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### An indirect tax law agenda

Beretta, G.

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## An indirect tax law agenda

Giorgio Beretta

### I. General overview

#### A. The concept of 'indirect tax'

“Beyond the everyday world ... lies the world of VAT, a kind of fiscal theme park in which factual and legal realities are suspended or inverted” *Royal & Sun Alliance Insurance Group plc v Customs and Excise Commissioners* [2001] EWCA Civ 1476 (CA) 54 (Sedley L.)

A proposal for an indirect tax agenda requires some preliminary observations on the concept of 'indirect tax'. Although theoretically imprecise as a categorisation,<sup>1</sup> taxes are customarily classified either as direct or indirect taxes.<sup>2</sup> But where does the distinction between a direct and indirect tax exactly lie? The tax object is not, by itself, decisive to validate this distinction. In principle, direct and indirect taxes can be imposed invariably on an income or consumption base.<sup>3</sup> Another argument points to direct taxes being premised on the coincidence of the taxable person or tax subject, on the one hand, and the person effectively paying the tax or the final taxpayer, on the other hand. Such a coincidence lacks with indirect taxes, whose legal design implies shifting the tax burden from the taxable person – 'the formal taxpayer' – to another person – 'the actual taxpayer'.<sup>4</sup> The unloading of the tax burden occurs upon the two

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<sup>1</sup> OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)* (OECD Publishing 2017), Commentary on Article 2 (Concerning Taxes Covered by the Convention) para 2.

<sup>2</sup> World Trade Organization (WTO), *Agreement on Subsidies and Countervailing Measures* (1994), Annex I (Illustrative List of Export Subsidies), Item E, Footnote 58.

<sup>3</sup> See Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) ch XXX, who famously advocated for consumption as an appropriate base for income taxation. See also Nicholas Kaldor, *An Expenditure Tax* (Allen and Unwin 1956), on the feasibility of a direct expenditure tax.

<sup>4</sup> This conventional argument can be traced back to John Stuart Mill, *Principles of Political Economy with Some Applications to Social Philosophy*, Book V (first published 1848, Longmans 1909) ch III.

persons entering into contact, usually because they act as counterparties to a transaction.<sup>5</sup> However, there is no guarantee that indirect taxes will always be shifted, nor will direct taxes regularly be borne by the taxable person.<sup>6</sup> The actual incidence of the tax requires a more complex investigation.<sup>7</sup>

Rather than levying techniques, this chapter focuses on the legal character of an ‘indirect tax’, which can be broadly understood as a tax on the consumption of goods and services.<sup>8</sup> The OECD defines ‘consumption taxes’ as ‘taxes on production, sale, transfer, leasing and delivery of goods and rendering of services’.<sup>9</sup> Consumption taxes fall into two broad categories: taxes on general consumption, mainly value added and retail sales taxes, and levies on specific goods and services, primarily excises, customs and import duties. The distinction between the two categories lies in the coverage of the taxes concerned. General consumption taxes such as value added and retail sales taxes are levied on all goods and services.<sup>10</sup> Specific consumption taxes such as excises, customs and import duties only target certain goods and/or services.<sup>11</sup> According to recent statistics, consumption taxes account for approximately one-third of overall

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<sup>5</sup> Reference to a transaction as a taxable event reflects the idea of indirect taxes as ‘*in rem* taxes’, in contrast to direct taxes as ‘*in personam* taxes’. See Richard Musgrave and Peggy Musgrave, *Public Finance in Theory and Practice* (Intn. Student Ed., McGraw-Hill Kogakusa 1980) 234.

<sup>6</sup> Victor Thuronyi, Kim Brooks and Borbala Kolozs, *Comparative Tax Law* (Kluwer Law International 2016) 46–47.

<sup>7</sup> Robert van Brederode, *Systems of General Sales Taxation: Theory, Policy and Practice* (Kluwer Law International 2009) 29–30.

<sup>8</sup> Ben Terra and Julie Kajus, *Introduction to European VAT* (IBFD 2021) paras 7.1–7-2. Admittedly, some correlations exist between the indirect technique of levying the tax and its legal character. See Art. 113 of the Treaty on the Functioning of the European Union (TFEU), which refers to ‘turnover taxes, excise duties and other forms of indirect taxation’.

<sup>9</sup> OECD, ‘The OECD Classification of Taxes and Interpretative Guide’ in *Revenue Statistics in Asian and Pacific Economies 2020* (OECD Publishing 2020) 135.

<sup>10</sup> See Terra and Kajus, *supra* n. 8, para 7.2.1., who link the legal character of a general consumption tax such as European VAT with the principle of equality that demands that ‘the equal is treated equally and the unequal in proportion unequally’.

<sup>11</sup> See Sijbren Cnossen, *Excise Systems: A Global Study of the Selective Taxation of Goods and Services* (Johns Hopkins University Press 1977) 7, who summarises the ‘distinguishing features’ of excises as ‘selectivity in coverage, discrimination in intent, and some form of quantitative measurement in determining the tax liability’. See also Dario Stevanato, ‘A Critical Review of Italy’s Digital Services Tax’ (2020) 74(7) *Bull. Intl. Taxn.* para 5.2., who considers the Italian Digital Services Tax (DST) as ‘an excise tax of a discriminatory nature’, since it applies only to ‘digital services’.

tax proceedings in OECD members. The largest proportion of tax revenue comes from levying general consumption taxes (in 2018, for more than 21 per cent of total tax revenue in OECD members), among which VAT has the lion's share.<sup>12</sup>

