%20Tax%20Act,%201991 (accessed 15 October 2019).

573 GN R.221 Government Gazette 2014: 585(37489).

574 National Treasury, 2018(2): 4, available at: http://www.treasury.gov.za/search.aspx?cx=018115738860957273853%3Aj5zowsrmpli&cof=FORID%3A11&q=Draft%20Explanatory%20Memorandum:%20Regulations%20prescribing%20electronic%20services%20for%20the%09purpose%20of%20the%20definition%20of%20%e2%80%9cElectronic%20Services%e2%80%9d%20in%20Section%201(1)%20of%20The%20Value-Added%20Tax%20Act,%201991 (accessed 15 October 2019).

4.4.2 Classification of Digital Goods as Electronic Services

As discussed in Chapter 3, the Green Paper on Electronic Commerce for South Africa is the main policy paper indicative of South Africa's approach to key e-commerce policy issues. The *Green Paper* indicated the principles-based approach adopted by the OECD with regards to the widely accepted general tax principles[575] and their application to the taxation of e-commerce are not at odds with the views held by SARS.[576] However, care should be taken to ensure the South African tax-base is protected against any potential erosion following international decisions favouring nations with stronger economies.[577] The *Green Paper* affirmed the supply of electronic products should not be treated as a supply of goods and should instead be treated as a supply of services to avoid problems that could potentially arise in relation to taxes on importation and the application of place-of-supply rules.[578] Despite confirming the above mentioned stance, and perhaps more importantly so for current consideration, the *Green Paper* expressed the following view:[579]

> The blanket characterisation of all on-line deliveries as supplies of services, even where a similar product can be delivered physically at a zero or reduced rate, does not appear to be fair. Unless rates and other differences in treatment are equalised, this will result in the heavier consumption taxation of many electronic commerce transactions.

Presently, after numerous legislative and regulative developments, the definition of "electronic services" has been amended to accommodate a greater array of digital services.[580] Due to the broad application of the new definition it would seem as if the intention is to make provision to classify all "digital goods" under the definition of "electronic services" for purposes of levying VAT on the supply thereof, subject to the requirements as contained in the VAT Act being met. It is important to be mindful that "electronic services" does not fall within the ambit of "imported services" to the extent

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[575] See paragraph 3.4.2.2 for more information on the agreed upon general tax principles.

[576] Department of Communications, 2000: 36 & 37, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019); Van Zyl, 2014: 64 & 65.

[577] Department of Communications, 2000: 36 & 37, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019); Van Zyl, 2014: 64 & 65.

[578] Department of Communications, 2000: 40, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019); Van Zyl, 2014: 65.

[579] Department of Communications, 2000: 41, available at: https://www.gov.za/documents/electronic-commerce-green-paper (accessed 26 February 2019); Van Zyl, 2014: 65.

[580] The Original Regulations came into effect on 1 June 2014; GN R.221 Government Gazette 2014: 585(37489). The Amended Electronic Services Regulations followed and came into effect on 1 April 2019; GN 429 Government Gazette 2019: 645(42316).

that the supplier is conducting an "enterprise" in South Africa and thereby required to register as a vendor.[581] The inverse is also true; a recipient who acquires "electronic services" from a foreign supplier is required to declare VAT on "imported services", except if the foreign supplier is registered as a vendor (Foreign Electronic Services Supplier) in the Republic. VAT on "imported services" is payable by the recipient (being the final consumer) if no VAT is charged by the foreign supplier of electronic services or the intermediary (if applicable) due to the supplier and/or intermediary not being registered as vendors, nor obliged to register and not voluntarily opting to do so; thereby effectively defaulting back to the reverse-charge mechanism.[582] The supply of tangible (physical) goods does not constitute electronic services and should therefore also be differentiated from the supply of digital goods which falls within the ambit of "electronic services".[583]

[581] SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 29, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

[582] SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 107, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pd (accessed 15 October 2019); Coetzee & Meiring, *Value-Added Tax on imported electronic services: a critical evaluation of the newly enacted South African legislation*, 2016: 35.

[583] SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 21, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

4.4.3 Issues for Consideration in terms of Classification

Van der Merwe[584] and Van Zyl[585] both opine that the form of supply should not result in a different tax rate for the same item, whether the item supplied is tangible (goods) or intangible (services). The tax rate should, in principle, be the same. The medium, storage or delivery method of an item should have no impact on the classification thereof, as these elements do not alter the fundamental nature of the item and are merely circumstantial based on the preference by the user thereof.[586] Unfortunately in most instances the form of the supply does determine the classification thereof to the detriment of the principle of neutrality.[587] For example, if software is downloaded from the Internet it is treated as a service, whereas if it is imported on compact disc, it is treated as goods.[588] Following the discussions above, it is apparent the VAT Act differentiates between the taxation of digital goods imported in an tangible form and digital goods imported in an intangible form via digital delivery.[589] In the case of physically stored digital goods, the digital goods are classified and taxed as imported goods, meaning the full value that is the price actually paid or payable for the digital goods must be declared for customs duty purposes[590] and VAT is to be levied on the customs value thereof.[591] Whereas digital goods delivered digitally are classified and taxed as the supply of electronic services under section 7(1)(*a*) of the VAT Act if the requirements as contained in the VAT Act are met, failing which it will be classified and taxed as imported services under section 7(1)(*c*). The taxable value of any supply of services in terms of the VAT Act[592] is the greater of the consideration[593] or the open

[584] Van der Merwe, 2003: 380 & 381.
[585] Van Zyl, 2014: 98.
[586] Doernberg *et al*, *Electronic commerce and multijurisdictional taxation*, 2001: 420-423; Van der Merwe, 2003: 380; De Wet & du Plessis, *Taxation (VAT),* in Buys (ed), *Cyberlaw@SA II, – The law of the Internet in South Africa*, 2004: 279.
[587] Van der Merwe, 2003: 380.
[588] Doernberg *et al*, 2001: 420-423; Van der Merwe, 2003: 380.
[589] Van Zyl, 2014: 98 & 99.
[590] CEA: sec 66(1).
[591] VAT Act: sec 13(2).
[592] VAT Act: sec 10.
[593] Consideration is generally the total amount of money (including VAT) received for a supply; SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 142, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pd (accessed 15 October 2019).

market value.[594] The different tax treatment can lead to market distortions as it renders digital supplies as compared to their physical counterparts.[595]

Van der Merwe[596] describes VAT as a typical tax on consumption, irrespective whether goods or services are being consumed, which raises the question: is it at all necessary to distinguish between goods and services? The question beckons even further considering jurisdictions where there is no differentiation between the VAT rate at which goods and services are taxed.[597] Another consideration to be taking into account is that lower tax rates often have an impact on consumer behaviour, especially the taxpayer's choice of product.[598] Historically imported goods and services were distinguished from one another due to legal and technological constraints hampering international trade in services or it not being economically viable. However, these reasons for differentiation are fading as e-commerce is placing an increasing amount of pressure on current tax rules and legislation governing them.[599] South Africa's VAT system taxes goods and services at the same rate, the historical differentiation therefore does not currently seem justified,[600] especially because the importation of goods is treated differently than the importation of services insofar as the importation of goods include imposing customs duties and an 10% upliftment before adding VAT.

4.5 CONCLUSION

The chapter provided an overview of the responsibilities of SARS with regards to the collection of indirect taxes, focussing on the tax treatment of e-commerce. An historical overview was provided for a better understanding of the underlaying principles and the development of South Africa's indirect tax framework with regards to VAT and customs duties, also highlighting the important role between the two tax types.

It has been established that the publication of the Amended Electronic Services Regulations (which came into operation on 1 April 2019), amended the definition of

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594 Section 3 of the VAT Act sets out the determination of the open market value.

595 Van Zyl, 2014: 99.

596 Van der Merwe, 2003: 381; Van Zyl, 2014: 65 & 66.

597 Van der Merwe, 2003: 381; Van Zyl, 2014: 66.

598 Van der Merwe, 2003: 381; Van Zyl, 2014: 66.

599 Fitzgerald, *The GST and electronic commerce in Australia*, 1999: para 14,available at http://www.austlii.edu.au/au/journals/MurUEJL/1999/32.html (accessed 18 October 2019); Van der Merwe, 2003: 381; Van Zyl, 2014: 66.

