UNIVERSITY OF PRETORIA
FACULTY OF LAW
CENTRE FOR HUMAN RIGHTS

THE NEED TO REFORM TRANSFER PRICING LAWS IN ZIMBABWE: A CRITICAL ANALYSIS

A research paper submitted in partial fulfilment of the requirement for the degree of Master of Laws in International Trade and Investment Law in Africa at the University of Pretoria.

Name: Primrose E.R. Kurasha
Student No: 10611640
Proposed degree: LLM in International Trade and Investment Law in Africa
Supervisor: Dr Femi Oluyeju
Date: 24 November 2017

Declaration

University of Pretoria

Faculty of Law

Centre for Human Rights

I, Primrose E.R. Kurasha, student number 10611640, understand what plagiarism entails and am aware of the University's policy in this regard. I declare that this mini-dissertation which is hereby submitted for the award of Legum Magister (LLM) in International Trade and Investment Law in Africa at the International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my own, original work and has not been previously submitted for the award of a degree at this or any other tertiary institution. Where someone else's work was used (whether from a printed source, the internet or any other source) due acknowledgement was given and reference was made according to departmental requirements.

____

P.E.R Kurasha

Pretoria

24 November 2017

Dedication

To a restored Zimbabwe, I dedicate my intellectual efforts to you. I dream about you, I envision your grandeur, I am obsessed with you. I will lead you and when I lead you, I will not let you down. God will preserve both our lives.

To ABSA Bank, thank you for funding my education. This was such an enlightening journey. It is in the same breath that I would also like to thank my Supervisor, Dr. Femi Oluyeju. Your morsels of wisdom were nourishing to my mind.

To my dear mother, the late Prof. Primrose Kurasha, I end alone a journey which we started together. I am humbled to be your illustrious and precedent-setting legacy in this world.

To my father, Prof. Jemison Kurasha, thank you for giving me the academia DNA. Your guidance as I wrote this dissertation enabled me to start and finish strong.

To my dear sister, Flora Kurasha, I am eternally grateful for your assistance in proof-reading this dissertation and for our robust discussions about the economy of our much beloved nation. Your clarity of thought is truly bedazzling. I am blessed to call you a friend, a twin-sister and a mentor.

To Imad Karrit, you literally held my hand from the beginning of this Masters' journey, by assisting me with my applications and right up to the end, by proof-reading this dissertation and shedding tears of joy with me in celebration of reaching the finish line. I pray that one day my Zimbabwe and your Mozambique will greatly benefit from our bond and camaraderie.

To my dear God, thank you for entrusting me with this gift of leadership, dream of a restored Zimbabwe, a strong character to bring it to pass and most importantly an unrelenting ethical work ethic. Thank you for granting me this opportunity to be highly educated.

To myself, you made it girl! Well done Your Excellency!

Table of Contents

CHAPTER 1: INTRODUCTION 7

1.1 Background to the research subject matter………………………………………. 7

1.2 Research Problem………………………………………………………………… 8

1.3 Research Questions……………………………………………………………… 8

1.4 Thesis Statement…………………………………………………………………. 9

1.5 Justification……………………………………………………………………… 9

1.6 Literature Review…………………………………………………………….... 10

1.7 Research Methodology……………………………………………………….. 16

1.8 Overview of Chapters………………………………………………………… 17

CHAPTER 2: THEORIES OF TRANSFER PRICING 19

2.1 Introduction…………………………………………………………………….19

2.2 Theoretical analysis of transfer pricing………………………………………… 19

2.3 What is transfer pricing? 19

2.4 How is transfer pricing done? ……………………………………………….. 19

2.5 Objectives of transfer pricing………………………………………………… 20

2.6 Theories of transfer pricing: Introduction……………………………………… 20

2.6.1 Approach to theories…………………………………………………….. 20

2.6.2 Theories of transfer pricing from a trade perspective………………… 23

2.7 The uses of transfer pricing: Practical examples……………………………….. 26

2.7.1 Corruption……………………………………………………………….. 26

2.7.2 Illicit financial flows…………………………………………………….. 27

2.8 Conclusion……………………………………………………………………… 28

CHAPTER 3: THE TRANSFER PRICING REGIME OF ZIMBABWE………………… 29

3.1 Introduction……………………………………………………….................... 29

3.1.1 The history of transfer pricing in Zimbabwe………………………… 29

3.2 Transfer pricing in Zimbabwe: Definition and characteristics………………… 30

3.2.1 What is transfer pricing in Zimbabwe? ……………………………… 30

3.2.2 Why is transfer pricing important in the Zimbabwean context? …….. 30

3.2.3 Affected transaction in terms of transfer pricing…………………….. 31

3.3 Transfer pricing laws in Zimbabwe…………………………………………… 31

3.3.1 Sources for the transfer pricing law in Zimbabwe………………… 31

3.3.2 The context of section 98B transfer pricing rules…………………. 31

3.3.3 Case law on transfer pricing……………………………………….. 37

3.4 Participants of transfer pricing in Zimbabwe………………………………... 38

3.5 Conclusion………………………………………………………………… 39

CHAPTER 4: COMPARATIVE LAW ON TRANSFER PRICING - THE CASE STUDY OF SOUTH AFRICA..42

4.1 Introduction…………………………………………………………….... 42

4.2 The definition and characteristics of transfer pricing in South Africa………... 42

4.3 The participants of transfer pricing in South Africa………………………….. 43

4.4 Consequences of transfer pricing in South Africa……………………………. 44

4.5 The law on transfer pricing in South Africa………………………………….. 44

4.5.1 Legislation……………………………………………………….. 45

4.5.2 Case Law………………………………………………………… 48

4.6 Methods used to arrive at an arm's length principle………………………….. 48

4.7 Conclusion and recommendations……………………………………………. 51

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS 56

5.1 Introduction…………………………………………………………….... 56

5.2 Summary of findings and conclusion………………………………………… 56

5.3 Recommendations…………………………………………………………. 57

5.3.1 Representation……………………………………………………… 57

5.3.2 Citizenry engagement……………………………………………… 58

5.3.3 Establish professional codes of conduct…………………………… 60

5.3.4 Judicial bodies……………………………………………………… 62

5.3.5 Transparency and country-by-country (CbC) reporting by MNCs… 62

5.3.6 Document trusts…………………………………………………….. 64

5.3.7 Donor assistance towards revitalising the tax system………………. 64

5.3.8 Personnel training and recruitement……………………………….... 66

5.3.9 Stolen Asset Recovery Initiative……………………………………. 67

5.3.10. Informal economy engagement…………………………………… 68

5.4 Conclusion……………………………………………………………….. 70

BIBLIOGRAPHY 74

CHAPTER 1: INTRODUCTION

1.1 Background

Transfer pricing describes the process whereby related entities such as a firm and the subsidiary manipulate the prices of their products in order to avoid paying tax.[1] This is very common amongst firms located in various jurisdictions such as Multi-national Corporations (hereafter referred to as "MNCs").[2] For example, a firm A in South Africa will sell its products for a much lower price (called a transfer price) to its subsidiary AB in Ireland and A will end up conveniently incurring a loss in order to evade being charged high taxes in South Africa, a country characterised by a high corporate tax rate. On the other end, AB will then recoup the losses by selling the products of the firm at the actual market price or at a higher price in Ireland and this they will be able to do because of the low tax rate charged on companies which operate in Ireland. Therefore, Ireland becomes a tax haven which then allows for tax avoidance, in the form of transfer pricing, by A.

Transfer pricing is tantamount to tax avoidance which is in violation of the arm's length principle. The arm's length principle of pricing states that a good or service must fetch the same price as it would, had the parties or firms transacting been independent.[3]

The five Organisation for Economic Co-operation and Development (hereafter referred to as "OECD") pricing methods are employed in order to determine the comparable arm's length price for a controlled transaction.[4] These five include the comparable uncontrolled price method, resale price method, cost plus method, transactional net margin method and the transactional profit split method.

May it kindly be noted that the words, 'taxpayer', 'MNC' and 'firm' are used interchangeably in this research. 'Unit', 'division', 'company' and 'subsidiary' are terms which are also used interchangeably according to the context.

---

1 B Croome *et al "Tax Law: An Introduction"* (2013) 538.

2 OECD Report of the Committee on Fiscal Affairs *'Transfer Pricing Guidelines for Multinational Enterprise and Tax Administrators'* (1994) 172 *Intertax* 318 para 12; Tanzi V *'Globalization, Tax Competition and the Future of Tax Systems'* (International Monetary Fund Working Paper 1996) 6.

3 Croome (n1 above) 539.

4 OECD *'Transfer Pricing Guidelines'* 336 para 87.

1.2 Research problem

The problem that my research is going to focus on is that of the ineffectiveness of transfer pricing law in Zimbabwe. Transfer pricing legislation in Zimbabwe has proven to be ineffective in curbing tax avoidance in the form of transfer pricing. Therefore, the ineffective transfer pricing laws need to be firmed up through reformation.

The ineffectiveness of transfer pricing legislation has been evident in the manner in which transfer pricing has remained rampant as a form of tax avoidance in Zimbabwe. Transfer pricing is a problem in Zimbabwe because it is also used for illicit financial flows from Zimbabwe. Therefore, this makes transfer pricing another potent platform used by foreign investors to syphon money out of the country. For example, in some countries, Zimbabwe included, there is a threshold given by government that when one invests, he or she cannot repatriate all the capital and they are only allowed to repatriate 50%. However, these foreign investors employ disguised means in order to circumvent the tax laws and repatriate all the money to their home states or to a tax haven. It logically follows therefore, that this topic of tax avoidance and transfer pricing is a very sensitive topic in the domain of trade and investment in Zimbabwe, which has become a source of governmental concern. This severity of transfer pricing and the magnitude of the problem justifies the aforementioned claim that, the laws of transfer pricing in Zimbabwe are ineffective hence, they need reformation. Effective transfer pricing laws regulate trade activities in order for them not to get out of hand as is illustrated in this example of the 50% repatriation quota.

1.3 Research question

How can transfer pricing laws in Zimbabwe be transformed to become effective?

However, in answering the major research question, the following sub-questions will also be answered consecutively, per chapter.

1.3.1 Sub-questions

i. What are the relevant theoretical underpinnings that can drive this research?
ii. What is transfer pricing and what are the implications?
iii. What is the current Transfer Pricing legislation in Zimbabwe?

iv. In terms of comparative law, what is the transfer pricing legislation in South Africa and how does it compare to that of Zimbabwe?

1.4 Thesis statement

The transfer pricing laws in Zimbabwe are not effective and are just as good as absent therefore, the main argument in this study is that they need to be reformed and reviewed. This action will facilitate greater revenue collection by the Zimbabwean government.

This study argues for the strengthening and reformation of transfer pricing laws in Zimbabwe. This speaks to the reform-mindedness of Trade and Investment lawyers such as me, who seek to increase the capacity of the private and public sector as we are trained to be transactional lawyers. The law is ineffective in that there are gaps related to transfer pricing laws or regulations. Therefore, in my arguing for the firming up and improvement of transfer pricing laws, I am basically advocating for the filling in of these *lacunae*.

1.5 Justification

The justification of this research is necessitated by the time, energy and expenses that it will take up for it is only for a systemic problem, which is yet to be addressed, that one can invest to such a large extent. Furthermore, this research is justified by the pernicious effects that transfer pricing has had on the Zimbabwean economy and I am going to explain this further. The ineffective transfer pricing legislation of Zimbabwe has led to tax avoidance, in the form of transfer pricing, being perpetuated. The repercussions of transfer pricing have had a domino effect on the economy which has seen taxes not being paid as and when they fall due. It logically follows that people in Zimbabwe are taking undue advantage of transfer pricing and its ineffective legislation and the implications of this are great and burdensome in the sense that, the fiscal space for the state of Zimbabwe has contracted as taxes play a vital role when it comes to the financial wherewithal of the government. This was confirmed by Zimbabwe's Finance Minister Honourable Chinamasa in his US$4.1 billion 2017 budget presentation to the Parliament and nation of Zimbabwe.[5] Therefore, once the people and businesses begin to avoid taxes in the form of transfer pricing, it depletes the national coffers. Once they are depleted this has dire socio-economic consequences. In other words, the government will not have

---

[5] Zimbabwe Independent 'New tax regime: Govt robbing the poor' 13 April https://www.theindependent.co.zw/2017/04/13/new-tax-regime-govt-robbing-poor/ (accessed 21 June 2017).

enough money to provide services, to procure infrastructure, to maintain it, to pay the salaries of its civil servants, etc.[6] All of this and more, Zimbabwe is currently experiencing and this is partly due to tax avoidance by Zimbabweans, partially in the form of transfer pricing. Tax avoidance in the form of transfer pricing has castigated the Zimbabwean economy due to ineffective and poor regulation.[7] Therefore summarily, the legal net, i.e. the Zimbabwean laws on transfer pricing, have not essentially helped matters. These pernicious effects of transfer pricing in Zimbabwe which are exacerbated by an ineffective transfer pricing legislation in justify this investigation.

1.6 Literature review

The Zimbabwean Finance Act of 2017 was hailed by many business analysts as an adjunct or supplementary tool to transfer pricing legislation.[8] This is because it deters tax avoidance by the informal sector, through the imposition of a new raft of taxes on the informal sector which is notorious for tax evasion. Affected parties included taxi and commuter omnibus operators, hairdressers and cross border traders.

According to the International Labour Organisation (hereafter referred to as "the ILO") 2016 Report, anti-tax avoidance laws on the informal sector are the best manner in which to collect revenue. This is because the informal sector is a major source of economic growth. Using a case study of Mauritius, the ILO observed that its economy had grown and is now the 10th largest in Africa because the government taxes and collects a lot of revenue form the informal sector. Mauritius' unemployment rate sits at 7.5% to date. According to the ILO, Zimbabwe's unemployment rate sits at 95%. It therefore goes without saying that Zimbabwe stands to benefit, in terms of economic growth, if it places effective anti-tax avoidance laws on issues such as transfer pricing by its large informal sector which not only outweighs its formal sector but holds more money and revenue. This would also solve Zimbabwe's cashflow and liquidity conundrum as it is estimated that about US$3 million to US$7million is currently circulating in Zimbabwe's informal sector.

---

6 Tralac Trade 'Zimbabwe tightens taxation to prop up falling economy' 15 September https://www.tralac.org/news/article/6239-zimbabwe-tightens-taxation-to-prop-up-failing-economy.html (accessed 22 June 2017).

7 As above.

8 The Finance Act of Zimbabwe [Act 2/2017].

It is vital that in order for the current transfer pricing legislation in Zimbabwe to be effective, its correct interpretation as an anti-tax avoidance law must be done. It serves as a law that convicts taxpayers whose main objective is to obtain a tax advantage by avoiding the payment of taxes. In light of this intention of the policy-makers in drafting the piece of legislation, purposive interpretation of the transfer pricing legislation is therefore imperative according to Murray.[9] The purpose of stopping tax evasion which the Parliament had in mind when drafting this legislation must therefore be prioritised by the courts when convicting of such tax evasion. This same reasoning behind purposive interpretation of tax law, in order to avoid tax evasion, can be extended to tax avoidance which is a cousin of tax evasion. Purposive interpretation has proved effective in English law, in the precedent setting case of *Lord Howard de Walden v IRC*.[10] In this case Lord Greene set a sound anti-tax avoidance principle by interpreting anti-tax avoidance legislation narrowly and purposively instead of broadly. Barring any form of rebuttal from the alleged taxpayer, he passionately concluded that it scarcely lies in the mouth of the taxpayer who plays with fire to complain, moreso against the strict interpretation of the anti-avoidance law which he tries to circumvent.

This is noteworthy as it is evidence of the evolution of the jurisprudence around the interpretation and application of anti-tax avoidance legislation. 'Evolution' is an appropriate term because before a more effective purposive interpretation method was adopted, anti-tax avoidance legislation used to be interpreted, not in a narrow and purposive manner, but by using a 'different method' as was explained by Lord Wilberforce in *IRC v Joiner*, in relation to the transactions in securities legislation namely, the Income Tax Act.[11]

Furthermore, a more practical solution to the problem of tax-avoidance in the form of transfer pricing, is citizenry engagement by ZIMRA, working *in tandem* with the Ministry of Finance. According to Tax Justice Network-Africa (hereinafter referred to as "the TJN"), a renowned civil society group within the tax fraternity, the missing ingredient in good tax policy is representation.[12] This representation entails ZIMRA engaging with corporates in as much as village assemblies and the entrepreneurs who define the informal sector, in order to conscientise them of the vitality of paying taxes instead of avoiding them.[13] ZIMRA needs to

9 R Murray Tax Avoidance (2012) 6.
10 [1942] 1 All ER 287.
11 [1975] 1 W.L.R. 1701.
12 TJN-Africa *Tax us if you can* (2011) 54.
13 As above.

educate them that tax avoidance only comes back to bite them in the form of a crippled economy characterised by many socio-economic ills as are currently bedevilling Zimbabwe.