Due to their importance for the fiscal budget of many countries, the discussion in this chapter is restricted to VAT-type consumption taxes.<sup>13</sup> The term 'value added tax' (VAT) is used hereinafter to refer to any national tax, irrespective of the name or acronym actually used,<sup>14</sup> which has the characteristics of a broad-based tax on final consumption collected from, but in principle not borne by, businesses through a staged collection process, whatever method is used for determining the tax liability (e.g., invoice-credit method or subtraction method).<sup>15</sup> A VAT's core feature is being neutral towards the production process and favouring international trade operations. Indeed, many developing countries have introduced a VAT to replace lost tax revenues following trade liberalisation. The circumstance that foundational VAT principles are generally the same across jurisdictions, despite the inevitable peculiarities of each national system, also helps the present discussion.<sup>16</sup>

## B. Broad research trajectories

Since the book aims to track developments in taxation to inspire future research, it cannot pass unnoticed the 'unparalleled tax phenomenon'<sup>17</sup> resulting from the transition of VAT, over the last half-century, from a tax limited to less than ten countries in the late 1960s to its application in nearly 170 countries worldwide.<sup>18</sup> In terms of proliferation, VAT is clearly a success.<sup>19</sup>

<sup>12</sup> OECD, *Consumption Tax Trends 2020: VAT/GST and Excise Rates, Trends and Policy Issues* (OECD Publishing 2020) 12, 15–16.

<sup>13</sup> Other specific consumption taxes are out-of-scope of the present analysis, such as excises, customs duties, or environmental taxes. The characterisation of the Digital Services Tax (DST) as an indirect tax is somehow disputed; however, its nature is not like that of a 'consumption tax'.

<sup>14</sup> The term 'Goods and Services Tax' (GST) is popular among Commonwealth countries (e.g., Australia, Canada, India, Malaysia, New Zealand, and Singapore). Samoa interestingly bridges the terminology gap, calling its VAT 'a value added goods and services tax' (VAGST).

<sup>15</sup> OECD, *International VAT/GST Guidelines* (OECD Publishing 2017) 4.

<sup>16</sup> *Ibid.*, 10–12.

<sup>17</sup> Alain Tait, *Value Added Tax. International Practice and Problems* (International Monetary Fund 1988) 3.

<sup>18</sup> OECD, *supra* n. 12, 18 and Annex 1.A.

<sup>19</sup> Robert van Brederode, 'Introduction: VAT Does Well, but Does It Do Well Enough?' in Robert van Brederode (ed), *Virtues and Fallacies of VAT: An Evaluation after 50 Years* (Kluwer Law International 2021) 3.

The introduction of VAT by an increasing number of countries has been acclaimed as nothing less than ‘the most pervasive tax reform throughout the world during the second half of the twentieth century’.<sup>20</sup> Necessity looms large behind the rise of VAT.<sup>21</sup> VAT is, in fact, part of the *acquis communautaire* that candidate States must accept to join the European Union (EU).<sup>22</sup> Adopting a VAT is positively correlated with participation in an IMF-supported programme for developing countries.<sup>23</sup> However, more than external pressures, the main strength of VAT rests on being ‘a revenue workhouse’.<sup>24</sup> VAT has, in fact, the psychological advantage that high-yield revenue can be collected almost unnoticably, insofar as the tax amount is concealed in the consumer price.<sup>25</sup> Tellingly, many countries have resisted the introduction of a VAT, but almost none have repealed it forever.<sup>26</sup>

The geographical expansion of VAT has not taken place steadily but in regional bursts.<sup>27</sup> As for its origins, it is disputed who, between Wilhelm von Siemens and Thomas S. Adams, proposed a VAT first in 1919.<sup>28</sup> Irrespective of its roots as a theoretical model, Maurice Lauré – the Deputy Manager of the General Directorate of Taxes in France – was the initiator of VAT in that country during the 1950s.<sup>29</sup> The French experience served as a canvas for enacting VAT in the then six countries part of the EU. Many other countries have adopted

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<sup>20</sup> Alan Schenk, Victor Thuronyi and Wei Cui, *Value Added Tax. A Comparative Approach* (2nd edn, Cambridge University Press 2015) 23.

<sup>21</sup> Michael Keen and Joel Slemrod, *Rebellion, Rascals and Revenue. Tax Follies and Wisdom through the Ages* (Princeton University Press 2021) 369.

<sup>22</sup> European Commission, ‘Enlargement – Conditions for Membership – Chapters of the Acquis’ (2021) [https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/glossary/acquis\\_en](https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/glossary/acquis_en) accessed 7 December 2021, Chapter 16: Taxation.

<sup>23</sup> Liam Ebrill and others, *The Modern VAT* (International Monetary Fund 2001) 6.

<sup>24</sup> Sijbren Cnossen, ‘Global Trends and Issues in Value Added Taxation’ (1998) 5(3) *Int’l Tax and Pub. Finance* 399, 413.

<sup>25</sup> Terra and Kajus, *supra* n. 8, para 7.6.1.2.

<sup>26</sup> Six countries have removed a VAT (Belize, Ghana, Grenada, Malaysia, South Vietnam, Zambia). But all – except Malaysia, which removed its GST and introduced a single stage tax in 2018 – have subsequently reinstated it.