600 Van Zyl, 2014: 66.

"electronic services" to accommodate a greater array of digital services.[601] The wide application of the definition of electronic services clearly indicates SARS' intent to subject digital goods to the same type of taxes as physical goods by making use of provisions contained in the VAT Act. To achieve such feat, the definition of "enterprise" is broadened to include the foreign supply of electronic services and the activities of an intermediary. Resultantly, a foreign supplier of electronic services (including an intermediary) which exceeds the compulsory VAT registration threshold and meets any two out of the three requirements (as contained in the definition of "enterprise") is required to register[602] as a vendor and account for VAT in respect of electronic services supplied to South African customers.[603] SARS has been successful in shifting the burden for declaring and collecting VAT onto Foreign Suppliers of Electronic Services and if applicable, their intermediaries, failing which the reverse-charge mechanism will be applicable and the recipient of the imported services will bear the onus for declaring and paying the VAT to SARS.

Although South Africa has recently taken large strides in expanding the VAT net to include the collection of taxes on digital goods, there are still areas of concern, especially in terms of enforcing compliance and the differentiated treatment in terms of tax calculation when comparing the supply of imported goods versus the supply of imported services. Due to the intangible nature of digital goods, these goods still remain elusive to any form of customs control. The following chapter analyses whether the CCA and CDA will aid SARS in collecting taxes, duties and amounts due on cross-border e-commerce transactions.

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[601] GN 429 Government Gazette 2019: 645(42316).

[602] SARS, *Foreign suppliers of electronic services – External Guide*, 2019: 4, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/VAT-REG-02-G02%20-%20Foreign%20Suppliers%20of%20Electronic%20Services%20-%20External%20Guide.pdf (accessed 15 October 2019); SARS Legal Counsel, *VAT 404 – Guide for Vendors*, 2017: 16, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pd (accessed 15 October 2019).

[603] VAT Act: sec 1(1) & 23(1A); SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 13, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

CHAPTER 5 – THE NEW CUSTOMS ACTS

5.1 INTRODUCTION

Traditionally customs control is primarily exercised as a mechanism for collecting revenue, protecting society and combating crime.[604] On a national level, evidence of the previous customs methodology is found in the South African Customs Administration's former coat of arms. Under the Directorate of Customs and Excise,[605] the coat of arms read "*Colligimus et Custodimus*" meaning "collect and protect".[606] The CEA was drafted to achieve this purpose and prescribes the roles and responsibilities to ensure optimal collection and protection.[607] However, the role of customs is moving away from merely collecting customs duties and protecting a country's sovereignty and borders; as a result of the advent of globalisation, constantly changing operating environment and the increasing importance of international trade.[608] The modern role of customs aims for a better balance between the necessity for rigid customs control and the facilitation of cross-border trade.[609] The international trend is to modernise customs systems in order to minimise their disruptive effect on legitimate trade as much as possible by making use of simple, predictable and efficient customs systems and optimising available technologies.[610]

The CEA is outdated, despite being extensively amended over the years to keep pace with the ever changing and complex environment in which international trade is conducted.[611] The he core structure of the Act remains unchanged and still reflects the

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604 SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 1, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019).

605 Until 1996 the South African Customs Administration resorted under the Directorate of Customs and Excise; Colesky, 2014: 45.

606 Colesky, 2014: 45.

607 Colesky, 2014: 45.

608 SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 1, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019).

609 SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 1, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019).

610 SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 1, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019).

611 SARS, *Questions & answers - new customs legislation*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/Q-and-A-for-the-new-Customs-Legislation.aspx (accessed 24 October 2019).

underlying principles stemming from the era in which it was drafted.[612] As such, the CEA does not address the changing focus of customs or the radical changes currently impacting international trade, such as the rapid growth in the use of information technology and the exchange of electronic data.[613] The need for a modern system of customs control aligned with current international trends and best practice necessitated the drafting of new legislation.[614] What was required was a fundamental restructuring of South Africa's customs and excise legislation to give effect to the *Revised Kyoto Convention*[615] and other binding international agreements.[616] Moreover, establishing a sound, clear and logical legislative framework is required as customs continues to perform a vital role in supporting Government's programmes to promote economic growth, job creation and social cohesion.[617]

The chapter seeks to provide a general overview of the new customs' legislative framework and the potential impact it has on both indirect and direct ecommerce. A critical question answered in the chapter is whether the CCA[618] and CDA[619] aid SARS in collecting taxes, duties and amounts due on cross-border e-commerce transactions.

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[612] SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 1, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019).

[613] SARS, *Questions & answers - new customs legislation*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/Q-and-A-for-the-new-Customs-Legislation.aspx (accessed 24 October 2019).

[614] SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 2, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019).

[615] The expression is commonly used to refer to the *International Convention on the simplification and harmonization of Customs procedures* (as amended), adopted by the Customs Co-operation Council (now known as the WCO) in Brussels in 1999. The revised *Kyoto Convention* entered into force on 3 February 2006. SARS, *Glossary*, 2019, available at: https://www.sars.gov.za/Pages/Glossary-R.aspx (accessed 26 October 2019); WCO, *The Revised Kyoto Convention*, 2019, available at: http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/pf_revised_kyoto_conv.aspx (accessed 26 October 2019).

[616] SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 2, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019).

[617] SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 2, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019); SARS, *Questions & answers - new customs legislation*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/Q-and-A-for-the-new-Customs-Legislation.aspx (accessed 24 October 2019).

[618] Act 31 of 2014.

[619] Act 30 of 2014.

5.2 DRAFTING OF NEW CUSTOMS AND EXCISE LEGISLATION

To deal with the challenges necessitated by changing circumstances, as explained in the introduction to this chapter, new legislation was required. Taking cognisance of the magnitude of the task and time required for dissecting the current CEA and rewriting it, the customs and excise aspects of the task are separated to allow for the project to be completed in various phases.[620] As proposed, upon successful completion of the customs and excise legislative overhaul, the CEA is to be replaced by a new legislative framework that consists of three separate pieces of legislation, namely:

a) a Customs Control Act;
b) a Customs Duty Act; and
c) an Excise Duty Act.[621]

The first phase comprised of the drafting of two Customs Bills, namely the *Customs Control Bill* (CCB) and the *Customs Duty Bill* (CDB). The drafting of the *Customs and Excise Amendment Bill* (CEAB) (amending the original CEA and continuing to deal with excise matters only).[622] The rewrite process of the CEA started as a result of a ministerial decision and the first draft of both the *Customs Control Bill* and *Customs Duty Bill* were released for public comment on 29 October 2009 followed by a secondary release for public comment in 2011.[623] The Minister of Finance introduced the three Bills on 24 October 2013 and the National Assembly's Standing Committee on Finance (SCoF) heard comments from the public at hearings which were held on 30 October 2013 and 28 January 2014.[624] On 4 February 2014 SARS presented to SCoF a report on its responses to the policy issues raised by the public with regards

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620 SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 2, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019).

621 SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 2, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019).

622 SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 2, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019).

623 SARS Legal Counsel, *Customs Bills history*, 2019, available at https://www.sars.gov.za/Legal/Archive/Pages/Customs-Bills-History.aspx (accessed 27 October 2019).

624 SARS Legal Counsel, *Customs Bills history*, 2019, available at https://www.sars.gov.za/Legal/Archive/Pages/Customs-Bills-History.aspx (accessed 27 October 2019).

to the CCB and CDB. The revised Bills, which incorporate the amendments proposed by the SCoF on 4 February 2014, were accepted by Parliament on 19 March 2014.[625]

The CCB,[626] CDB[627] and CEAB[628] were officially promulgated as Acts of Parliament following the publication thereof in the Government Gazette in July 2014. The new customs and excise legislation consisting of the CCA, CDA and *Excise Duty Act* 91 of 1964 (EDA) will replace the CEA on date yet to be determined by the President by proclamation, referred to as the "effective date".[629] The CCA and CDA are two new Acts of Parliament, whereas the EDA will consist of the original CEA as amended by the removal of all provisions relating to customs control and customs duty.[630] The removal of all customs provisions from CEA will take place on the "effective date" when the *Customs and Excise Amendment Act*, 32 of 2014 (CEAA) becomes effective and what remains after the "effective date" will relate exclusively to excise and related matters.[631] Post the "effective date", the "*Customs and Excise Act*" will be renamed the "*Excise Duty Act*" in accordance with the provisions of CEAA.[632] The EDA will eventually be replaced by a new Act specifically dealing with excise matters, however in the interim the excise provisions as provided for in the CEA will continue to apply under the EDA after the "effective date".[633]

[625] SARS Legal Counsel, *Customs Bills history*, 2019, available at https://www.sars.gov.za/Legal/Archive/Pages/Customs-Bills-History.aspx (accessed 27 October 2019).
[626] Promulgated as the *Customs Control Act* 31 of 2014; GN 582 Government Gazette 2014:589(37862).
[627] Promulgated as the *Customs Duty Act* 30 of 2014; GN 552 Government Gazette 2014:589(37821).
[628] Promulgated as the *Customs and Excise Amendment Act* 32 of 2014; GN 583 Government Gazette 2014:589(37863).
[629] SARS Legal Counsel, *Understanding the Customs & Excise transitional provisions*, 2017: 1.
[630] SARS Legal Counsel, *Understanding the Customs & Excise transitional provisions*, 2017: 1.
[631] SARS Legal Counsel, *Understanding the Customs & Excise transitional provisions*, 2017: 1.
[632] CEAA: sec 87.
[633] SARS Legal Counsel, *Understanding the Customs & Excise transitional provisions*, 2017: 1.

