

TAX AVOIDANCE OPPORTUNITIES BY INVESTING IN TAX HAVENS - A SOUTH AFRICAN PERSPECTIVE

by

Elma Mac Robert
Student number 29592870

Submitted in partial fulfilment of the requirements for the degree

Magister Commercii in Taxation

in the

FACULTY OF ECONOMIC AND MANAGEMENT SCIENCES

at the

UNIVERSITY OF PRETORIA

STUDY LEADER: Prof M Cronje

Date of submission:
2011-12-06

ACKNOWLEDGEMENTS

I would like to extend my gratitude to the following:

- my husband, for supporting me in all my aspirations;
- my baby boy Ian who was born during the completion of my mini dissertation who had to share his mother's attention with academia;
- my mother for helping to take care of my baby while I completed my mini dissertation;
- the Department of Taxation for supporting me by providing an extension of submission when my baby was born; and
- God for providing me with the will to complete this degree.

ABSTRACT

TAX AVOIDANCE OPPORTUNITIES BY INVESTING IN TAX HAVENS - A SOUTH AFRICAN PERSPECTIVE

by

ELMA MAC ROBERT

STUDY LEADER: PROF M CRONJE
DEPARTMENT: TAXATION
DEGREE: MAGISTER COMMERCII

The National Treasury announced that foreign exchange regulations would to be amended to enable greater foreign investment by South African entities.

The effect of the above less stringent regulations increases the opportunity for investors to invest/earn income in tax havens which will have an effect on the ability of the South African Revenue Service (hereinafter referred to as SARS) to collect revenue for the National Treasury.

Investments in tax havens have various tax benefits for the investor due to the favourable tax treatment that the investor is likely to receive. There is, however, a risk that the taxpayer, seeking these benefits, might contravene the South African Income Tax Act and be found guilty of tax evasion.

Only known tax havens were studied as, given the complexities of international taxation, almost every tax system could be considered a tax haven if compared to the South African tax system.

Key words:

Tax havens

Tax evasion

Tax avoidance



Investment opportunities

Foreign income earning opportunities

Anti-avoidance measures

OPSOMMING

BELASTINGVERMYDINGS GELEENTHEDE DEUR TE BELÊ IN BELASTINGTOEVLUUGSOORDE – ‘n SUID-AFIKAANSE PERSPEKTIEF

deur

ELMA MAC ROBERT

STUDIELEIER: PROF M CRONJE
DEPARTEMENT: BELASTING
GRAAD: MAGISTER COMMERCII

Die Nasionale Tesourie het sekere buitelandse valutabeheermaatreëls aangekondig om groter beleggings deur Suid-Afrikaanse entiteite moontlik te maak.

Die effek van bogenoemde verslapping van regulasies skep egter ook die geleentheid vir beleggers om in belastingtoevlugsoorde te belê of om inkomste daar te verdien wat die Suid-Afrikaanse Inkomstediens se pogings, om inkomste vir die Nasionale Tesourie in te vorder, sal belemmer.

Beleggings in belastingtoevlugsoorde het verskeie voordele vir die belegger wat waarskynlik gunstige belastinghantering tot gevolg sal hê. Daar is egter ook die risiko dat die belegger homself kan skuldig maak aan belastingontduiking en daarmee die Suid-Afrikaanse Inkomstebelastingwet sal oortree.

Slegs bekende belastingtoevlugsoorde word in hierdie studie ondersoek aangesien internasionale belasting taamlik kompleks is. Byna elke belastingstelsel kan gesien word as ‘n belastingtoevlugsoord as dit vergelyk word met die Suid-Afrikaanse belastingstelsel.

Sleutelwoorde:

Belastingtoevlugsoorde

Belastingontduiking



Belastingvermyding

Beleggingsgeleenthede

Buitelandse inkomsteverdienings geleenthede

Teenvermydingsmaatreëls

TABLE OF CONTENTS

CHAPTER 1	INTRODUCTION AND PROBLEM STATEMENT	1
1.1	BACKGROUND.....	1
1.2	PROBLEM STATEMENT	2
1.3	RESEARCH OBJECTIVES	2
1.4	IMPORTANCE AND BENEFITS OF THE PROPOSED STUDY	3
1.5	DELINEATION AND LIMITATIONS.....	3
1.6	DEFINITIONS AND KEY TERMS.....	4
1.7	ABBREVIATIONS USED.....	5
1.8	RESEARCH DESIGN.....	5
1.9	BRIEF OVERVIEW OF CHAPTERS	6
CHAPTER 2	LEGISLATION APPLICABLE TO INVESTMENTS INTO TAX HAVENS 7	
2.1	INTRODUCTION.....	7
2.2	SOUTH AFRICAN TAX LEGISLATION APPLICABLE TO INVESTMENT INTO TAX HAVENS	7
2.2.1	Difference between tax evasion and tax avoidance	7
2.2.2	Anti-avoidance measures as contained in the Act.....	8
2.2.3	Controlled foreign company.....	11
2.2.4	Investments in offshore trusts (s7(5) & s7(6) & s7(8) & s25B(2A)	13
2.2.5	Transfer pricing	15
2.2.6	Residence basis for taxation	15
2.2.7	Double taxation agreements form part of legislation	16
2.3	PROBLEMS WITH INTERPRETATION OF LEGISLATION.....	17
2.3.1	Substance over form (intention)	17
2.3.2	Proving that the primary purpose of a transaction was for commercial substance and not to obtain a tax benefit.....	18
2.3.3	Examples of arrangements that are purely tax driven	18



2.4	CONCLUSION.....	19
CHAPTER 3	INVESTMENT OPPORTUNITIES IN TAX HAVENS	20
3.1	INTRODUCTION	20
3.2	CHARACTERISTICS OF A TAX HAVEN	20
3.3	BENEFITS AND RISKS FOR THE SOUTH AFRICAN INVESTOR BY INVESTING IN TAX HAVENS	22
3.3.1	Cyprus	22
3.3.2	Malta	28
3.3.3	Mauritius	32
3.3.4	Seychelles	35
3.3.5	Intermediate holding companies.....	38
3.4	CONCLUSION.....	40
CHAPTER 4	CONCLUSION.....	42
4.1	INTRODUCTION	42
4.2	RESEARCH PROBLEM AND OBJECTIVES	42
4.3	SUMMARY OF FINDINGS	42
4.4	SUGGESTIONS FOR FURTHER RESEARCH.....	45
	LIST OF REFERENCES.....	46

LIST OF TABLES

Table 1: Abbreviations used in this document	5
Table 2: List of transactions considered purely tax driven per Australian Tax Office	18
Table 3: Cyprus tax rates for individual tax payers	23
Table 4: South African tax rates for individual tax payers	23

CHAPTER 1 INTRODUCTION AND PROBLEM STATEMENT

1.1 BACKGROUND

During the months preceding October 2010, South Africa experienced a strengthening of the Rand. This had a significant impact on the manufacturing industry. In recognition of this, the National Treasury of the Republic of South Africa (hereinafter referred to as the National Treasury) announced certain measures in October 2010 that would counter the effect of the strengthening of the Rand to a certain extent. One of the measures was that foreign exchange regulations were to be amended to enable greater foreign investment by South African entities (National Treasury, 2011a:11).

The National Treasury is in the process of modernising and harmonising the investment framework. As a result they are busy issuing various discussion papers, one relating to the regulation of direct foreign investments into South Africa (National Treasury, 2011a:12). This discussion paper, however, also addresses large cross-border transactions or where the re-domiciling of existing South African assets or enterprises are involved (National Treasury, 2011b:vi).

The effect of the above less stringent regulations increases the opportunity for investors to invest in tax havens that has an effect on the ability of SARS to collect revenue for the National Treasury.

Investment in tax havens has various tax benefits for the investor due to the favourable tax treatment that the investor is likely to receive. This favourable tax treatment is mainly due to the fact that a taxpayer is not taxed at all or taxed at a nominal value on the income earned in a tax haven (Olivier & Honiball, 1997:553). There is, however, a risk that the taxpayer, seeking these benefits, might contravene the South African Income Tax Act and be found guilty of tax evasion.