<sup>27</sup> Michael Keen and Ben Lockwood, ‘The Value Added Tax: Its Causes and Consequences’ (2010) 92(2) *JDev. Econ.* 138, 144. See also Eleonor Kristofferson, ‘Value Added Tax as a Legal Transplant’ (2021) 49(2) *Intertax* 187, 193–194, who submits that ‘[w]hen different countries introduced VAT, they were inspired either by an already existing VAT system or by a theoretical model of VAT’.

<sup>28</sup> Kathryn James, *The Rise of the Value-Added Tax* (Cambridge University Press 2015) 1.

<sup>29</sup> Maurice Lauré, *La Taxe sur la Valeur Ajoutée* (Sirey 1952). See also Carl Shoup, ‘Taxation in France’ (1955) 8(4) *Natl. Tax J.* 325, 328, who observes that, at the

a VAT since then.<sup>30</sup> In 1986, New Zealand developed a new type of VAT that aimed to eliminate several fallacies of the original European model. This ‘Modern VAT’ was later adopted in Australia, Canada, Singapore, and South Africa.<sup>31</sup> The European and New Zealand models are now the VAT types most largely applied worldwide.<sup>32</sup> Notable examples of countries introducing a VAT in recent years are the GCC countries (2016) and India (2017), whereas discussions on the introduction of VAT at the federal level are ongoing in Brazil. Remarkably, the global success story of VAT in the past half-century has not yet reached the shores of the United States.<sup>33</sup>

The global spread of VAT in the last decades is undoubtedly a major development to be included in an indirect tax agenda. Most international trade is now subject to VAT, and the interaction of different VAT systems significantly impacts cross-border trade. In response to a call for a global standard on VATs, the OECD developed the International VAT/GST Guidelines in 2015–17.<sup>34</sup> The Guidelines are the first legal instrument for the cross-border operation of VAT. However, since the principles and indications contained therein are only soft law, countries are not obliged to comply with these recommendations and differences in the various legal systems persist.<sup>35</sup> Moreover, even if countries comply with internationally agreed guidelines, national authorities may still

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time of its introduction in France in 1954, VAT was seen as ‘an invention of the first order’ and France as an ‘innovator in taxation’.

<sup>30</sup> See Brederode, *supra* n. 19, 3, who considers that ‘[t]he time period 1990–1999 is VAT’s “Golden Age” with about 73 countries joining, and since it has returned to its original growth pattern, adding between 10–20 countries each decennium’.

<sup>31</sup> Ebrill and others, *supra* n. 23.

<sup>32</sup> See Schenk, Thuronyi, and Cui, *supra* n. 20, ch 2, who group national VATs into four families: (i) European VAT; (ii) New Zealand GST; (iii) Japanese VAT; and (iv) South African VAT.

<sup>33</sup> The economist Larry Summers explained in a quip why VAT is a ‘tax taboo’ in the US: ‘Liberals think it’s regressive and conservatives think it’s a money machine. If they reverse their positions, the VAT may happen’, reported by Jan Rosen, ‘Tax Watch; The Likely Forms of New Taxes’ *New York Times* (New York, 19 December 1988).

<sup>34</sup> The International VAT/GST Guidelines, adopted as a recommendation by the OECD Council in September 2016, were endorsed by over 100 jurisdictions worldwide at the third meeting of the Global Forum on VAT in 2015. Launched by the OECD in 2012, the Global Forum on VAT is a platform for a global dialogue on international VAT/GST standards and key issues of VAT/GST policy and operations.

<sup>35</sup> Pernilla Rendahl, ‘Methodological Notes on a Changing Legislative Landscape’ in Marie Lamensch, Edoardo Traversa and Servaas van Thiel (eds), *Value Added Tax and the Digital Economy. The 2015 EU Rules and Broader Issues* (Kluwer Law International 2015), 169–180.

interpret them differently. Finally, recommendations and policies contained therein do not provide individual taxpayers with rights that can be invoked or relied on before national courts. The increased interaction of national VAT systems might create adverse consequences: as the world is getting smaller, the VAT implications are getting bigger!<sup>36</sup>

Another VAT topic deserves to be included in an indirect tax agenda for future research. It relates to the growth of the digital economy or, using the OECD lexicon in vogue, the ‘digitalisation of the economy’.<sup>37</sup> The challenges in the field of VAT and digitalisation have been debated already in the late 1990s as a result of the growth of electronic commerce.<sup>38</sup> These challenges concern, mainly, the possibility of online supplies to be provided at a distance, in a fast and almost anonymous way, which complicates the application and enforcement of VAT. Changes reflecting these discussions have been implemented in the early 2000s by several VAT systems, with the EU being the first to introduce specific rules for ‘electronically supplied services’ in 2003.<sup>39</sup> Similar issues were highlighted, concerning VAT exemptions for importing low-value goods, in Action 1 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) project in 2015.<sup>40</sup> The OECD has provided further guidance on issues related to digitalisation in 2017,<sup>41</sup> and, concerning the involvement of digital platforms in the collection of VAT on e-commerce, in 2019.<sup>42</sup>

However, the digitalisation of the economy has not yet reached its last mile. Developments in Information and Communication Technology (ICT) have made it possible for an increasing number of services to be delivered remotely through the Internet. The advent of the sharing economy has contributed to push the digital frontier further and further as to include within it even

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<sup>36</sup> Nils Eriksen and Kelvin Hulsebos, ‘Electronic Commerce and VAT – An Odyssey towards 2001. The World Is Getting Smaller, the VAT Implications Are Getting Bigger’ (2000) 11(4) *Intl. VAT Monitor*, 137–143.

