Articles

The Tax Treatment of Holding Companies in Mauritius: Lessons for South Africa

THABO LEGWAILA*
University of Pretoria

1 Introduction

The South African government announced in the 2010 Budget Review that it intends to promote South Africa as a gateway to investment into Africa.[1] During the years 2010 and 2011, government intends to undertake investigations as to what steps it should take in order 'to enhance our attractiveness as a viable and effective location from which businesses can extend their African operations'.[2] It is envisioned that some '[r]elief from exchange control and taxation for various types of headquarter companies located in South Africa will be considered'.[3]

Within the African continent, Mauritius has been aggressive in attracting investment into African countries to be channeled through Mauritius. The Mauritian approach focused on using the tax regime to achieve this purpose. Being considerably aggressive, the Mauritian authorities have been successful in attracting investment in this way. In light of the South African government's similar intentions, this article discusses the Mauritian corporate-tax provisions applicable to holding companies with a view to identifying the tax attributes that could be adopted by South Africa in enhancing this country's suitability to host headquarter companies.

A headquarter company is a holding company that is often formed where multinational groups of companies have significant economic interests in a region which is distant from its head office. The purpose of a headquarter company is to oversee and co-ordinate the group's business interests in a particular region. These companies usually provide the full range of administrative and management functions associated with a head office; for

* B Iuris (Venda), LLB, LLM (Wits), PG Dip Tax Law, LLM (Cape Town), LLD (Pretoria). This article is an adapted version of part of my doctoral thesis at the University of Pretoria entitled *The Suitability of the South African Corporate Tax Regime for the Use of South African Resident Intermediary Holding Companies* (2010).

[1] National Treasury *Budget Review* (2010) at 78.

[2] Ibid.

[3] Ibid.

Cite as: (2011) 23 *SA Merc LJ* 1–15.

example, treasury and tax management, internal audit, public relations, market research and marketing, insurance and accounting.[4]

Mauritius is similar to South Africa in numerous key respects. Like South Africa, it is an African country, a developing country, and a member of the Southern African Development Community. These features make Mauritius the suitable country to study and compare to assess and enhance South Africa's suitability to hosting holding companies. Furthermore, Mauritius is successfully being used by multinational investors as a gateway to invest in countries in Africa and around the world.

The Mauritian tax system is constantly being adjusted to make Mauritius an even more attractive investment destination. This adjustment is regularly influenced by tax and economic experts from all over the world who recommend incentives that would be more suitable for investors from outside Mauritius.[5]

2 Mauritian Corporate Income Tax

Mauritius has a global system of corporate income tax, that is, it is a residence-based tax system. The taxation of resident companies is governed by the Income Tax Act of 1995, which is, as is the case with its corporate laws, also substantially based on the equivalent law in the United Kingdom. A company is treated as resident in Mauritius if it is incorporated in Mauritius, or if it is managed and controlled from Mauritius. According to Joory,[6]

> '[i] In determining whether a company's central management and control is exercised in Mauritius, the tax authorities will look at the decision-making process to ascertain whether the key decisions are taken in Mauritius. The fact that the board of directors of a company normally meet in Mauritius is prima facie evidence that the company's central management and control is in Mauritius.'

A resident company is taxed on its worldwide taxable income. The worldwide taxable income includes foreign-source income. A non-resident company carrying on business through a branch in Mauritius is subject to tax on the income of the branch.[7] Mauritius does not have a controlled foreign company regime. Non-resident companies not carrying on business in Mauritius, even though they may be wholly-owned subsidiaries of a Mauritian holding company, will not be taxed in Mauritius. In this regard Joory comments as follows:[8]

> 'Foreign enterprises carrying on business in Mauritius are subject to tax only on their Mauritian-sourced income. When business is carried on through a registered branch, income is

[4] A Ogley *Principles of International Tax: A Multinational Perspective* (1993) at 137.

[5] Discussion with Prof Peter Harris, Director, Centre for Tax Law, University of Cambridge on 20 Mar 2009.

[6] D Joory *International Taxation of Low-Tax Transactions* (2008) at II/63, available at *http://books.google.co.za/books?id=prLYMAwtTcC&pg=PT52&lpg=PT52&dq=Mauritius* (accessed on 15 May 2010).

[7] Low Tax: Global Tax and Business Portal 'Mauritius Domestic Corporate Taxation', available at *http://www.lowtax.net/lowtax/html/jmudctx.html* (accessed on 16 Mar 2010).

[8] See Joory op cit note 6 at D II/55.

determined on the basis of the local activity of the branch. Deductions are allowed for reasonable head office expenses incurred in relation to the branch operations. A branch is liable to tax at the same rate and in the same manner as a local corporation. There is no additional tax on the transfer of branch profits.'