No recent research could be found which explores the tax avoidance opportunities of an investment into a tax haven or income earning opportunities in a tax haven in a South African context. The platforms that were searched included the University of Pretoria

Library as well as the UPeTD website, Proquest, Ebscohost and Google Scholar. Given the fact that the National Treasury intends to introduce less stringent exchange control regulations, it would give this research practical importance since there would be an increased outflow potentially of investments into tax havens.

Before one can explore investment/income earning opportunities in tax havens the concept of a tax haven first needs to be fully understood. It might not always be obvious that a specific country could constitute a tax haven since countries are not necessarily listed as known tax havens.

Previous research has addressed several aspects of what a tax haven is (Olivier & Honiball, 2008:552). This is also incorporated into this research as it is important to first understand what a tax haven is before one explores the potential investment/income earning opportunities and violations *id est* venturing into tax evasion.

The concept of tax evasion is also a grey area as it deals with the taxpayer's intention. Previous research on this has been done (Stiglingh, Koekoemoer, Van Schalkwyk, Wilcocks, De Swart & Jordaan, 2011:727) which are incorporated into this study.

1.2 PROBLEM STATEMENT

The aim of this study is to determine the legal opportunities available for the South African investor to invest/earn income in tax havens to avoid tax without venturing into tax evasion.

1.3 RESEARCH OBJECTIVES

The study is guided by the following specific research objectives:

- to identify South African legislation applicable to investments/income earning opportunities in tax havens as well as a discussion on the problematic interpretation of such legislation; and

- to identify countries that are tax havens in relation to South Africa that presents the South African investor with investment opportunities. It also addresses methods on how the South African investor could obtain these investment opportunities without venturing into tax evasion.

1.4 IMPORTANCE AND BENEFITS OF THE PROPOSED STUDY

From a practical point of view, as mentioned in the background, the National Treasury announced that it intends to reduce the exchange control regulations to enable greater foreign investment by South African residents (including individuals and entities). This is to counter the effect of the strengthening of the Rand.

The less stringent regulations increase the risk that South African investments might be channelled to tax havens which would reduce the revenue that SARS is able to collect.

It also increases the risk that the South African investor might be found guilty of tax evasion. The investor should therefore be informed what the tax consequences might be before he endeavours to invest in a tax haven.

No study in this regard has been done in a South African context as discussed earlier. This study therefore gives a consolidated view of all the elements involved in such investments/income earning opportunities to assist the potential investor to make an informed decision.

1.5 DELINEATION AND LIMITATIONS

This study is limited to the outflow of investments out of South Africa into tax havens and does not address inward investments.

Only commonly known tax havens, that South Africa has treaties with, will be studied. These tax havens are identified through the study of available literature. Given the complexities of international taxation, almost every tax system could be considered a tax haven if certain components are compared to the South African tax system.

Furthermore, the legislation that is analysed in this study is limited to the risks for tax evasion/avoidance, as well as the opportunities that exist with the new proposed tax legislation.

Given the fact that various structures exist to structure a foreign investment, this study could not address all the possible options. Certain individual and company structures are investigated that could potentially be used by an individual or an entity to avoid South African tax by investing in a tax haven. Before any investment decisions are taken, they should be done in consultation with a professionally competent firm.

1.6 DEFINITIONS AND KEY TERMS

The foundation of this study is based on the definition of the key terms namely tax avoidance, tax evasion, tax havens and investment opportunities. The definition of these terms should be considered for purposes of this study. These terms are defined below:

Tax avoidance

Tax avoidance is a method by which a taxpayer's tax liability is reduced by means of careful tax planning (Stiglingh *et al*: 2011:727).

Tax evasion

Tax evasion is an illegal method by which a taxpayer's tax liability is reduced. The taxpayer could face criminal prosecution, interest and penalties if found guilty of this act (Stiglingh *et al*: 2011:727).

Tax havens

Tax havens could be viewed as "... countries that have enacted tax legislation especially designed to attract the formation of branches and subsidiaries of parent companies based in heavily-taxed industrial nations ..." (Palan,2002:154).

Tax havens are those countries that have tax systems that are more favourable than the South African tax system (Olivier, 2008:552). The concept of tax havens is discussed in Chapter Three.

Investment opportunities

Investment opportunities in this study refer to opportunities for a South African resident (individual or entity) that could be used to reduce its overall taxation by investing/earning income in tax havens.

1.7 ABBREVIATIONS USED

The following are key terms used in the study. The abbreviations are used further throughout the study.

Table 1: Abbreviations used in this document

Abbreviation	Meaning
CGT	Capital gains tax
CFC	Controlled foreign company
CSL	Seychelles Special Licence Company
GAAP	General Accepted Accounting Practice
IHC	Intermediate holding company
MJHA	Ministry for Justice and Home Affairs
OECD	Organisation for Economic Co-operation and Development
RSA	Republic of South Africa
SARS	South African Revenue Service
SIBA	Seychelles International Business Authority
STC	Secondary tax on companies

1.8 RESEARCH DESIGN

This literature review focuses on South African legislation applicable to foreign investments, problems with the interpretation of the law and on the tax opportunities for the South African investor by investing into tax havens.

A review of various literatures was performed to come to a proper understanding of the advantages and disadvantages of investing/earning income in tax havens as well as to get a thorough understanding of the taxation implications thereof. The literature includes

books utilised during previous studies, information received by searching on the internet on various websites, class notes as well as information obtained from previous court cases.

1.9 BRIEF OVERVIEW OF CHAPTERS

Chapter One provides a background to the study and presents the problem statement as well as the research objectives. The benefits of the study are highlighted as well as the delineations and limitations inherent to this study. Thereafter the key terms and abbreviations and underlying assumptions, used throughout the study, are defined. This is a non-empirical study in the form of an extensive literature review.

Chapter Two provides an overview of current legislation and it discusses the concept of a tax haven identifying potential investment/income earning opportunities for the South African investor to invest/earn income in certain known tax havens. It also touches on problems with interpretation of current legislation.

Chapter Three analyses the concept of a tax haven. Thereafter it identifies certain known tax havens that South Africa has treaties with that could present the South African investor with investment opportunities to reduce its total tax liability by means of tax avoidance.

Chapter Four concludes the study and highlights the benefits of the study and identifies an area for further research.

CHAPTER 2

LEGISLATION APPLICABLE TO INVESTMENTS INTO TAX HAVENS

2.1 INTRODUCTION

This chapter provides a summary of all legislation that is applicable to investments/income earning opportunities in tax havens. Various studies could be found that address certain components of this area but no study could be found that provides an overview and analysis of the various components of international tax relating to investments by a South African investor into tax havens. This chapter identifies legislation applicable to such investments and discusses problems with interpretation of identified legislation.

2.2 SOUTH AFRICAN TAX LEGISLATION APPLICABLE TO INVESTMENT INTO TAX HAVENS

Before starting with the analysis of tax legislation applicable to the investment into tax havens the concept of tax evasion and tax avoidance is discussed. Over aggressive investment strategies might move the investment from tax avoidance to tax evasion that carries penalties and/or may lead to criminal prosecution. The South African Income Tax Act 58 of 1962 (hereinafter referred to as “the Act”) provides for certain anti-avoidance measures that prevent schemes to avoid tax. This section also touches on the concepts of a controlled foreign company (hereinafter referred to as a CFC), intermediate holding companies (hereinafter referred to as IHC), foreign trusts and transfer pricing as all of these can potentially be vehicles to avoid tax. This chapter also discusses residence basis for taxation and the legal power of treaties as these concepts form part of South African legislation applicable to investment into tax havens.

2.2.1 Difference between tax evasion and tax avoidance

In a nutshell tax avoidance is legal and tax evasion is illegal as the latter is the fraudulent actions by a taxpayer to avoid its legal obligations. In practice the differentiation enters into a grey area (Stiglingh *et al*, 2011:717).

In *IRC v Duke v Westminster* [1936] AC 1 it was stated that “every man is entitled, if he can, to order his affairs so that tax attaching under the appropriate Act is less than it would otherwise be. If he succeeds in ordering them so as to secure this result, then, however, unappreciative the Commissioners for Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax”.