<sup>37</sup> OECD, ‘BEPS. Action 1 Tax Challenges Arising from Digitalisation’ (2021) <https://www.oecd.org/tax/beeps/beeps-actions/action1/> accessed 7 December 2021.

<sup>38</sup> OECD, *Electronic Commerce: Taxation Framework Conditions* (OECD Publishing 1998).

<sup>39</sup> Marie Lamensch, *European Value Added Tax in the Digital Era: A Critical Analysis and Proposals for Reform* (IBFD 2015).

<sup>40</sup> OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report* (OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing 2015) 119–129 and Annex C.

<sup>41</sup> OECD, *Mechanisms for the Effective Collection of VAT/GST Where the Supplier Is Not Located in the Jurisdiction of Taxation* (OECD Publishing 2017).

<sup>42</sup> OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Supplies* (OECD Publishing 2019).

services once not capable of direct delivery from a remote location, such as accommodation and passenger transport.<sup>43</sup> Indeed, the speed of digitalisation has much increased during COVID-19. Many services, including those traditionally provided ‘on the spot’, such as education and fitness training, are now being provided at a distance and not necessarily in real-time. As a result of this continuous shift, the boundaries between the analogical and digital worlds are becoming increasingly fluid, and the ‘unity of action, time and place’, to refer to the categories of classical theatre, is upset.<sup>44</sup>

The global spread of VAT and the digitalisation of the economy are the two broad research trajectories that will be explored further in the chapter. Since no international agreement on VAT currently exists, but national VAT systems still differ substantially, the chapter will use the OECD International VAT/GST Guidelines as a relevant framework for identifying the main gaps and unexplored research issues. Notably, the research proposals will focus on topics related to the levying of VAT at the international level. Other important issues that are specific to any VAT system will not be discussed. However, experience under European VAT, the first type of VAT enacted and still influential for other VAT systems with its extensive case-law, will be used to illustrate further the research proposals.

## II. Main gaps and unexplored research issues

### A. Businesses and consumers of online supplies

Although targeting consumption by private persons, nearly all VATs stipulate that the person supplying goods or services to the consumer should be solely responsible for charging, collecting and remitting VAT.<sup>45</sup> Suppliers act as unpaid ‘tax collectors for the State and in the interest of the public exchequer’.<sup>46</sup>

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<sup>43</sup> Giorgio Beretta, *European VAT and the Sharing Economy* (Kluwer Law International 2019) 13.

<sup>44</sup> Case C-568/17 *Geelen* [2019] ECLI:EU:C:2019:109, Opinion of AG Szpunar, para 17.

<sup>45</sup> See Ben Terra, *Sales Taxation: The Case of Value Added Tax in the European Community* (Kluwer Law International 1997) 6, who reasons that ‘it is only for technical reasons that the tax is not levied directly on private consumers’; however, ‘this ideal, direct taxation upon the private consumer, should be borne in mind when designing an efficient indirect tax on consumption’.

<sup>46</sup> Case C-271/06, *Netto Supermarkt*, [2008] EU:C:2008:105, para 21. See also Brederode, *supra* n. 19, 8, who argues that ‘[c]ollecting taxes for the government is in itself ... a tax in natura’.



As VAT is designed as a broad base tax, the category of persons who should pay the tax is generally defined widely.<sup>47</sup> Only persons acting in their capacity as consumers are, in principle, excluded.<sup>48</sup> Nevertheless, the explosive growth of online sales and new business models have caused many VAT systems to depart from the traditional supplier collection model. To secure effective VAT collection, many countries have introduced special liability regimes for new types of intermediaries, in particular digital platforms.<sup>49</sup> Under these special regimes, the digital platform is wholly and solely liable for the VAT on the online supplies of goods or services it facilitates. To assume full VAT liability, however, the platform must play a prominent role in the supply toward the customer (e.g., by setting the terms and conditions of the underlying supply or having control on payment).<sup>50</sup> In such an event, the actual supplier is no longer treated as a taxable person, and the digital platform takes over his VAT personality.<sup>51</sup>

The globalisation and digitalisation of the economy also present challenges in identifying the status and location of the customer. The destination principle requires suppliers to ascertain their customers' status (i.e., a business or private consumer) and location (i.e., the taxing jurisdiction) on a transaction basis. However, this assessment might prove difficult for supplies that are provided and consumed remotely, where limited or no interaction may occur between the two parties.<sup>52</sup> To facilitate the supplier's tasks, many VAT jurisdictions

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<sup>47</sup> Peter Melz, 'Who Is a Taxable Person to VAT?', in Kristen Andersson, Peter Melz and Christer Silverberg (eds), *Liber Amicorum Sven-Olof Lodin* (Kluwer Law International 2001) 158–162.

<sup>48</sup> See Rita de la Feria and Richard Krever, 'Ending VAT Exemptions: Towards a Post-Modern VAT' in Rita de la Feria (ed), *VAT Exemptions: Consequences and Design Alternatives* (Kluwer Law International 2013) 12, who submit that the exclusion of a supplier from the scope of VAT ultimately 'replicate the effect an exempt supply'.

<sup>49</sup> OECD, *supra* n. 42. Australia, Canada, EU, New Zealand, Singapore, and the UK have all either introduced or proposed a VAT liability regime for digital platforms or online marketplaces.

<sup>50</sup> See Marie Lamensch and others, 'New EU VAT-Related Obligations for E-Commerce Platforms Worldwide: A Qualitative Impact Assessment' (2021) 13(2) *World Tax J.*, 441–479, who discuss the potential impact of new (specifically, European) VAT obligations on platforms' business model(s).