5.3 AIM OF THE NEW CUSTOMS ACTS

The CCA and CDA aim to deliver the capability required for SARS Customs to evolve into a world-class customs agency.[634] SARS describes the CCA and CDA as modern pieces of legislation with the primary aim to simplify customs administration by providing a platform for customs modernisation.[635] The Acts aim to provide end-to-end supply chain visibility for SARS by enforcing mandatory electronic submission of communications, advance cargo reporting, improved container sealing provisions and the requirement of various electronic notifications throughout the process.[636] As part of the platform for customs modernisation, on the effective date, the number of registrants and licensees will increase from 76 in the CEA to 130 in the CCA.[637] Registered clients will be required to provide SARS Customs with a lot more information especially regarding the movement of cargo and goods. The magnitude of increased requirements to comply with the law is further apparent by the increase in cargo reports from six in the CEA to 60 in the CCA. The CCA also provides for six declaration types compared to the singular declaration type in the CEA.[638] SARS Customs will be sending more than 350 customs electronic messages to support transactional and post clearance compliance.[639]

The Acts phased implementation is known as the NCAP (New Customs Acts Programme) and is divided into three streams: Reporting of Conveyances and Goods (RCG), Registration, Licensing and Accreditation (RLA) and Declaration Processing

[634] SARS, *New customs legislation update*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx (accessed 20 September 2019)

[635] SARS, *Questions & answers - new customs legislation*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/Q-and-A-for-the-new-Customs-Legislation.aspx (accessed 24 October 2019).

[636] SARS, *Questions & answers - new customs legislation*, 2019, available at: https://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/Q-and-A-for-the-new-Customs-Legislation.aspx (accessed 24 October 2019).

[637] SARS, *Reporting of conveyances and goods presentation,* 2018, available at: http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx (accessed 16 September 2018).

[638] SARS, *Reporting of conveyances and goods presentation,* 2018, available at: http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx (accessed 16 September 2018).

[639] SARS, *Reporting of conveyances and goods presentation,* 2018, available at: http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx (accessed 16 September 2018).

System (DPS).[640] RCG's provisions is contained in Chapter 3 of the CCA and the main focus areas include: goods and cargo matching, status validations and messaging, reporting of cargo, crew, stores, conveyances, outturn reporting and goods accounting.[641] RLA's provisions are contained in Chapters 28, 29 and 30 of the CCA and its focus areas include: validation of entities, relationships and premises, electronic application for registration, licensing and accreditation, automated case management for risk and exception handling and approvals for entity associations and bonds. Lastly DPS's provisions are contained in Chapter 4 of the CCA and its main focus areas include: customs regular and expedited clearance, customs release, customs procedure, home use, international instruments, goods accounting, duty and/or tax billing and compliance messaging and reporting.

5.3.1 Customs Control Act

The CCA is intended to replace the provisions of the CEA relating to customs control of all means of transport, goods and persons entering or leaving the Republic.[642] The rationale for customs control is two-pronged, firstly, to ensure that any taxes imposed by other tax levying Acts on imported and exported goods are collected and, secondly, that all other laws regulating the import or export of specific goods are complied with.[643] Examples of other tax levying Acts include the CDA and VAT Act, whereas examples of goods subject to laws prohibiting, restricting or regulating the importation or exportation thereof include ammunition, protected species, goods subject to permit control and counterfeit goods.[644]

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[640] Theron, 2018, available at: http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx (accessed 7 September 2018).

[641] Theron, 2018, available at: http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx (accessed 7 September 2018).

[642] CCA: sec 3.

[643] CCA: sec 3.

[644] GN 1039 Government Gazette 2013:580(36945); SARS Legal Counsel, *Memorandum on objects of Customs Control Bill*, 2013: 350.

5.3.2 Customs Duty Act

The CDA has a smaller scope than the CCA by making provision for the imposition, assessment, payment and recovery of customs duties on goods imported or exported from the Republic. It is a tax levying Act that relies on the CCA providing a sufficient "platform" for the collection of taxes and duties due in terms of the CDA.[645]

In accordance with the preamble to the Act,[646] the Act is structured around three broad elements, namely the imposition of duties, the assessment of duties and the payment and collection of duties. The Act is intentionally drafted to give maximum effect to the notion of self-assessment whereas the role of customs is focussed on the verification of the self-assessment rather than on assessing the amount of tax.[647] SARS[648] explains:

> In terms of this notion persons liable for duties are required, as part of the clearance process, to make their own tariff classification, value determination and origin determination of the goods, to assess the amount of any tax applicable to the goods and to pay tax according to their own assessment.

Customs, in terms of Section 85 of the CDA, can within a period of three years from the date of acceptance of the clearance declaration, make a re-assessment of customs duty on goods, irrespective of whether or not:[649]

(a) the goods have been released;

(b) the goods are still subject to customs control; or

(c) an amount of duty has been paid on the goods.[650]

Nevertheless, a self-determination does not affect Customs' right to override the self-determination and make its own determination in relation to tariff, value or origin as provided for in Chapter 6, 7 and 8 of the Act.

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645 SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 53, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019); SARS Legal Counsel, *Memorandum of objects of Customs Duty Bill*, 2013: 96.

646 Preamble to the *Customs Duty Act*, 30 of 2014.

647 SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 53, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019); SARS Legal Counsel, *Memorandum of objects of Customs Duty Bill*, 2013: 97.

648 SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 53, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019); SARS Legal Counsel, *Memorandum of objects of Customs Duty Bill*, 2013: 97.

649 Exception to the three-year time period are contained sections 86, 87 and 88 of the CDA.

650 CDA: sec 85.

5.4 IMPACT OF THE NEW CUSTOMS ACTS ON E-COMMERCE

In terms of the CEA "goods" were defined to include "(a) anything classifiable within any heading or subheading of Part 1 of Schedule No. 1; and (b) generally all wares, articles, merchandise, animals, currency, matter or things". The definition of "goods" in the CCA refrains from making reference to Part 1 of Schedule No. 1 and instead specifies various categories of goods as follows:

> any wares, supplies, merchandise, articles, products, commodities, substances, documents or any other things capable of being transported, whether loose, packed, in a package or holder, containerised or in bulk, and includes—
> (a) any animals, whether dead or alive, or parts of animals;
> (b) any plants, whether dead or alive, or parts of plants;
> (c) any postal items;
> (d) any baggage of persons entering or leaving the Republic, whether accompanied or unaccompanied;
> (e) any vessels, aircraft, locomotives, railway carriages, vehicles or other means of transport, whether or not used for the transport of goods or travellers;
> (f) any transport equipment whether or not used in the transport of goods, including reusable transport equipment;
> (g) currency;
> (h) any commodity capable of being pumped through pipelines or conveyed by means of cable-car or conveyor belt; and
> (i) electricity.

Both Acts only make provision for physical (tangible) goods and do not include any provisions for digital (intangible) goods. It would therefore seem as if the new Customs Acts once they become effective (in their current state) are incapable of imposing customs duties on digital goods as the Acts do not recognise digital goods as part of the broad definition of "goods" for customs purposes. However, this does not rule out future amendments being made to the Acts to include digital goods and customs procedures in relation thereto. Below the impact of the new Customs Acts on indirect e-commerce and direct e-commerce will be analysed.