Transfer pricing is a form of tax injustice because of its very nature, i.e. the avoidance of paying taxes by a taxpayer. Its perpetuity as a tax injustice can be attributed to factors such as the presence of secrecy jurisdictions around the world which provide services typified by high confidentiality levels thus enabling the hiding of taxable incomes and harbouring criminal activities. The world's most infamous secrecy jurisdictions are Panama, Ireland and London which unsurprisingly houses Egypt's Rosetta Stone.

Secrecy jurisdictions are defined as places that intentionally create regulation for the primary benefit and use of those not resident in their geographical domain.[14] That regulation is designed to undermine the legislation or regulation of another jurisdiction.

The other phenomenon that is evident in the tax injustice of tax avoidance and its transfer pricing component, as compared to tax evasion, a crime for which many have been convicted, is the inability of the tax revenue authorities to track down tax avoidance and ameliorate it by making the offenders pay the tax and in the worst case scenario, convict them. This is due to the very nature of tax avoidance as compared to tax evasion in the sense that, the tax avoidance industry clearly distinguishes between tax evasion, which is illegal in most countries, and tax avoidance, which usually involves exploiting loopholes in tax legislation.

In order to grasp transfer pricing and tax avoidance clearly, theoretical underpinnings that define transfer pricing must be elucidated. Inherent to a taxpayer's duty to pay taxes and not avoid them through transfer pricing is the responsibility of honouring an inherent social contract implicit in taxation, which aims at ensuring the constant provision of national services to the taxpayers themselves. This is well expressed in the African philosophy of *Ubuntu*, in other words 'humanness'. Articulated by the Zulu maxim *'umuntu ngumuntu ngabantu',* Nelson Mandela articulates the philosophy of *Ubuntu* as a oneness in people which enables the sustenance and survival of each member of that community and foreigners as well, courtesy of

---

[14] TJN-Africa (n17 above) 2.

monetary and non-monetary handouts, donations and gifts within that same community, which improve the community member's livelihood.[15]

Zimbabwean author Chakaipa proceeds to define *ubuntu* as the philosophy of *unhu*. *Unhu* is the Shona term for *Ubuntu*. In the same breath as Mandela, he reiterates that *unhu* is typified by the unity of a community which enables one to survive and become.[16] In other words, one cannot become or evolve into self-actualisation, Maslow's highest form of a human's development in his famous 'hierarchy of needs', if he is not rooted in a community which grooms and trains him for such evolution and success.

Evident in the philosophy of *ubuntu* is co-dependence of citizens, foreigners and refugees. All of these groups which happen to form the constituency of taxpayers in a nation. *Ubuntu* denotes co-dependence which prioritises socio-economic justice. Tax payment is therefore, a modern day *Ubuntu* which promotes the collective good of citizens through socio-economic justice by having every taxpayer pay tax and not avoid doing so through e.g. transfer pricing. This therefore ensures the greater good of all the nation and its inhabitants to be treated in a humane and decent manner as per the requisites of *ubuntu*.

Theoretical underpinnings are not only existent in transfer pricing when it concerns the problem of transfer pricing itself but they also exist when it comes to the solutions for the problem of transfer pricing and tax avoidance. In order to ensure tax compliance by taxpayers through the end of transfer pricing and a tax policy guided towards the need of taxpayers and their better representation, the 4R theory was propounded.[17] The 4Rs are namely, Raise (revenue equitably); Redistribute (income and wealth to address poverty and inequality); Reprice (goods and services) and Representation (by the taxpayers). This study focuses on the 2Rs' namely, Raise (revenue equitably) and Representation (by the taxpayers).

In this study, the fourth 'R' of representation is a solution to the problem of transfer pricing. This is because history has shown that unjust tax systems lead to tax avoidance and non-compliance. However, good tax bargaining between the government and the taxpayers creates

---

15 'Nelson Mandela describes the concept of ubuntu', New York: dotSUB http://dotsub.com/view/2ff54345-ea2f-492e-b62a-46a04ff2221e

16 K Chakaipa *Karikoga Gumiremiseve (The Ten Arrows)* (2001) (1958).

17 Tax Justice Network- Africa *Tax Us If You Can* (2011) 6.

an equitable system in which taxes are paid more coherently and systematically. Therefore, this goes to show that representation in the form of citizenry engagement are important components of a sound tax policy. Examples of groups that advocate for representation include investors who feel they pay too much corporate tax because they are not well represented hence, they end up engaging in transfer pricing.

On a comparative basis, South Africa has a lot of literature and law around the area of transfer pricing. In South Africa, the South African Revenue Service (hereafter referred to as "SARS") regulates transfer pricing in accordance with s31 of the Income Tax Act, 1962, which is based on the transfer pricing provisions provided by the OECD guidelines on transfer pricing. According to these, the mandate of the SARS is to ensure that a transaction is concluded at an arm's length principle and that group entities also conclude their transactions at an arm's length. As is the case of Zimbabwe, the employment of the arm's length principle is to be determined by SARS using the OECD's five aforementioned payment methods.

SARS regulates transfer pricing in terms of s31 of the South African Income Tax Act through the Commissioner who is empowered to adjust the price of a transaction which was not concluded according to the arm's length principle. Not only does the Commissioner proceed to raise the price of the transaction and set it at what it would have been had it been concluded according to the arm's length principle but he also taxes the concerned entities accordingly and raises penalties and interest.

South African transfer pricing jurisprudence is characterised by certain key concepts which is an obvious sign of a well-established anti-transfer pricing system. These concepts include definitions of key concepts such as "an affected transaction", "connected person", a "natural person", a "tax benefit", a "company", a "trust" and a "close corporation". Besides the violation of the arm's length principle, these are also the focal points of the Commissioner in investigating and establishing the occurrence of transfer pricing.

The beauty of a well-established anti-transfer pricing system in South Africa has been in its continuous growth and advancement which has seen South African transfer pricing legislation evolve from a unilateral approach and embrace a multinational approach, by collaborating with

other G20 countries in the formation of the OECD BEPS Action Plan.[18] This is a model law for anti-transfer pricing which aims to fight transfer pricing in respect of base erosion and profit sharing.[19] The 2015 BEPS Final Report contains actions 8 to 10 whose provisions align transfer pricing outcomes with value creation.[20] Transfer pricing issues dealt with in this study concern intangibles including contractual allocation of risks and profits.

Continuing on the same comparative trajectory, this investigation proceeds to focus on transfer pricing in Africa. Again the python of tax avoidance in the form of transfer pricing, is seen striking at the core of revenue collection and incapacitating the function of governments. It is for this reason that transfer pricing legislation has been prioritised in the 21st Century. It has been prioritised to such an extent that there has been significant debate on the most effective tax regime for African countries as a whole in order to combat cross border tax crimes such as transfer pricing. However, efforts towards realising this homogenous African tax regime have been stifled by the fact that the sophistication of revenue authorities in Africa varies immensely and so does the nature of challenges uniquely faced by the African countries.

Nonetheless, ameliorating transfer pricing remains a priority in African nations in order to protect local tax bases and this led 37 African countries voluntarily joining the African Tax Administration Forum (hereafter referred to as "ATAF") between 2009 and 2015.[21] The main aim is to increase voluntary tax compliance and curbing tax evasion and avoidance.[22]

The UN has also accelerated these efforts to curb transfer pricing in Africa by educating developing African nations on how to draft transfer pricing legislation, how to set up specialised transfer pricing units and how to identify and work with transfer pricing databases and how to pursue simplified strategies for testing the arm's length nature of related party transactions.[23]

---

18 Adams & Adams' *Transfer Pricing*: (2016) 3
19 As above.
20 As above.
21 https://www.ataftax.org/en/members/countries (accessed 18 August 2017).
22 https://www.ataftax.org/en/about/overview (accessed 18 August 2017).
23 United Nations Practical Manual on Transfer Pricing for Developing Countries (2017) iii.

1.7 Research methodology

This will be a qualitative paradigm in the form of desktop research. It will constitute of a critical comparative analysis of the Zimbabwean transfer pricing legislation and the South African transfer pricing legislation. This critical analysis is also open to more than one answer. South Africa is used as a case study in this inquiry because it has been identified as the ideal case study based on practices that would be characterised as best practices of transfer pricing laws in terms of efficacy. Moreover, South Africa is most suitable because South Africa and Zimbabwe are of the same Roman-Dutch legal family. Furthermore, South Africa has a more developed and well established tax law system which is characterised by sound policies, and their implementation, around transfer pricing and tax avoidance hence it is suitable for my comparative analysis.

This investigation will prioritise primary law in the form of legislation and case law. This is because of its binding nature on the topic of transfer pricing. It is however observed that not much Zimbabwean or South African case law exists around transfer pricing. In Zimbabwe's case, this is because the transfer pricing legislation in Zimbabwe has recently been enforced since 1 December, 2016 and therefore, the law is still evolving. Whilst neither of the two nations has developed case laws, at least South Africa has effective, mature and well implemented legislation. This research will also employ case studies in the case of Zimbabwe.

Imperative to this investigation will also be a focus on secondary law. This research will employ a detailed discussion of related literature which dwells on the theoretical underpinnings of transfer pricing. These will inform the reader of the type of transfer pricing that has taken place in Zimbabwe. This literature will include academic publications, news articles, and articles by firms which solve these cases, to mention but a few. These news or website articles are vital as they convey the day to day incidents of transfer pricing and the application of the law thereof. In other words, they paint a true picture of the status quo of transfer pricing laws in Zimbabwe and South Africa thus, enabling one to judge the efficacy and the evolution of transfer pricing laws in Zimbabwe and comparatively South Africa.

Furthermore, the academic articles enable one to grasp the transfer pricing problem and the laws around tax avoidance from a very critical approach.

This study adopts a critical approach as a way to analyse transfer pricing legislation in Zimbabwe and to recommend the most efficient manner in which transfer pricing can be tackled. This critical approach will consider the current debilitating economic environment in Zimbabwe, the political turmoil, the poor implementation of these tax policies through the judiciary and how all of this catalyses the rampant transfer pricing currently castigating the Zimbabwean economy.

Besides a comparative and a critical approach, this investigation will also be characterised by a historical approach. This historical approach will be enriched by academic articles and other secondary law sources. The historical approach will give a historical background to the problem of transfer pricing in Zimbabwe and thus inform the reader of its undesirable effect thereof and the subsequent necessity of having effective and reformed transfer pricing legislation in Zimbabwe in order to tackle this historical tax avoidance in Zimbabwe. This historical approach helps explain the prevalence of transfer pricing in Zimbabwe in other words. It also acts as a tool for the critical approach in terms of its ability to lay a platform for the description, interpretation and examination of transfer pricing and its laws, which, in this investigation, will later be analysed and criticised in true form and style of the critical approach.

1.8 Overview of chapters

Chapter 1: Introduction

This introductory chapter will be characterised by a full description of the background to this research and the problems that inform it. It then progresses to give an outline on transfer pricing legislation in Zimbabwe. The aim of this is to zoom into the topic and this will herald the start of a clearer discussion of this investigation. Thereafter, the aforementioned research problem will follow. The research question and sub-questions to this research will then ensue. This will then feed into a discussion of the thesis statement which will be followed by a justification of my research. The literature review of the investigation will then ensue. Subsequent to that will be a detailed research methodology. This will be followed by a Chapter overview which will conclude the chapter.

Chapter 2: Theoretical Analysis and Underpinnings of Transfer Pricing

Summarily, this second chapter of the study will give a narrative of transfer pricing. Coupled with this narrative will be a theoretical analysis of this transfer pricing. The conclusion of

chapter 2 shall be in the form of case studies which will be sealed at the end by a chapter conclusion.

Chapter 3: Analysis of the current Transfer Pricing legislation in Zimbabwe

This chapter will comprise of a narrative of transfer pricing in Zimbabwe characterised by a historical approach. A critical approach of the current transfer pricing legal regime in Zimbabwe shall then follow. It will consist of not only transfer pricing in Zimbabwe but also the recently enacted law around transfer pricing in Zimbabwe.

Chapter 4: Comparative Law on Transfer pricing

Chapter 4 will be a fusion of a historical approach, a critical approach and a comparative approach. This is because, using the historical approach, a narrative of transfer pricing in South Africa and the enactment and evolution, through its application by the courts, of the South African transfer pricing legislation shall be given. This will progress into an examination and analysis of transfer pricing in South Africa and the implementation of South African transfer pricing laws thereof. The chapter shall conclude on a comparative note which mainly focuses on comparing the transfer pricing regime in Zimbabwe to that of South Africa. The approach to be adopted is akin to that of a peer review mechanism. This section shall also highlight the challenges not only of transfer pricing but also of the transfer pricing laws in South Africa, challenges on which Zimbabwe can improve on. This is obviously after having discussed the challenges of transfer pricing laws in Zimbabwe in the beginning of this chapter under the narrative of transfer pricing in Zimbabwe.

Chapter 5: Conclusion and Recommendations

This investigation shall be concluded by offering sound recommendations to the reformation of transfer pricing legislation in Zimbabwe based on the comparative work of this entire dissertation. Of vitality to this investigation is the offering of practical and relevant solutions to transfer pricing in Zimbabwe and the efficacy of the legislation thereof. This is what is meant by 'sound' recommendations. This conclusive chapter will also highlight various pertinent aspects discussed in the previous chapter which have a profound impact on the topic and reformation recommendations.

CHAPTER 2: THEORIES OF TRANSFER PRICING

2.1 Introduction

The previous chapter was a brief introduction to the entirety of this dissertation and its subject matter. The main aim of this next chapter is to discuss the various theories of transfer pricing that exist. This will entail the laying of the theoretical foundation which will facilitate further understanding of transfer pricing in Zimbabwe. The theories of transfer pricing discussed in this chapter answer the central question of the reformation of transfer pricing laws in Zimbabwe in the sense that, these transfer pricing theories clearly explain the different forms of transfer pricing and therefore expose that it is these modifications of transfer pricing that the transfer pricing laws have got to address in order for it to be effective. The chapter shall conclude with instances or examples in which transfer pricing is used, such as corruption and illicit financial flows.

2.2 Theoretical analysis of transfer pricing

Before delving into the theories, a conventional definition of transfer pricing shall be given which shall later on be used as a frame of reference for understanding the transfer pricing theories. This will also be followed by an explanation of how it works and its objectives so as to enhance the value of this definitional section.

2.3 What is transfer pricing?

Transfer pricing is characterised by the setting of prices for transactions which are finalised between two entities which are located in different tax jurisdictions. Such transactions are called controlled transactions as opposed to independent transactions of non-related entities. The products that are traded can include tangibles, intangibles, services and financial transactions and the entities can be company divisions and departments, or parent companies and its subsidiaries.

2.4 How is transfer pricing done?

Ideally the parent company or headquarter company or mother company, buys or sells products from its foreign based subsidiary at the same price as it would have bought it from an independent entity or external entity. In other words, an ideal controlled transaction between a mother company and a subsidiary must be valued at the same price as an independent

transaction between different companies. This is known as the arm's length principle and is endorsed by the OECD.

2.5 Objectives of transfer pricing

Domestic Transfer Pricing is needed in order to, enhance departmental autonomy, increase the morale and motivation of managers, enhance performance evaluation and improve goal congruence.

International Transfer Pricing is needed in order to avoid imminent tax blows from local tax authorities; avoid incurring tax penalties and interests; safeguard a company's reputation, to facilitate compliance with transfer pricing guidelines; to proactively prepare and maintain the required documents; to avoid double taxation and to minimise risk, maximise savings and optimise profits.[24] Moreover, international transfer pricing is needed in order to, enhance a firm's competitive position; improve governmental relations and reduce foreign exchange risks.

2.6 Theories of transfer pricing: Introduction

The economic approach is used to explain the following theories of transfer pricing. This is advantageous because it enables a full appreciation of the costs and benefits of transfer pricing and transfer pricing policies. Thereafter, the economic transfer pricing model is employed in a form which simplifies transfer pricing fundamental concepts and facilitates a deeper understanding of accounting. The three transfer pricing theories to be employed are namely, a joint level of output theory, a perfectly competitive intermediate and final markets theory and an imperfectly competitive intermediate and final markets.