Taxable income includes rents, dividends, royalties and interest. However, dividends paid by 'tax incentive' companies, companies listed on the stock exchange, and companies which are fully taxable in Mauritius, are exempt from tax in the hands of the receiving shareholder, whether resident or not. Capital gains are not generally subject to tax in Mauritius. However, in certain instances capital gains arising from the disposal of land are taxed. All other capital gains are not included in taxable income.[9]

2.1 Rates of Tax

The rate of normal corporate income tax in Mauritius is currently 15 per cent on taxable income, having been reduced from 25 per cent as of 1 July 2007. Corporate profits are calculated by application of the ordinary principles of commercial accounting, subject to the rules contained in the tax legislation. In the 2007/2008 budget, the Mauritian treasury introduced a Special Levy on the banking sector that applies only to profitable banks. The Special Levy combines the features of a turnover tax and a tax on profits. It is calculated at 0.5 per cent of the turnover and 1.7 per cent of the profits made.[10]

The 2007/2008 budget also introduced an Advance Payment System (commonly known as 'APS') for companies. In terms of this system, companies are required to effect quarterly provisional tax payments on the basis of the taxable income of the preceding tax return. Final reconciliation of tax liability will be done when the annual tax return for that year is submitted.[11] Furthermore, all companies with an annual turnover of above R30 million or having more than 50 employees are required to submit their income tax and value-added tax returns electronically.

2.2 Alternative Minimum Tax

Since 2004, Mauritius has also applied the alternative minimum tax (the 'AMT') system. The AMT system is designed to ensure that taxpayers pay at least some tax, whatever the level of deductions. It applies if a company declares a dividend or distributes any shares instead of dividends and if the tax payable is less than 5 per cent of that company's book profits.[12]

---

[9] Low Tax: Global Tax and Business Portal op cit note 7. See also Low Tax: Global Tax and Business Portal 'Mauritius: Country and Foreign Investment Regime', available at *http://www.lowtax.net/lowtax/html/jmucfir.html* (accessed on 15 Feb 2011).

[10] Low Tax: Global Tax and Business Portal op cit note 7.

[11] To avoid double tax payment in the first year, the tax due for the previous year is spread over three years, in equal installments. The first quarterly payment was required from large companies as from the financial year starting 1 Jul 2008. See Mauritius: Domestic Corporate Taxation op cit note 7.

[12] See Mauritius Revenue Authority 'Electronic Filing of PAYE and VAT Return', available at *http://www.gov.mu/portal/sites/mra/efile.htm* (accessed on 12 Apr 2010).

AMT is payable by companies whose normal tax payable in an income year is less than 7.5 per cent of its book profit. The tax payable under the AMT system equals the lower of 7.5 per cent of the book profit[13] or 10 per cent of dividends declared for that year and any amounts distributed instead of dividends. The tax payable is the higher of the AMT or the tax payable under the normal corporate-tax rules. Book profit is reduced by the amount of exempt dividends from resident companies and profits and/or gains from the sale of fixed assets or securities, and is increased by disallowed expenditure incurred in the production of such exempt income.[14]

AMT does not apply to companies that are exempt from normal corporate tax. Furthermore, due to the method of calculating the normal tax (that is, multiplying the tax rate applicable to a company by its taxable income and deducting tax credits other than foreign tax credits) most companies that are owned by non-residents normally fall outside the scope of the AMT system.[15]

2.3 Other Tax Instruments

The Mauritian tax system does not contain most of the anti-avoidance provisions that are found in developed tax systems. There are no transfer pricing and thin capitalisation provisions, nor controlled foreign company provisions, exchange controls or withholding taxes.[16]

3 Tax Aspects that Make Mauritius Popular

From a tax point of view, Mauritius is a popular jurisdiction for multinational structures. As Joory[17] explains,

> 'Mauritius is a low tax jurisdiction, as well as a no-tax jurisdiction for certain offshore entities (referred to as Global Business Companies). Low taxation and tax exemption on sale of securities, coupled with a wide network of tax treaties makes Mauritius an attractive jurisdiction for cross-border business activities.'

The nil income tax rate on total net income before distributions applies not only to companies holding Global Business Licence 2 ('GBL2 companies'),[18] but also to headquarter companies, companies licensed to carry out activities in a Freeport zone, and offshore trusts electing non-residence status, among others.

In addition to GBL2 companies and the other companies that are not taxed, Mauritius imposes a low tax of 15 per cent on approximately 40 types of enterprises referred to as tax-incentive companies. The more prominent

[13] Book profit is calculated in terms of the generally accepted accounting principles. For purposes of the AMT calculation, capital gains and losses on revaluation of fixed assets, dividends received from resident companies, and trading profits and losses from the sale or revaluation of securities are excluded in the computation of book profit. See Ernst & Young *Worldwide Corporate Tax Guide* (2006) at 581.