5.4.1 Indirect E-Commerce

Indirect e-commerce involves a transaction that is initiated, ordered and finalised online through an electronic interface, but the product itself is physically delivered to the recipient via traditional methods.[651] The ever-growing Internet-based economy has revolutionised the retail industry resulting in a major shift in buying patterns, increasing demands from industry and consumers for rapid delivery of consignments. Whilst the economic potential presented by e-commerce has caused exponential growth in the

[651] See Chapter 2.2 for the complete explanation with regards to the different types of cross-border e-commerce transactions.

volumes of smaller consignments.[652] These e-commerce shipments are usually of low value, but high in volume and due to the growing volumes of the shipments the management of the goods is increasing difficult for Customs Authorities.[653] The main challenges presented by cross-border B2C and C2C e-commerce shipments are to ensure rapid release and clearance while managing safety and security risks, efficient revenue collection and statistical analysis.[654] Cross-border trade of goods by means of indirect e-commerce in most cases involve delivery of the goods by means of a courier[655] which shortens delivery time as compared to other modes of delivery.[656] In terms of the *Draft Customs Control Rules* (DCCR)[657] "courier business" means:

> a business service provided by a person in the international transportation of goods on an express door to door delivery basis, either by—
> (a) transporting goods into the Republic for express delivery to consignees inside the Republic and delivering the goods to those consignees;
> (b) receiving in the Republic goods imported for express delivery to consignees inside the Republic and delivering those goods to those consignees;
> (c) collecting goods in the Republic for express delivery outside the Republic, transporting the goods out of the Republic and delivering the goods to consignees outside the Republic; or
> (d) collecting goods in the Republic for express delivery outside the Republic and arranging the export and the delivery of the goods to consignees outside the Republic.

To address these challenges SARS has incorporated trade facilitation measures by way of the Chapter 24 of the CCA, which provides for the expedited clearance and release of goods. Part 3 of Chapter 24 in particular deals with the clearance and release of goods for home use or a permissible customs procedure in accordance with

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652 WCO, 2018(1): 8, available at: www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/ecommerce/wco-framework-of-standards-on-crossborder-ecommerce_en.pdf?la=en (accessed 22 November 2019).

653 WCO, 2018(1): 8, available at: www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/ecommerce/wco-framework-of-standards-on-crossborder-ecommerce_en.pdf?la=en (accessed 22 November 2019).

654 WCO, 2018(1): 8, available at: www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/ecommerce/wco-framework-of-standards-on-crossborder-ecommerce_en.pdf?la=en (accessed 22 November 2019).

655 Rule 1.1(1) of the *Draft Customs Control Rules* defines "courier" to mean "a person conducting a courier business in terms of rule 29.8 who, for the purpose of clearing, handling or transporting courier articles in the course of conducting such a business, may also be the holder of any or all of the following licences:
(a) A carrier licence;
(b) a customs broker licence;
(c) a registration as an importer or exporter; or
(d) an air cargo depot licence."

656 Alternatively, international postal articles can be sent via the South African Post Office (SAPO), as catered for in Chapter 22 of the CCA. Currently, in terms of section 13 of the CEA, the customs clearance and tax collection in respect of postal items is performed by the SAPO on an agency basis. If such postal items are not properly cleared in terms of the Act, they are handed over to SARS for processing.

657 DCCR: rule 1.1(1).

simplified clearance procedures.[658] Rule 24.17 of the DCCR provides the requirements to qualify for simplified clearance for prescribed courier articles.[659] The requirements are as follows:

1) A simplified clearance must be submitted containing the minimum information, as specified in rule 24.17(4), to the customs authority electronically through EDI or in paper format to the specific Customs Office applicable;[660]
2) In the case of importation the simplified clearance declaration must be submitted before the arrival of the consignment at the place of entry, whereas for exportation via air, the simplified clearance declaration must be submitted no later than one hour before the courier articles being transported are taken for loading on board the foreign-going aircraft and by road as prescribed in section 94 of the CCA;[661] and
3) Only a licensed courier may submit a simplified clearance declaration for the clearance of prescribed courier articles handled by that courier.[662]

No formal application for simplified clearance in terms of section 534 of the CCA is necessary as the application for the courier licence is regarded also to be an application for simplified clearance.[663]

All courier articles are required to be cleared in terms of section 89 or 93 of the CCA. However certain courier articles are altogether excluded from clearance requirements, such as: ordinary letters, postcards, printed papers not liable to tax, literature for the blind, trade samples with no commercial value, goods of a customs value below R500 (known as the *de minimus* threshold).[664] It must be noted that these courier articles still require permission to be removed into free circulation in terms of rule 4.8 of the

[658] CCA: sec 518*(c)*.
[659] Rule 1.1(1) of DCCR states "prescribed courier article" means "a courier article which is required to be cleared in terms of section 89 or 93 of the Control Act but which falls within a category of courier articles that may in terms of rule 24.16(a) be cleared in accordance with simplified clearance procedures".
[660] DCCL: rule 24.17(1)*(a)* & *(b)*.
[661] Act 31 of 2014; DCCL: rule 24.17(2)*(a)* & *(b)*.
[662] DCCL: rule 24.17(3). Rule 24.17(4) contains the minimum information required in terms of importation and exportation and Rule 24.17(5) stipulates the required minimum supporting documentation to be produced or submitted to the customs authority on request.
[663] Rule 24.25(1)*(b)* of the DCCL states: "the courier licence issued to that person must for all purposes be regarded to be a permission granted by the customs authority in terms of section 534(1) for the simplified clearance of prescribed courier articles during the validity period of the licence".
[664] See sections 91(1)*(g)*, *(h)* and *(i)* and 95(1)*(h)*, *(i)* and *(j)* of the CCA.

DCCL or permission to load for exportation in terms of rule 4.12 of the DCCL, as may be appropriate.

In summary, depending on the value of the goods imported or exported, one of four scenarios may apply to clearance requirements:

1) If the value of the goods is equal to or less than the *de minimis* threshold (R500), submission of a clearance declaration is not required.[665] Furthermore, the trader does not have to be registered with SARS Customs or have a customs code.
2) If the value of the goods is more than the *de minimis* threshold, but less than the value determined in terms of section 533(2)*(a)* of the CCA[666] and qualifies for the simplified clearance procedures, the goods may be cleared in terms of the simplified clearance procedure as may be prescribed by submitting a simplified clearance declaration or another document.
3) If the value of the goods is more than R500 and the goods do not qualify to be cleared in in terms of simplified clearance procedures, a clearance declaration in accordance with section 167 of the CCA[667] must be submitted.
4) If the value of the goods is more than the value determined in terms of section 533(2)*(a)* of the CCA[668] and the goods do not qualify to be cleared in terms of simplified clearance procedures, a clearance declaration in accordance with section 167 of the CCA[669] must be submitted.

[665] See sections 91(1)*(g)* and 95(1)*(h)*.
[666] Act 31 of 2014.
[667] Act 31 of 2014.
[668] Act 31 of 2014.
[669] Act 31 of 2014.

5.4.2 Direct E-Commerce

As stated above there is currently no provision made in the CCA for levying customs duties on cross-border trade in digital goods or digital content. Yet, this is by no means a clear indication of South Africa's stance on the matter. Colesky[670] states: "the very nature of the function of a customs administration is international cross-border trade, which in turn necessitates co-operation between countries to facilitate trade". As such, international customs evolvement is driven by international organisations like the WTO, who place specific customs-related obligations on its members. Failure to implement the obligations imposed will constitute a breach and defeats the objective of membership to the WTO. Therefore, the discussion below takes into consideration South Africa's views as a WTO Member country.

5.4.2.1 The WTO Moratorium on Customs Duties on Electronic Transmissions

Since the *Declaration on Global Electronic Commerce*, adopted at the Second Ministerial Conference in 1998,[671] the WTO's Members have continued the practice of not imposing customs duties on electronic transmissions, referred to as the "moratorium".

The WTO General Council conducts periodic reviews of the *Work Programme on Electric Commerce* based on reports from the WTO bodies responsible for implementing the programme.[672] Ministers have considered the *Work Programme on Electronic Commerce* at their Ministerial Conferences in Geneva 1998, Doha 2001, Hong Kong 2005, Geneva in 2009, Geneva 2011, Bali 2013, Nairobi 2015 and Buenos Aires 2017. At each of those Ministerial Conferences, the Ministers agreed to continue the practice of not imposing customs duties on electronic transmissions until their next session. The next session will be the WTO's Twelfth Ministerial Conference and will take place from 8 to 11 June 2020 in Nur-Sultan, Kazakhstan.[673] There is cause for

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[670] Colesky, 2014: 40.