Certain tax havens have secrecy laws that enable investors to hide certain income and assets and as a result evade tax in their resident countries (Du Plessis: 2008).

In the international context this difference becomes grey as tax evasion is in essence tax fraud and not all countries have defined the context of tax fraud (Olivier & Honiball, 2008: 383).

2.2.2 Anti-avoidance measures as contained in the Act

The Act contains certain specific anti-avoidance legislation that mainly deals with domestic income. Furthermore there is also general anti-avoidance legislation that would counter investments into tax havens with the specific purpose to avoid tax. These measures are reflected in sections 80A – 80L of the Act that are discussed below.

Section 80A of the Act defines an impermissible tax avoidance arrangement. The Commissioner has the authority to disregard a transaction and to take steps to protect South Africa’s tax base if it is found that a transaction is an impermissible tax avoidance arrangement.

According to section 80A of the Act, there are four requirements that should be met before the provisions of an impermissible avoidance arrangement may be applied. These requirements are:

- there must be an arrangement;
- the arrangement must result in a tax benefit;
- the sole purpose of the arrangement is to obtain a tax benefit; and

- if the arrangement is in the context of business, one of the following four criteria should be met:
 - means or manner not normally employed;
 - rights or obligations not normally created;
 - lack of commercial substance; or
 - misuse or abuse of provisions of the Act; and
- if the arrangement is not in the context of business, one of the following three criteria should be met:
 - means or manner not normally employed;
 - rights or obligations not normally created; or
 - misuse or abuse of provisions of the Act.

Once the requirements of section 80A are met, section 80B of the Act gives certain powers to the Commissioner, namely he can

- disregard or combine certain or all steps of an impermissible arrangement;
- disregard any tax-indifferent party and treat such party and any other party as one;
- deem connected persons as one and the same person for purposes of determining the tax treatment;
- re-allocate or re-characterise gross income, accrual of capital nature or expenditure among parties; and
- deal with the impermissible avoidance arrangement as if it has not occurred or in any manner in which the Commissioner sees fit to prevent the relevant tax benefit.

Section 80C of the Act deals with lack in commercial substance. Examples of commercial substance are *id est*

- the inclusion of elements that eliminate or offset one another;
- round-trip financing per section 80D;
- the presence of a tax-indifferent party per section 80E; or
- when the legal substance of the whole agreement differs from individual steps of the legal form (Stiglingh *et al*: 2011:730).

Section 80D of the Act deals with round trip financing. This is when funds are transferred among parties that result in a tax benefit and reduce any business risks by any party.

Please note that these provisions apply to any round-tripped funds and ignore the timing, sequence or manner in which the funds flowed.

Section 80E of the Act deals with the accommodation of a tax-indifferent party. A tax-indifferent party is a party on which the amount derived from the avoidance arrangement has no effect on its tax liability. However, the other party to this avoidance arrangement has an impact on its tax liability as a result of the arrangement in question.

A tax haven creates substantial opportunities for a tax-indifferent party as it seeks to attract foreign investment by means of its financial, legal and tax systems. A company that is set up in a tax haven can be regarded as an accommodating tax-indifferent party should the requirements of section 80E be met (Du Plessis, 2008).

Section 80E of the Act, however, does contain certain safe harbour rules to ensure that a foreign party is not deemed to be a tax-indifferent party. These rules apply if either:

- the amounts derived by the party in question are subject to income tax in jurisdictions other than the Republic which is equal to at least two-thirds of the amount of normal tax that would have been payable in connection with those amounts had they been subject to tax under this Act (section 80E(3) and s 80E(4)); or
- the party involved continues to engage directly in active substantive trading activities in connection with the avoidance arrangement for a period of at least 18 months: Provided these activities are attributable to the place of business or a place that would constitute a foreign business establishment as defined in section 9D(1), if it were located outside the Republic and the party in question were a controlled foreign company (section 80E(3)(b)).

Section 80F of the Act further states that the Commissioner may treat connected parties as one and the same person. It may further disregard tax-indifferent parties and treat such parties as one and the same person.

Section 80G of the Act states that an avoidance agreement is automatically presumed to have been entered into to obtain the tax benefit unless it can be proven that obtaining the tax benefit was not the main purpose of entering into this arrangement.

Reportable arrangements are further tools that the Commissioner has at his disposal to combat tax avoidance. Section 80M to 80T of the Act deals with the nature of such arrangements. This section of the Act places the *onus* on the promoter (or if the promoter is not a resident, all other participants) of such an arrangement to submit *inter alia* details and key steps of the arrangements as well as the anticipated tax benefits for all participants.

The following are examples of reportable arrangements per section 80M:

- it contains provisions for the calculations for section 24J interest, finance costs or other charges. These calculations are dependent on the assumptions relating to the tax treatment of the arrangement;
- an instrument that would have qualified under section 8E and 8F of the Act;
- the arrangement would be treated as a financial liability for GAAP purposes but not for purposes of the Act;
- there is not a reasonable expectation of a pre-tax profit;
- there is a reasonable expectation of a pre-tax profit if the latter is less than the tax benefit and;
- the arrangement lacks commercial substance.

2.2.3 Controlled foreign company

In the absence of CFC rules there are substantial opportunities to avoid tax by investing in tax havens. An example of this is when a South African resident invests in a foreign company that is incorporated in a tax haven. The company in the tax haven in turn invests in another company and earns interest on its investment. As the income is earned by a non-resident it is not subject to tax in South Africa (Olivier & Honiball, 2008: 428).

Please note that individual non-connected residents that each hold less than 5% are not deemed to be a resident for purposes of section 9D. It is also not used to calculate the

50% as discussed later in this paragraph. Per section 9D(12) of the Act, if a South African resident/s holds between 10% and 20% of the participation rights in a foreign company, the resident may elect for the company to be regarded as a CFC. In this instance section 6quat rebates are available. This option is only beneficial if the resident has significant foreign income against which the section 6quat rebates can be set off.

However, CFC rules are defined in section 9D of the Act and it would result in the above scheme being taxed in South Africa. It states that a CFC arises when a South African resident/s owns more than 50% of the participation rights of a company incorporated outside of South Africa. In such a scenario, the resident/s is taxed on the income of the foreign company whether or not the resident received income from the company or not.

A question arises whether a foreign trust could be regarded as a foreign company as defined as this is a potential opportunity to avoid CFC rules. A trust is not a company and as a result the CFC rules are not applicable to a foreign trust. As a result a foreign trust is not subject to section 9D but it has its own anti-avoidance rules as discussed later in this study. A further question that arises is whether a foreign company, of which the sole shareholder is a foreign trust, could also be regarded as a CFC if the foreign trust is a fully discretionary trust. As the shareholders do not have an indirect right to participate in the shares of the company (as is the case in a discretionary trust) one could argue that this right belongs to the trust. As a result such company would not be considered a CFC (Olivier & Honiball, 2008: 439).

As a result there is an opportunity for a South African investor to set up a foreign discretionary trust and to invest in a foreign company (preferably in a tax haven with low corporate taxes) by means of the foreign trust. Any income earned by the company would then not be subject to CFC rules in South Africa. However, once the income is diverted back to the South African resident through the trust, it is taxable again based on the anti-avoidance rules of trusts that are discussed later in this study under the trust section.

However, before one endeavour to set up such structures there should be a legitimate business reason (other than for tax avoidance) otherwise SARS will apply its anti-avoidance legislation as reflected in section 80A – 80L.

It should be noted that foreign business establishments as described in section 9D(9)(b) of the Act are exempt from CFC rules. The purpose is that the Commissioner does not want to apply anti-avoidance measures to foreign companies with legitimate business activities.

However, in certain instances (a not all-inclusive list is provided below) this exclusion does not apply per section 9D(9)(b)(i) to section 9D(9)(b)(iii) of the Act:

- transactions between the CFC and a resident-connected person to the CFC which are not at arms' length;
- sales by the CFC to the resident-connected person if the goods were initially purchased by the CFC from the resident-connected person;
- passive income as defined in section 9D(9)(b)(iii) earned by the CFC. Examples of this type of passive income are dividends, interest rentals, annuities, insurance premiums, certain capital gains, foreign currency gains. However, if the passive income does not exceed 10% of the total income of the CFC, the CFC is a bank or rental business the exclusion applies again;
- net income of the CFC relates to a foreign dividend declared by a CFC to another CFC if both companies are CFC's of the same South African resident; or
- net income that relates to capital gains.