2.6.1 Approach to theories

For computational simplicity this dissertation employs Hirshleifer's bi-divisional assumption of the constituency of an MNC or firm.[25] In other words, in discussing theories of transfer pricing in a firm or MNC, examples based on a firm comprising of two divisions namely, the Manufacturing Division and Distribution Division shall be utilised.

---

[24] 2013 Global Transfer Pricing Survey by Ernst &Young 1.

[25] J Hirshleifer 'On the Economics of Transfer Pricing' (1956) 29 *The Journal of Business* 172-184.

For example, the first division namely, the Manufacturing Division, avails its output to the second division namely, the Distribution Division, under standard "perfect market" assumptions.[26] Added to these "perfect market" assumptions are the demand and cost independence assumption. Demand independence means, the Distribution Division's prices and sales thereof, are not affected by the Manufacturing Division's pricing and output decisions. Therefore, if the Distribution Division's increases its prices for example, or decides to decrease its units of flour in production, this will not affect the prices or sales of the Distribution Division. Similarly, in cost independence, if the Manufacturing Department changes its output or alters the price at which it sells its output, it has no effect on the costs incurred by the Distribution Division.

This independence of departments in their operations must also be seen in their transactions in the sense that, although they conclude controlled transactions together, in the interest of the arm's length principle, the transaction is similar to that of an independent transaction, especially in terms of the independence of the set prices.

Theory 1: A joint level of output

In order to determine a joint level of output for a firm or MNC's divisions, the manufacturing division sells all of its output to the distribution division. This transaction is completed at a set transfer price. This transfer price must ensure profit maximisation and must be set in a way that if these two divisions were autonomous, with the least managerial interference, both divisions will make output decisions which ensure profit maximisation through this transfer price and the ensuing transaction. This profit maximisation is to be made by departments which are located in the same tax jurisdiction regardless of whether or not the corporate tax is high. This mandate of profit maximisation in the setting of the transfer price is fundamental to the transaction in order to prevent tax avoidance in the form of transfer pricing. This is especially the case considering that if the divisions are located in a high tax jurisdiction, no taxes will be avoided by making a loss (engineered by the setting of the transfer price) in this high tax jurisdiction since profit maximisation would have been mandated.

Theory 2: Perfectly competitive intermediate and final markets

[26] J Hirshleifer (n30 above) 172-173.

This scenario is an extension of theory 1 in the sense that, the manufacturing division, besides making intra-group sales with the distribution division and concluding controlled transactions thereof, sells its output to an external intermediate market and thus concludes independent transactions with them. The second theory is based on the assumption that the manufacturing division can sell an unlimited amount of its output on the intermediate market at the current market-determined price. This assumption is rooted in another assumption that the intermediate market for the manufacturing division output and the final market for the distribution division output are both perfectly competitive.

In this second theory, the ultimate test of transfer pricing again is found in the profit made in the transaction as will be further explained. In the first instance, the manufacturing division sells its output to the external intermediate market and collects a revenue of US$200. It also sells its output to the final market namely, the distribution division and makes US$150. Evidently, in the controlled transaction which is intra-group, a US$50 loss has been made as compared to the independent external transaction. If the manufacturing division is located in a tax jurisdiction which is characterised by high corporate taxes, then it clearly would have avoided paying taxes in terms of the controlled transaction. This tax avoidance is due to the transfer price that was set for the controlled transaction between the two divisions. This second theory is therefore an apt illustration of the definition of transfer pricing as a form of tax avoidance in the sense that, transfer pricing involves the systematic manipulation of prices aimed at artificially reducing or increasing profits or causing losses in order to avoid taxes in a specific country. A further application of this theory to the Zimbabwean situation would result in the ZIMRA Commissioner General penalising the MNC for tax avoidance done through transfer pricing, by adding the US$50 to the following year's taxable income which is owed by the company.

Theory 3: Imperfectly competitive intermediate and final markets

This theory is the same as the second theory however, the market conditions are imperfect in the sense that, managers of the manufacturing division and the distribution division of the firm influence the transfer prices for their products by varying their outputs.[27] So unlike in theory 1 and 2 where perfect competition and market forces influenced the transfer prices in both the controlled and uncontrolled transactions, this is not the case in this 3rd theory.

[27] Hirshleifer (n30 above) 176.

2.6.2 Theories of transfer pricing from a trade perspective

The focus in this section is on the theories of transfer pricing from an economics approach which is mainly theoretical. In this section I discuss the theories of transfer pricing from a trade perspective which is practical and which informs everyday trade and transfer pricing, mainly in Arica. The common approaches or theories employed to set transfer prices are namely negotiated prices, cost basis and the market price approaches.[28]

Negotiated price theory

A transfer price that is agreed on between the selling and purchasing units is called a negotiated transfer price.[29] In concluding a negotiated transfer, the managers of the particular units or subsidiaries of an MNC deliberate on the Terms and Conditions of the transfer. If they agree to conclude it then they must agree on a transfer price. This transfer price will only be agreed upon if the selling unit/division's profits increase due to the transfer and the purchasing unit/division's profits also increase due to the same transfer. This is the negotiation aspect of the transfer and the transfer price from which this theory gets its name. Therefore, this transfer price agreed upon must fall within these two assumptions or this range of acceptable transfer. The range of acceptable transfer price is defined as the transfer price range within which the profits of both units participating in a transfer price would increase.

There are two main advantages of a negotiated transfer price. Firstly, the autonomy of the units is preserved through negotiated transfer pricing and this aligns with the main objective of decentralisation in management. Secondly, negotiated transfer pricing is effective because the unit managers who negotiate the transfer price are well versed in the potential costs and benefits of the transfer as compared to others in the company.

Be that as it may, limitations to the negotiated price theory exist. Firstly, concluding a negotiated transfer price is tedious and time consuming for the participating managers. This is because the negotiation takes long mainly because of the evaluation of the terms and conditions which must be done before the transfer price is agreed on. Secondly, these negotiations result

---

[28] T Mohammad *et al* 'Transfer Pricing And Taxation Implication Disclosure In Segmental Reporting: Malaysian Evidence' (2005) 4 *International Business & Economics Research Journal* 33.

[29] RH Garrison & EW Noreen *Managerial Accounting International Edition* (2011) 468.

in conflict between units within a group. Thirdly, the success of this process and theory depends on the negotiation skills of the managers therefore, this is disadvantageous as this makes the measurement of unit profitability sensitive. Another limitation of the negotiated price theory is that it is time consuming on top management as it requires it to oversee the negotiating process and to mediate disputes which rise, all at the expense of them neglecting their other managerial duties. The final limitation of the negotiated price theory is that this approach results in a suboptimal level of output if the negotiated price is more than the opportunity cost of supplying the transferred goods.

Cost basis theory

Transfer prices are also set by companies as either variable cost or full cost basis incurred by the selling units. Companies or units usually adopt cost based transfer price in business.

The disadvantages of the cost basis theory abound nonetheless. Firstly, the use of variable cost or full cost basis incurred by a selling unit as a transfer price is a precursor to bad decisions and sub-optimisation. This is because the full cost or absorption cost approach offers a varying transfer price due to the unstable cost per unit which results from variable capacity use. Furthermore, the full cost or absorption cost approach conceals the underlying cost structure from the decision makers and therefore, fails to provide solutions as to how cost savings can be obtained by efficiently utilising capacity. Moreover, the full cost approach is implemented through a formula approach by adding an arbitrary mark-up which covers capacity related costs and a targeted profit margin, to a variable cost. This arbitrary approach which is adopted by the full cost approach makes it artificial and unreliable.

Secondly, the selling unit will never show a profit on any internal transaction if cost is employed as the transfer price.

Thirdly, cost controlling incentives are absent with a cost-based transfer price. There is little incentive or motivation to reduce costs when costs of one unit are simply passed on to the next.

Market price theory

The market price is the selling price of a product on an open market.[30] The best approach to transfer pricing is the competitive market price based. In other words, to yield the best results from transfer pricing, basing it on competitive market price is recommendable. A highly competitive market allows the producing division to sell as much of the product as it wishes to external customers, and the purchasing division can acquire an unlimited amount of the product from external vendors without affecting the price. In this way, the market offers an objective valuation of the intermediate product, and that price should be used as a basis for price transfers and guide within the firm.

If the purchasing division forecasts only making a short-term profit or even a loss at the outside or external market price, then the company must not internally produce the product but must get it from the external market for supply. Furthermore, if this latter option results in the purchasing division only making a short-term profit instead of a long-run profit, then the division should stop acquiring and processing this product but instead allow the producing unit to sell all its output to the external market. Placing the intermediate product in such a competitive market results in the market price proving to be a superb basis or foundation for the independence of the decisions of the producing and purchasing divisions.

A major disadvantage of the market price approach is that there exists high chances of conflict occurring with the quotation of the price for the intermediate product or service on a long-term contract and a spot basis. An imperfectly competitive market such as is usually the case with manufactured goods, further complicates the transfer pricing problem.

Moreover, conflict is also as a result of short-term and long-term considerations. An external vendor may quote a low price in order to buy loyalty from the business and to also buy into the business but with the exception of raising the price later on. This might cause conflict between managers because it is normally not recommendable for the company to switch its source of supply from an internal unit to an external company unless the external company does not change the quoted price in the long-run.

[30] Garrison & Noreen (n34 above) 472.

2.7 The uses of transfer pricing: Practical examples

An understanding of the above theories of transfer pricing is enhanced by citing the uses of transfer pricing in the economy of a nation. In order to fully grasp the tax avoidance practice of transfer pricing, one must understand how and where it is used, in other words, real life case scenarios, and I expose these in this section. Transfer pricing is used for corruption, illicit financial flows and in the informal economy.

2.7.1 Corruption

John Christensen who is an authority on tax havens defines corruption as, the abuse of public interest and the undermining of public confidence in the integrity of rules, systems and institutions that are designed to promote the public interest.[31] Tax avoidance and therefore transfer pricing, is a form of corruption because public assets and taxes are stolen. Certain sectors of society are allowed to bypass and break accepted revenue collection norms when corruption, in the form of transfer pricing, occurs. This goes to show the futility of tax laws and rules since clearly one set of rules exists for the rich and the other for the poor. This unfair treatment in transfer pricing speaks to the lack of ethics that epitomises corruption.

Corruption through transfer pricing is facilitated by secrecy jurisdictions as defined in Chapter 1. According to the Financial Secrecy Index (hereafter referred to as "the FSI") of the TJN the secrecy jurisdiction with the most global financial impact is the United States of America (hereafter referred to as "the USA").[32] It is followed by Luxembourg, Switzerland, the Cayman Islands and the City of London.[33] Clearly transfer pricing allows corruption to thrive in globalised and advanced markets unlike in developing markets of the Third World in which corruption mainly thrives because of odious debts and kickbacks amongst the top echelon. Another secrecy jurisdiction which has thrived of late is Panama.

Be that as it may, the FSI also exposes the causal forces for corruption through transfer pricing as partly being the African nations which legalise and permit tax avoidance and evasion under a veil of secrecy. These include Liberia, Mauritius and Seychelles.

---

[31] MR Venkatesh *Dr. Manmohan Singh- A Decade of Decay* (2013) 216.

[32] Tax Justice Network- Africa (n22 above) 11.

[33] As above.

Zimbabwe, like Mauritius and Liberia, was also on the supply side of this corruption by not having any anti-Transfer pricing legislation until 2016. This *lacuna* virtually legalised and allowed for tax avoidance and many public assets in the form of taxes were and syphoned to tax havens or secrecy jurisdictions.

2.7.2 Illicit financial flows

Illicit financial flows, according to Raymond Baker, are defined as involving money that is illegally earned, illegally transferred or illegally utilised. If it breaks laws in its origin, movement or use, then it qualifies for the label.[34] Transfer pricing is also used to facilitate illicit financial flows. The transactions which facilitate illicit financial flows are characterised by transfer pricing in the form of under-pricing and overpricing between subsidiaries of the same multinational company. This is typical of transfer pricing as explained in Chapter 1. According to a survey conducted in 2007 which assessed the economic practices of 476 MNCs, 80% acknowledged that transfer pricing remains central to their tax strategy.[35] Moreover, a TJN survey into the largest quoted companies in the Netherlands, France and the UK, notes that 99% of those for which information was discovered operated through secrecy jurisdictions.[36] This section illustrates how transfer pricing is used to effect illicit financial flows by MNCs and other subjects in general.

The reason that transfer pricing has got to be stopped is because a lot of public assets in the form of taxes are lost through illicit financial flows which are facilitated by transfer pricing. According to anti-money laundering expert Raymond Baker, 3% of total global funds are generated through illicit financial flows.[37] He proceeds to state that criminal proceeds that are generated through drug trafficking, racketeering, counterfeiting and more are about 30-35% of the total.[38] This goes to show that transfer pricing is fostering crime in the sense that by its facilitation of illicit financial flows, it is catalysing the occurrence of other crimes such as drug trafficking which get their existence through the presence of funds which are generated from

---

[34] O Gocer 'International Terrorism and its Key Market' published Master's Thesis by the Diplomica Verlag GmbH, 2005 44.

[35] C Chavagneux & R Palan *Les paradis fiscaux* (2007) 65.

[36] Tax Justice Network 'Where on earth are you? Big companies in tax havens' 23 March http://taxjustice.blogspot.co.za/2009/03/where-on-earth-are-you-big-companies-in.html (accessed 19 September 2017).

[37] R Baker 'Illicit Financial Flows from Africa: Hidden Resource for Development' 26 March (Washington DC: Global Financial Integrity, 2009) http://www.gfip.org/storage/gfip/documents/reports/gfi_africareport_web.pdf

[38] As above.

illicit financial flows flowing from transfer pricing and tax avoidance. Global Financial Integrity (hereafter referred to as "the GFI") estimates that the cumulative stock of illicit financial flows from Africa amounted to US$865 billion between1970-2008 and by 2011 the figure could have been as high as US$1.8 trillion.[39] These statistics illustrate the severity of illicit financial flows which are partially catalysed by transfer pricing hence, transfer pricing must be ended through reformative and effective anti-transfer pricing laws and this also applies to Zimbabwe.

2.8 Conclusion

In conclusion, none of the theories and approaches towards transfer pricing are flawless. Be that as it may, transfer pricing theories seek to explain the importance of intra-group controlled transactions concluded through transfer pricing, by highlighting their implications in the form of taxation, management control and the relationships between MNCs and their host countries. Furthermore what can be deduced from the purpose of transfer pricing theories is that, within the case of separate units or MNC subsidiaries, transfer pricing is essential for financial reporting and the calculation of the taxable income. However, in the case of the companies or units being located in different jurisdictions, transfer pricing becomes important for tax monitoring and supervision. It is therefore not surprising that it is in this area of tax payment and monitoring that poor underdeveloped countries fail with regards to transfer pricing because they are poorly equipped to monitor MNCs which manipulate transfer prices in order to avoid tax.

---

[39] Tax Justice Network Africa (n22 above) 12.

CHAPTER 3: THE TRANSFER PRICING REGIME OF ZIMBABWE

3.1 Introduction

The previous chapter discussed the minutia of the theoretical underpinnings of transfer pricing and also provided examples thereof. This chapter gives the Zimbabwean perspective of transfer pricing, especially its repercussions on a crippling economy. This discussion of transfer pricing in Zimbabwe exposes the areas in which the transfer pricing laws in Zimbabwe are ineffective by laying bare the case studies. By doing this, this investigation aims to catalyse the reformation of the transfer pricing laws in Zimbabwe by unravelling what it is that they need to correct. This is how the central question is answered in this chapter.

3.1.1 The history of transfer pricing legislation in Zimbabwe

New transfer pricing legislation was enacted in Zimbabwe on 1 January 2016 through an amendment of the Income Tax Act [Chapter 23: 06] of Zimbabwe (hereafter referred to as the 'Zimbabwean Income Tax').[40] The new transfer pricing rules govern both domestic and international transactions between parties namely, entities and associates. This was done as a rescue mechanism for ZIMRA as it is meant to enable them to govern tax and collect revenue efficiently by preventing tax avoidance.

The new transfer pricing rules are characterised by the following features;

They are enforceable by virtue of the Zimbabwean Income Tax Act having been enforced.

They are aligned with the Organisation for Economic Co-operation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. Mention is also made of the United Nations (hereafter referred to as "the UN") Manual on the interpretation of transfer pricing and the UN Practical Manual on Transfer Pricing for developing for developing countries.

They entrench the arm's length principle of pricing in order to determine whether or not transfer pricing took place and a consequential consideration is to be paid to ZIMRA by a liable firm.[41]

---

40 "Zimbabwe enacts new transfer pricing legislation" *Global Tax Alert* 16 March 2016 1.
41 S98B (1)-(3) of the Income Tax Act [Chapter 23: 06].