[671] WTO Ministerial Conference, *Declaration on Global Electronic Commerce*, 1998.

[672] See footnote …

[673] WTO, *Twelfth WTO Ministerial Conference*, available at: https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm (accessed 3 November 2019).

concern as recently three countries[674] have indicated a desire to break from the practice of continuing the moratorium.[675]

5.4.2.2 ICC Calls for Permanent Prohibition on Customs Duties on Electronic Transmissions

On 17 September 2019 the ICC made their stance clear by calling on the WTO Members to permanently prohibit the imposition of tariffs on cross-border data flows as the deadline for renewal of the moratorium on the application of customs duties on electronic transmissions is fast approaching.[676] According to the ICC Working Group on E-commerce (ICC WGEC) the moratorium has enabled digital trade to flourish and within the broader WTO membership is essential for digital trade.[677] The implementation and enforcement of customs duties and formalities on electronic transmissions are described as virtually impossible and will have a highly distortive impact on the digital economy.[678] The ICC WGEC warns the moratorium's economic benefits far outweigh any potential tariff revenue from digitised good and services specifying that this is the case both for developing and least developed economies.[679] Simultaneously, the ICC WGEC concedes that developing countries in particular have legitimate concerns regarding revenue loss from the digitalisation of the economy, but insists traditional tariff measures and formalities are not the answer.[680] It is advised that achieving global consensus on direct and indirect tax regimes based on international best practices is the optimal way to deal with this public policy concern.[681]

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674 The ICC do not name the three countries, but it is believed to be India, Indonesia and South Africa. Reasons being that India and South Africa submitted a communication for circulation to the WTO General Council calling for key issues surrounding the moratorium to be revisited, whereas Indonesia went as far as to create tariff codes for "software and other digital goods transmitted electronically" in its Customs Tariff Book. WTO General Council, *The e-commerce moratorium and implications for developing*, 2019: 4.

675 Denton, *ICC draws line in sand on customs duties on digital trade*, 2019, available at: https://iccwbo.org/media-wall/news-speeches/icc-on-customs-duties-on-digital-trade/ (accessed 3 November 2019).

676 Denton, 2019, available at: https://iccwbo.org/media-wall/news-speeches/icc-on-customs-duties-on-digital-trade/ (accessed 3 November 2019).

677 ICC Working Group on E-commerce, *The business case for a permanent prohibition on customs duties on electronic transmissions*, 2019: 1.

678 ICC Working Group on E-commerce, *The business case for a permanent prohibition on customs duties on electronic transmissions*, 2019: 1.

679 ICC Working Group on E-commerce, 2019: 1.

680 ICC Working Group on E-commerce, 2019: 1.

681 ICC Working Group on E-commerce, 2019: 1.

The ICC is not isolated in its call to permanently prohibiting the imposition of customs duties on electronic transmissions. BSA (The Software Alliance)[682] states no country will benefit from an end to the moratorium and those countries that choose to impose customs duties on electronic transmissions will suffer the most. Imposing such duties is ultimately a self-defeating step that will reduce those countries' competitiveness, undermine their exports, and hurt their consumers and workers.[683]

The *European Centre for International Political Economy* (ECIPE) conducted research on the potential impact on Gross Domestic Product (GDP) and tax losses the global imposition of tariffs on electronic transmissions will have.[684] The research revealed that the decision to levy import duties on digital goods and services would have negative economic consequences as prices would rise and consumption decline, which would slow GDP growth and shrink tax revenues.[685] The research further indicates that "the payoff in tariff revenues would ultimately be minimal relative to the scale of economic damage that would result from import duties on electronic transmissions".[686]

The research consisted of a comprehensive assessment of the impact of electronic transmissions and established that imposing tariffs caused large losses inside the economies of the four selected countries.[687] The net impact of the tariffs reflect how reduced economic growth would affect consumption, corporate and personal income taxes. The table below depicts the findings of the ECIPE research conducted.

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[682] BSA, *Why should WTO Members support extension of the WTO Moratorium on customs duties on electronic transmissions*, 2019, available at: https://www.bsa.org/files/policy-filings/08272019wtocustomsduties.pdf (accessed 3 November 2019).

[683] BSA, 2019, available at: https://www.bsa.org/files/policy-filings/08272019wtocustomsduties.pdf (accessed 3 November 2019).

[684] The research examines the impact on India, Indonesia, South Africa and China (and the general case for developing countries) and concludes that imposing such tariffs would be fiscally counter-productive. Makiyama & Narayanan, *The economic losses from ending the WTO Moratorium on electronic transmissions*, 2019: 2.

[685] Makiyama & Narayanan, 2019: 2.

[686] Makiyama & Narayanan, 2019: 2.

[687] Makiyama & Narayanan, 2019: 4.

Country	Tariff potential (UNCTAD 2017)	Tariff potential (UNCTAD 2019)	GDP loss	Tax losses
India	39	497	-1,930	-2,007
Indonesia	1	54	-164	-23
South Africa	1	36	-25	-12
China	81	492	-606	-244

Table 2: GDP and tax revenue losses based on global imposition of tariffs (including reciprocal tariffs) on electronic transmissions (in millions of US$).[688]

The conclusion is that the impact on GDP, tax revenues and the economy would be dire as each one of the four countries examined in the ECIPE study would lose considerably more in GDP than they stand to gain in tariffs, similarly duties would take a toll on domestic output that would weaken tax collection.[689] If the goal is to increase revenue collection, it is advised that imposing tariffs is the wrong approach as the net result for tax authorities would be negative.[690] This finding is in line with the ICC WGEC that insists that imposing traditional tariff measures and formalities are not the answer.

5.4.2.3 South Africa's Position on the WTO Moratorium on Customs Duties on Electronic Transmissions

On 12 July 2018 India and South Africa jointly introduced a proposal to the WTO General Council to re-examine the impact of the Moratorium on customs duties on electronic transmissions as digital trade continues to evolve and increase exponentially.[691] Discussions took place in the WTO General Council on 26 July 2018 and on 27 November 2018 and centred around the following areas:

- Revenue implications of the moratorium on electronic transmissions;
- Scope and definition of electronic transmissions;
- Technical feasibility of imposing customs duties on electronic transmissions;
- Broader impact of the Moratorium on trade and industrialization.[692]

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[688] Table adapted from Makiyama & Narayanan, 2019: 2.
[689] Makiyama & Narayanan, 2019: 2.
[690] Makiyama & Narayanan, 2019: 2.
[691] WTO General Council, *Moratorium on customs duties on electronic transmissions: Need for a re-think*, 2018.
[692] WTO General Council, *Moratorium on customs duties on electronic transmissions: Need for a re-think*, 2018.

In support of the 2018 proposal, South African and Indica jointly submitted a further communication on 4 June 2019 to the WTO General Council to present further evidence emphasising the above listed issues drawing largely from concrete facts and statistics based on the UNCTAD's research paper, "*Growing Trade in Electronic Transmissions: Implications for the South*" (hereinafter referred to as UNCTAD 2019 Study).[693] The UNCTAD 2019 Study makes a vital contribution to the existing research on e-commerce, as it is the first study that estimates the "electronic transmission" or "online trade" in digitisable products.[694] The study is therefore unique in capturing the revenue implications of the Moratorium, whereas previous studies only estimated the impact of the Moratorium on the basis of "physical trade" in digitisable products.[695]

The estimated total imports of digitisable products in Table 3 below is calculated by adding the actual amount of physical imports of digitisable products for 2017 to the estimated online imports (electronic transmissions) of digitisable products. The estimated total imports of digitisable products is thereafter multiplied by the associated average bound tariffs for each aggregate group of countries.[696] The result is the estimated tariff revenue loss (per annum) due to moratorium on electronic transmissions.

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[693] WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 1.

[694] WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 2.

[695] WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 2.

[696] Bound rates are the maximum rate of tariff (the ceiling rates for duties as listed in members' "schedules" or lists of commitments) allowed by the WTO to any member state for imports from another member state. Author Unknown, *Definition of bound tariff rate*, http://www.businessdictionary.com/definition/bound tariff-rate.html (accessed 9 November 2019); WTO, *Tariffs*, https://www.wto.org/english/tratop_E/tariffs_e/tariffs_e.htm (accessed 9 November 2019).