[14] See Joory op cit note 6 at D II/53; see also Ernst & Young op cit note 13 at 580.

[15] Joory op cit note 6 at D II/53.

[16] I Oleynic *Mauritius Tax Guide* (2006) at 25; Ernst & Young op cit note 13 at 584.

[17] Joory op cit note 6 at D II/51.

[18] See par 3.1 below.

examples of these types of companies are companies holding a Global Business Licence 1 ('GBL1 companies'); unit trusts; authorised mutual funds; venture capital funds; manufacturing and export-service companies; companies operating in priority sectors such as hotels, housing, export service and small and medium-sized industries; and internet and network service providers.

Relative to its geographical size, low-tax system and international exposure, Mauritius has an extensive treaty network. It has a network of 33 tax treaties with eight awaiting ratification and six more being negotiated.[19] Besides this significant number, the Mauritian tax-treaty policy includes a preference for a tax-sparing[20] clause and minimum (often zero) withholding taxes.

3.1 Companies Holding Global Business Licences

The Mauritian government provides for Global Business Licences for Mauritian incorporated companies owned by foreigners. Companies holding Global Business Licences are very popular for foreign investment into Mauritius. The special tax regime for these companies was intended for that purpose. Two kinds of Global Business Licences are on offer: the GBL1 and the GBL2.[21]

There are specific rules applicable to both GBL1 and GBL2 companies. Both kinds may only conduct offshore-business activities with persons who are not resident[22] in Mauritius and in currencies other than the Mauritian rupee. They are not allowed to hold any immovable property in Mauritius, or certain securities in Mauritian corporations or any account in a bank in Mauritian currency.[23]

An additional benefit provided by the Mauritian Financial Services Development Act of 2001 to bodies regulated by it, including GBL1 and

[19] Mauritian Revenue Authority 'Double Taxation Agreements', available at *http://www.gov.mu/portal/sites/mra/dta.htm* (accessed on 16 Feb 2010).

[20] A tax-sparing clause is a tax-treaty provision in terms of which a contracting state agrees to grant relief from residence taxation with respect to source taxes that have not actually been paid – taxes that have been 'spared' or hypothetical taxes – in the other contracting state. See Organisation for Economic Co-operation and Development (OECD) 'Tax Sparing – A Reconsideration', available at *http://www.oecd.org/dataoecd/10/48/2090389.pdf* (accessed on 16 Feb 2010). See also the discussion on tax-sparing credit below in par 3.1.1(*b*)(*ii*).

[21] Oleynik op cit note 16 at 43-4.

[22] For purposes of determining residency in respect of individuals in Mauritius, a 'resident' is an individual who is domiciled in Mauritius unless his or her permanent place of abode is outside Mauritius; has been present in Mauritius in that income year, for a period of, or an aggregate period of, 183 days or more; or has been present in Mauritius in that income year and the two preceding tax years, for an aggregate period of 270 days or more. See KPMG 'Mauritius, Taxation of International Executives', available at *http://www.kpmg.com/SiteCollectionDocuments/TIES/MAURITIUS_2007_TIES.pdf* (accessed on 24 Mar 2010).

[23] Section 21(1) of the Financial Services Development Act of 2001. Specific securities that may not be held are 'any share, debenture, security or any interest in any company incorporated or registered under the Companies Act 2001 or in any société or partnership under the *Code Civil Mauricien* or the *Code de Commerce*, or in any body corporate or association formed or registered under any enactment in force in Mauritius, other than in a corporation holding a Category 1 Global Business Licence': s 21(1)(*b*) of the Financial Services Development Act of 2001.

GBL2 companies, is that of secrecy and confidentiality. No person or body is authorised to disclose information or present documentation to any court, tribunal, committee of inquiry or other authority in Mauritius unless ordered to do so by a court of law on application by the Director of Public Prosecution. The order can be made only for inquiry into the trafficking of narcotics and dangerous drugs, arms trafficking or money laundering. With the permission of the Financial Services Commission, disclosure of information may be made to the shareholders of the company, but such information is not available for public inspection.[24]

Headquarter companies are interposed between the operating subsidiaries and the ultimate holding company. This formation accords with the nature of the companies holding Global Business Licences in Mauritius. A headquarter company can be formed in Mauritius as a company holding a Global Business Licence, as it does not conduct any business and does not have to hold any immovable property directly.