2.2.4 Investments in offshore trusts (s7(5) & s7(6) & s7(8) & s25B(2A))

As noted under the CFC section of this study, investment in an offshore trust could potentially be used to avoid CFC rules. The Act, however, prescribes certain anti-avoidance measures specifically pertaining to trusts.

Section 25B(2A) of the Act states that where a South African resident obtains a vested interest in a non-resident trust's capital (retained or accumulated income), the South African resident is taxed on such capital provided that the South African resident had a contingent right to the capital during the time that the capital was generated.

Section 25 of the Act is subject to the provisions of section 7 of the Act. Where any subsection of section 7 is applicable, the income of the trust is taxed in the hands of the

founder instead of the trustees and beneficiaries. These are specific anti-avoidance measures that the legislator introduced.

Section 7(5) of the Act states that where any donation, settlement or other disposition is made and the benefit of this cannot be enjoyed until the occurrence of a contingent event, the benefit is taxed in the donor's hands.

Section 7(6) of the Act states that where the donor has the right to revoke the beneficiary's right to receive income, the donor is taxed on any such income that accrued to the beneficiaries.

Section 7(8) of the Act states that where any amount accrues to a non-resident by virtue of a donation made by a resident, such accruals should be taxed in the hands of the resident donor. Section 7(8) does not apply if the donation made is by a resident to a CFC in relation to the resident donor, as CFC rules would apply in this instance.

However, there are difficulties under the interpretation of trust law, which provides for further research opportunities in this field:

- when is a trust a person for tax treaty purposes?;
- is a foreign trust a resident that is subject to tax in South Africa? and
- when does a trust constitute a permanent establishment (Olivier & Honiball, 2008:284 - 286).

If an entity is not considered to be a person under domestic law it may be a person under treaty provisions (Olivier & Honiball, 2008:22). Should a trust therefore not be considered to be a person in a tax haven, a tax treaty can specifically include such a body. A tax treaty applies to residents of the contracting states.

According to the United Nations and OECD Model Tax Convention a person is considered as any body of persons (Olivier & Honiball, 2008:22). A trust may be seen as any body of persons.

2.2.5 Transfer pricing

A potential method for a multinational group of companies to avoid tax might be to price goods lower in a high tax jurisdiction so that the profits are taxed in a low tax jurisdiction (Olivier & Honiball, 2008:484).

Section 31(2) of the Act prevents this avoidance measure by giving the Commissioner *inter alia* the right to adjust the price of a transaction between a resident and a non-resident if the price does not reflect an arms-length price. This adjustment may result in a deemed dividend and resultant STC liabilities for the resident company.

2.2.6 Residence basis for taxation

In terms of section 1 of the Act a South African resident has to include in gross income the total amount (in cash or otherwise) received or accrued in his favour for a year of assessment. These receipts would exclude receipts of a capital nature. As a result a South African resident is taxed on its world-wide income.

South Africa therefore applies a residence basis for taxation (Stiglingh *et al*, 2011:49).

Residency status for a person other than a natural person is determined by the place of effective management or where the company is incorporated, established or formed (Stiglingh *et al*, 2011:54). This study addresses the place of effective management concept for completeness purposes, as it is a very grey area and open to various interpretations.

In terms of SARS's Interpretation Note 6 the place of effective management is defined as "[t]he place where the company is managed on a day-to-day basis by the directors or senior managers of the company, irrespective of where the overriding control is exercised or where the board of directors meets. Management by these directors or senior managers refers to the execution and implementation of policy and strategy decisions made by the board of directors. It can also be referred to as the place of implementation of the entity's overall group vision and objectives" (SARS, 2002b:3).

This definition does, however, differ from country to country. In the United Kingdom, the place of effective management is the place where the executives and senior staff, the individuals “who make the business tick” is situated (Legwaila, 2010:19).

In terms of double taxation agreement provisions, the place of effective management does not always determine residency but in certain instances the place of incorporation determines residency as is the case in the United States of America/South African tax treaty (Louw, 2010).

In terms of section 1 of the Act South African residency status for a natural person is determined as follows:

- a natural person that is an ordinary resident of South Africa. In *Cohen v CIR*, 1946 AD 174 (13 SATC 362) it was held that a person is an ordinary resident of the country that he would naturally and as a matter of course return to from his wanderings. If he is not an ordinary resident he may be a resident of South Africa due to the amount of time that he was physically present in South Africa;
- the physical presence test would deem a natural person to be a resident of South Africa based on the following criteria:
 - if he is present for more than 91 days in aggregate during the current year of assessment; and
 - if he was present for more than 91 days in aggregate during each of the five years of assessment preceding the current year of assessment; and
 - if he was present for more than 915 days in aggregate during the preceding five years of assessment prior to the current year of assessment.

2.2.7 Double taxation agreements form part of legislation

This study investigates potential investment opportunities into tax havens by a South African investor. Tax treaties are possible tools that can be used to eliminate double taxation as well as to ensure a certain income (that is taxed at a lower rate per the tax treaty) is earned in the country with the lower tax rate.

The legal power of a tax treaty should therefore also be addressed in this study.

In terms of section 108(2) of the Act, once a double taxation agreement has been approved by Parliament and published in the Government Gazette it becomes effective and is enacted as part of the Act. If there are contradictions between the double taxation agreement and the Act, the double taxation agreement overrides the provisions of the Act (Stiglingh *et al*: 2011:553).

2.3 PROBLEMS WITH INTERPRETATION OF LEGISLATION

2.3.1 Substance over form (intention)

In terms of the *plus valet quod agitur quam quod simulate concipitur* rule, a court does not recognise the form of an agreement should it differ from the true intention of the parties (Olivier & Honiball, 2008:385). The practical application of the above rule is, however, open to interpretation of the courts and various court cases in this matter have been conducted.

The courts can only interpret the law and cannot create it. By interpreting it the intention of the legislator should be taken into account, but the law cannot operate beyond its language (Olivier & Honiball, 2008:386).

A transaction is only simulated if the true intention of the parties is deliberately concealed (Olivier & Honiball, 2008:386).

As noted earlier in this study, every taxpayer has the right to organise his affairs in such a manner as to minimise his tax liability. However, the agreement must reflect the true intention of the parties. If agreements are merely entered into to avoid tax, but the parties never intended to give effect thereto, the courts will not give effect to the agreements (Olivier & Honiball, 2008: 387).

2.3.2 Proving that the primary purpose of a transaction was for commercial substance and not to obtain a tax benefit

Should the courts find that the agreement does not reflect the true intention on the parties, it will revert back to the substance of the agreement. The tax assessment should then be based on the substance of the agreement.

In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*, 1977 A 534 (A) it was held that the onus is on the taxpayer to prove to the courts that the Commissioner's assessment is incorrect.

The Commissioner is, however, obliged to provide evidence to support its revised assessment (Erasmus, 2008:23).

Evidence and testimony outside the ambit of the agreements may be used to prove the true intention of the parties. This evidence, however, does carry the burden of rebuttal. This burden is not a proper *onus* and as a result the Commissioner does not have to establish a case of probabilities. Should the court be in doubt whether the Commissioner was right or wrong after presentation of the evidence by the taxpayer, the taxpayer, who had the true onus, would fail (Olivier & Honiball, 2008:390).