<sup>51</sup> OECD, *supra* n. 42, 23–48; OECD, *The Impact of the Growth of the Sharing and Gig Economy on VAT/GST Policy and Administration* (OECD Publishing 2021) 77–82.

<sup>52</sup> OECD, *supra* n. 15, 69.

have introduced rebuttable presumptions or other evidence tests.<sup>53</sup> These tests enable the supplier to rely on unequivocal elements, such as the customer's VAT registration number, or information routinely collected in the course of normal commercial operations, and from this to identify their customer's status and jurisdiction. These pieces of evidence might be further supported by other indicia, such as information available in commercial registers, the customer's contact telephone number, the IP address of the device used to download digital content, or the customer's trading history.<sup>54</sup> However, due to uncertainties of relying on these evidence tests, suppliers of online services might be practically unable to determine the status and location of their customers, especially if the services in question can be utilised by anyone from anywhere, also in anonymised form.<sup>55</sup>

Challenges related to identifying both the supplier and the customer of online supplies constitute unexplored VAT issues for future research. In particular, the proposed research in this field could entail the establishment of reliable and practical criteria to identify the person liable to VAT and the customer in the case of online supplies.

## B. Bundled, composite and mixed supplies

Administratively, VAT is levied on each transaction. Defining what exactly constitutes a transaction is therefore crucial. Complexity arises when a transaction entails the joint provision of different goods and services to the same customer, possibly by separate undertakings. Under national VAT systems, a transaction that includes a mixture of two or more components is referred to, usually, as a 'bundled', 'composite', or 'mixed' supply.<sup>56</sup> Under European VAT, no legislative provision exists on how to deal with bundled supplies. Fortunately, the Court of Justice of the European Union (CJEU) has long

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<sup>53</sup> Under European VAT, specific guidance on customer identification and location in the case of supplies of services taxable at destination is contained in Council Regulation 282/2011, as amended by Council Regulation 1042/2013.

<sup>54</sup> OECD, *supra* n. 15, 41 and 70. For other indicia used for the customer identification purposes, see Arts 24e and 24f of Council Regulation 282/2011.

<sup>55</sup> See Dutch Court of the Hague, 15 October 2021, Case 18\_8226, V-N 2021/2463, ECLI:NL:RBDHA:2021:10751, where, in good justice ('*goede justitie*'), absent any proof of evidence, the number of non-EU customers of a Dutch Bitcoin miner was set at 75 per cent of that supplier's overall customers.

<sup>56</sup> See Case C-231/94 *Faaborg-Gelting Linien* [1996] ECLI:EU:C:1996:184, para 14, which refers to composite supplies as transactions 'characterized by a cluster of features and acts'.

developed a doctrine on ‘composite supplies’.<sup>57</sup> This case-born doctrine stipulates that, in principle, each supply should be treated as fully distinct and independent. This main ‘splitting’ rule has two relevant exceptions. Under the first exception, two or more components are considered as a single composite supply if such elements are so closely linked to form, objectively, a single economic supply, which would be artificial to split. Under the second exception, there is a composite supply when one or more elements of a supply are merely ancillary, in the sense that they do not constitute an aim in itself for the customer but only serve as a means of better enjoying the supply’s principal element.<sup>58</sup>

Since the application of the doctrine on ‘composite supplies’ requires analysing the essential characters of the supply, Member States and taxpayers might have different views on composite supplies. Inconsistencies in the treatment of bundled supplies could easily occur also across other VAT systems, which may have developed their own approach in this regard.<sup>59</sup> The OECD International VAT/GST Guidelines contain no indication on how to deal with bundled supplies.<sup>60</sup> Background discussion documents in the development of the International VAT/GST Guidelines list ‘different approaches to bundled (mixed) supplies’ as a possible source of double (non-)taxation between different VAT systems.<sup>61</sup> Although the 2006 draft of the International VAT/GST Guidelines contains a subparagraph titled ‘Mixed and Bundled Supplies’ (under the main paragraph entitled ‘Services Characterisation Issues’), that reference has been ultimately deleted from the final version of the OECD International VAT/GST Guidelines.<sup>62</sup>

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<sup>57</sup> Case C-349/96 *Card Protection Plan (CPP)* [1999] ECLI:EU:C:1999:93.

<sup>58</sup> Giacomo Lindgren Zucchini, ‘Composite Supplies in the Common System of VAT’ (Doctoral Dissertation, Örebro University 2020).

<sup>59</sup> For instance, Australian GST distinguishes between ‘mixed supplies’, i.e., bundled supplies in which each component is separately identifiable and must individually recognised, ‘composite supplies’, i.e., bundled supplies containing a dominant part that is integral, ancillary, or incidental to that part, or ‘neither supplies’, i.e., bundled supplies having a separate identity from their own parts.

<sup>60</sup> See OECD, *supra* n. 15, 85, which makes only a slight reference to the concept of ‘composite supplies’, while considering supplies directly connected with immovable property.

<sup>61</sup> OECD, *Report: The Application of Consumption Taxes to the Trade in International Services and Intangibles* (OECD Publishing 2004) 6 and 18; OECD, *The Application of Consumption Taxes to the Trade in International Services and Intangibles: Progress Report and Draft Principles* (OECD Publishing 2005) 3 and 7.

<sup>62</sup> OECD, *International VAT/GST Guidelines. February 2006* (OECD Publishing 2006) 4.