3.1.1 Taxation of GBL1 Companies

A GBL1 company is a company engaged in qualified global business that is carried on from within Mauritius with persons who are all resident outside Mauritius and whose business is conducted in a currency other than the Mauritian rupee.[25] The Financial Services Development Act of 2001 provides that no person may conduct any 'qualified global business' unless that person holds a category 1 Global Business Licence.[26] A qualified global business for purposes of a GBL1 company, is any business or other activity specified in the Second Schedule to the Financial Services Development Act of 2001 which is carried on from within Mauritius. The Second Schedule lists the following activities: aircraft financing and leasing; assets management; consultancy services; employment services; financial services; funds management; information and communication technology services; insurance; licensing and franchising; logistics and/or marketing; operational headquarters; pension funds; shipping and ship management; and trading.

The GBL1 company is the recommended structure for individuals, body corporates, trusts or partnerships including limited liability partnership or a société for investment in any of the activities listed in the Second Schedule through a Mauritian entity.

3.1.1(*a*) Tax Residence of a GBL1 Company

A GBL1 company is required to be a tax resident of Mauritius. Such a company should obtain a Tax Residence Certificate (a 'TRC'). The TRC is

---

[24] Alliance 'Category 1 Global Business Company', available at *http://www.alliance-mauritius.com/gbl1.php* (accessed on 11 Mar 2010).

[25] See Alliance op cit note 24. See also Oleynik op cit note 16 at 44.

[26] See s 20(1)(*a*) of the Financial Services Development Act of 2001.

issued by the Commissioner of Income Tax. To be tax-resident, the company must demonstrate that its effective management and control is in Mauritius. To satisfy the residence test, the GBL1 company must satisfy the following six requirements:[27]

- The company must have at least two resident directors in Mauritius.
- The board meetings of the company must be initiated and chaired from within Mauritius. This requirement does not necessarily require that the meetings should be held in Mauritius. Where the meetings are held by way of, for example, tele-conferencing, the chairperson of such meeting should be located in Mauritius.
- The company must open and maintain an account with a local bank through which funds must flow.
- The registered office of the company must be situated, and all statutory records of that company must be stored, in Mauritius.
- The company's qualified company secretary must be resident in Mauritius.
- The company must have a local auditor.

Where an investor plans to incorporate a headquarter company in the form of a GBL1 company such investor would need to ensure that the above requirements are met. Failure to comply with these requirements could result in the headquarter company being disqualified as a GBL1 company and consequently face higher taxes. The investor might also be faced with more serious consequences in the home country.

3.1.1(*b*) Tax Treatment of a GBL1 Company

GBL1 companies are taxed at a flat rate of 15 per cent on their taxable income. Prior to June 2006, this tax rate for GBL1 companies was seen to be a tax-incentive rate. However, in 2007 the normal corporate tax rate was also reduced to 15 per cent, placing it on par with the tax rate for GBL1 companies. However, to some extent companies have retained their tax-incentive status as a result of the availability of tax-relief provisions that apply only to GBL1 companies.

The Mauritian Income Tax Regulations of 1996 allow for foreign tax credits on the foreign-source income of a Mauritian resident. In drafting these regulations, the approach has been to be as generous as possible to the taxpayer with regard to foreign tax credit, making the tax regime for GBL1 companies as attractive as possible.

[27] Orca-Worldwide 'Mauritius GBC I Company (Tax Resident – Treaty Access)', available at *http://www.ocra-mauritius.com/local/resident.asp* (accessed on 18 Apr 2010). See also Alliance op cit note 24.

Three forms of credits are on offer. Two of the credits apply to the actual tax paid or payable by the taxpayer and the other is a notional, presumed tax credit. The following three tax credits are available:

(*i*) Underlying Tax Credit

An underlying or foreign tax credit is a mechanism used to reduce or eliminate double taxation when the same income is taxed in more than one country. In terms of this method of eliminating double taxation, foreign taxes paid by a resident taxpayer on foreign-source income generally reduce domestic taxes payable by the amount of the foreign tax.[28] The underlying tax credit is granted in the residence country, that is, Mauritius. The foreign tax credit can be provided by unilateral means, where the country provides for the credit in its tax laws or by virtue of the tax treaty.

Foreign tax credit in Mauritius is granted through a unilateral provision contained in the tax law. Section 77 of the Mauritian Income Tax Act of 1995 provides as follows:

> 'Credits in respect of foreign tax
> (1) Where a taxpayer derives income which is subject to foreign tax, the amount of foreign tax so paid shall be allowed as a credit against income tax payable in Mauritius in respect of that income.
> (2) The credit in respect of foreign tax shall, in the case of a dividend, include credit for any foreign tax imposed on the profits out of which that dividend is directly or indirectly paid.
> (3) The Minister may, by regulations, provide for the implementation of the provisions of this section and for the granting of credit for foreign tax in such manner and on such conditions as he thinks fit.'