2.3.3 Examples of arrangements that are purely tax driven

The Australian Tax Office listed certain arrangements that would be seen as transactions that are purely tax driven (Du Plessis, 2008). These transactions are reflected in Table 2 below:

Table 2: List of transactions considered purely tax driven per Australian Tax Office

Transaction	Risk to South African resident
Anonymous offshore debit cards	World wide income received by an RSA resident must be declared. Criminal prosecution or penalties may be the result of non-compliance.
Anonymous credit card accounts	
Bank accounts in tax havens	
International business company (companies resident in tax haven)	CFC rules may apply where an RSA resident is the controller of a company resident in a tax

Transaction	Risk to South African resident
	haven.
Trust based in tax haven	Income of a trust where an RSA resident transfers property or services to a trust set up in a tax haven, may be taxed as income in RSA.
Tax-free savings account	Interest derived by RSA resident is subject to tax in RSA even if it is from sources outside of RSA. This includes a bank account or an investment in a tax haven.
Anonymous international and investment trusts	
Overseas licensing	The gross income from such royalty income (including from a tax haven) is taxed in RSA if it is derived by an RSA resident.
Re-invoicing (International business company based in tax haven used as intermediary between importers or exporters and their customers)	Complicated transfer pricing and other international tax rules are in place in RSA. Criminal prosecution or penalties may be the result of non-compliance.

Source: Du Plessis (2008).

Before one endeavours to enter into the above-mentioned activities there should be a legitimate business purpose, as it would almost certainly attract the attention of SARS. SARS might have strong arguments in court in favour of proving that a transaction was purely tax driven. (Du Plessis, 2008.)

2.4 CONCLUSION

It is crucial to ensure that before a transaction is structured to invest in a tax haven, there should be sufficient evidence to prove that the primary purpose for such a cross-border investment was for a legitimate business purpose. This ensures that the anti-avoidance measures are not applicable. A taxpayer does, however, have the right to arrange his affairs in such a way as to minimise his taxes.

Tax treaties, however, override legislation and as a result create an opportunity for a taxpayer to invest in a country and pay a lower tax on certain income. It also eliminates double taxation. There are thus opportunities to invest/earn income in countries with lower tax rates that have tax treaties with South Africa.

The following chapter investigates possible investment/income earning opportunities into tax havens.

CHAPTER 3

INVESTMENT OPPORTUNITIES IN TAX HAVENS

3.1 INTRODUCTION

Before investment opportunities in tax havens may be explored, the characteristics of a tax haven are firstly addressed. Thereafter certain known tax havens are selected to be investigated. This study provides an overview of the selected countries' tax systems and investigates opportunities for the South African investor to invest or earn income in these countries and as a result to reduce its tax liability. Even though income-earning opportunities are not reflected in the title of this study, the topic is relevant and related to this area of research and as a result included as part of this study.

The discussion approaches the topic from the point of view of a South African resident that wishes to invest or earn income abroad. As a result this study explores the benefits to such an investor (being an individual or an entity) by investing in its own name, as an individual or via a company or a trust.

The results of this analysis provide investment structures that may be used to invest in tax havens to minimise the investor's tax liability in a legal manner.

3.2 CHARACTERISTICS OF A TAX HAVEN

Tax havens usually provide anonymity and shelter from their home governments by means of enacting such legislation to protect such investors (Palan, 2002:151).

Tax havens could be viewed as "... countries that have enacted tax legislation especially designed to attract the formation of branches and subsidiaries of parent companies based in heavily-taxed industrial nations ..." (Palan,2002:154).

Palan (2002:154) identifies, within the above definition, four further major categories of tax havens:

- no income tax;
- low taxation;
- only internal tax events are taxed. Foreign sources are either not taxed or taxed at a low rate; and
- special privileges are granted/given to certain companies or operations.

The OECD has a further definition of what a tax haven is where it states that it is a country that is able to finance its public expenditure with limited income taxes and which actively is available to non-residents to assist in the avoidance of tax which would normally have been taxed at higher tax rates (Olivier & Honiball, 2008:552).

The OECD also has four classifications to identify whether a country is a tax haven:

- no or few taxes;
- lack of exchange of information. These countries usually have secrecy laws to protect the identity of investors;
- lack of disclosure in how its legal or administrative provisions operate; and
- no requirement for the substantiation of a qualifying activity (OECD, n.d.).

There are potential opportunities for tax avoidance with specific tax havens i.e. Mauritius which can be considered a tax haven if its tax regime is compared to that of South Africa. The current tax treaty, (as it stands now) however, does not make provision to exclude these beneficial tax regimes. (Olivier & Honiball, 2008:567.)

Various sources, including UPeTD website, Proquest, Ebscohost, Google Scholar and books, were used to identify known tax havens. After these tax havens were identified, they were compared to the list of tax treaties that South Africa currently has.

Above action resulted in the following tax havens, which South Africa has treaties with, to be identified:

- Cyprus and Malta – foreign source profits are taxed only on internal taxable events or in certain events, not at all or at very low rates; and
- Mauritius and the Seychelles – certain companies are taxed at a low taxation.

Please note that the above is not an all-inclusive list of tax havens as, given the complexities of modern tax systems, almost every country can be a potential tax haven if compared to another tax system which poses difficulties in identifying such countries (Palan, 2002:154).

In this chapter above-mentioned tax havens are analysed from a South African resident perspective.

3.3 BENEFITS AND RISKS FOR THE SOUTH AFRICAN INVESTOR BY INVESTING IN TAX HAVENS

3.3.1 Cyprus

This analysis investigates the Cyprus tax system and the effect the system would have on a South African investor should he invest in Cyprus. It also aims to identify opportunities to reduce such an investor's overall tax liability by investing/earning income in Cyprus.

The most significant motivator for an investor to consider investing in Cyprus is that the overall tax rates for Cyprus are low compared to those in South Africa.

The corporate tax rate for all Cyprus companies is only 10% (PWC, 2011:13). The Act prescribes a corporate tax rate of at least 28% for most companies. Certain companies, for example personal service providers, are even taxed at a higher rate in South Africa.

Furthermore the Cyprus 2011 tax rates for individuals are set out in Table 3.

Table 3: Cyprus tax rates for individual tax payers

Taxable income EURO	Tax rate %	Accumulated tax EURO	Accumulated tax Rand*
0 – 19 500	Nil	Nil	
19 501 – 28 000	20	1 700	17 472
28 001 – 36 300	25	3 775	38 799
over 36 300	30	3 775 plus 40% of the amount above 36 300	38 799 plus 40% of the amount above 373 088

Source: PWC (2011).

*The EUR/Rand conversion is based on an exchange rate of R10,2779 as at 12 August 2011 as quoted on www.fin24.com by McGregor BFA.

The 2011 tax rates for South Africa are set-out in Table 4.

Table 4: South African tax rates for individual tax payers

Taxable income Rand	Tax rate %	Accumulated tax Rand*
0 – 140 000	18	18% of each R1
140 001 - 221 000	25	25 500 plus 25% of the amount above 140 000
221 001 – 305 000	30	45 450 plus 30% of the amount above 221 000
305 001 – 431 000	35	70 650 plus 35% of the amount above 305 000
431 001 – 552 000	38	114 750 plus 38% of the amount above 431 000
552 000 and above	40	160 730 plus 40% of the amount above 552 000

Source: SARS (2011).

This study's main focus is on high-income individuals and entities. If, for example, such an individual could earn R1 million in either Cyprus or South Africa the tax liability would be R226 873 in Cyprus and R339 930 in South Africa based on the 2011 tax tables of both countries and based on the above exchange rate. As may be seen from this comparison, it would be more favourable to earn income in Cyprus.

Given the fact that the corporate tax rate for Cyprus is significantly lower than that of South Africa, South African residents should aim to earn certain types of income in Cyprus that is

taxable only in Cyprus in terms of the double taxation agreement between South Africa and Cyprus.

Cyprus taxes its residents (entities and individuals) on income accrued on sources locally and abroad. Income derived from sources in Cyprus, by non-residents, is also taxable in Cyprus. (PWC, 2011:4.) This is similar to the Act as a South African resident is taxed on all its local and foreign income. As a result there is a risk of double taxation for the South African investor, but the tax treaty between South Africa and Cyprus deals with this.

Furthermore, if a non-resident company carries on a business through a permanent establishment in Cyprus, such profits would also be taxable in Cyprus (PWC, 2011:13).

The tax treaty between South Africa and Cyprus defines a permanent establishment as a fixed place of business through which an enterprise carries on its business. The fact that a company is a resident in one state and carries on a business in another state, would not necessarily mean that such a business is a permanent establishment as the treaty has a list of specific inclusions and exclusions to this definition which should first be consulted before a final conclusion is made. (SARS, 1998.)