In light of increased interaction between different VAT systems and the digitalisation of services, which often include tangible and intangible components alike, it might be interesting to develop a research line on bundled supplies. The proposed research might entail a comparative analysis of selected VAT systems to create a set of agreed principles on bundled supplies, possibly also for non-VAT purposes.<sup>63</sup>

### C. Place of taxation of cross-border services

The main success of the OECD International VAT/GST Guidelines probably lies in validating the destination principle as the gold standard to allocate taxing rights among different countries, potentially influencing non-OECD members.<sup>64</sup> The destination principle is designed to ensure that tax on cross-border supplies is ultimately levied only where final consumption occurs.<sup>65</sup> To pinpoint the place of consumption, which, by itself, is a contentious matter, VAT laws generally use proxies or predictions about where the use or consumption of particular goods or services is likely to take place.<sup>66</sup> For this purpose, supplies of goods and services are classified into different categories, and specific allocation rules are applied to each category. The classification of services into different categories is based on the nature and characteristics of each supply. Other models follow an iterative approach, in which the principle underlying the place of taxation rule is described in more general terms and where a series of rules are applied consecutively to determine the appropriate place of taxation. A combination of both approaches is also possible.<sup>67</sup>

The application of the destination principle is relatively straightforward in the case of cross-border trade in goods, but much less for services.<sup>68</sup> Regarding services classification, the OECD International VAT/GST Guidelines rec-

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<sup>63</sup> For a general approach on bundled supplies in taxation, see Giorgio Beretta, 'The Meaning and Scope of the Ancillary Principle under Model Tax Conventions' (2018) 46(8/9) *Intertax*, 639–653.

<sup>64</sup> Mariya Senyk, *The Origin and Destination Principles as Alternative Approaches towards VAT Allocation: Analysis in the WTO, the OECD and the EU Legal Frameworks* (IBFD 2020) para 7.1.3.2.

<sup>65</sup> Guideline 3.1.

<sup>66</sup> OECD, *supra* n. 15, 40–41.

<sup>67</sup> Rebecca Millar, 'Echoes of Source and Residence in VAT Jurisdictional Rule' in Michael Lang, Peter Melz and Eleonor Kristoffersson (eds), *Value Added Tax and Direct Taxation: Similarities and Differences* (IBFD 2009) para 1.3.

<sup>68</sup> While the concept of 'services' generally also includes a reference to 'intangibles', some VAT systems (e.g., Canada) may regard 'intangibles' as a separate category. For the purposes of this section, reference to services includes intangibles.

commend that taxing rights over ‘on-the-spot supplies’ (e.g., accommodation, entertainment activities, exhibitions, hairdressing, and restaurant services) be allocated to the jurisdiction in which the supply is physically performed.<sup>69</sup> For all other services, the recommended approach is to assign taxing rights to the jurisdiction in which the customer has its usual residence.<sup>70</sup> However, with the digitalisation of the economy, the distinction between different categories of services becomes increasingly blurred. This occurs, in particular, if the (sub-) category of e-services is defined narrowly.<sup>71</sup> A narrow-based definition of e-services could impede to qualify services supplied remotely under the same category. Notably, where the definition of e-services refers to criteria such as the supply being fully automated or involving only minimal human intervention, several services such as the supply of online teaching or telesurgery might not be considered e-services, even if delivered via the Internet similarly to digitised products.<sup>72</sup> In such an event, the place of consumption of these services might be determined with reference to the place where the activity takes place. However, the circumstance that the supplier and the customer are in separate (far-flung) locations renders the actual place of performance challenging to identify.<sup>73</sup>

A correct qualification of cross-border services is crucial for applying the destination principle. Future research on this subject therefore appears timely. The proposed research might develop a revised framework for the classification of online services to determine the place of consumption and the application of the destination principle.<sup>74</sup>

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<sup>69</sup> Guideline 3.5.

<sup>70</sup> Guideline 3.6.

<sup>71</sup> This occurs, under European VAT, with a narrow-based definition of ‘electronically supplied services’. See Art. 7(1) of Council Regulation 282/2011.

<sup>72</sup> Arthur Cockfield, Walter Hellerstein and Marie Lamensch, *Taxing Global Digital Commerce* (2nd edn, Kluwer Law International 2019) 252–254.

<sup>73</sup> See Case C-568/17 *Geelen* [2019] ECLI:EU:C:2019:109, concerning the question of where the place of performance is in the case of erotic interactive live sessions filmed and broadcasted over the Internet, i.e., that place being, alternatively, where the models filmed, the streaming broadcaster, or the viewers are located.

<sup>74</sup> See Madeleine Merks, ‘VAT and E-Services: When Human Intervention Is Minimal’ (2018) 29(1) *Intl. VAT Monitor*, para 5, proposing a definition of e-services which includes all services delivered over the Internet or an electronic network, where the supplier and the recipient of the service, due to its digital nature, can be located in different places.