They are characterised by a heavy system of documentation which the firms and entities use in order to prove their utilisation of the arm's length principle in their pricing.[42]

The five OECD pricing methods are employed by the new rules in order to determine the comparable arm's length price for a transaction. These five include the comparable uncontrolled price method, resale price method, cost plus method, transactional net margin method and the transactional profit split method. Be that as it may, the Commissioner General of ZIMRA is not restricted to any one of these methods of pricing if the firm presents sufficient documentary evidence of the pricing method.[43]

The transfer pricing rules are applicable to a transaction which is concluded by a Zimbabwean-resident and a non-Zimbabwean resident (whether or not related) whom the Commissioner General deems to reside in a tax haven.[44] This aims to 'red-flag' the beneficial transactions.

3.2 Transfer pricing in Zimbabwe: Definition and characteristics

3.2.1 What is transfer pricing in Zimbabwe?

Transfer pricing is the price that is charged for the transfer of goods, services, intangibles or financing in a group or company context; from one group company to another group company or any other associated/controlled entity to another.

3.2.2 Why is transfer pricing important in the Zimbabwean context?

In the Zimbabwean context, transfer pricing is important because companies and groups need prices for intercompany transactions, tax authorities want to ensure group companies in their countries earn a 'fair share of the profit cake', i.e. arm's length prices- that third parties would charge in a comparable situation, transfer pricing in the tax world is governed by specific rules and has specific methods to determine what arm's length is, of the OECD Guidelines and other important issues.

42 S98B (5) of the Income Tax Act [Chapter 23: 06].
43 Thirty-Fifth Schedule of the Income Tax Act [Chapter 23: 06].
44 S98B (4) of the Income Tax Act [Chapter 23: 06].

3.2.3 Affected transactions in terms of transfer pricing

The transactions which are affected by transfer pricing are cross border transactions, domestic transactions, transactions which are conducted by related parties that must transact at same price as unrelated and transactions which are concluded at Arm's Length Principle (ALP).

3.3 Transfer pricing law in Zimbabwe

3.3.1 Sources for the transfer pricing law in Zimbabwe

Section 98B is aligned with the OECD principles. Section 98B is also sourced from the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration and this same source guides the interpretation of the provision.[45] The UN Manual on the interpretation of transfer pricing and the UN Practical Manual on Transfer Pricing for developing countries are cited as relevant sources to section 98B and the 35th Schedule.[46]

3.3.2 The content of section 98B transfer pricing rules

Section 98B augments already present section 98 tax avoidance rules. It administers domestic transactions between associated entities, connected persons and transactions completed between foreign entities. In section 98B (1) of the Zimbabwean Income Tax Act, clarifies its purpose to regulate transactions between associated persons. Section 98B (4) of the Zimbabwean Income Tax Act provides that the new transfer pricing rules apply to a transaction that is completed between a Zimbabwean resident and a non-Zimbabwean resident who resides in a secrecy jurisdiction or a tax haven according to the Commissioner General of ZIMRA.

The scope of the new transfer pricing rules of section 98B apply to both domestic and international transactions (between connected persons).

Section 98B (2) enables ZIMRA to adjust transactions which contravene the arm's length principle. The profit that would have accrued to the taxpayer who will be avoiding the payment of taxes will, in this case, be included in the taxable income of the taxpayer. This shows the tax implications that are inherent in tax avoidance done through transfer pricing.

---

[45] Thirty-Fifth Schedule (Section 98B), section 13.

[46] As above.

Section 98B (3) provides a guideline for the taxpayer by giving him the law which ZIMRA uses in order to ascertain if the conditions of a controlled transaction between connected persons complies with the arm's length principle. This law is the 35the Schedule of the Zimbabwean Income Tax Act.

Section 98B (5) is the provision which mandates the documentation of all domestic and international controlled transactions carried out by the taxpayer. Summarily section 98B (5) applies to transactions which fall under section 98B (1)-(4) of the Zimbabwean Income Tax Act. The documentation referred to in section 98B (5) is prescribed in the 35th Schedule.

In accordance with OECD principles, the supporting documentation must contain a detailed "functional analysis" and an "economic analysis," including information on how the most appropriate transfer pricing method was selected and the application of the method, to demonstrate the arm's length nature of the transaction and price.

The legal status of the 35th Schedule is that it is not entrenched as is evident in section 98B(6). This is because the Finance Minister of Zimbabwe can amend of replace the 35th Schedule through a notice placed in a statutory instrument, after consultation with the ZIMRA Commissioner General.

Section 98B (7) provides the procedure through which section 98B (6) takes place. After consulting with the ZIMRA Commissioner General about the proposed amendment or replacement of the 35th Schedule through a statutory instrument, the Finance Minister of Zimbabwe tables the proposed statutory instrument before the House of Assembly for debate. If the House does not vote against the publication of the statutory instrument within the next seven sitting days after the tabulation, the Finance Minister can proceed to publish it in the Gazette.

Conclusively, section 98B focuses on transactions between associates, employers and employees. These transactions are to reflect the arm's length principle in order to evade tax avoidance. The new transfer pricing rules are also applicable to the income earned from the transfer or the licensing of intangible property.

Penalties of transfer pricing in Zimbabwe

Section 98B(2) of the Zimbabwean Income Tax Act is the penalty clause for the transfer pricing rules. It states that the profit that would have accrued to the taxpayer who will be avoiding the payment of taxes will, in this case, be included in the taxable income of the taxpayer. The penalty is in the forfeiture of this profit to SARS in the form of tax carried forward for the next season. Normal penalties apply to transfer pricing, up to 100%.

Summarily therefore, according to section 98B, if the transaction is found to have contravened transfer pricing rules in terms of section 98B, then the Commissioner General of ZIMRA is entitled to distribute, apportion, allocate income, and make deductions or tax credits accordingly. The Commissioner General is also allowed to re-characterise the source of income or the nature of the payment.

Arm's length principle and arm's length range in transfer pricing rules in Zimbabwe

Section 98B includes the arm's length principle in transfer pricing.[47] ZIMRA uses the arm's length principle in order to determine whether a controlled transaction has flouted the transfer pricing rules.[48]

In order to determine the comparable arm's length price for a controlled transaction (to an independent transaction), ZIMRA uses the five OECD recognised methods.[49] These five OECD methods fall into two categories namely the 'traditional transactional' methods and the 'profit based' methods. Under the traditional transactional methods, methods such as the 'comparable uncontrolled price' method (hereafter referred to as the "CUP"), the 'resale price' method (hereafter referred to as the "RP") and the 'cost plus' method (hereafter referred to as the "CP"). Under the 'profit based' methods fall the 'transactional net margin' method (hereafter referred to as the "TNMM") and the 'profit split' method.

Before giving a full description of each one of the methods, it is noteworthy to mention that the application of each one of these methods to a particular transaction is done on a case by case basis.

47 Section 98B (3).
48 Thirty-Fifth Schedule (Section 98B), section 2.
49 Thirty-Fifth Schedule (Section 98B), section 4(5).

The factors that feed into the selection of the approved method are that; firstly, the respective strengths and weaknesses of the approved method is considered; secondly, the appropriateness of the approved method in view of the nature of the controlled transaction is considered, after having made a determination of the functions undertaken by each person in the controlled transaction and taking into account the assets used and risks assumed; thirdly, the availability of the reliable information needed to apply the selected transfer pricing method or other methods is considered; fourthly, the degree of comparability between the controlled and uncontrolled transaction, including the reliability of comparability adjustments, if any, that may be required to eliminate differences between them, is considered; and finally, normal penalties apply to transfer pricing, up to 100%.[50]

A taxpayer can only apply one of the approved methods when determining the arm's length on a given transaction.[51]

If a taxpayer selects any one of these methods in order to determine whether the controlled transaction was consistent with the arm's length principle, prior to the Commissioner General, the Commissioner General's examination of whether the conditions of the controlled transaction were consistent with the arm's length principle shall be based on the transfer pricing method used by the taxpayer.[52]

The five OECD methods are now to be discussed in detail.

The CUP method consists of comparing the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction.

The RP method consists in comparing the resale that a purchaser of property in a controlled transaction earns from reselling that property in an uncontrolled transaction with the resale margin that is earned in comparable uncontrolled and resale transactions.
The CP method consists of comparing the mark-up on those costs directly and indirectly incurred in the supply of property or services in a controlled transaction with the mark-up on

50 Thirty-Fifth Schedule (Section 98B), section 4(2)(a)-(d).
51 Thirty-Fifth Schedule (Section 98B), section 4(3).
52 Thirty-Fifth Schedule (Section 98B), section 4 (4).

those costs which are directly and indirectly incurred in the supply of property or services in a comparable uncontrolled transaction.

The TNMM consists of comparing the net profit margin relative to an appropriate base, such as costs, sales or assets, that a person achieves in a controlled transaction with the net profit margin relative to the same base achieved in comparable uncontrolled transactions.

The transactional profit split method consists of allocating to each associated person participating in a controlled transaction the portion of common profit (or loss) derived from such transaction that an independent person would expect to earn from engaging in a comparable uncontrolled transaction.

In the event that a taxpayer applies a transfer pricing method other than any of these five to a controlled transaction, this is permissible if the ZIMRA Commissioner General is satisfied that none of the approved methods can be reasonably applied to determine arm's length conditions for the controlled transactions and that this other transfer pricing method yields a result that is consistent with that which would be achieved by independent persons engaging in comparable uncontrolled transactions under comparable circumstances.

Arm's length range

The new transfer pricing rules establish the concept of a transfer pricing range. This is the acceptable range of prices, margins or profit shares that have been reached in a transaction after the application of one of the approved transfer pricing methods.[53] The Commissioner General need not make any adjustment if the relevant financial indicator which is derived from the controlled transaction falls within the arm's length range and if the appropriate transfer pricing method is selected. Nonetheless, if the relevant financial indicator falls outside the arm's length range, the Commissioner may adjust it and any such adjustment will be to the median of the arm's length range.

---

[53] Thirty-Fifth Schedule (Section 98B), section 6.

Double taxation

Aware of the possibility of double taxation inherent in ZIMRA adjustments, the new transfer pricing rules caters for corresponding adjustments for both controlled domestic and international transactions.

Intra-group services and the arm's length principle

Earlier on in my introductory definition of transfer pricing in Zimbabwe, transfer pricing was defined as consisting of an intra-group component which is characterised by a controlled transaction taking place in an intra-group setting and prices being set at transfer price level. The new transfer pricing legislation includes provisions which focus on intra-group services, specifically their transactions. These provisions align with the OECD guidance on intra-group services. An intra-group service charge is consistent with the arm's length principle where firstly, it is charged for a service that is actually rendered; secondly, the commercial position of the recipient is improved because of the economic or commercial value stemming from the service; thirdly, where it is charged for a service that an independent party in comparable circumstances would have been willing to pay for or would have performed in-house and finally, where its amount corresponds to that which would have been agreed upon between independent parties in comparable circumstances.

Transfer pricing rules and intangible property

In most jurisdictions which seek to attract Foreign Direct Investment (hereafter referred to as "FDI"), transfer pricing rules do not apply to controlled transactions which involve the transfer of intangible property. Nonetheless, transfer pricing rules in Zimbabwe contain provisions applicable to intangible property.[54] According to these provisions, a determination of whether the conditions of a controlled transaction involving licences, sales or other transfers of intangible property between associated persons was consistent with the arm's length principle is permissible under the new transfer pricing regime. These provisions also take into consideration the various parties' interests, including the value and usefulness of the intangible property to their business.[55] The existence of any geographic limitations on the exercise of rights to the intangible property, the exclusive and non-exclusive character of the rights transferred and the right of the transferee to participate in further developments of the

---

54 Thirty-Fifth Schedule (Section 98B (9)(1)).
55 As above.

intangible property by the transferor are factors which are considered by ZIMRA as well in the case of intra-group transactions which involve intangible property.[56]

3.3.3 Case law on transfer pricing

There is no reported case law on transfer pricing in Zimbabwe. The law that was regulating transfer pricing before the enactment of section 98B transfer pricing rules was the old section 98 of the Income Tax Act. It was a provision on which ZIMRA rode on to prove the illegitimacy of transfer pricing but it was vague as it targeted tax avoidance in general and not transfer pricing specifically.

It is also because of this old section 98 provision that there is no reported case law on transfer pricing as it placed the burden of proof to prove transfer pricing and tax avoidance by a company on the ZIMRA Commissioner General. Due to a lack of a coherent documentation system by the firms, the Commissioner General failed to discharge this burden of proof by proving that transfer pricing had actually taken place as there was no data he could use. This lack of documentation was because the old section 98 did not oblige the firms and MNCs to document their transactions in order for them to present them to the Commissioner General upon his request, so as to verify any transfer pricing and tax avoidance.

Whilst there might not be reported case law on transfer pricing, transfer pricing case studies exist nonetheless and these are discussed in this section.

Case Study 1: River Ltd. transfer pricing case

In this case, ZIMRA used the salaries of local directors to determine the arm's length salary of River Ltd.'s three directors and charges PAYE on the adjusted price, which was a profit that the firm had not been taxed.

The facts of this case are that River Ltd. is a Zimbabwe Tobacco Merchant which is headed by three executive directors that are resident in South Africa. The directors are paid salaries by the company but they earn very low salaries compared to other local executive directors. This raises an alarm for ZIMRA. River Ltd. justified this suspicious move by saying that the directors earn little salaries as they are hardly in Zimbabwe, where the business operations are

[56] Thirty-Fifth Schedule (Section 98B (9)(2)(a)-(d)).

based. It went further to argue that it was imperative however, that these three became directors regardless of their foreign residence due to their expertise, expertise which it still has not proven. The three executive directors are also shareholders.

Case Study 2: ABC Zimbabwe Branch

In this case, the total Management fee charged by ABC Zimbabwe was disallowed because the client did not provide satisfactory evidence that the Management fees were incurred at an arm's length.

The facts of this case are that ABC Mauritius is the Headquarter Company of five subsidiaries namely, ABC Zimbabwe, ABC Botswana, ABC DRC, ABC UK and ABC Mozambique. The ABC Zimbabwe Branch is registered in Zimbabwe. Initially, ABC Zimbabwe was charged US$1.8million Management fees for which it paid Non-Resident's Tax on Fees (hereafter referred to as 'NRTF'). It also claimed the US$1.8million for income tax. ZIMRA, in accordance with its section 98B documentation provision, requested ABC Zimbabwe to give a breakdown and documentary evidence to justify that US$1.8million Management fees that had been incurred in order to allow it to become an allowable deduction for income tax purposes.

ZIMRA ascertained that section 16(1)r of the Zimbabwean Income Tax Act only allowed a maximum Management fee deduction of not more than US$345 338, 65 to ABC Zimbabwe. Therefore, ABC Zimbabwe over deducted by US$1.45 million.

3.4 Participants of transfer pricing in Zimbabwe

In answering this question, this section focuses on the main group (s) of taxpayers who are guilty of transfer pricing and also identifies the participants of transfer pricing as identified in the transfer pricing legislation of Zimbabwe.

The wording of section 98B clearly exposes MNCs and big enterprises or corporations as the main culprits of transfer pricing. According to section 98B, transactions between associated persons or entities shall be subject to the new transfer pricing rules. According to section 2A of the Zimbabwean Income Tax Act (hereafter referred to as 'section 2A'), Associated entities are usually components of MNCs. MNCs comprise of headquarters and subsidiaries or associated entities. According to section 2A, an associated entity responds to a mother company or headquarters of an MNC by acting on its directions, its suggestions, its wishes and

its requests. Apt examples of an associated entity are a near relative of a person, a partner in a partnership and a trustee of a trust. This concept of 'associated entity' holds true for that of 'connected persons' as it is virtually the same concept as well.

Section 98B clarifies the participants of transfer pricing more by stating that the transfer pricing legislation targets transactions between associates, employers and employees. These are 'connected persons' as well.

3.5 Conclusion

In conclusion the two effects of the section 98B transfer pricing legislation are that firstly, for transfer pricing cases that arise covering the period prior to 1 January 2016, section 98 of the Income Tax is applied. Secondly, for transfer pricing cases that arise with effect from 1 January 2016, section 98B of the Income Tax Act is applied.

Furthermore, the implications of section 98B abound.
The first implication is that domestic and cross border transactions must be at arm's length. Any controlled domestic or cross border transaction which is not at arm's length shall be guilty of transfer pricing and the profit shall be included in the taxpayer's taxable income for the following financial period.