Should a South African resident therefore incorporate a company in South Africa but earn the income of the company through a permanent establishment in Cyprus that income would be taxable in Cyprus. The South African company in South Africa would, however, also be liable to be taxed under the Act on its worldwide income, which would lead to potential double taxation.

The tax treaty between Cyprus and South Africa states that: “[t]he profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment” (SARS, 1998). Out of this paragraph it can be derived that, should a South African company set up a permanent establishment in Cyprus, it *may* be taxed in Cyprus.

As a result the company would be taxed at the lower Cyprus rate and would avoid the higher South African taxes.

It could therefore be tax beneficial to set up a South African company with a permanent establishment in Cyprus as the profits from the permanent establishment would be taxed at a lower rate.

A company is a resident of Cyprus if it is controlled and managed in Cyprus (PWC, 2011:13). If a company is therefore incorporated in Cyprus but controlled and managed in South Africa, it would not be a resident for Cyprus tax purposes and it would only be taxed under South African law. This would eliminate double taxation.

The tax treaty between South Africa and Cyprus refers to the place of residency as the place of effective management and as a result this concept is discussed in the following paragraphs (SARS, 1998).

The place of effective management is not defined in the treaty between South Africa and Cyprus. Extensive searches within the Cyprus Inland Revenue Department's website could not provide a definition of place of effective management in a Cyprus context. A recent treaty between Cyprus and Germany which was signed on 18 February 2011 provided a definition of place of effective management that could be considered acceptable by the Cyprus government should a dispute arise between the South African and Cyprus governments. It should be noted that this definition is not binding between South Africa and Cyprus but could provide guidance. This definition stated that the place of effective management is the place where the key management decisions are taken (Paparino Milonas, 2011). It also does not differ significantly from the South African guidance provided in the SARS Interpretation Note 6 whereby the place of effective management is *inter alia* considered to be the place where the day-to-day management of the company takes place. Refer to Chapter Two for a more detailed discussion of this concept from a South African perspective.

Should a South African investor therefore decide to move his assets to a Cyprus company but effectively manage them from South Africa, he would still be a resident for South African tax purposes.

A potential manner by which to postpone taxes might be to set up a discretionary trust in Cyprus. An international trust, being a trust, the assets of which are located outside Cyprus, is not subject to tax in Cyprus (PWC, 2011:42). Furthermore, profits arising from a permanent establishment abroad are also fully exempt from tax in Cyprus (PWC, 2011:14). Permanent establishment losses incurred abroad may also be set off against profits made by its company in Cyprus. Subsequent profits by the permanent establishment are, however, taxable up to the amount of the losses previously allowed as a deduction (PWC, 2011:16).

Given the above facts, a South African resident investor can set up a discretionary international trust in Cyprus. Refer to Chapter 2.2.3 for a discussion on why a discretionary trust could be a good tool to use in a foreign investment structure. This trust can then invest in shares in a company abroad, preferably in another tax haven with overall low tax rates. Any income earned by the company would then not be subject to CFC rules (and resultant taxes) in South Africa. Taxes in Cyprus would also be avoided by setting up such a structure since Cyprus does not tax international trusts. Even if such a structure could be considered a permanent establishment, Cyprus also does not tax permanent establishments abroad. However, once the income is diverted back to the South African resident through the trust, it would be taxable again based on the anti-avoidance rules of trusts that was be discussed in Chapter Two.

Further benefits of an international trust include the following:

- interest, dividends or other income received by an International trust from a Cyprus company are not taxable;
- gains on disposal of assets by such a trust are not subject to capital gains tax or estate duty; and
- if a non-Cyprus resident retires in Cyprus and decides to set up an international trust of which he is the beneficiary, he would still be exempt from tax if all the property that the trust owns and the income that it earned is abroad. This might be a beneficial

tax-planning tool for the South African investor if he owns property in a country that has a treaty with Cyprus. If the property is situated in South Africa it would still be taxed in South Africa (PWC, 2011:43).

In terms of the double taxation agreement between South Africa and Cyprus, income from immovable property is only taxable in the country where the immovable property is situated. Such income includes income from letting or any other use of the property. It also states that income from immovable property includes income from immovable property by an enterprise or income from immovable property used for the performance of independent personal services. If the fixed property is used to derive income from a personal service provider, such income is taxable in the country where the personal service is provided. (SARS, 1998.)

A South African investor can therefore potentially buy property in a company, earn rentals thereon and only be taxed at the Cyprus corporate rate of 10% versus the rate of 28% as prescribed by the Act, that he could have paid in the absence of the double taxation agreement. CFC rules might, however, apply and as a result it may be more beneficial to hold the property in the individual's own name. Since Cyprus's individual tax rates are still more favourable than those of South Africa the South African resident would still be able to derive a tax benefit from such an investment. One should, however, note that capital gain on the alienation of such property is taxed in Cyprus at 20%, which is higher than the effective rate in South Africa of 14% (SARS, 1998). This difference should be slightly offset by the method by which Cyprus calculates its base cost where inflationary adjustments are taken into account. Cognisance should also be taken of the fact that Cyprus also imposes an annual tax on immovable property. This is payable by entities and individuals and is calculated on a sliding scale based on the value of the property (PWC, 2011:40).

A South African resident accountant may also consider providing his/her independent personal services from a fixed property in Cyprus. As discussed above, income from independent personal services derived from a fixed property in a country are only taxable in that country per the tax treaty between Cyprus and South Africa. This income would be taxed at far lower individual rates in Cyprus than in South Africa.

If the South African resident does not own immovable property in Cyprus from whence to provide independent personal services, the tax treaty between South Africa and Cyprus provides an opportunity for an independent personal service provider for example an accountant to render services from Cyprus to South Africa. If a South African resident accountant provides consulting services from a fixed place of business in Cyprus, his income would only be taxable in Cyprus provided he resides in Cyprus for an aggregate exceeding 183 days in any 12-month period beginning or ending in the fiscal year concerned (SARS, 1998). Such a South African resident would then avoid being taxed at the higher South African rate on the income that he earned while being in Cyprus.

A final opportunity that this study could identify was if a South African resident becomes a director of a Cyprus company. In such an instance directors' fees earned by the South African resident would only be taxable in Cyprus in terms of the double taxation agreement (SARS, 1998). The South African resident could potentially invest in a Cyprus company but then there would be CFC constraints. If the resident then pays most of the profits out as directors' fees, the director would only be taxed in Cyprus at lower tax rates than in South Africa.

3.3.2 Malta

This analysis investigates Malta's tax system and the effect the system would have on a South African investor should he invest in Malta. It also aims to identify opportunities to reduce such an investor's overall tax liability by investing in Malta.

Malta has a retiree programme called the Maltese retiree programme under the Resident Scheme Regulations of 2004. If an individual qualifies for this programme he would receive a certificate granting him permanent residency in Malta as well as access to considerable tax benefits. Malta has a system whereby residency permit holders are taxed at a flat rate of 15% on income earned in Malta and on foreign income remitted to Malta. The taxes are, however, subject to a minimum tax of EUR 4 192 after double taxation relief. (PWC, 2010.)

Any individual that is not a resident of Malta may apply for such a certificate, provided that he:

- can earn an annual income of at least EUR 13 950 in his respect and EUR 2 300 in respect of each dependant; and
- has an annual income arising outside of Malta of at least EUR 23 000 or has capital in his possession of at least EUR 349 000; and
- would take up residency within of year of the approval of the permit;
- buys a home within one year to the value of at least EUR 116 000 or a flat to the value of EUR 69 000 or rents a property to the value of at least EUR 4 150 per annum; however if the home-owner sells the above property or gives up the lease on or after 14 September 2011 he would lose the certificate unless he purchases a property to the value of at least EUR 400 000 or rents a property to the value of at least EUR 4 150 (MJHA, 2010).