#### D. Double taxation and non-taxation

The global proliferation of VAT has increased the situations in which international businesses have to deal with two or more VATs. While widespread adoption of the destination principle encourages convergence between different VAT systems, there are various approaches for taxing cross-border supplies globally. A lack of internationally agreed principles for allocating taxing rights between different VAT jurisdictions raises the ‘spectre of double taxation’, where more than one country seeks to levy tax on the same supply, or, in the inverse case, double non-taxation.<sup>75</sup> In 2004, the OECD listed several situations of double (non-)taxation due to possible mismatches between different VATs, such as: (i) different interpretations of the same or similar concepts; (ii) different approaches to the timing of supply and its interactions with the place of supply; (iii) different definitions of services and intangibles; (iv) inconsistent treatment of bundled or mixed supplies; (v) no order in interpreting key proxies; and (vi) other uncertainties.<sup>76</sup>

Currently, no international coordination mechanisms exist to align the treatment of a supply under two or more national VATs.<sup>77</sup> Although ensuring some convergence among different VAT jurisdictions, the OECD International VAT/GST Guidelines are only soft laws. As such, the Guidelines do not always produce the symmetrical balance needed to avoid unintentional double or non-taxation of the same supply.<sup>78</sup> Neither unilateral relief mechanism is

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<sup>75</sup> Case C-459/19 *Wellcome Trust* [2021] ECLI:EU:C:2020:496, Opinion of AG Hogan, para 47. For a definition of international double taxation in the field of VAT, which occurs ‘whenever an international transaction is subject to turnover tax ... in several countries, regardless of whether it concerns the same taxpayer or not’, see Hans Ruppe, ‘General Report’ in *Cahiers de Droit Fiscal International* (Vol. LXVIIIb, IFA 1983), 114–116.

<sup>76</sup> OECD, *Report: The Application of Consumption Taxes to the Trade in International Services and Intangibles* (n. 61) 18.

<sup>77</sup> Preliminary studies on possible coordination mechanisms to avoid double (non-)taxation have been made under European VAT. See EU VAT Forum, ‘Prevention and Solution of VAT Double Taxation Dispute’ (Report), Ref. Ares(2020)423263; Commission, ‘Introduction of a Mechanism for Eliminating Double Imposition of VAT in Individual Cases’ (Consultation Paper) TAXUD/D1/..., 5 January 2007.

<sup>78</sup> The OECD International VAT/GST Guidelines sometimes contain insufficient direction, e.g., in relation to the criteria for allocating services between different establishments of a multi-location entity (MLE). See OECD, *supra* n. 15, 44–49, 57–64, which identify three alternative allocating criteria (i.e., the direct use approach, the direct delivery approach, and the recharge method), however without expressing a clear preference.

necessarily in place, at the level of a national VAT, to avoid double taxation or non-taxation due to disparities between different VAT systems.<sup>79</sup> Nor is any mechanism available to either prevent (e.g., an advance ruling) or settle (e.g., an arbitration court) international double taxation disputes in the area of VAT.<sup>80</sup> VAT treaties to be agreed upon by countries based on a common taxation model were suggested as a possible remedy against VAT double (non-) taxation situations in the past.<sup>81</sup> However, these or similar proposals have so far been developed only as a brilliant academic exercise.<sup>82</sup>

With VATs keeping spreading worldwide, double taxation and non-taxation issues are undoubtedly high on an indirect tax agenda. The proposed research might include an inventory of the most common situations of double or non-taxation at the international level. Based on such an analysis, the study could also advance possible solutions to address these problems and mechanisms for coordinating taxing rights between different VAT jurisdictions.<sup>83</sup>

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<sup>79</sup> Pernilla Rendahl, 'Unilateral Measures to Avoid International Double (Non-) Taxation: VAT/GST v. Direct Taxation' in Michael Lang, Peter Melz and Eleonor Kristoffersson (eds), *Value Added Tax and Direct Taxation: Similarities and Differences* (IBFD 2009). See also Case C-593/19 [2021] SK Telecom ECLI:EU:C:2021:281, paras 45–46, which excludes any unilateral obligations for EU Member States to exempt a supply because the same supply is taxed in a non-EU country. According to the EU judges, only an international VAT agreement concluded with that third country could prevent double taxation.

<sup>80</sup> In principle, cross-border disputes between taxpayers and tax administrations in VAT could be solved through the mutual agreement procedure (MAP) laid down in Art 25 of the OECD Model. Two contracting states can, in fact, use the MAP under their tax treaty to solve cases of both juridical and economic double taxation, although concerning taxes not covered by the treaty (such as VAT). See also Thomas Ecker, 'Digital Economy International Administrative Cooperation and Exchange of Information in the Area of VAT' in Michael Lang and Ine Lejeune (eds), *VAT/GST in a Global Digital Economy* (Kluwer Law International 2015), 158–160, who distinguishes between 'disputes about the facts of a case' and 'disputes about legal interpretation'.

<sup>81</sup> A statement in favour of a VAT model convention was made in 2004 by the Business and Industry Advisory Committee to the OECD (BIAC) and the International Chamber of Commerce (ICC), as reported in OECD, *The Application of Consumption Taxes to the Trade in International Services and Intangibles: Progress Report and Draft Principles*, supra n. 61, 4.

<sup>82</sup> Thomas Ecker, *A VAT/GST Model Convention: Tax Treaties as Solution for Value Added Tax and Goods and Services Tax Double Taxation* (IBFD 2013).

<sup>83</sup> Possible solutions against double (non-)taxation and coordination mechanisms can be read in Michael Lang and others (eds), *CJEU – Recent Developments in Value Added Tax 2016* (Linde Verlag 2017), part II (62–136).