The second implication of section 98 is that taxpayers, especially MNCs, must prepare and present a local transfer pricing documentation file at ZIMRA's request. This documentation allows the ZIMRA Commissioner General to determine whether the controlled transactions of the taxpayer have complied with the arm's length principle.

The third implication of the new transfer pricing legislation is that timeframes for presenting the transfer pricing documentation may be limited. This is especially considering the fact that a proposed prescription of 6 years exists.

The fourth implication of the transfer pricing rules is that ZIMRA has the right to adjust revenues and expenses to reflect market values. ZIMRA usually engages in such exercises during its comparison between controlled and independent transactions, which it does in order to determine the actual price or worth of a transaction which is queried for transfer pricing.

The next implication is that taxpayers must develop a transfer pricing policy that conforms to the new legislative requirements in terms of section 98B. It is implicit that they must review and align any existing policies to the new legislation.

The final implication is that ZIMRA must review affected contracts and evaluate the impact of this new transfer pricing legislation and ensure that all controlled or intercompany transfer prices are within the arm's length range.

It is evident that *lacunae* in the documentation requirement exist because whilst schedule 35 does prescribe the use of documentation for transactions, it does not specify the exact type of documentation to be presented to the ZIMRA Commissioner General and it is in connection with this that Zimbabwe can learn from South Africa. This is because, from 2015 onwards, South African legislature and SARS have clearly stated the type of documentation that must to be presented to the SARS Commissioner in order to check for transfer pricing and the compliance of the arm's length principle in controlled transactions. A thorough evaluation of South Africa's documentation requirement is made in the next chapter.

The documentation that is strongly recommended in connection with the transfer pricing in Zimbabwe and the new transfer pricing rules thereof is firstly, documentation which places the onus on a taxpayer to prove that it completed a transaction which was aligned to the arm's length principle.

Secondly, the documentation that the taxpayer's documentation must be able to facilitate a ZIMRA audit.

Thirdly, in terms of prescription, the transfer pricing claim must prescribe after 6 years. The documents should provide for this. Therefore, the records for controlled transactions of the last six years must be kept by the taxpayer for sake of a ZIMRA audit. Documentation which clarifies pricing between group companies is also recommended.

Essentially, the purpose of the documentation in transfer pricing should be to ensure full disclosure of controlled transactions between connected persons, regardless of whether they are domestic or international.

Conclusively, based on a broad and purposive interpretation of section 98B as is encouraged by the Zimbabwean Constitution, it is apparent that there is no targeted industry in transfer pricing rules. In other words, the s98B transfer pricing rules have no particular industry or sector focus. This shows that they apply to all taxpayers in any industry of the Zimbabwean economy.

This approach is open to criticism in the sense that one might argue against its efficiency on the basis that it takes a machine gun approach towards tackling transfer pricing and tax avoidance in Zimbabwe, as opposed to a shot-gun method by targeting specific industries. Nonetheless, Zimbabwe's economy is rather peculiar as it is currently in doldrums and needs to be resuscitated by every cent available. It is in this sense that one might therefore rebut this argument and contend that this all-inclusive and non-industry specific approach which characterises Zimbabwe's new transfer pricing legislation is a smart and effective approach, as it aims at raking in more revenue for the country by targeting tax collection from all industries of the Zimbabwean economy.

Finally, the rationale behind the application of section 98B to controlled international transactions is to "red-flag" cross-border transactions between Zimbabwe and a low-tax jurisdiction (tax haven), particularly if the overseas entity lacks substance and significant "people functions." Section 98B transfer pricing principles apply where a Zimbabwe-resident engages in a transaction with a person (whether or not related) resident outside Zimbabwe in a jurisdiction considered by the Commissioner General to provide a tax benefit in relation to the transaction.

CHAPTER 4: COMPARATIVE LAW ON TRANSFER PRICING - THE CASE STUDY OF SOUTH AFRICA

4.1 Introduction

In the previous chapter, I examined and analysed transfer pricing in Zimbabwe. As an answer to the central question of how the ineffective transfer pricing laws in Zimbabwe can be transformed, this chapter proposes that they can be transformed by likening them to the effective transfer pricing laws of South Africa. This chapter does this by extensively examining transfer pricing, as a form of tax avoidance in South Africa and the laws around it too. Unfortunately there is no reported case law on transfer pricing to include. The reasons of which I will provide below. Included in these are academic articles and other literally texts on transfer pricing in South Africa. A sound conclusion will close this chapter.

The former Finance Minister of South Africa, Pravin Gordhan once said that 'tax policy is an indispensable part of national self-determination'. And indeed it is. Self –determination is the cornerstone of modern-day democracy and a major component of international law which is commonly regarded as a *jus cogens*. Self-determination provides that a people, based on respect for the principle of equal rights and fair equality of opportunity, have the right to freely choose their sovereignty and international political status without interference.[57] Extending this reasoning therefore, one concludes that a right to a sound tax policy which manifests into impeccable service delivery and a functioning economy is entitled to the citizenry of a nation in as much as they are entitled to a right to freely choose their political status and sovereignty in terms of the right to self-determination. All tax ultimately belongs to the people of the nation and they have a right to know how taxes are collected, directly or indirectly, in as much as they have the responsibility to pay tax. It is therefore for this reason that tax avoidance in the form of transfer pricing in any nation is an affront to tax justice globally and especially in South Africa.

4.2 The definition and characteristics of transfer pricing in South Africa

The Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (hereafter referred to as 'the Commission'), in its Second Interim Report, defined transfer pricing in South Africa as the process whereby related entities set prices at which they transfer goods or services

[57] Article 1 of Chapter I of the United Nations Charter.

between each other.[58] A transfer price is a price determined by a taxpayer when selling to, buying from or sharing resources with a related or connected person. A transfer price is different from a market price, which is the marketplace price used in the transactions of goods and services between unrelated parties who each strive to make a profit from each transaction.[59] According to the Commission, transfer pricing involves the systematic manipulation of prices aimed at artificially reducing or increasing profits or causing losses in order to avoid taxes in a specific country. The litmus test for transfer pricing is the contravention of the arm's length principle by a taxpayer.

4.3 The participants of transfer pricing in South Africa

The reason that South Africa has managed to tackle transfer pricing so well, to such an extent that I have employed it as a best practice case study for my research is primarily because the South African Revenue Service (hereafter referred to as 'SARS'), under the leadership of the-then SARS Commissioner Mr. Pravin Gordhan, identified the worst offenders of transfer pricing and tax avoidance and placed restrictions on their transactions.

MNCs which are located and trade in various jurisdictions are notorious for transfer pricing. This is because the MNCs and their subsidiaries operate in different countries which have different tax systems and tax laws. Therefore they tend to manipulate their profits and thereby avoid payment of taxes through transfer pricing so that the profits appear lower in a country with higher tax rates and higher in a country with lower tax rates. MNCs are usually prone to transfer pricing because of the large network of internal payments that result from the goods that they supply to each other.

---

58 Commission of Inquiry into Certain Aspects of the Tax Structures of South Africa 'Second Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa: Thin Capitalisation Rules' (1995) para 1.3b. See also J Ware & P Roper *Offshore Insight* (2001) 178; A Stroud & C Masters *Transfer Pricing* (1991) 10.

59 South African Revenue Service's 'Practice Note No 7: Determination of Taxable Income of Certain Person from International Taxation: Transfer Pricing (section 31 of the Income Tax Act 58 of 1962)' 6 August 1999 para 7.1; Article 9 of the OECD Model Tax Convention on Income and on Capital (2003 condensed version; D Hay *et al* 'Past and Present Work in the OECD on Transfer Pricing and Selected Issues' (1994) 10 *Intertax* 424; OECD Report of the Committee on Fiscal Affairs 'Issues in International Taxation No 2: Thin Capitalisation: Taxation of Entertainers, Artistes and Sportsmen' (1987) 17; VH Miesel *et al* 'International Transfer Pricing: Practical Solutions for Inter-Company Pricing-Part II' (2003) 29 *International Tax Journal* 1.

4.4 Consequences of transfer pricing in South Africa

According to Sunia Mani, group executive of the large business centre at SARS, transfer pricing by MNCs cost South Africa a staggering R250 billion from 2012-2015.[60] This resulted in a hefty loss of tax revenue by the South African government. Of this R250 billion, R80 billion constituted management fees paid overseas from South Africa.[61]

The manner in which all of these transfer pricing activities by MNCs took place back then and continue to do so now, is through service payments which are made to overseas businesses. These payments consequently erode the tax base. Payments include the so-called management fees.

Another consequence of transfer pricing in South Africa is that South Africa is not reaping the fruits of being a host country to MNCs. This is evident in the manner in which its coffers are constantly under pressure and the demands for infrastructural development continue to rise. The road network nationwide is underdeveloped and the education system is not accessible to all. Conclusively, there is a huge disconnect between where real value and creativity is created, which is in South Africa, versus where profits are being shifted to namely, in Panama or Ireland because all there is in Panama is a nice beach and an indigenous man on the beach. Therefore, ultimately South Arica is not seeing the real value that MNCs derive from operating in its nations. The root cause of this is that tax practitioners, in their bid to attract Foreign Direct Investment (hereafter referred to as 'FDI'), are under constant pressure to lower taxes to the detriment of the development of South Africa through revenue collection. This lack of development of South Africa as a host nation is a major consequence of transfer pricing.

4.5 The law on transfer pricing in South Africa

The strongest arsenal that South Africa has had in waging the war on transfer pricing and tax avoidance has been in the form of a sound policy. The South African legislature has enacted transfer pricing laws over the years which have enabled SARS to sanction the taxpayers who were guilty of transfer pricing.

[60] South African Tax Guide Xolani Mbanjwa 'Transfer pricing drains us of tax blood' 10 November http://www.sataxguide.co.za/transfer-pricing-drains-us-of-tax-blood/ (accessed 10 September 2017).

[61] As above.

Moreover, case law around the issue of transfer pricing has also evolved over the years. This is also authoritative and shows the manner in which the legislation and international law concerning transfer pricing is applied in South Africa.
In this section I focus on this law of transfer pricing in South Africa.

4.5.1 Legislation

Old Transfer Pricing Rules

S 31(1) of the South African Income Tax Act was the first transfer pricing piece of legislation. It provided that transfer pricing was committed in a transaction involving the transfer of goods or services between connected persons at a price that is not at arm's length firstly, if one party was a resident and the other was a foreign resident; secondly, if one party was a foreign resident and the other a South African permanent establishment of a foreign resident; and thirdly, if one party was a resident and the other was a foreign permanent establishment of a resident.

The non-arm's length price of the aforementioned s31(1) provision was a price which was different from the price which the goods or services in the transaction would have been expected to fetch had the parties been independent. In light of these considerations, tax avoidance in the form of transfer pricing would have been committed by a taxpayer and SARS was empowered, in terms of the legislation, to adjust the price of the transaction to align with the arm's length price for the products.[62]

The repeal of s31(1) was necessitated by its poorly articulated rules which resulted in legal uncertainty for taxpayers. These structural problems led to loopholes which were capitalised on by taxpayers and formed the basis of their arguments justifying their transfer pricing. In terms of the structure, the interpretation of the rules was narrow as it focused on separate transaction instead of overall transactions which were profit driven. Due to this taxpayers argued based on the literal terms of the transaction, instead of the overall economic substance and commercial objective of the arrangement.

Furthermore, although s31(1) permitted the use of OECD methods in order to determine an arm's length price, the provision emphasised the use of the comparable uncontrolled pricing

[62] Explanatory Memorandum on the Taxation Laws Amendment Bill, 2010 para 5.3, part I(A).

method over other transfer pricing methodologies which were more reliable and better suited for the other cases as each case was judged on a case by case basis.

Finally, s 31(1) emphasised the 'price' instead of the 'profits' of a transaction. Such emphasis was not aligned to Model tax treaties, thus creating potential difficulties in the mutual agreement procedures available under tax treaties.[63]

Thus South Africa's transfer pricing rules in the form of s31(1) of the South African Income Tax Act, were merged with thin capitalisation rules as found in s31(3) of the same Act and thus amended. These new transfer pricing rules were effective from years of assessment commencing on or after 1 January 2011.

New Transfer Pricing Rules

S31(1) of the Income Tax Act, as amended by the Taxation Laws Amendment Act 22 of 2012, defines 'financial assistance' as the provision of a debt or a guarantee.

S31(2) of the Income Tax Act as amended by the Taxation Laws Amendment Act 24 of 2011 provides that;

> Where-
>
> a) any transaction, operation, scheme, agreement, or understanding constitutes an affected transaction; and
>
> b) any term or condition of that transaction, operation, scheme, agreement or understanding-
>
> i. is a terms or condition contemplated in paragraph (b) of the definition of 'affected transaction'; and
>
> ii. results or will result in any tax benefit being derived by a person that is a party to that transaction, operation, scheme, agreement or understanding,
>
> the taxable income or tax payable by any person contemplated in the paragraph (b)(iii) that derives a tax benefit contemplated in that paragraph must be calculated as if that transaction, operation, scheme, agreement or understanding had been entered into on the terms and conditions that would have existed had those persons been independent persons dealing at arm's length.

S31(3) of the Income Tax Act as amended by the Taxation Laws Amendment Act 24 of 2011 states that:

> To the extent that there is a difference between-

---

63 Explanatory Memorandum on the Taxation Laws Amendment Bill, 2010 para 5.3, part II.

a) any amount that is, after taking subsection (2) into account, applied in the calculation of the taxable income of any resident that is a party to an affected transaction; and
b) any amount that would, but for subsection (2) have been applied in the calculation of the taxable income of the resident contemplated in paragraph (a), the amount of that difference must, for purposes of subsection (2), be deemed to be a loan that constitutes an affected transaction.

S31(4) provides:

For the purposes of subsection (2), where any transaction, operation, scheme, agreement or understanding has been directly or indirectly entered into or effected as contemplated in that subsection in respect of-

a) the granting of any financial assistance; or
b) intellectual property as contemplated in the definition of 'intellectual property' in section 23(1) or knowledge,

'connected person' means a connected person as defined in section 1: Provided that the expression 'and no shareholder holds the majority voting rights in the company' in paragraph (d)(v) of that definition must be disregarded.

Essentially, the new transfer pricing rules focus on cross-border transactions, operations, schemes, agreements or understandings that have been effected between connected persons, or undertaken for the benefit of connected persons. If the transactional terms or conditions which are made or imposed by the connected persons significantly vary from the transactional terms and conditions that would otherwise have existed between independent persons acting at arm's length, and such a difference confers a South African tax benefit on one of the parties, the taxable income of the parties that have benefited must be calculated as if the transactional terms and condition had been concluded as arm's length.

Taxpayers such as MNCs are therefore expected to account for transfer pricing based on the arm's length principle independently and without SARS intervention. This is a notable change from the previous regime which mandated the transfer pricing adjustments to be made by SARS as and when it was necessary. The new transfer pricing rules under the amended s31 of the South African Income Tax Act empower SARS to adjust the terms and conditions of a transaction, operation, scheme, arrangement or understanding in order to reflect the arm's length terms and conditions.

The new transfer pricing rules are closely aligned with the wording of the OECD and UN model tax conventions and are in line with tax treaties and other international tax principles. These

new transfer pricing rules can also be employed by SARS to deny interest deductions for interest that would not have existed had the South African entity not been thinly capitalised with excessive debt. This is possible because of the manner in which the amended s31 merges transfer pricing with thin capitalisation rules. According to the new s31(1), the scope of financial assistance includes any loan, advance or debt or any security or guarantee. Thus, any lending done through foreign financial assistance, from a foreign person to a foreign person with a South African business establishment is subject to the thin capitalisation rules.[64]

4.5.2 Case law

There is currently no substantive case law in South Africa on transfer pricing because the transfer pricing disputes are settled out of court. Significant amounts of money are at stake when it comes to transfer pricing issues so it is risky for the MNCs and companies to litigate in court as they do not know how the South African courts will interpret transfer pricing, i.e. whether or not the courts will do so in their favour. This is because if the courts do not interpret the transfer pricing laws in their favour and find the MNCs guilty of transfer pricing, then the MNCs are likely to lose millions of dollars in sanctions to SARS and their reputation is also likely to be tarnished. This will cause them further damage, patrimony-wise, as they are likely to lose their clients which will result in a loss of profits.

For the sake of a jurisprudential argument, it is ironic that MNCs harbour such legal uncertainty around the transfer pricing laws in South Africa and their interpretation and application by the courts thereof and yet South Africa has imported all of its transfer pricing laws mainly from jurisdictions of these same MNCs. This importation is legitimate as it has been done in the spirit and purport of the Constitution as South African courts are mandated, by the South African Constitution, to consider international law, including international tax law, and foreign law.