Aggregate Groups	Estimated Total Imports of Digitisable Products ($Mn)	Simple Average of Bound Duties in 2017 (%)	Potential Tariff Revenue Loss using Average Bound Duties ($M)
WTO Developing Members (excluding LDC's)	79 957	12.6	10 075
Sub-Saharan Africa	144 566	0.2	2 630
WTO LDC Members	5669	46.4	1 506
Middle East - North Africa	5 371	18.9	1 015
WTO High-Income Members	2 995	50.3	289

Table 3: UNCTAD 2019 Study, potential tariff revenue loss for 2017 due to moratorium.[697]

From the above table it is clear that there is a large gap between the potential tariff revenue loss (using bound duties) of the WTO high-income countries and the rest of the aggregate groups. The potential tariff revenue loss to developing members is almost 35 times that of the high-income countries, whereas for Sub-Saharan countries the potential tariff revenue loss is ten times that of the WTO high income countries. Developing country members have the potential to generate almost 35 times more tariff revenue by imposing customs duties on electronic transmissions as compared to the developed countries, many of which have almost zero bound duties on physical imports of digitisable products.[698]

A key issue emphasised in the 2019 proposal to the WTO General Council is the difference of opinion between Members as to whether the moratorium covers "contents" transmitted electronically.[699] Contents transmitted electronically refers to the "software" or digitised content contained on an carrier medium, for example a digital music album stored on an USB flash drive or any other physical data storage device. Since the *Declaration on Global Electronic Commerce*, adopted at the Second Ministerial Conference in 1998,[700] The WTO's Members apply the moratorium to

[697] Adapted from Banga, 2019: 18, 47 & 48; List of countries in the aggregated groups is provided in Annex Table A.5 on page 47 to 48. WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 2.

[698] WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 2.

[699] WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 3.

[700] WTO Ministerial Conference, *Declaration on Global Electronic Commerce*, 1998.

"electronic transmissions", yet after 20 years there is still no agreed definition or any common understanding amongst Members as to what is covered under "electronic transmissions". The lack of a clear understanding of what "electronic transmissions" entails is a critical issue that impacts on the accurate determination of potential revenue losses.[701] To arrive at a common understanding is encouraged by South Africa and India prior to the review of the e-commerce moratorium at the end of December 2019.[702]

Despite a clear lack of common understanding as to what the agreed moratorium covers, some Members have forged ahead in amending legislation to tax intangible imports (including digital goods).[703] The progressive action by the Members show that it is technically feasible to impose additional taxes and duties on electronic transmissions.[704] South Africa and India opine that the existence of the e-commerce Moratorium is precisely because it is indeed feasible to impose customs duties on such transmissions.[705]

5.4.2.4 The ECIPE Study's Critical Assessment of the UNCTAD Reports

The ECIPE study critically analysed the 2017 and 2019 UNCTAD reports[706] and the potential tariff revenue loss projected therein. The UNCTAD reports made a strong case for ending the Moratorium, however the ECIPE study contains substantial criticism in respect thereof, including:

- The UNCTAD research failed to discuss the economic and domestic tax losses likely to follow after customs duties are levied;
- The significant and costly enforcement and compliance costs associated with implementing electronic tariffs were not considered;
- Certain assumptions made are believed to merit serious scepticism, especially with regards to all physical media or paper-based products being digitised in the future and thereby exempt from duties under the Moratorium; and

[701] WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 3.
[702] WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 3.
[703] The Members include: Australia, New Zealand, the European Union, Indonesia and India; See Banga, 2019: 24 & 25; WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 3 & 4.
[704] Banga, 2019: 25; WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 4.
[705] WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 4.
[706] Banga, *Rising product digitalisation and losing trade competitiveness*, 2017; Banga, Growing trade in electronic transmissions: implications for the south, 2019.

- The monetary potential of "lost" tariffs due to digitalisation is substantially overstated by over-estimating the value of digital trade despite contrary evidence indicating otherwise.[707]

5.5 WILL THE NEW CUSTOMS ACTS ENHANCE SARS' COLLECTION CAPABILITY IN TERMS OF CROSS-BORDER DIGITAL TRADE?

The provisions of the CCA[708] and CDA[709] currently do not cater for the levying of taxes or duties on cross-border direct e-commerce. The Acts solely focus on physical (tangible) goods at the expense of any potential additional revenue collected from digitised goods. The intent shown from South Africa (alongside India) in challenging the WTO Moratorium on customs duties on electronic transmissions for: lack of clarity, revenue implications, having an unclear scope and definition and no common understanding of electronic transmissions amongst the WTO's Members has already had positive consequences as research reports and further academic studies on the topic came to the fore. The action taken by South Africa can be seen as suggestive of South Africa potentially being in favour of imposing customs duties on digital goods.

The WTO reached a stalemate with regards to the classification of "digital content" and whether it should be treated as a "good" and the trade thereof regulated under the GATT[710] or should it be considered as a "service" and regulated under the *General Agreement on Trade in Services* (GATS).[711] The United States of America (USA) advocates that digital content should be treated as goods and its trade be disciplined under GATT;[712] whereas the European Union has advocated for categorising electronic transmissions as services, to be disciplined under services commitments of

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[707] Makiyama & Narayanan, 2019: 3.
[708] Act 31 of 2014.
[709] Act 30 of 2014.
[710] See paragraph 4.3.1.3.
[711] The Agreement, which came into force in January 1995 and forms Annex 1B to the Agreement establishing the WTO (known as the Marrakesh Agreement, signed on 15 April 1994), is the first and only set of multilateral rules covering international trade in services; WTO, *GATS – Fact and Fiction*, 2001: 1, available at: https://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm (accessed 6 November 2019). Banga, 2019: 26;
[712] The USA strongly supports subjecting the trade treatment of electronically delivered software to as liberal a trade regime as possible and are known to be the founder of the idea of continuing the practice of not imposing custom duties on electronic transmissions in accordance with the existing moratorium. Banga, 2019: 26; WTO General Council, *Summary by the Secretariat of the issues raised at the sixth dedicated discussion on electronic commerce under the auspices of the General Council on 7 and 21 November 2005*, 2005: 3.

countries under GATS.[713] The classification of digital content is further complicated by some Member Countries arguing that it is neither a good nor a service and instead "ideas and content" protected under intellectual property rights and should therefore be treated under the Agreement on *Trade-Related Aspects of Intellectual Property Rights* (TRIPS).[714]

The Moratorium[715] was agreed upon in 1998 without reaching a resolution on the classification of "digital content" as it was agreed the issues relating to classification can continue to be discussed under the *Work Programme on E-Commerce*.[716] The classification of digital content as either goods or services has important implications. If treated as goods, custom duties can be imposed on the importation thereof along with other disciplines such as rules of origin, customs valuation, whereas if treated as services Members will be able to impose domestic regulations on it.[717] The lack of clarity is a result of the lack of a resolution with regards to the classification of "digital content" raised by South Africa and India, of what is covered by the Moratorium:[718] the "carrier" or the "content"?[719] In other words, does the Moratorium cover the "carrier" of the digital content or the "digital content" itself or both?

There is an WTO concession[720] in place with regard to the importation of software (data instructions) that stipulates that only the cost or value of the carrier medium on which the data or instruction is recorded must be taken into account for customs duty purposes. It is further observed that the GATT WTO Members in general determine

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[713] The EU and EC argue that the GATT was designed only for physical (tangible) products and electronic transmissions should be classified as services, more specifically as "software implementation services" under GATS which encompasses production, distribution, marketing, sale and delivery of a service. WTO General Council, *Classification Issue – Submission from the European Communities*, 2003; Banga, 2019: 26;

[714] The TRIPS Agreement forms Annex 1C to the Marrakesh Agreement and became effective 1 January 1995. If digitised products were classified as intellectual property rights, customs duties would not be a problem as royalties are to be paid as opposed to tariffs. Whether the transmission is cross-border or domestic, the issue of royalties will remain. WTO General Council, *Preparations for the 1999 Ministerial Conference - Communication from Indonesia and Singapore*, 1999: 4; Banga, 2019: 27.

[715] WTO Ministerial Conference, *Declaration on Global Electronic Commerce*, 1998.

[716] Banga, 2019: 27.

[717] Banga, 2019: 27.