### E. Administrative cooperation and exchange of information

In a globalising world with more jurisdictions embracing a VAT, tax administrations are naturally encouraged to cooperate to detect tax evasion and avoid revenue losses. Indeed, even when national VAT systems strictly abide by the destination principle, several challenges may arise regarding administrative compliance.<sup>84</sup> Notably, VAT systems could experience serious hindrances to collect VAT from businesses not established in the jurisdiction of consumption, i.e., where VAT is due. Particularly in the case of online supplies by foreign suppliers, there is a misalignment between the country that has substantive jurisdiction to tax and the country with enforcing taxing powers.<sup>85</sup> Being soft law, the International VAT/GST Guidelines do not contain any legally binding mechanism for enforcing VAT rules on sellers located outside the consumption jurisdiction, although the OECD has outlined best practices for addressing these challenges.<sup>86</sup>

In principle, a variety of administrative cooperation and exchange of information instruments in international taxation could also be used for mutual assistance by tax administrations in VAT matters, namely: (i) the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters; (ii) the OECD Model Tax Convention (in particular the information exchange provision in Article 26 which applies to all taxes, including VAT); and (iii) the OECD Model Agreement on Exchange of Information on Tax Matters.<sup>87</sup> All these instruments offer a reasonable basis for mutual cooperation between tax authorities, both in individual or broader classes of cases, and provide for various methods of information exchanges (i.e., on request, automatic, or spontaneous). Enhanced possibilities for administrative cooperation and exchange of information could also result from recent developments in this field at the international level.<sup>88</sup> At the same time, a set of instruments for assistance in the recovery of taxes may be exploited for VAT collection purpos-

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<sup>84</sup> OECD, *supra* n. 15, 104–106.

<sup>85</sup> Walter Hellerstein, 'Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective' (2003) 38(1) *Georgia Law Review* 1.

<sup>86</sup> See OECD, *Mechanisms for the Effective Collection of VAT/GST Where the Supplier Is Not Located in the Jurisdiction of Taxation*, *supra* n. 41, which recommends countries to implement simplified registration-based compliance regimes for non-resident suppliers.

<sup>87</sup> However, under all the instruments mentioned above, a country may decide to restrict the scope of administrative cooperation to non-VAT matters only.

<sup>88</sup> See OECD, *Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy* (OECD Publishing 2020) 8, which provides that



es.<sup>89</sup> It should also be noted that closer mechanisms for cooperation between tax authorities are available at the regional level. Notably, Council Regulation (EU) No 904/2010 provides a framework for administrative cooperation in VAT among the EU Member States. Instead, the EU has concluded only two international agreements for administrative cooperation in VAT with third countries (i.e., Norway and the UK).<sup>90</sup>

Since VAT issues do not stop at one country's borders, the importance of exchange of information and other forms of administrative cooperation between different VAT jurisdictions can hardly be underestimated. Still, it is striking that this subject has not been much studied until now.<sup>91</sup> The proposed research might then analyse the main flaws of the current mechanisms for administrative cooperation and exchange of information. Building on these findings, the research could also study VAT-specific instruments for sound collaboration between different tax administrations.

### III. Future and expected developments

VAT has finally come of age with more than 50 years of experience. This chapter has tracked its developments through two broad research trajectories, i.e., the global spread of VAT and the digitalisation of the economy. Exploration of these patterns has enabled the identification of five major gaps and unexplored research issues, concerning:

- (i) businesses and consumers of online supplies;
- (ii) bundled, composite and mixed supplies;

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the information exchanged under such a new reporting regime can be used for VAT purposes in the jurisdiction receiving the information.

<sup>89</sup> See, in particular, Art 27 of the OECD Model (assistance in the collection of taxes).

<sup>90</sup> See, however, Commission, 'An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy' (Communication) COM (2020) 312 final, 13, stating that 'the Commission will propose starting the process to negotiate administrative cooperation agreements in VAT with relevant third countries (similar to the one between the EU and Norway), starting from some of the main trade partners of the EU'.

<sup>91</sup> See, however, Marc Bourgeois and Adeline Römer, 'Effects of Existing Tax Treaties on VAT (Relevance of Arts. 24–27 OECD Model for VAT/GST)' in Michael Lang, Peter Melz and Eleonor Kristoffersson (eds), *Value Added Tax and Direct Taxation: Similarities and Differences* (IBFD 2009).

- (iii) place of taxation of cross-border services;
- (iv) double taxation and non-taxation; and
- (v) administrative cooperation and exchange of information.

Clearly, neither these five major gaps nor the two broad research trajectories included in this chapter exhaust all developments and unexplored research issues in VAT. Other (major) developments in the indirect tax field can be expected in the (near) future.

Notably, high hopes are pinned on embracing technology solutions in VAT. Although several IT tools are available, two types of technology solutions are most promising for applications in VAT, i.e., real-time reporting and blockchain.

Real-time reporting consists of suppliers exchanging transaction details or invoices with tax administrations nearly in real-time. Real-time reporting systems allow businesses to automatically extract data from their accounting systems and share it with the tax authorities in a standardised electronic file. Many EU Member States are using or plan to use different real-time reporting systems, and the European Commission is expected to issue a proposal in this field in the next future.

Blockchain is another technology that looks attractive for VAT purposes. It is a form of distributed ledger technology (DLT) that enables recording and automating transactions and other processes, such as VAT payment. VAT-related interest in blockchain also rests in the possibility to share information with multiple parties in a trusted and verified manner, which could help reduce or prevent VAT fraud.

Whether or not the reader has a specific interest in any of the topics proposed above, the author believes that the ‘fiscal theme park’ of VAT – to borrow the sarcastic words of Lord Justice Sandley<sup>92</sup> – will not cease to pique the curiosity of those who decide to dive into the world of VAT.

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<sup>92</sup> *Royal & Sun Alliance Insurance Group plc v Customs and Excise Commissioners* [2001] EWCA Civ 1476 (CA) 54 (Sedley L).