4.6 Methods used to arrive at an arm's length principle

As mentioned earlier on, in order for transfer pricing to have taken place in a transaction, the transfer price will be a non-arm's length price. This arm's length price is determined by SARS by employing the five OECD methods as recognised by the OECD guidelines, as is the case

---

[64] Explanatory Memorandum on the Taxation Laws Amendment Bill, 2010 para 5.3, part III (A).

with Zimbabwe.[65] In this section I take a look at these methods because it would be unscholarly of me to only discuss the transfer pricing as a form of tax avoidance and not how SARS comes to the conclusion, through the employment of these five OECD methods, that a transfer price has been set. These five OECD methods are the CUP, the RP, the CP, the TNMM and the transactional profit split method. I shall now proceed to describe each one of the methods fully.

The CUP method is the primary pricing method. It used to directly compare the price charged for a specific product in a controlled transaction between connected or related person and the price charged for a closely comparable product in an independent transaction in like circumstances.[66] The CUP method is the most direct and reliable way to apply the arm's length principle.[67] This accounts for its preference with SARS under the old s3(1) transfer pricing regime.

In order to effect the 'cost-plus' method, an arm's length transfer price set by adding a mark-up to the supplier's costs in a controlled transaction, is estimated. The mark-up should give create profit for the supplier, by factoring in the supplier's functions, the risks he would have taken and the assets that he would have used.[68]

The RP method is employed by SARS in the absence of comparable sales. The resale price is based on the price at which a product, which has been purchased from a connected enterprise, is resold to an independent enterprise. Having taken operational costs, an appropriate gross margin is then used to reduce the resale price. This enables SARS to find an appropriate profit after considering the functions performed, the risks assumed by the reseller and the assets used. The balance then constitutes the arm's length principle.[69]

On the other hand, transaction-based methods are characterised by a flexible approach in their application because if any material differences arise between the controlled and uncontrolled transactions and these differences greatly affect the final price, they can be accounted for through reasonable adjustments.[70] Nonetheless, cases with an unsatisfactory degree of

---

65 SARS Practice Note No 7 paras 9.1.2 to 9.1.3.
66 OECD 'Transfer Pricing Guidelines' 337 para 92.
67 Hay *et al* (n59 above) 10.
68 SARS Practice Note No 7 para 9.6.1.
69 SARS Practice Note 7 para 9.5.1; DC Campos *Bulletin for International Fiscal Documentation* (1996) 217.
70 Hay *et al* (n59 above) 10.

comparability still arise regardless of this flexible approach. It was in light of such constraints which are characteristic of the transaction based methods, that the OECD developed other profit-based methods that are not as likely to be adversely affected by the constraints. Examples of these newer methods include the TNMM method and the 'profit split' method.

The TNMM examines the net profit margin that a taxpayer realises from a controlled transaction between connected parties. Such an examination is done relative to an inappropriate base of assets, costs or sales. The tested party's profit level indicator is compared with those of comparable independent parties.

Calculations according to the profit split method are done in the following manner; the combined profit is initially identified and split between the connected parties in a controlled transaction.[71] This split is done by an approximate division of anticipated profits which were also reflected in an arm's length agreement. The profit split method is an apt transfer pricing calculation in cases of interrelated transactions which cannot be evaluated separately.

According to Practice Note 7, the above OECD methods are based on measuring an MNC's pricing strategies against a benchmark of the pricing strategies of independent entities in uncontrolled transactions. The SARS Commissioner applies the most suitable method on a case by case basis depending on the facts and available and reliable data. Market realities are also a contributory factor. Generally however, the traditional transaction methods are preferred by SARS. In terms of Annexure A of the SARS Practice Note 7, a four-step approach which was developed by the Australian Tax Office was recommended by the SARS Commissioner in order to arrive at an arm length's price. These four steps are namely;

1. understanding the cross-border dealings between connected persons in the context of the tax payer's business and assessing the risk;
2. selecting the appropriate transfer pricing method;
3. applying the selected method; and
4. calculating the arm's length price according to the selected method.

[71] SARS Practice Note No 7 para 9.8.1; OECD 'Transfer Pricing Guidelines' 346 para 1.

4.7 Conclusion and recommendations

The reach of transfer pricing laws in South Africa has been curtailed by South Africa's Headquarter Company (HQ) regime. South Africa introduced this regime in order to attract Foreign Direct Investment (hereafter referred to as "FDI") by offering tax incentives to MNCs so that they setup locally.[72] These tax benefits accrue to companies that are resident in South Africa and elect to be HQ companies. According to this HQ regime, one of the tax benefits is that of transfer pricing. Transfer pricing in laws forbid it as a form of tax avoidance however, for HQ companies, transfer pricing laws do not extend to foreign financing or intellectual property licensing. In other words, transfer pricing is allowed when it comes to intellectual property and foreign funds in MNCs. This shows that the reach of transfer pricing laws in South Africa are not all encompassing and are therefore ineffective when it comes to areas such as intellectual property and foreign financing of MNCs.

Transfer pricing laws in South Africa are ineffective because they are obsolete. It was pointed out by Annet Oguttu, chairperson of the base erosion and profit-shifting subcommittee of the Davis Tax Commission that, South African and international tax laws must be updated as they are now obsolete.[73] The business era in which the current tax laws served was the pre-digital era. In the present-day digitalised and highly technological era, money is moved globally at a faster pace hence the rise in transfer pricing by MNCs. While South Africa has updated its national transfer pricing rules as I noted above, it is yet to do so on a global stage where the MNCs subscribe to international tax laws.

It would be noteworthy to highlight that this obsolete nature of tax laws in South Africa is also the main cause of transfer pricing in South Africa. This is because there is no deterrent in the form of tax laws to ameliorate transfer pricing hence it is catalysed.

In order to stop transfer pricing and its consequential profit shifting and base erosion one might wonder whether the catalysing channel of transfer pricing should be blocked. This is not the solution because most of the supply chain is fragmented around the world due to globalisation.

---

[72] AW Oguttu 'Developing South Africa as a Gateway for Foreign Investment in Africa: A Critique of South Africa's Headquarter Company Regime' (2011) 36 *South African Year Book of International Law* 61; J Kruger &L Brunton 'South Africa: The South African Headquarter (HQ) Company Regime' http://www.sars.gov.za/TaxTypes/CIT/Pages/default.aspx (accessed on 1 September 2017).

[73] South African Tax Guide Xolani Mbanjwa 'Transfer pricing drains us of tax blood' 10 November http://www.sataxguide.co.za/transfer-pricing-drains-us-of-tax-blood/ (accessed 10 September 2017).

In the olden days one would complete most of the supply chain in South Africa and did not focus on the rest of the world.

A more suitable solution to curb transfer pricing in South Africa would be to update transfer pricing laws. South Africa has updated its national transfer pricing laws however, it is yet to develop more laws which counter base erosion and profit shifting in the form of tax treaty ratification with other countries. This will create efficient international tax law to which MNCs will be bound and will not contravene.

A comparative analysis between transfer pricing in Zimbabwe and transfer pricing in South Africa and the laws would have me conclude that the South African transfer pricing rules are characterised by heavy documentation just like the Zimbabwean transfer pricing rules. In terms of s29(1)(b)of the Tax Administration Act, No 28 of 2011 (hereafter referred to as the 'TAA'), an entity or an MNC must keep records, books of accounts or documents that are specifically required by the Commissioner of SARS by public notice.

On 15 December 2015, a Public Notice was issued by SARS detailing the additional record-keeping requirements for transfer pricing transactions. According to the Practice Note, taxpayers with a consolidated South African turnover of R1 billion or more must comprehensively and extensively document their transactions.

Furthermore, South African taxpayers who make a turnover below the R1 billion threshold must retain documentation to support any cross-border related-party transaction. The transfer pricing policy of these records must meet OECD standards and requirements.

The type of transactions that need documentation according to the Practice Note are called 'potentially affected transactions' in terms of s31 of the South African Income Tax Act. Potentially affected transactions are all cross-border transactions with the connected persons as listed in s31 of the South African Income Tax Act, regardless of whether or not the transaction terms and conditions are different from those of an arm's length transaction.

The new Zimbabwean transfer pricing rules, just like those of South Africa, are characterised by a system of heavy documentation in terms of s98B (5) of the Zimbabwean Income Tax Act. The MNCs ought to use these in order to prove their application of the arm's length principle

in their transfer pricing transactions. Unlike SARS, ZIMRA is yet to give a detailed scope of the specific documents MNCs and other companies need to retain when engaging in transfer pricing transactions.
The advantage of SARS' extensive documentation requirements is that the South African taxpayers are provided with clarity on the information that must be retained for transfer pricing purposes. Unlike in Zimbabwe, where the taxpayers are still uncertain and have been left guessing as to the specific type of information required for transfer pricing purposes by the ZIMRA Commissioner General.

The disadvantage of this documentation however, is that it is onerous. SARS places onerous documentation requirements on taxpayers which increases the compliance burden of the taxpayers, resulting in additional costs and a heightened chance of further tax avoidance, as taxpayers are likely to fail to document all the controlled transactions. The heavy documentation which characterises the new transfer pricing rules in South Africa is onerous because these record-keeping requirements for MNCs will require detailed information which may not be relevant for tax purposes. Some of this more onerous information includes;

A business operation summary which includes, *inter alia*, the key value drivers supported by independent industry research findings or reports. This can be problematic where industry research findings or reports may not exist for certain African countries.

Secondly, for a non-resident tested party, all contracts and invoices with customers and suppliers as well as segmented financial information per potential affected transaction.

Thirdly, for tested parties, a detailed allocation of revenues, costs, expenses and profits between its connected person transactions and independent person transactions.

Furthermore, a detailed information for affected transactions that relate to financial assistance.

Moreover, a summary of financial forecasts that are contemporaneous with the financial assistance transactions in question, but only as far as is meaningful in relation to the period of the funding transactions, indicating the expected levels of interest cover, gearing or other relevant measures over the forecast period.

Finally, any other information, data or document which may be relevant in the determination of an arm's length return under section 31(2), including data relating to a connected person.

To conclude this comparative analysis on the documentation requirement, this study asserts that this documentation requirement in terms of South African law has evolved from 2015 to 2017, as it now fully complies with the recommendations of the OECD under BEPS Action 13. On 2 June 2017, SARS published a draft Public Notice requiring the submission of country-by-country (hereafter referred to as 'CbC'), master file and local file returns. The information about these three documents must be submitted, by an MNC and all other reporting entities as defined in the regulations, in the business requirement specification (hereafter referred to as the 'BRS').

The advantage of this evolution is that the transfer pricing regime in South Africa is edging closer towards the finalisation of the requirements of its documentation. Zimbabwe can learn from this.

A major advantage of this Public Notice is that its requirement of the submission of the three documents is in line with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Authorities, which advocates for a three-tiered approach to transfer pricing documentation consisting namely of CbC report, master file and local file. The specific form in which the CBC will be laid out will be published in the BRS.

In conclusion, the evolution of the South African transfer pricing regime has been a marvel to watch. This is because it has resulted in South African tax law becoming a best study for other African countries to learn from. It is trite that the new amendment had a lot of gaps and loopholes which had to be filled especially with regards to the documentation requirements. These were important because they form the basis of the claim for tax avoidance in the form of transfer pricing. Nonetheless, SARS and the legislature incrementally worked on improving the legislation loopholes by specifying the requisite documentation over time. This also confirms that South African systems are put in place to serve the most current needs of its society, staring from cultural all the way to law, in this case tax law.

The recommendations which are given in the final chapter are mainly for Zimbabwe. Be that as it may, South Africa can improve its taxing system by adopting some of these initiatives and recommendations as there is always room for improvement.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The previous chapter detailed transfer pricing in South Africa, the evolution of its transfer pricing laws, and an evaluation of the transfer pricing legal regime of South Africa. This chapter concludes this investigation by giving a summary of findings and offering recommendations to the transfer pricing woes faced by Zimbabwe and also South Africa. It is in this way that this chapter offers an answer to the central question of how the ineffective transfer pricing laws in Zimbabwe can be transformed. This is because this chapter's recommendations give the practical solutions to the transformation. These recommendations are also applicable to South Africa because a few imperfections and *lacunae* are apparent in its transfer pricing rules too regardless of its effectiveness.

5.2 Summary of findings and conclusion

Transfer pricing remains a plague that has hit global tax systems, Sub-Saharan Africa and Zimbabwe and South Africa included. It, as a form of tax avoidance, has been more susceptible to abuse than tax evasion, because, as tax avoidance it stems from loopholes in tax law which are exploited unlike in the case of tax evasion which is legislated against. This assertion and conclusion is true as is evident in the address of the former Finance Minister of South Africa Pravin Gordhan to the UK parliament in November 2009 in which he said that 'We have allowed the word avoidance to gain too much respectability. It is just a smarter form of evasion.'[74] This is true as he had concluded that tax avoidance, in its many forms such as transfer pricing, was just as illegal as tax evasion however, it was deemed to not be as criminal as tax evasion because it was not legislated against and this is evident in the fact that transfer pricing is a criminal manifestation of the exploitation of the legal loopholes in tax law. These legal loopholes, back in 2009, were not explicitly categorised as illegal.

Be that as it may, according to Steve Jobs, if you define the problem correctly, you almost have the solution. Having identified the problem of tax avoidance as transfer pricing and its many causes, these following solutions are suitable problem solvers. The following are my recommendations;

[74] Tax Justice Network- Africa (n22 above) 29.

5.3 Recommendations

5.3.1 Representation

As highlighted in Chapter 1, representation of taxpayers in tax policymaking bodies such as Parliament is fundamental. This is because the potential impact of the new tax laws on the prospective taxpayers can be gauged by the various interested stakeholders. If these potential taxpayers' grievances are considered during tax policymaking, tax laws suitable to them are likely to be enacted by the legislature and this will guard against tax avoidance and evasion as their interests will be reflected in the tax laws and the tax burden will not be as onerous.

An apt illustration of representation concerning tax laws in Africa is in Ghana. Since 1987, Ghana Private Road Transport Union made a pact with the government that in exchange of being taxed they would be given parliamentary seats thus, political representation in the tax policymaking body of legislature was achieved in Ghana.[75] This attainment of representation was an effective move in the area of transport as this is an area in which operators such as the Ghana Private Road Transport Union have an interest in federating on a national level.

One might argue that the MNCs guilty of transfer pricing have had this opportunity of representation with regards to tax policy making therefore, they have no justification in avoiding to pay tax by hiding their profits in secrecy jurisdictions. This argument is true to a certain extent because in many studies it has been established that MNCs have influenced their tax policies by lobbying impoverished African governments such as that of Zimbabwe for tax holidays and special tax treatments to exploit natural resources such as diamonds in Marange.

Be that as it may, I argue that these MNCs should also, like in Ghana, have parliamentary seats given to them in exchange of their paying taxes so that they have a voice in the setting of corporate taxes, which is the main thing that they try to avoid in transfer pricing. Moreover, it will also give them a platform to provide guidance on the most effective ways to implement the transfer pricing legislation in their industries and thus see to its eventual reform and efficiency as is my aim in this research.

Nonetheless, this move goes to the heart of the sovereignty of a nation. This is especially so considering that these powerful MNCs invest in poor African countries such as Zimbabwe and

---

[75] Tax Justice Network- Africa (n22 above) 17.

South Africa. It can therefore be seen that the solution of representation brings with it another problem of the threat to sovereignty. According to Henry Kissinger, sovereignty is essentially the ultimate authority which is endowed in a state and its government and such authority is used in the decision-making process of the state and in the maintenance of order.[76] This problem is heightened by the neo-colonialism ideology regarding FDI which has saturated African nations in the 21st Century as they try to completely free themselves from the shackles of imperialism which was typical of the 20th Century African continent. Summarily, neo-colonialism is defined as a remnant form of imperialism in which past colonisers dominate their former colonies economically and culturally by marginalising not only the indigenous people's cultures but their economic interests as well by prioritising their own.[77]

This argument is myopic in the sense that it fails to take a full horizontal overview of the powers of the government of the host country of the MNC which will be paying tax and is likely to undertake transfer pricing. This is because the government of the host country can leverage its policymaking power and essentially its sovereignty through other means and pieces of legislation such as indigenisation policies which mandate the MNCs on how to conduct themselves whilst they operate in the host countries through for example, mandatory provisions in the indigenisation laws which not only make it mandatory for MNCs to have partial indigenous ownership but also make them adhere to the transfer pricing legislation which is already in place. In this case therefore, the transfer pricing legislation is reformed by making it effective in the sense that its implementation thereof is embedded in other pieces of legislation, in the form of suspensive conditions to the establishment of MNC operations in the host county. This is therefore a way of micro-managing transfer pricing in an economy. Zimbabwe already has an Indigenisation Act and the legislature can amend it by adding the provision which makes the adherence to transfer pricing legislation mandatory. This would then serve as an internal mechanism.