The foreign tax credit is granted on the amount taxable in Mauritius to the extent that such amount has been taxed in a foreign jurisdiction. The foreign tax credit will also, in the case of dividend income and where the shareholding is not less than 5 per cent, include any foreign tax imposed on the profits out of which that dividend has directly or indirectly been paid.[29]

(*ii*) Presumed Tax Credit

A presumed tax credit, like the tax-sparing credit, is not based on actual taxes paid. It is based on a presumed tax paid. The presumed tax credit applies as an alternative to the foreign or underlying tax credit. In order to apply for the foreign tax credit, the taxpayer must have actually paid the tax or be liable to pay such tax. However, with regard to the presumed tax credit, a certain amount of tax is presumed to have been paid, where the taxpayer produces no records of such payment or liability.[30]

Mauritian tax legislation provides for a presumed tax credit of 80 per cent of the Mauritius tax chargeable in case no documentary evidence is produced in support of the payment of foreign tax at the same rate as Mauritius.[31]

---

[28] BJ Arnold & MJ McIntyre *International Tax Primer* (2002) at 36.
[29] See the Income Tax (Foreign Tax Credit) Regulations 1996, GN 80 of 1996 (20 Jul 1996) in reg 7.
[30] See D Campbell *International Taxation of Low-Tax Transactions* (2007) at II/61.
[31] The presumed tax credit was reduced from 90% to 80% in 2002 by the Finance Act of 2000.

The Mauritian presumed tax credit presumes that 80 per cent of the income has been taxed in the source state. The presumption is not that the income was taxed at 80 per cent. If the latter were the case, all foreign-source income would not be taxed in Mauritius as according to the tax credit rules, the maximum tax payable in the residence country is payable. In this case, the maximum tax payable in Mauritius is 15 per cent. As a result, only 20 per cent of the income is taxable at a rate of 15 per cent resulting in an effective rate of 3 per cent.

(*iii*) Tax Sparing Credit

Tax sparing is a tax-treaty provision in terms of which a contracting state agrees to grant relief from residence taxation with respect to source taxes that have not actually been paid (thus, taxes that have been 'spared' or hypothetical taxes) in the other contracting state.[32] It is typically provided by way of a tax-sparing credit. Put differently, it is a credit granted by the country of residence of the taxpayer for foreign taxes that for some reason were not actually paid to the source country but would have been paid under the source country's normal tax rules.[33] The credit is normally granted in respect of notional source country taxes of a certain kind, for instance dividends, interest and royalties or to all income arising in the source state.[34]

A distinction may be drawn between tax sparing and matching credit. In tax sparing the notional foreign tax represents the tax forgone by the source country under special measures that are more often than not designed to encourage foreign investment. Matching credit, in contrast, operates as a kind of exemption that is not linked to the level of source-country tax or any reduction of it.[35] Without a tax-sparing provision in the treaty, the actual beneficiary of the tax incentive provided by a source country to attract foreign investment would be the residence country instead of the foreign investor, or the residence country instead of the country providing the tax incentive.[36]

The standard Mauritian tax-sparing clause provides that for the purposes of the normal tax credit granted by Mauritius's treaty partner, 'the tax payable in Mauritius shall be deemed to include the amount of tax which would have

[32] See HA Shannon 'Tax Incentives and Tax Sparing' (1992) 2 *International Tax Review* 84-96; OECD op cit note 20

[33] See Arnold & McIntyre op cit note 28 at 50.

[34] L Olivier & M Honiball *International Tax – A South African Perspective* (2008) at 333 outline the different forms of tax-sparing provisions may take as follows: (*i*) the state of residence may allow as a deduction or credit the amount of tax which the state of source could have imposed in accordance with its general legislation; (*ii*) the state of residence may allow as a deduction the amount of tax as limited by the tax treaty for a specific type of income e.g. dividends, royalties and interest; (*iii*) the state of residence may allow a deduction against its own tax of a specified amount fixed at a higher rate; or (*iv*) the state of residence exempts the income which has benefited from tax incentives in the source state. The Mauritian policy of tax sparing takes the first form.

[35] See B Larking (ed) *IBFD International Tax Glossary* (2005) sv 'Tax Sparing Credit'.

[36] Arnold & McIntyre op cit note 28 at 50.

been paid if the tax had not been reduced in accordance with laws designed to promote economic development in Mauritius'.[37]

The practical application of the Mauritian tax-sparing provision is that where the Mauritian laws provide for the imposition of a lower rate of tax, or for the exemption of income from tax, the treaty partner's tax authorities should allow a sparing-tax credit for the tax which would have been chargeable in Mauritius had those incentive provisions not been enacted. This ensures that the effective tax rate of the investor is limited to the tax that would have been payable in Mauritius.