[718] WTO Ministerial Conference, *Declaration on Global Electronic Commerce*, 1998.

[719] Banga, 2019: 27.

[720] In 1995, the *WTO Committee on Custom Valuation* adopted the following decision: "In determining the customs value of imported carrier media bearing data or instructions, only the cost or value of the carrier medium itself shall be taken into account. The customs value shall not, therefore, include the cost or value of the data or instructions, provided that this is distinguished from the cost or the value of the carrier medium." Committee on Customs Valuation, *Decisions adopted by the Tokyo Round Committee on Customs Valuation*, 1995: 3; Banga, 2019: 27.

customs duties on digitisable products on the value of the “carrier” medium and not on the often much higher value of the “content”.[721] However, except for software imported by way of a carrier medium, nothing formally prevents Members from imposing customs duties on the actual “content”.[722] Existing literature supports the view that the moratorium applies to the transmission itself and not the value of its content.[723] Indonesia[724] supports this view and noted that, "…it is our understanding that such moratorium shall not apply to electronically transmitted goods and services. In other words, the extension of the moratorium applies only to the electronic transmissions and not to products or contents which are submitted electronically." In contrast thereto, the position of some countries is that the moratorium does cover “content” transmitted electronically, as is evident in many Members’ free trade agreement (FTA) practices.[725] These Members opine that not covering “content” will render the Moratorium meaningless.[726]

Currently SARS Customs applies the WTO concession[727] in the valuation of recorded computer programmes classified in tariff headings 8523.[728] The customs value of such goods only takes into account the cost or value of the carrier medium and does not include the cost or value of the data or instructions (content value), provided that this is separately distinguished from the cost or the value of the carrier medium on the invoice.[729] Excluded from the WTO concession are computer games and pre-loaded

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[721] Wunsch-Vincent, *The WTO, the Internet and trade in digital products: EC-US perspectives*, 2006: 43 & 44; Banga, 2019: 28.

[722] Wunsch-Vincent, *The WTO, the Internet and trade in digital products: EC-US perspectives*, 2006: 43; Banga, 2019: 28.

[723] Banga, 2019: 28.

[724] WTO Ministerial Conference, *Statement by Indonesia*, 2017.

[725] WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 3.

[726] WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 3.

[727] Committee on Customs Valuation, *Decisions adopted by the Tokyo Round Committee on Customs Valuation*, 1995: 3

[728] Tarif Heading 85.23 covers: “Discs, tapes, solid-state non-volatile storage devices, "smart cards" and other media for the recording of sound or of other phenomena, whether or not recorded, including matrices and masters for the production of discs (excluding products of Chapter 37); Chapter 85 of Schedule 1 Part 1 Section XVI of the *Customs & Excise Tariff (Tariff Book)*; SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 21.

[729] SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 21.

software (such as *inter alia* computer programmes loaded on laptops, computers, cell phones).[730]

5.6 REMAINING ISSUES

The biggest advantage of tangible goods for establishing customs control, as compared to intangible goods, is being able to physically withhold the release of the goods pending payment of taxes and duties. The chances are slim to none for the importer of physical goods to altogether evade the payment of taxes and duties if the importer properly declared the goods when being imported via one of the Republic's designated commercial ports of entry as prescribed in the CEA.[731] However, digital (intangible) goods do still present the risk of completely evading the imposition of taxes and duties in the case of the supplier of electronic services not being registered as a VAT vendor (or not required to) as well as the intermediary failing to declare, which then reverts to the reverse charge mechanism placing the burden on the honesty of the recipient, whom then has the opportunity to not declare the transaction to SARS. This leaves a void that could potentially be extorted to evade the payment of taxes. It is the view of the author that further measures should be considered by SARS to close the potential gap for leakage of revenue. In this day and age with increasing technological capabilities coupled with the simplification of online trading in both digital services and digital goods, is it not time for customs authorities to extend their presence to the digital realm?

[730] In the case of computer games, the full value that is the price actually paid or payable for the games must be declared for Customs duty purposes; SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 21.

[731] The designated commercial ports of entry are provided for in Section 6(1)*(a)* of the CEA and listed in paragraph 200.00 of the Schedule to the CEA Rules.

5.7 CONCLUSION

The CCA and CDA seek to modernise the role of customs in South Africa by placing more emphasis on trade facilitative measures which is currently not one of the primary responsibilities of Customs under the CEA. One of the primary aims of the new Customs Act's is to minimise Customs' disruptive effect on legitimate trade as much as possible by making use of simple, predictable and efficient customs systems, optimising available technologies and to give effect to the *Revised Kyoto Convention* and other binding international agreements.[732] On the effective date the CCA, CDA and EDA will replace the CEA and signify the complete, fundamental restructuring of South Africa's customs and excise legislation.

It has been established that the new Acts does provide trade facilitative measures for online initiated physically delivered goods (indirect e-commerce) insofar as the delivery of the goods is completed by courier. However, in the case of digital goods (direct e-commerce) the new Acts makes no provision for cross-border trade implications, formalities or the taxation thereof. Importantly the new Acts, in their current states, does not enhance SARS' collection capability in terms of cross-border digital trade in digitised goods as no provision is made for the concept of "digital goods" in the CCA or CDA. A possible reason for the omission in the new Acts of any legal provision providing for the levying of customs duties on digital goods could be due to South Africa being bound to the existing WTO Moratorium on the levying of customs duties on electronic transmissions.

South Africa has as of late become more vocal with regards to the impact of the Moratorium on developing countries. South Africa and India have sent more than one communication to the WTO General Council requesting the Moratorium to be re-examined on the grounds of revenue implications, scope and definition issues, technical feasibility of imposing customs duties and the broader impact of the Moratorium on trade and industrialization.[733] The communications for circulation sent to the WTO General Council is viewed by some as an indication of a desire to oppose

[732] SARS, *Draft Customs Bills: Explanatory memorandum*, 2009: 1 & 2, available at: https://www.gov.za/documents/customs-control-and-customs-duty-draft-bills-explanatory-memorandum (accessed 26 October 2019).

[733] WTO General Council, *Moratorium on customs duties on electronic transmissions: Need for a re-think*, 2018.

the practice of extending the Moratorium.[734] This beckons whether the action taken by South Africa can be seen as suggestive of South Africa potentially being in favour of imposing customs duties on digital goods. As a final thought, the questions is posed as to whether the time is rife to explore whether it is plausible for customs authorities to extend their presence into the digital realm.

[734] Denton, *ICC draws line in sand on customs duties on digital trade*, 2019, available at: https://iccwbo.org/media-wall/news-speeches/icc-on-customs-duties-on-digital-trade/ (accessed 3 November 2019).

CHAPTER 6 – CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION

The digital revolution of cross-border trade in services and goods gave rise to the much-anticipated VAT overhaul in South Africa. The aim of this dissertation was to investigate whether current regulations surrounding e-commerce are sufficient in applying and collecting applicable taxes and duties when dealing with either physical goods or digital goods. To this effect an analysis of the current legislation applicable in South Africa levying consumption taxes on cross-border e-commerce transactions was undertaken.

6.2 CONCLUSIONS

It has been established in chapter four of this dissertation that the VAT Act has been used as the primary tool to implement a tax aimed at addressing digitalisation of goods and services. Following the publication of the *Green Paper on Electronic Commerce for South Africa* in 2000 there was a period of uncertainty as to how South Africa will widen the tax net to include the vast amount of e-commerce transactions. Prior to 2014, the VAT Act provided for the inbound supply of electronic services to be taxed under the provisions of "imported services".[735] In terms of these provisions the onus was on the domestic recipient of electronic services to declare VAT on the services received and ensure payment of VAT due to SARS (reverse-charge mechanism).[736] Customer compliance was low due to the reliance on the impractical reverse charge mechanism for enforcing VAT payment. Government soon changed the approach to

[735] National Treasury, *Explanatory Memorandum to the Regulations prescribing electronic services for the purpose of the definition of "electronic services" in section 1(1) of the Value-Added Tax Act, 1991*, 2018: 4, available at: http://www.treasury.gov.za/search.aspx?cx=018115738860957273853%3Aj5zowsrmpli&cof=FORID%3A11&q=Draft%20Explanatory%20Memorandum:%20Regulations%20prescribing%20electronic%20services%20for%20the%09purpose%20of%20the%20definition%20of%20%e2%80%9cElectronic%20Services%e2%80%9d%20in%20Section%201(1)%20of%20The%20Value-Added%20Tax%20Act,%201991 (accessed 15 October 2019).