5.3.2 Citizenry engagement

Another recommendation would be that of the engagement of citizenry by ZIMRA. Citizenry engagement is two-fold in the sense that not only does it entail educating the Zimbabwean mases on the importance of paying taxes but it is also engagement in the sense that it will lead

---

[76] The 1648 Treaty of Westphalia; H Kissinger 'Introduction and Chpt 1' *World Order: Reflections on the Character of Nations and the Course of History* (2014)

[77] K Nkrumah *NEO-COLONIALISM: The Last Stage of Imperialism* (1965) x.

to a culture of whistle blowing by the citizens whenever they notice tax avoidance. I will first discuss citizenry engagement in so far as it concerns educating the masses on the importance of taxes and then I will proceed to discuss whistleblowing by citizens in the next paragraph.

ZIMRA needs to fully educate the masses of Zimbabwe, MNCs included, of the fiscal-social contract that is inherent in tax paying. The fiscal-social contract is the ultimate test of a representative government because tax connects rights to reality in the sense that, the realisation of rights such as housing, security, health and education is only possible with sufficient funding from the government. This funding comes from revenue collection mainly in the form of taxes hence, tax avoidance in the form of transfer pricing has a ripple effect on the citizens of the host country in which the MNCs operate. These citizens are also possibly the employees of the MNCs which are guilty of transfer pricing in Zimbabwe. By showing the citizenry this ripple effect of transfer pricing it will definitely enlighten them on the importance of paying taxes. This mass education can be done through carrying out surveys and consultations by ZIMRA in order to understand the interests of diverse groups and civil society organisations regarding taxation.

The ultimate form of citizenry engagement is in the form of whistleblowing. Whistle-blowing will essentially involve the citizens of Zimbabwe reporting to ZIMRA any taxpayer who avoids or evades paying taxes, MNCs included. This will make the monitoring of transfer pricing easier for ZIMRA especially when it comes to MNCs because it is the employees who have hands on evidence of the transfer pricing who will now be reporting to ZIMRA and will be presenting the evidence of transfer pricing to ZIMRA as well. Moreover, the lawyers and accountants who assist the MNCs with executing transfer pricing by transferring their profits to secrecy jurisdictions will also report the MNCs to ZIMRA because they would have been enlightened of the importance of paying taxes in terms of the fiscal-social contract. This is a more binding legal contract than the employment contract which exists between them, the lawyers or the accountants, and the MNCs which will usually mandate the lawyers to assist the MNCs to shift their profits to secrecy jurisdictions. Furthermore, the lawyers and the accountants will be forced to join the whistle blowing bandwagon and abandon their gravy train on which their stomachs are fed by the MNCs through the transfer pricing transactions, because of the societal pressure which would have come with the enlightening of the citizens on the importance of paying taxes and the whistleblowing as well.

Protection for these whistle blowers cannot be ignored and trivialised. This is because their lives are at risk if they whistle blow transfer pricing considering that they will be costing MNCs millions in terms of taxes and losses. This is more so now that transfer pricing has is heavily penalised and sanctioned against in terms of the transfer pricing legislation of Zimbabwe.

Conclusively therefore, the education of the masses through various programmes is imperative in order to assist the government of Zimbabwe in the collection of more revenue. Moreover, the political will on the part of the MNCs and the various key stakeholders is indispensable in this process.

5.3.3 Establish professional codes of conduct

A professional code of ethics must be established in order to ensure that the lawyers and accountants uphold the law, especially tax law, by not facilitating transfer pricing transactions completed by MNCs as they avoid paying taxes. In adhering to this code of ethics they would also be meeting their fiduciary acting in acting in the best interests of the firm.

These codes of conduct would be best suited to Zimbabwe if they reflect the current economic climate and legislation. In other words, they would be more effective if they are contextualised. This professional code of conduct would be best established by each professional association. For example, the Advocacy Chambers in Zimbabwe should establish its own professional code of conduct in as much as the Chartered Accountants of Zimbabwe and auditors have their own. This method of professional associations dictating the rules of play ensures the best hands-on application of the professional codes of conduct. A further requirement of signing the code should be given to all the lawyers and accountants as a pre-condition to them practising the profession.

The implementation of this recommendation can be specific to each profession. To curb tax avoidance and transfer pricing, accountants should; firstly, never mix auditing with the provision of other services like corporate consulting or tax advice; secondly, respect their duty to the shareholder and other users of account by ensuring MNCs report their finances truthfully; thirdly, respect the duty to the public by ensuring that companies give a truthful account of their role in society and finally, create ethical codes of conduct to counter arguments from company directors who may demand otherwise.

To curb transfer pricing lawyers should do the following;

Firstly, create a climate of compliance, in which they give legal advice which is in the best interest of the shareholders, management and wider stakeholders.

Secondly, create a climate of trust in which advice which is given is always within the letter and spirit of the transfer pricing law.

Thirdly, operate with transparency, where all legal instruments on offer are maintained in a public registry, with known owners as beneficiaries;

Furthermore, work for the public interest by not creating secretive trusts or arranging the ownership of fictitious companies, both of which are used as secret vehicles for transfer pricing and profit shifting.

Moreover, desist from offering contracts which are constituted by clauses that suggest the use of secrecy jurisdictions and tax havens because this contradicts the spirit of the transfer pricing law in Zimbabwe.

Banks must also do the following;
Firstly, they must know and respect the transfer pricing laws of other countries by not offering secrecy services where clients, by not reporting their funds back home, can easily break transfer pricing laws.

Secondly they must thoroughly know their clients and never accept a company without clear beneficial owners as clients.

Thirdly, they must keep records of the company or MNC or account beneficial owners for the period that interest and other capital gains are likely to be taxable, usually up to ten years.

Furthermore, they must improve financial transparency and not influence governments to try to establish new secrecy jurisdictions;

Finally, they must prioritise public interest more than client interest by cooperating with regulators and judicial inquiries concerning their clients because banks' operational licences are granted by the public.

5.3.4 Judicial bodies

A new tax law court should be established in which transfer pricing contraventions can be adjudicated on. The local Zimbabwean court currently face a backlog on the cases they are yet to hear therefore, this would definitely exonerate them of the pressure to perform which they are likely to encounter with the rise of transfer pricing cases which will find their standing courtesy of the new transfer pricing legislation.

Anti-corruption bodies which fight tax avoidance and transfer pricing can also be established. These will then be the ones to bring the transfer pricing cases before the new tax law courts. This will aid in the abolishment of transfer pricing and improved revenue collection by ZIMRA. Instead of having every whistle blower or aggrieved party come to the courts and enter their cases on the court roll, which would lead to a case backlog again because of the probable numerous cases, the anti-corruption body in Zimbabwe can assist ZIMRA and the courts in this way.

Zimbabwe currently has an anti-corruption body however, it is infamous for being heavily compromised and lacking impartiality due to political interferences. This alone dents its integrity and makes it unsuitable for the proposed tax law court to work with. Nonetheless, this does not leave us stranded and without an option because a new anti-corruption body which is more focused on tax issues such as transfer pricing can always be formed on the recommendation of ZIMRA to the Zimbabwean Ministry of Finance which is currently under the leadership of Patrick Chinamasa.

5.3.5 Transparency and country-by-country (CbC) reporting by MNCs

In order to curb transfer pricing I recommend that host countries such as Zimbabwe, request CbC reports from MNCs. These reports will inform stakeholders, taxpayers of host countries included, about their activities which involve where and how they pay their tax, their annual accounts, the location of the MNCs and their branches and the type of business that the MNCs carry out. This would expose the MNCs' secrecy jurisdictions and tax havens, which is their territory of transfer pricing. Secrecy jurisdiction would be exposed by the MNC's country

listing and also by its data which will show where intra-group trading is particularly dense. This in turn would be beneficial to Zimbabwe not only because it would expose the secrecy jurisdictions of the MNCs but it would also save Zimbabwe as a host country, the time and money in sourcing this data as it would already have been provided for in the MNCs' CbC reports. Moreover, all of this information would then trigger investigations into corporate profit sharing by ZIMRA.

I recommend that the implementation of the country-by-country reporting by MNCs be done by the International Accounting Standards Board which sets accounting rules for most MNCs. It showed interest in doing this in 2007 by wanting to develop CbC reporting for extractive industries.

For the sake of the implementation of the CbC report system, ZIMRA can be guided by SARS which has already started using CbC reports to curb transfer pricing.

A further step into implementation would be that of the Zimbabwean legislature creating a law which mandates MNCs and large companies to publish the names if the subsidiaries which they own in various countries. Preferably Zimbabwe should make this a pre-requisite to an MNC setting up operations and operating in Zimbabwe. This requirement can be monitored by the Reserve Bank of Zimbabwe (hereafter referred to as "the RBZ") and ZIMRA's Commissioner. This is more effective than for instance the African Union and continental financial regulators monitoring this because the RBZ and ZIMRA will micro-manage the implementation of the country-by-country reporting thus making it more effective.

On the issue of the content of the MNCs' CbC reports, I recommend the inclusion of the following in its accounts;

1. The country of operation of the MNC;
2. The MNC's trade name in the various countries in which it operates
3. The MNC's financial performance in these various countries of operation including;
    a. Sales, both intra-group sales and inter-group sales
    b. Purchases, both intra-group sales and inter-group sales
    c. Financing costs, both intra-group sales and inter-group sales
    d. Labour costs and employee numbers
    e. Tangible and intangible assets

f. Pre-tax profit
g. Tax payments to the government of the location where it trading
h. Corporate social responsibility.

5.3.6 Document trusts

Trusts should operate transparently and must document their contents and activities with ZIMRA. The agents of trust are usually lawyers and accountants and they are the ones who should be held responsible for informing ZIMRA of any payments made by the trust. The activities of the trusts which must be documented and must be kept transparent to ZIMRA include the external payments that the trust makes. This is because secrecy trusts are abused as vehicles for transfer pricing as they are used to hide wealth from ZIMRA. After hiding the wealth, it is then transferred to secrecy jurisdictions through transfer pricing.

The legitimacy of my argument that trusts must be transparent and have their activities documented lies in the fact that trusts are like limited liability companies ash they share the same rights and privileges. Just like it is imperative for limited liability companies to be transparent about their use of these rights and privileges so should it be on trusts as well as the rights and privileges are the same and so is their ultimate use. The implementation of my recommendation of the documentation of trusts will be best done through national legislation and CbC report.

5.3.7 Donor assistance towards revitalising the tax system

International donor assistance towards revitalising the tax system and increasing revenue by ZIMRA is highly recommended. NGOs, based in and out of Zimbabwe can provide financial assistance to ZIMRA in order for it to setup initiatives which will stop transfer pricing and profit shifting being carried out by MNCs in Zimbabwe. This is advisable because such financial assistance is of long-term sustainability and Rwanda is a case in point. The Rwanda Revenue Authority improved its revenue collection from 9% in 1998 to 14.7% in 2005 through earmarked technical donor support, marginalising tax ‘politics’ and policies and an unprecedented political will to solve the tax issues of the Republic.[78]

[78] OECD Annual Report. Resource Flows to Fragile and Conflict-Affected States 2010 (Paris: OECD, 2010).

Moreover, coupled with the donor financial assistance to assist Zimbabwe improve its tax woes should be political will from the nation and its government to channel those donor funds earmarked for revenue collection by ZIMRA, to ZIMRA and its tax collection efforts.

Donor financial assistance could help;

1. Promote South-South information sharing within Africa and other developing states. This could be in the form of bilateral ‘on request treaties as is the case with the EU. This information sharing would help enlighten nations such as Zimbabwe on the secrecy jurisdictions and tax havens in which MNCs store their profits earned from transfer pricing. This information sharing between Zimbabwe and other nations should include trusts and corporate bodies as these are the usual secrecy vehicles of transfer pricing and profit-shifting used by taxpayers.
2. Promote legitimate peer review processes of tax system reform.
3. Introduce new tax programmes which not only enlighten the citizenry on the vitality of paying taxes but also keep them accountable in terms of paying taxes.
4. Bolster citizen and parliamentary scrutiny of investors and lenders in African countries.
5. Study national, regional and continental freedom of information laws.

The ultimate goal of donor financial assistance in Zimbabwe would be to tackle tax avoidance, especially transfer pricing.

The implementation of this donor assistance tax reformation policy is mainly through political will which will then be followed by a setup of tax programmes which channel and allocate the earmarked funds to the anti-transfer pricing bodies in ZIMRA. The reason political will is the chief implementer in this case is because no matter how well structured the donor funded tax programmes aimed at conquering transfer pricing are going to be, they will crumble if they are proliferated by corruption from ZIMRA officials who will be managing them.

In further implementation, best practices must be employed by ZIMRA in order to strengthen its local tax administration, especially the new transfer pricing legislation. It can do this through comparative legal studies which focus on the sound transfer pricing legislation of South Africa as a form of best practice analysis.

5.3.8 Personnel training and recruitment

Under the new era of regulated transfer pricing, training of ZIMRA personnel is imperative. They must be trained to understand the arm's length principle, as per the five methods of the OECD, in order to detect transfer pricing and tax avoidance. The tax officials are given the authority to carry out this determination of transfer pricing and to penalise it in terms of the transfer pricing law, s98B, in the sense that, S98B mandates the Commissioner to determine transfer pricing by application of the five OECD methods and penalise for it. Since the Commissioner cannot be in different places at various times, he then delegates his authority to the ZIMRA officials. If this delegation of responsibilities by the Commissioner is going to be effective, then the ZIMRA personnel must be trained to monitor transfer pricing. They must also be trained to report it to the ZIMRA Commissioner. Therefore, it is necessary to set up structures to report any tax avoidance.

The implementation of this recommendation can firstly be through a 5-year Strategic Management Plan for ZIMRA which includes personnel training for the duration of that 5 year strategy.

Secondly, the training institutions which are specifically tax orientated and are only meant for ZIMRA personnel must be setup and administered efficiently. These schools will engage top tax law experts, such as Croome from South Africa to train the ZIMRA personnel. The reason that these schools must only be for ZIMRA tax officials is because of the classified nature of the tax information which will be discussed in those lectures. The tax information will be international as some of the lecturers in the school will be tax law experts in various countries and they are likely to use their cases as best practice case studies of which these particular cases might involve national governments' key strategies on collecting taxes and penalising their avoidance through intelligence systems.

Moreover, besides training the currently employed ZIMRA personnel, ZIMRA must also hire new tax officials who are trained already. This will assist ZIMRA to effectively administer transfer pricing. The benefit of this is clear if one is to juxtapose the Netherlands with Kenya or Nigeria. In Netherlands, which is an OECD country, 30 000 tax and customs officials are employed for a population of 10 million. Not only do they extract revenue but they also manage tax credits and timeously respond to taxpayer queries. This makes the Dutch tax system very efficient. It is evident that their focus is to serve the interests of taxpayers more than it is to

merely tax them. If the ZIMRA tax officials could operate with such a humane heart cooperation in curbing transfer pricing and tax avoidance would be easily achieved.

On the other hand, it was recorded that in 2011 Nigeria only had 5 000 tax officials for its population of 140 million. This meant there was no meaningful tax dialogue that existed between them and the citizenry. This was also the case with the Kenyan Revenue Authority which employed approximately 3 000 tax and customs officers to serve a population of 32 million. This has resulted in inefficiencies in African tax systems as they are inaccessible due to the fact that those that the tax personnel are so few and cannot meaningfully engage with the majority of the citizenry. Furthermore, these African countries have also been castigated by poverty and dwindling coffers because of tax avoidance and transfer pricing due to a shortage of tax officials who could efficiently administer the tax system. ZIMRA can learn from this juxtaposition the vitality of not only training its tax officials but of hiring competent tax officials in order to curb transfer pricing and effectively administer the tax system of Zimbabwe.

5.3.9 Stolen Asset Recovery Initiative

What is characteristic of transfer pricing is profit shifting, in other words syphoning the public assets of the host nation which are in the form of tax, to secrecy jurisdictions. MNCs are the major culprits of this in Zimbabwe. To tackle this problem of stolen assets, ZIMRA can take up the Stolen Asset Recovery initiative (hereafter referred to "StAR). Countries which have implemented StAR have won the war of recovering stolen assets by requesting that their stolen assets which were held abroad in secrecy jurisdictions be frozen.