3.1.1(*c*) Application of the Credits

A combination of the foreign tax credit or presumed tax credit and the tax-sparing provisions provide a significant tax relief measure for GBL1 companies.

The Mauritian tax credit presumes that 20 per cent of the foreign-source income has not been taxed. As a result, the 20 per cent is taxed at a tax rate of 15 per cent, resulting in an effective rate of 3 per cent. For example, if a GBL1 company earns MR200 million of foreign income, a presumed tax credit for MR160 million will be granted and the MR40 million will be taxed at 15 per cent resulting in an effective tax amount of MR6 million. In the same circumstances, if the taxpayer chooses to apply the foreign tax credit option on all income taxed in the source country, there would not be any tax in Mauritius, unless the source country taxes income at less than a 15 per cent rate.

Based on the aforegoing, the presumed tax credit option operates more efficiently than the foreign tax credit in circumstances where the underlying investment is located in a tax haven. According to this functional structure, investors from foreign tax partner countries wanting to invest in a tax haven or preferential tax regime are incentivised to set up a GBL1 company in Mauritius. Such company would benefit from the Mauritian tax treaties. The GBL1 company would then set up operations or a subsidiary in a tax haven. No or low lax will be levied in the tax haven. The income will be earned in Mauritius or brought in as a dividend.

The country of residence will not be able to tax because the company will be effectively managed in Mauritius. Any dividends accruing to the shareholders resident in the country of residence, would be subject to a tax-sparing clause, granting 15 per cent credit on the amount of the dividend received. The effective rate would depend on the tax rate in the resident country. Assuming all dividends are declared, as in the previous example, a GBL1 company earns MR200 million of foreign income, a presumed tax

[37] See art 23(2) of the Double Tax Agreement between Mauritius and South Africa of 1997, available at *http://www.sars.gov.za/home.asp?pid=3919#ComprehensiveTreatieMauritius.pdf* (accessed on 15 Feb 2011).

credit for MR160 million is granted, and the MR40 million will be taxed at 15 per cent resulting in an effective tax amount of MR6 million. If the shareholders of the GBL1 company are resident in a country with a flat tax rate of 35 per cent, the tax-sparing clause will apply to the effect that a credit of MR30 million will be granted. The shareholder's home country will levy a tax of MR70 million less the MR30 milion notionally paid in Mauritius. This will result in an overall effective rate of 20 per cent as opposed to 35 per cent that would have been effectively levied but for the tax-sparing clause.

3.1.1(*d*) The Benefits of GBL1 Licence for a Headquarter Company

The tax treatment of GBL1 companies in Mauritius is advantageous for headquarter companies. This is due to the fact that the headquarter company can be incorporated as a GBL1 company and access the benefits of the tax-sparing credit and either the underlying tax credit or the presumed tax credit. Where the foreign-source income is taxed at a rate of 15 per cent or more, applying the underlying tax credit would result in no tax being payable in Mauritius. However, where the tax is lower than 15 per cent, a presumed tax credit will result in an effective rate of 3 per cent in Mauritius.

In addition, where Mauritius has a tax treaty with the country of residence of the ultimate holding company,[38] the tax-sparing credit would grant a credit for the 15 per cent tax that would have been paid in Mauritius but for the GBL1-company incentive. In effect, therefore, the effective tax rate for the company would be the sum of the higher of 3 per cent Mauritian tax or the source-based tax levied on subsidiaries and the difference between the 15 per cent tax that should have been levied in Mauritius and the foreign dividend tax rate levied in the residence country of the ultimate holding company.

3.1.2 Taxation of GBL2 Companies

3.1.2(*a*) Tax Residence of a GBL2 Company

A company can qualify as a GBL2 company if it is wholly owned by persons who are not resident in Mauritius and operates exclusively outside Mauritius. In addition, a company may only carry on business activities as a GBL2 company if it satisfies the following criteria:[39]

- it must be a private company incorporated or registered under the Companies Act of 2000;
- it should not conduct business with persons resident in Mauritius;

[38] Mauritius has tax treaties containing tax-sparing credit provisions with the following countries: China, Croatia, India, Kuwait, Lesotho, Malaysia, Mozambique, Namibia, Nepal, Oman, Pakistan, Rwanda, Seychelles, Singapore, Swaziland, Sweden, Thailand, Uganda and Zimbabwe.

[39] Section 19(2) of the Financial Services Development Act of 2001.