As a result there is a potential opportunity for a South African resident to move to Malta under the Maltese retiree programme and render independent personal services (i.e. accountancy services) from Malta to South Africa. The tax treaty between South Africa and Malta, however, states that income earned by a resident of South Africa shall only be taxable in South Africa (SARS, 1997a). However, such income may be taxed in Malta if the personal service provider worked for more than 183 days during any 12-month period beginning or ending during the fiscal year concerned (SARS, 1997a). If the South African resident therefore obtains above certificate and renders independent personal services from Malta for a period of at least 183 days he will only pay tax at a flat rate of 15% subject to a minimum of EUR 4 192 on the income earned while in Malta. Should a South African resident therefore earn R1 million, he will pay tax at a rate of R339 930 (refer to Table 4 of this study) in South Africa, whereas in Malta he would only pay R150 000.

Malta's corporate tax rate is 35%. At first glance it does not seem beneficial to invest in Malta through a company as the tax rate is higher than what the Act currently prescribes of 28%. However there are certain concepts in the Malta tax legislation that could be beneficial to the South African investor.

Malta provides tax advantages for holding companies as well as for participation holdings.

A participation holding is the holding of shares by a Maltese resident company in a company that is not a resident of Malta. Further requirements are:

- the Malta resident company has to have at least 10% of the shares of the non-resident company; and
- the Malta resident company is an equity shareholder in the non-resident company and has the right to purchase or right to refuse the purchase of the equity shareholding, or has the right to appoint a director on the board; or
- the Malta resident company is an equity shareholder in the non resident company which invested EUR1.2 million and held the investment for a period of at least 183 days uninterrupted; or
- the Malta resident company holds the shares in the non-resident company for purposes to further its own business and the shares are not held as trading stock (KPMG, 2010a:6).

Also note that the participatory holding can also be held in a non-resident body that is not a company for example a partnership (KPMG, 2010a:6).

Participation exemption provides relief for dividends and capital gains received from participation holdings of a Malta resident company in a non-resident company (KPMG, 2010a:6).

There is thus an opportunity for a South African investor to set up a discretionary trust (the participatory holding does not have to be a company) in Malta and let the trust invest in offshore investments. Refer to Chapter 2.2.3 on why a discretionary trust is a good foreign investment structure tool. Dividends received as well as capital gains earned on the investments would then be exempt from tax in Malta.

Above relief is optional. Should the Malta resident company elect to include the dividend income in its tax return it would pay tax thereon at 35%. The shareholders of the Malta holding company would then receive a tax refund when the dividends or gains are distributed to them. (KPMG, 2010a:6.)

The participation exemption with regard to dividends would only be applicable if any of the following conditions exist:

- the non-resident entity in which the participation investment is held is a European Union Member country; or
- the non-resident is subject to a tax rate of at least 15%; or
- passive income and royalties do not make up more than 50% of the income of the participation investment company (KPMG, 2010a:6).

If none of the above requirements is met, the participation exemption would not be applicable if both of the following requirements are met:

- the investment must not be held as a portfolio investment; and
- the investment must have been subject to a tax rate of at least 5% (KPMG, 2010a:6).

The above limitations restrict the opportunity for the South African investor (as discussed earlier) as passive income would make up more than 50% of the income of the participation investment trust of the typical investor as envisaged in this study. As a result it would be difficult for the South African resident investor to make use of this tax incentive. Also once the income is diverted back by the discretionary trust (that was set up to invest in non-Maltese countries) it would be taxable in the South African resident's hands as section 7(8) of the Act would become applicable. Furthermore, the trust that was incorporated in Malta would attract tax at 35% in Malta (PKF, n.d.).

The tax treaty between South African and Malta does not eliminate double taxation of dividends in both countries. It does, however, have a clause to limit the effect of double taxation, namely should a South African resident company distribute a dividend to a company which is a resident of Malta, the South African tax shall not exceed more than 5% on the gross amount of dividends (SARS, 1997a).

The Act currently imposes a 10% STC on companies on dividends distributed. This will be replaced in the near future by a dividends withholding tax. A South African investor could potentially set up a holding company in Malta that invests in a South African company. If the South African company declares a dividend to Malta, it would only be subject to taxes of 5% instead of the normal 10% STC. The 5% limit that the double taxation agreement

provides would give a saving of 5% taxes paid to the South African company. CFC legislation might however counter such a structure.

There are no withholding taxes on interest, dividends and royalties in Malta (KPMG, 2010a:7). However, should such income accrue to a South African resident, he would still be liable for South African taxes with limited interest and dividend exemption.

A final opportunity that this study could identify was if a South African resident becomes a director of a Malta company. In such an instance directors' fees earned by the South African resident would only be taxable in Malta in terms of the double taxation agreement (SARS, 1997a). The South African resident could potentially invest in a Maltese company but then there would be CFC constraints. If the resident then pays most of the profits out as directors' fees, the director would only be taxed in Malta at lower individual tax rates than in South Africa.

3.3.3 Mauritius

This analysis investigates Mauritius's tax system and the effect the system would have on a South African investor should he invest in Mauritius. It also aims to identify opportunities to reduce such an investor's overall tax liability by investing in Mauritius.

The tax rate for individuals and most companies is fixed at a rate of 15% which is significantly less than the South African individual tax rates as reflected in Table 4 of this study as well as the 28% corporate tax rate as prescribed by the Act (KPMG, 2010b). A South African resident should therefore attempt to earn income in Mauritius.

An opportunity that this study could identify was if a South African resident becomes a director of a Mauritius company then the directors' fees earned by the South African resident are only taxable in Mauritius in terms of the double taxation agreement (SARS, 1997b). The South African resident could potentially invest in a Mauritius company but then there would be CFC constraints. If the resident then pays most of the profits out as directors' fees, the director would only be taxed in Mauritius at lower individual tax rates than in South Africa.

Mauritius taxes its resident trusts at 15%. A deemed credit is available to the value of 80% (PKF, 2011). This brings the effective tax rate of the trust down to 3%. Dividends paid by tax incentive companies, companies fully taxable and companies listed on the Mauritius stock exchange are exempt from tax in the hands of the resident or non-resident shareholder (Legwaila, 2010:285).

A South African resident could potentially set up a discretionary trust in Mauritius and invest in shares or securities in South Africa with the purpose to earn interest and dividends. Refer to Chapter 2.2.3 on why a discretionary trust is a good foreign investment tool. In accordance with the tax treaty between South Africa and Mauritius, dividends and interest paid by a South African company to a resident of Mauritius (being the discretionary trust) would be taxable in Mauritius (SARS, 1997b). However, South Africa can also tax such dividends limited to 15%. (SARS, 1997b). Currently South Africa imposes a 10% STC on dividends declared. Given the fact that Mauritius does not tax dividends and such an investment would attract STC in South Africa to the value of 10%, it would lead to total taxes of 10%. Such a structure would therefore not give the taxpayer any tax savings. However if the company's securities only generates interest income such a structure would be a beneficial tax savings tool as the tax treaty eliminates double taxation on interest income thus resulting in effective taxes of 3% on interest earned by the trust (SARS, 1997b).

If the discretionary trust as mentioned in the previous paragraph invests in shares and securities in Mauritius, such dividends would not be taxable at all and the interest would also be taxed at 3%. Cognisance should, however, be taken of the fact that once the income that is held in the trust is diverted to South Africa, SARS would be able to tax such income.

Currently the corporate tax rate is 15% for certain enterprises referred to as tax incentive companies. These enterprises include internet and network service providers, small and medium size industries, export services, housing, hotels, manufacturing and export services, venture capital funds, authorised mutual funds, unit trusts, Global Business Licence 1 companies (Legwaila, 2011:4-5).

Mauritius issued special Global Business Licences to foreigners that own companies incorporated in Mauritius. These companies only conduct offshore business and cannot hold any fixed property, certain securities or bank accounts in Mauritius currency. There are also significant secrecy laws regarding these companies. Head quarter companies are a popular type of Global business licence company as they do not conduct any business in Mauritius (Legwaila, 2011:5).

Global Business Licence 1 companies are companies that carry on certain listed qualifying activities with individuals that are not residents of Mauritius and are conducted in a currency other than Mauritius rupee. These companies are required to be residents of Mauritius. These companies can apply foreign tax credits from foreign source income to their taxable income that makes it a very attractive vehicle to set up headquarter companies (Legwaila, 2011:5 - 6).