Nonetheless, the StAR initiative is difficult to employ for all countries, especially poor ones because of its very high burden of proof. A high burden of proof entails an intense use of resources such as evidence showing the stolen assets which were stolen through syphoning as facilitated by transfer pricing. All this evidence is expensive for ZIMRA to gather but it will not be so if prior to adopting the StAR initiative, ZIMRA adopts the earlier mentioned country-by –country reporting because it will disclose the MNCs subsidiaries and off shore accounts which are located around the globe. The golden thread in my recommendation is therefore apparent in this way.

My recommendation of the StAR initiative is not only legally sound but it is also economically sound because Africa needs the fuds it would have recovered. StAR notes that for every US$100 million recovered, four million children could be fully immunised, or water connections provided to 250 000 households.[79] This is important because the economic stability and the security of a nation depend on its health system as the wellbeing of children assures a nation of future leaders and policymakers. Moreover, the sole existence of a nation is guaranteed provided its children mature into adults who will reproduce and compensate for the dead population. Therefore, StAR definitely goes a long way as it not only addresses transfer pricing but also manages the economics of a nation and such foresight is what present-day African nations desperately need.

5.3.10 Informal economy engagement

I recommend that ZIMRA taxes the informal economy of Zimbabwe which constitutes 80% of the economy. According to the ILO, Zimbabwe currently sits at a 95% unemployment rate however, the majority of the money is stored in the informal sector which constitutes 95% of the economy. Due to the fact that they are not taxed, the informal sector participants, through transfer pricing with their related international subsidiaries or business counterparts, avoid tax. They do this by selling their goods at cheaper prices to their fellow Irish vendors for example and then the Zimbabwean informal sector entrepreneurs store up their profits which they would have gained through a mark-up or overpricing in a sale done by their counterparts, in Ireland or Wales.

My argument of engaging the informal economy is sound if one is to look at the value of the informal economy according to statistics. Africa's under-taxed or untaxed informal economy was worth 43% of GDP in 2002-03, as compared to 16% in the OECD and 30% in Asian countries.

A case study of this was Mauritius which successfully increased its revenue collection after it started taxing its informal sector. The ILO observed that its economy had grown and is now the 10th largest in Africa because the government taxes and collects a lot of revenue form the informal sector. Mauritius' unemployment rate sits at 7.5% to date, which is significantly

[79] Stolen Asset Recovery Initiative (StAR), Stolen Asset Recovery Initiative (StAR): Challenges, Opportunities, and Action Plan (World Bank/ UNODC, 2007).

lower than the rate in Zimbabwe. According to the ILO, Zimbabwe's unemployment rate sits at 95%. It therefore goes without saying that Zimbabwe stands to benefit in terms of economic growth if it places effective anti-tax avoidance laws, on issues such as transfer pricing, on its large informal sector which not only outweighs its formal sector but also holds more money and revenue. This would also solve Zimbabwe's cashflow and liquidity conundrum as it is estimated that about US$3 million to US$7million is currently circulating in Zimbabwe's informal sector.

In order to implement the aforementioned recommendation, I propose that the Zimbabwean legislature amends the Income Tax Act by adopting direct taxation targeting the informal sector and thus increase the tax base and consequently the tax collection. Rwanda implemented direct taxation by charging US$40 per month and this boosted revenue in Rwanda because between 1998 and 2006, the national budget and tax revenue of Rwanda grew threefold.

Secondly I propose that ZIMRA give tax incentives as was the case in Rwanda. For example, in Rwanda national tax days which celebrate exemplary taxpayers exist. ZIMRA can emulate this reward system.

ZIMRA's engagement of the informal sector can be catalysed through the formation of a progressive tax system in which the wealthy MNCs pay a higher proportion of their income tax than the poorer informal sector participants such as vendors. ZIMRA can facilitate this through the introduction of progressive marginal rates of taxation and the charging of special levies on goods and activities that are primarily consumed by wealthy MNCs, which are also high-income earners, such as luxury cars which the MNCs buy for their senior management and also charge levies on bulldozers and cranes which the MNCs in extractive industries use in order to extract minerals.

The benefits of my recommendation to engage the informal sector are desirable as I am now to prove. The major benefit of taxing the informal economy is that the tax base of Zimbabwe will increase and so will the revenue that it collects.

Moreover, dependence on foreign financial aid is likely to decrease. In an economically stagnant Zimbabwe, international foreign aid accounts for 88% of the country's dwindling coffers. If ZIMRA efficiently taxes the large and lucrative informal Zimbabwean sector, then

the nation's dependence on foreign aid is likely to decrease. This was the case in Rwanda due to direct taxation on the informal economy and tax incentives. The Rwandan government collected more tax, increased its revenue and this eventually led to a significant decrease on foreign aid dependence as domestic revenue accounted for 44% of the state budget in 2008 despite the country hosting no significant natural capital.

5.4 Conclusion

In conclusion, a balance must be struck by Zimbabwe between curbing transfer pricing and creating an investor friendly nation in which companies can set up their headquarters and secure the profits of MNCs this way. In an attempt to attain this goal, Zimbabwe can emulate South Africa in legislating for a new headquarters company regime which is favourably characterised by an exemption from foreign financing or intellectual property licensing in terms of controlled or independent transactions. This gives MNCs and their headquarters more freedom in setting prices which are conducive to the tax environment.

The implementation of the recommendations in this chapter would curb and eventually end transfer pricing. Nonetheless the benefits are hundredfold because many other areas of the Zimbabwean tax system will be positively affected. Ameliorating the understaffing typical of African tax systems by hiring and recruiting more tax officials will increase efficiency in the sense that, staff morale will increase, productivity will improve and corruption will decrease. Due to the many supervisors who will now be present to monitor the activities of the tax officials, the tax officials will not receive bribes anymore. ZIMRA will no longer suffer from its staff being poached by the private sector because it will retain them through training and thus facilitate their reaching self-actualisation.

In my opinion, the ultimate rescuer of transfer pricing in Zimbabwe is the government because the buck stops with the leader, of which in this case the policymaker, namely the government of Zimbabwe is the leader. I opine that the government of Zimbabwe should end transfer pricing because it has the greatest influence on the operation of business in Zimbabwe including revenue collection. To its credit, it has taken a first step in curbing transfer pricing by enacting s98B, the transfer pricing law. I further recommend that in order to make this piece of legislation more efficient and effective, government must implement a system of taxation that firstly requires each taxpayer, MNCs included, to pay tax according to their means; secondly, imposes no undue cost on the taxpayers to comply with that law; thirdly, provides

taxpayers with reasonable certainty as to their dues; provides an accessible information and arbitration system when the law is vague; imposes a duty to ensure that taxes are applied impartially, free of corruption and are equally enforced and ensures the accounting of an open and transparent receipt of taxes and also ensure that state spending is budgeted and accounted for through democratic and transparent processes.

If government does this it would be great because it would fill in potential loopholes that are likely to be inherent in a pioneering policy such as is s98B. As the first transfer pricing law in Zimbabwe, it might have inherent defects which are due to a country's lack of expertise in drafting legislative pieces of such a nature.

Moreover, members of parliament should request information on secretive extraction and other investment deals in order to uphold the equality of all taxpayers. Through intergovernmental cooperation, governments can tackle the issue of secrecy jurisdictions by creating international tax treaties which provide for a more accessible tax system with readily available information on an automatic and multilateral basis.

The government of Zimbabwe must also ensure that it is represented at global fora which are influential in tax policymaking such as the Brettonwood Institutions. African tax policy is designed by external influential forces such as globalisation forces and the international organisations associated with the Washington consensus. The Washington consensus is a forum which was pivotal in determining the global structure of taxes and the level of rates and countries risk disapproval of the International Monetary Fund (hereafter referred to as "the IMF") and the World Bank if they refuse to be part of the Washington consensus. This consensus aimed at reducing corporate tax and to a lesser extent, personal tax. As aforementioned, ZIMRA must reduce the corporate tax it charges companies and MNCs as a way of curbing transfer pricing because it is from these high taxes that MNCs avoid payment of taxes through transfer pricing. Nonetheless, it logically follows that the realisation of this tax reduction can be catalysed provided that ZIMRA officials partake in world fora which influence global tax policies such as the Washington consensus which was hosted by the Brettonwood Institutions.

As a meaningful initial step to the participation on international fora aimed at tax policymaking, Zimbabwe should actively participate in the UN processes which target the sharing of

impetuous and reformative tax practices which have been successful in the global South, amongst nations of the South. One of these processes is the global South-South Sharing of Successful Tax Practices which is the brainchild of the UN Development Programme and its Finance for Development office. Transfer pricing is under the global South-South Sharing of Successful Tax Practices' S4TP Focus Areas. The UN aims to tackle transfer pricing through this South-South initiative by strengthening the institutional capacity of national tax administrations to monitor transfer pricing, i.e. intra-group pricing of transactions in MNCs. This exposure to successful reformative tax policies would benefit Zimbabwe and its ZIMRA immensely as the achievements of these tax reform programmes as discussed by the UN, would feed into more efficient transfer pricing policymaking by the Zimbabwean legislature.

Civil Society Organisations (hereafter referred to as "CSOs") in Zimbabwe are taking a lacklustre approach towards initiating tax reforms which tackle transfer pricing such that it is only the legislature which is ending it through enacting laws such as s98B. Be that as it may, the legislature is doing the bare minimum. It is about time CSOs advocate for tax justice vociferously so as to deter the MNCs from shifting their profits and short-changing Zimbabwe of the socio-economic development that they owe it as a host country.

Moreover, this fight to end transfer pricing and promote tax justice system in Zimbabwe is an intersection of democracy. Better payment of taxes would lead Zimbabwe to a more civil democracy characterised by better governance because a new civil society would have been birthed. This can be achieved if CSOs educate Zimbabweans on national tax justice and what can be done to tackle it. Civil society must prioritise raising awareness about the importance of taxation; developing alternatives to the tax consensus which are best-suited for the tumultuous political and economic Zimbabwean climate; making governments accountable for how they raise revenue and spend it; demanding transparent mineral extraction contracting processes and audits of existing contracts; making companies and MNCs pledge to preparing country-by-country accounts; educating the masses on the detrimental consequences of tax avoidance; and creating a dialogue between tax administrations and civil society.

In conclusion, these recommendations which I have offered for Zimbabwe are pivotal to the reform of its transfer pricing laws because they will fill in the gaps that are present in the current transfer pricing laws of Zimbabwe. These recommendations would be best implemented on a piece meal basis in order for the reform to be effective. The political will of the Zimbabwean

people and authorities however, remain the main weapon in conquering tax avoidance done through transfer pricing.

BIBLIOGRAPHY

Primary Law

Legislation

The Finance Act of Zimbabwe [Act 2/2017].

The Income Tax Act of South Africa 58 of 1962.

The Income Tax Act [Chapter 23: 06] of Zimbabwe.

Case Law

IRC v Joiner [1975] 1 W.L.R. 1701.

Lord Howard de Walden v IRC [1942] 1 All ER 287.

Case Studies

River Ltd. Transfer Pricing Case Study

ABC Zimbabwe Branch Transfer Pricing Case Study

Treaties

The 1648 Treaty of Westphalia

The United Nations Charter

Model Treaties

OECD Model Tax Convention on Income and on Capital (2003 condensed version).

Secondary Law

Books

Chakaipa, K *Karikoga Gumiremiseve (The Ten Arrows)* (Longman Zimbabwe in association with The Literature Bureau: Harare 2001).

Chavagneux, C& Palan, R *Les paradix fiscaux* (La Decouverte: Geneva 2007).

Croome, B; Oguttu, A; Muller, E; Legwaila, T; Kolitz, M; Williams, RC & Cornelius, L *Tax Law: An Introduction* (JUTA: CapeTown 2013).

Garrison, RH & Noreen, EW *Managerial Accounting International Edition* (McGraw-Hill Irwin: New York 2011)

Kissinger, H *World Order: Reflection on the Character of Nations and the Course of History* (Penguin: New York 2014)

Manual on Transfer Pricing for Developing Countries (United Nations: New York 2017).

Murray, R *Tax Avoidance* (Sweet & Maxwell: London 2012).

Nkrumah, K *NEO-COLONIALISM: The Last Stage of Imperialism* (Thomas Nelson & Sons, Ltd.: London 1965).

Stroud, A & Maters, C Transfer Pricing (Butterworths: London 1991).

TJN-Africa *Tax us if you can* (Pambazuka Press: Nairobi 2011).

Venkatesh, MR *Dr. Manmohan Singh- A Decade of Decay* (Rare Publications: Chennai 2013).

Ware, J & Roper, P Offshore Insight (Butterworths: Durban 2001).

Journal Articles

Hay, D *et al* ‘Past and Present Work in the OECD on Transfer Pricing and Selected Issues’ (1994) 10 *Intertax* 424.

Hirshleifer, J ‘On the Economics of Transfer Pricing’ (1956) 29 *The Journal of Business* 172.

Miesel, VH *et al* ‘International Transfer Pricing: Practical Solutions for Inter-Company Pricing-Part II’ (2003) 29 *International Tax Journal* 1.

Mohammad, T *et al* ‘Transfer Pricing And Taxation Implication Disclosure In Segmental Reporting: Malaysian Evidence’ (2005) 4 *International Business & Economics Research Journal* 33.

OECD Report of the Committee on Fiscal Affairs *‘Transfer Pricing Guidelines for Multinational Enterprise and Tax Administrators’* (1994) 172 *Intertax*.

Oguttu, AW ‘Developing South Africa as a Gateway for Foreign Investment in Africa: A Critique of South Africa’s Headquarter Company Regime’ (2011) 36 *South African Year Book of International.*

Internet Articles

Baker, R ‘Illicit Financial Flows from Africa: Hidden Resource for Development’ 26 March (Washington DC: Global Financial Integrity, 2009) http://www.gfip.org/storage/gfip/documents/reports/gfi_africareport_web.pdf

Kruger, J & Brunton, L ‘South Africa: The South African Headquarter (HQ) Company Regime’ http://www.sars.gov.za/TaxTypes/CIT/Pages/default.aspx (accessed on 1 September 2017).

‘Nelson Mandela describes the concept of ubuntu’, New York: dotSUB http://dotsub.com/view/2ff54345-ea2f-492e-b62a-46a04ff2221e

South African Tax Guide Xolani Mbanjwa ‘Transfer pricing drains us of tax blood’ 10 November http://www.sataxguide.co.za/transfer-pricing-drains-us-of-tax-blood/ (accessed 10 September 2017).

Tralac Trade ‘Zimbabwe tightens taxation to prop up falling economy’ 15 September https://www.tralac.org/news/article/6239-zimbabwe-tightens-taxation-to-prop-up-failing-economy.html (accessed 22 June 2017).

Zimbabwe Independent 'New tax regime: Govt robbing the poor' 13 April https://www.theindependent.co.zw/2017/04/13/new-tax-regime-govt-robbing-poor/ (accessed 21 June 2017).

Reports/Papers

2013 Global Transfer Pricing Survey by Ernst &Young.

Adams & Adams' *Transfer Pricing*: (2016)

Campos, DC *Bulletin for International Fiscal Documentation* (1996).

Commission of Inquiry into Certain Aspects of the Tax Structures of South Africa 'Second Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa: Thin Capitalisation Rules' (1995).

Gocer, O 'International Terrorism and its Key Market' published Master's Thesis by the Diplomica Verlag GmbH, 2005 44.

OECD Annual Report. Resource Flows to Fragile and Conflict-Affected States 2010 (Paris: OECD, 2010).

Stolen Asset Recovery Initiative (StAR), Stolen Asset Recovery Initiative (StAR): Challenges, Opportunities, and Action Plan (World Bank/ UNODC, 2007).

Tanzi V *Globalization, Tax Competition and the Future of Tax Systems* (International Monetary Fund Working Paper 1996).

"Zimbabwe enacts new transfer pricing legislation" *Global Tax Alert* 16 March 2016.

Regulations

South African Revenue Service's 'Practice Note No 7: Determination of Taxable Income of Certain Person from International Taxation: Transfer Pricing (section 31 of the Income Tax Act 58 of 1962)' 6 August 1999.

35th Schedule to the Income Tax Act [Chapter 23: 06] of Zimbabwe.

Manuals and Guidelines

Explanatory Memorandum on the Taxation Laws Amendment Bill, 2010.

Manual on the interpretation of transfer pricing

Organisation for Economic Co-operation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

UN Practical Manual on Transfer Pricing for Developing Countries (2017).

Websites

https://www.ataftax.org/en/about/overview (accessed 18 August 2017).

https://www.ataftax.org/en/members/countries (accessed 18 August 2017).