[736] National Treasury, *Explanatory Memorandum to the Regulations prescribing electronic services for the purpose of the definition of "electronic services" in section 1(1) of the Value-Added Tax Act, 1991*, 2018: 4, available at: http://www.treasury.gov.za/search.aspx?cx=018115738860957273853%3Aj5zowsrmpli&cof=FORID%3A11&q=Draft%20Explanatory%20Memorandum:%20Regulations%20prescribing%20electronic%20services%20for%20the%09purpose%20of%20the%20definition%20of%20%e2%80%9cElectronic%20Services%e2%80%9d%20in%20Section%201(1)%20of%20The%20Value-Added%20Tax%20Act,%201991 (accessed 15 October 2019).

taxing the electronic supply of services as the shortcomings of the reverse charge mechanism was clear to see.

On 1 April 2014 a definition for “electronic services” was inserted in section 1 of the VAT Act,[737] the definition of “enterprise” was expanded and a registration requirement for Foreign Electronic Service Suppliers inserted in section 23 of the VAT Act.[738] Following the proposals of the DTC, the VAT Act undergone further amendments.[739] Most notably the definition of “electronic services” is broadened, as opposed to the previous exhaustive list, to accommodate a greater array of digital services.[740] The wide application of the definition of electronic services clearly indicates SARS’ intent to subject digital goods to the same type of taxes as physical goods by making use of provisions contained in the VAT Act. The new regulations and amendments thereby effectively enable a VAT collection mechanism which can levy VAT on both digital goods and services under the auspices of the definition of “electronic services”.[741] As it stands (effective from 1 April 2019), the VAT Act requires Foreign Electronic Service Suppliers (including intermediaries) to register for VAT in South Africa, where the total value of electronic services supplied in South Africa exceeded R1 million within the 12 month period.[742]

It has been uncovered that whilst the VAT Act has broadened the collection of VAT on cross-border digital trade, the CCA and CDA makes no provision for the tax treatment of digital goods. The new Customs Acts once they become effective (in their current state) are incapable of imposing customs duties on digital goods as the Acts do not recognise digital goods as part of the broad definition of “goods” for customs purposes. Similarly, the current CEA also does not make provision for any digital goods. Currently SARS Customs applies a WTO concession in the valuation of recorded computer programmes which determines the customs value of such goods only takes

[737] The regulations prescribing electronic services for the purpose of the definition of “electronic services” were published in the *Government Gazette* on 28 March 2014 and came into effect on 1 June 2014; GN R.221 Government Gazette 2014: 585(37489).

[738] Section 165(1)*(d)*, *(e)* and 178(1)*(b)* of the *Taxation Laws Amendment Act* 31 of 2013. GN R.221 Government Gazette 2014: 585(37489).

[739] Davis Tax Committee, 2018: 34-36.

[740] GN 429 Government Gazette 2019: 645(42316). Davis Tax Committee, 2018: 35.

[741] GN 429 Government Gazette 2019: 645(42316).

[742] VAT Act: sec 23(1A).

into account the cost or value of the carrier medium.[743] This does not include the cost or value of the data or instructions (content value), provided that it is separately distinguished from the cost or the value of the carrier medium on the invoice.[744] Therefore in terms of taxing the digital goods, except the exclusions provided for, SARS Customs will only collect VAT and customs duties on the customs value of the carrier medium and not the full value of the digital goods or content contained on the carrier medium. The WTO concession applies even if the value of the digital goods or content far exceed the physical medium that such goods or content are contained on for the importation thereof. The WTO Moratorium on customs duties on electronic transmissions is also applicable to South Africa. SARS therefore does not currently levy customs duties on the cross-border trade in digital goods. The WTO's Members apply the moratorium to "electronic transmissions", yet there is no agreed definition or any common understanding amongst Members as to what is covered under "electronic transmissions". The lack of a clear understanding of what "electronic transmissions" entails is a critical issue which has led to South Africa and India proposing a re-examination of the moratorium.[745] This beckons whether the action taken by South Africa can be seen as suggestive of South Africa potentially being in favour of imposing customs duties on digital goods.

In the case of direct e-commerce, whereby digital goods are imported via intangible electronic means, the collection of VAT on the supply of electronic services (including digital goods) is the responsibility of the foreign supplier of such electronic services. A foreign supplier of electronic services (including an intermediary) that exceeds the compulsory VAT registration threshold and meets any two out of the three requirements (as contained in the definition of "enterprise") is required to register as a vendor and account for VAT in respect of electronic services supplied to South African customers.[746] However, digital (intangible) goods do still present the risk of completely evading the imposition of taxes and duties in the case of the supplier of electronic services not being registered as a VAT vendor (or not required to) as well as the

[743] Committee on Customs Valuation, *Decisions adopted by the Tokyo Round Committee on Customs Valuation*, 1995: 3

[744] SARS Group Executive: Customs Operations, *Valuation of imports – external directive*, 2014: 21.

[745] WTO General Council, *The e-commerce moratorium and implications for developing countries*, 2019: 3.

[746] VAT Act: sec 1(1) & 23(1A); SARS Legal Counsel, *Frequently asked questions: Supplies of electronic services*, 2019: 13, available at: http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G16%20-%20VAT%20FAQs%20Supplies%20of%20electronic%20services.pdf (accessed 10 October 2019).

intermediary failing to declare, which then reverts to the reverse charge mechanism placing the burden on the honesty of the recipient, whom then has the opportunity to not declare the transaction to SARS.

6.3 RECOMMENDATIONS

A value assessment is required by SARS of the deemed “lost” revenue due to no customs duties being collected on digital goods. The estimation will greatly assist SARS in making any future decision which impacts on tax policy especially with regards to the digital economy. It is imperative for SARS to be fully aware of what direct e-commerce represents for SARS and the South African economy prior to making any decisions as to how best utilise the potential thereof. This entails establishing whether any future taxation thereof will lead to economic growth and additional revenue for the fiscus, a potential decline in economic growth and loss of revenue for the fiscus or any combination thereof.

Government needs to be in the position to determine whether digital goods should continue to reside under the broad definition of electronic services and taxed in terms of the VAT Act at the expense of the collection of any potential revenue from customs duties imposed on imports. Or whether the CEA and/or CCA should be amended to provide for the levying of customs duties on the cross-border trade in digital goods in terms of the applicable customs legislation. The decision should be based on pure economic fundamentals. The execution of the decision needs to further encourage regulatory certainty. The importance of regulatory and legal certainty alongside definitive tax treatment cannot be over emphasised.[747] It is most imperative to remain aligned with international principles and guidelines, as stressed by the DTC.[748]

[747] Krogman and Khumalo, 2016: 9; Budree 2017: 22.
[748] Davis Tax Committee, 2018: 35.

6.4 CONCLUDING REMARKS

The regulation and facilitation of the rising levels of e-commerce derived digital goods is undoubtedly a challenge for revenue administrations and customs administrations alike. However, it also presents opportunities for higher levels of revenue collection through increased economic activity and, as such, should be supported e-commerce enabling legislation. Further consideration is required to ascertain whether the current legislation regulating the taxation of e-commerce will suffice, or if further amendments are required to provide for the necessary changes to enhance the tax base to be reflective of the drastic changes in the economy.

Customs administrations are uniquely positioned within the international trade supply chain to facilitate legitimate trade, collect revenue due and protect the local industry. The effect and benefits of digitalisation is clear. If e-commerce is capitalised on it can potentially generate additional revenue for the fiscus. The tax base must however be properly expanded to include such new developments. It is advised that Government properly digest all available resources on the possible effects and impact of levying customs duties on digital goods. Strong considerations need to be given to the cost implications and collection methods.

For SARS better regulation and facilitation of cross-border e-commerce transactions can provide the opportunity to generate additional revenue for Government and enhance economic growth. This can only be achieved by creating an environment whereby an appropriate level of consumer trust is established. To this effect South Africa does have laws addressing key regulatory issues regarding trade in e-commerce.[749] What remains is for SARS to determine the desired extent of levying consumption taxes on cross-border digital goods. Once it has been established, the application thereof must be aligned to guiding international tax principles to further embed the taxation of cross-border trade in digital goods in South Africa by way of continuous regulatory certainty.

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[749] Budree 2017: 27-28.

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