- it should not conduct any dealings in Mauritian currency, the rupee; and
- it should have obtained the GBL2 licence issued by the Financial Services Commission.[40]

The legislative regime for GBL2 companies is more flexible than that of GBL1 companies.[41] A GBL2 company may be set up either by direct incorporation or by way of continuation. Alternatively, a GBL1 company may be converted into a GBL2 company. A GBL2 company may either be limited by shares or by guarantee, or limited by shares and guarantee, or simply unlimited. A GBL2 company may also be registered as a Limited Life Company. It must at all times have a registered agent (an Offshore Management Company) and a registered office in Mauritius where all statutory books and records are to be kept. The purpose of the registered agent is to communicate with the Mauritian authorities and to ensure that the company complies with statutory requirements.[42] Unlike GBL1 companies, GBL2 companies do not have to hold board meetings in Mauritius or have them set up or chaired in Mauritius. The GBL2 company board meetings can be held anywhere in the world.

GBL2 companies are generally used to carry on activities that include non-financial consultancy; information-technology services; logistics; marketing; shipping; ship management; non-financial trading; passive investment holding; and once-off transactions using a special purpose vehicle. In addition, the Financial Service Commission has the power to approve any additional activities upon application by the GBL2 company.[43]

3.1.2(*b*) Tax Treatment of a GBL2 Company

A GBL2 company is tax-exempt as it does not fall within the purview of Mauritian tax law. It does not pay any tax on its worldwide income to the Mauritian authorities. It does not pay any withholding tax on dividends, nor is any capital-gains tax levied on a GBL2 company. In effect, the tax cost of a GBL2 is effectively the foreign tax suffered. Because of its tax-exempt status, a GBL2 company does not have access to Mauritian tax treaties.[44]

The fact that GBL2 companies are not taxable in Mauritius, means that when a GBL2 company earns foreign-source income, such income will be fully taxed in the foreign country and when it distributes dividends to its shareholders, such dividends will be taxable in the home country of the shareholders without any tax relief. This limits the tax benefits derivable from

[40] The Financial Services Commission may refuse to license a company with a GBL2 if, in its view, the impact of the company's affairs on third parties is such that it needs to be subject to a higher degree of supervision. See International Financial Consulting 'GBL2 Companies', available at *http://www.ifcconsult.com/services_GBL2.asp* (accessed on 11 Apr 2010).

[41] See Ernst & Young op cit note 13 at 580.

[42] See International Financial Consulting op cit note 40.

[43] See Alliance 'Category 2 Global Business Company', available at *http://www.alliance-mauritius.com/gbl2.php* (accessed on 15 Apr 2010).

[44] Oleynik op cit note 16 at 44.

using a GBL2 company. As a result of these limitations, a GBL2 company, or a company of that nature, would not be ideal to use as a headquarter company.

3.2 Advance Tax Rulings

The Mauritian tax system allows a taxpayer to obtain a tax ruling from the Director-General of the Mauritian Revenue Authority in respect of the application of the tax law to income that the taxpayer derives or may derive.[45] The Mauritian provision is drafted in a wide form, to the extent that 'any person' may apply in relation to 'any income'. Practically, however, only persons that are liable to tax in Mauritius have an interest in obtaining such rulings. The ruling is not in respect of the transaction, as is the case with the rulings in the Netherlands and in South Africa. According to the Income Tax Act of 1995, the ruling is in relation to the income. In determining the application of the Act to the income, the Director-General would rely on the nature of the transaction giving rise to the income.

An application for a ruling should include 'full details of the transaction relating to the income together with all documents relevant to the transaction'[46] and 'specify precisely the question as to which the ruling is required'.[47] Upon application for the tax ruling, the applicant is required to provide a statement setting out the applicant's opinion as to the taxation of such income.[48] The tax ruling is binding on the Director-General.[49] Thus, the taxpayer will be entitled to be taxed on the income in the manner in which the Director-General indicated the tax implications of such income to be.[50] However, the ruling would not be binding on the Director-General if there is any material difference between the facts relating to the transaction and the details contained in the application.[51]

4 Conclusion

The Mauritius tax system is one of the most attractive in the world for holding companies. The corporate income-tax rate of 15 per cent is one of the lowest, compared to the corporate tax rates of most African countries.[52] Despite this low rate of tax, there are special low rates for companies undertaking certain business activities, including exporting and construction companies and companies in the financial services sector. The effective tax

[45] See s 159(1) of the Income Tax Act of 1995, read with the definitions in s 1 of 'Director-General' and 'Authority'.
[46] Section 159(2)(*a*) of the Income Tax Act.
[47] Section 159(2)(*b*) of the Income Tax Act.
[48] Section 159(2)(*c*) of the Income Tax Act.
[49] Section 159(4) of the Income Tax Act.
[50] Section 159(7) of the Income Tax Act.
[51] Section 159(5) of the Income Tax Act.
[52] The worldwide average corporate tax of rate for 2008 was 25.9%: see KPMG *Corporate and Indirect Tax Rate Survey* (2008) at 14, available on *http://www.kpmg.com/SiteCollectionDocuments/Corporate-and-Indirect-Tax-Rate-Survey-2008v2.pdf* (accessed on 2 Feb 2010).

rate of 3 per cent on GBL1 companies is a main attraction to use Mauritius as a host for a headquarter company.

The fact that dividends and capital gains are not subject to tax further enhances Mauritius as an ideal tax jurisdiction for most kinds of business. This is the more so given that no special circumstances have to exist for the dividends or capital gains to receive tax-free treatment. Furthermore, tax losses may be offset against future income for an indefinite period of time, with no monetary limit applying to such losses. In addition, where the alternative minimum tax applies, it limits the tax compliance cost and liability for eligible companies.

In addition to these positive general tax attributes, Mauritius achieved and maintains its attraction as a host for headquarter companies through the special tax dispensation that was designed to invite and draw foreign investment. The tax-exempt status of GBL2 companies makes these vehicles quite attractive in a group business structure. The fact that the GBL2 companies do not have access to the Mauritian tax-treaty network, severely diminishes the tax benefits of this entity. However, it is the GBL1 companies that yield the most tax benefits. The combination of the tax-sparing clause in the double taxation agreements and the presumed tax credits give the GBL1 company a major competitive tax advantage over structures that other countries worldwide offer investors.

It should be observed that observers regard Mauritian attempts to attract foreign investment using the tax system as extremely aggressive, to such an extent that it is often considered to be a tax haven.[53] South Africa is an observer in the OECD.[54] It gained observer status in 1998 in an attempt to foster good relations between South Africa and the OECD and OECD countries.[55] Care should be taken in designing an appropriate tax system to ensure that it is not considered too aggressive to hamper its relationship with the OECD.

The success of the Mauritian government in attracting holding companies is a lesson for South Africa and any other country that aims to attract such companies to their shores. Tax relief should be granted to headquarter companies whose presence does not adversely impact on the fiscus of the host country, that is, companies whose presence in South Africa is for pure administrative and management purposes of the group of companies.

It is also important to follow the Mauritian example by allowing incentivised holding companies to benefit from the facility of tax treaties. This

---

[53] See SAICA 'Mauritius Tax Opportunities', available at *www.saica.co.za/integritax/599_Mauritius_tax_opportunities.htm* (accessed on 1 Jun 2010); Tax Justice Network 'Mauritius – A Tax Haven?', available at *http://taxjustice.blogspot.com/2010/01/mauritius-tax-haven.html* (accessed on 25 May 2010).

[54] See P Mjwara, The Department of Science and Technology *OECD Review of the SA National System*, available at *http://www.dst.gov.za/presentations/oecd%20review.ppt* (accessed on 25 May 2010).

[55] W Blankley, M Scerri, N Molotja, I Saloojee (eds) 'Measuring Innovation in OECD and NON-OECD Countries' (2006), available at *http://www.hsrcpress.ac.za/product.php?productid=21* (accessed on 25 May 2010).

would eliminate the risk of the tax that has been saved in Mauritius from being picked up by another country, for example by way of a tax on foreign dividends or attribution of controlled foreign company income in the country where the ultimate holding company of the group is located. As we have seen, Mauritius achieves this by including tax-sparing provisions in its treaties.

The existence of a special regime is an important feature that attracts investors who fit the criterion of the country with such a regime. In Mauritius, the fact that there is a global business licence for foreign investors, serves as a confirmation of special treatment for investors operating in that country. South Africa should follow suit by providing such a special regime to ensure foreign investors of a special and favourable regime. Publicising the special dispensation for headquarter companies also has attractive attributes in favour of a regime that aims to attract headquarter companies. The Mauritian holding-company regime is clearly publicised with an unambiguous and transparent intention of attracting investors. It would therefore serve South Africa well by advertising its headquarter-company regime to investors searching for an ideal location to locate their headquarter companies.

As is the case with GBL2 companies, the location of the decision makers of the company should not affect the company's residence. Thus, the effective management allocation of residence should be disabled in relation to headquarter companies to allow such companies to be managed by persons who are not resident in South Africa. Finally, like the Mauritian system, the tax regime should be constantly reviewed to ensure that it is updated and is therefore able to cater for the changing business practices of investors. In this way the system would continuously be able to attract headquarter companies to South Africa.