A Global Business Licence 1 company might fall under the ambit of South African CFC tax rules. In terms of the Mauritian and South African tax treaty, if a company were a resident of both South Africa and Mauritius, article 4(3) of the treaty would deem the company in question to be a resident in the country where its effective management is situated. Since effective management is one of the residence requirements of a Global Business Licence 1 company, it would only be taxable in Mauritius at 15% (SARS, 1997b).

There is no transfer pricing, thin capitalisation, CFC provisions, exchange control or withholding taxes in Mauritius (Legwaila, 2011:4). This makes it an attractive country to set up a holding company. One should, however, take note of South African CFC rules.

A 0% tax rate applies to Global Business Licence 2 companies as well as headquarter companies, companies licensed to carry out trading in a Freeport zone as well as offshore trusts electing non-residence status. Global Business Licence 2 companies do not have access to tax treaties and as a result fall outside the ambit of this study. It is, however, noted in this study for completeness purposes (Legwaila, 2011:4).

In conclusion, this study also identified the following investment/income earning opportunity. In terms of the tax treaty between South Africa and Mauritius, income from immovable property would be taxed in the country where the property is situated (SARS, 1997b). To avoid CFC legislation, an investor should rather invest in the property through its own name. Should the South African investor then earn rental income, it would only be taxed at 15% Mauritius versus the much higher taxes it would have paid if it earned the rental income in South Africa as illustrated in Table 4 of this study.

The tax treaty between South Africa and Mauritius also states that income from immovable property includes income from immovable property by an enterprise or income from an immovable property used for the performance of independent personal services (SARS, 1997b). If the fixed property is used to derive income from a personal service provider, such income will be taxable in the country where the personal service is provided (SARS, 1997b). A South African resident accountant may therefore consider providing its services from a fixed property in Mauritius. Such income earned in Mauritius, even though he is a resident of South Africa would then only be taxable in Mauritius in terms of the tax treaty between South Africa and Mauritius. Since Mauritius taxes individuals at 15% it would be significantly less than what the South African resident would have paid in South Africa as reflected in Table 4 of this study. Mauritius generally does not impose capital gains tax. However, the investor should be aware that in certain instances capital gains might be imposed on the disposal of land that is situated in Mauritius (Legwaila, 2010:313).

3.3.4 Seychelles

This analysis investigates the Seychelles tax system and the effect the system would have on a South African investor should he invest in the Seychelles. It also aims to identify opportunities to reduce such an investor's overall tax liability by investing in the Seychelles.

The Seychelles has a territorial basis for taxation that means that only locally-sourced income is taxed (Lowtax, n.d). The tax rates for individuals are 15% for Seychellois and non-Seychellois for monetary remuneration (SRC, 2011). The Seychelles further taxes

non-monetary (fringe benefits) remuneration at 20%. The latter tax is for the account of the employer (SRC, 2011). In the case of an entity or a trust, the tax rate is 25% for the first 1 million Seychelles Rupees (hereinafter referred to as SR) and 33% on the remainder of income (SRC, 2011).

As can be seen from the above, Seychellois individual taxation is rather favourable at 15% if compared to South African individual taxation as reflected in Table 4 of this study. An investor should therefore aim to earn income in his own name that would only be taxable in the Seychelles in terms of the tax treaty between South Africa and the Seychelles.

The first opportunity that could be identified for a South African resident could be to invest in immovable property in the Seychelles. In terms of the tax treaty agreement between South Africa and the Seychelles, income from immovable property would be taxed in the country where the property is situated (SARS, 2002a). Such income includes income from letting or any other use of the property. It also states that income from immovable property includes income from immovable property by an enterprise or income from an immovable property used for the performance of independent personal services (SARS, 2002a). If the fixed property is used to derive income from a personal service provider, such income will be taxable in the country where the personal service is provided (SARS, 2002a).

A South African resident accountant may therefore consider providing its services from a fixed property in the Seychelles. He may also consider renting the property out. Such income, even though he is a resident of South Africa would then only be taxable in the Seychelles in terms of the tax treaty between South Africa and the Seychelles. Since the Seychelles taxes individuals at 15% it will be significantly less than what the South African resident would have paid in South Africa as reflected in Table 4 of this study. The Seychelles also does not impose capital gains on taxes' capital gains (Sterling Offshore Ltd, n.d.). Furthermore, the tax treaty between South Africa and the Seychelles states that capital gains would only be taxable in the country where the immovable property is situated (SARS, 2002a). The effect of this is that when the South African resident disposes of the property situated in the Seychelles, there would be no capital gains tax

In the case of an entity or a trust, the tax rate is 25% for the first 1 million SR and 33% on the remainder of income (SRC, 2011). If these tax rates were compared to the 28% that the Act prescribes, it would not really be more beneficial to set up company and/or trust structures in the Seychelles to avoid taxes.

However, the Seychelles provides for a Seychelles Special Licence Company (hereinafter referred to as a CSL) that which has various tax incentives.

The Seychelles Companies Ordinance of 1972 provides for the formation of a Seychelles Special Licence Company, which has special tax provisions. This company qualifies as a resident of the Seychelles and as a result has access to various tax treaties.

This type of company is only liable for 1,5% taxation on its worldwide profits (SIBA, n.d.:4). This rate is extremely favourable if compared to the Act that taxes any company at a rate of at least 28%.

Furthermore, this type of company is exempt from withholding taxes on dividends, interest and royalties (SIBA, n.d.:4). The Seychelles does not impose taxes on capital gains and gains from the proceeds on securities are generally not taxed (Sterling Offshore Ltd, n.d.).

The Seychelles and South African tax treaty states that these dividends, interest and royalties would be taxed in country where the recipient is situated provided that that individual/entity is the beneficial owner (SARS, 2002a). As a result, if a South African investor invests via a CSL in South Africa the income would be earned in South Africa and paid to a CSL. Such income would then be exempt from tax in the hands of the CSL. However, South African CFC legislation counters such a structure resulting in the investor not being able to utilise this tax avoidance opportunity.

Currently the Seychelles and South African tax treaty states that capital gains shall be taxed in the country of which the entity is a resident. The only exemption is that the gains on disposal of property shall be taxed in the country in which the immoveable property is situated. (SARS, 2002a.)

Given the fact this company qualifies as a Seychelles resident, it has access to tax treaties, one being the Seychelles and South Africa tax treaty (Fidelity corporate services n.d.). This type of company could be beneficial as a headquarters company as it would be able to make use of the beneficial tax rates.

Even though the beneficial owners of the CSL have to be identified to the Seychelles authorities during the application process for the company, this information remains anonymous (SIBA, n.d.:8). This increases the risk for tax evasion should a South African resident want to invest in a CSL.

CSL may be used to engage in the following business activities: holding company or headquarters, human resources, intellectual property, franchise, marketing, investment services, offshore insurance and re-insurance, offshore banking and investment management and advice. A CSL is also the prescribed entity to operate under the Seychelles International Trade Zone License. A CSL may also engage in any other business with the approval of the Seychelles International Business Authority and may also engage with business in the Seychelles (Fidelity corporate services n.d.).

The Seychelles and South Africa tax treaty only makes provision for the exchange of information in so far as it is obtainable under the laws or in the normal course of the administration of that or of the other Contracting State (SARS, 2002a). However, in terms of section 22(3) of the Seychelles Companies (Special Licences) Act, 2003 no information would be disclosed unless it is required for court proceedings relating to the Penal code, Anti-Money Laundering Act or the Business Act. This increases the risk for tax evasion by a South African investor.

3.3.5 Intermediate holding companies

Another method of potential tax avoidance is an intermediate holding company (hereinafter referred to as IHC). This can be used in any tax haven and as a result is not discussed under a specific country. An IHC is a company that manages, acquires and sells

investments. Due to exchange control regulations, South African investors are not allowed to have domestic investments via an IHC. In certain instances such company is also used as a headquarters company as this would share costs and further support the substance requirement to prove that tax avoidance was not the main purpose to set up the company (Olivier & Honiball, 2008:297-298).

Should the South African exchange control regulations become less stringent, as is the intention of the National Treasury, investments might flow out of South Africa to IHC's set up in tax havens. It would also facilitate future reinvestment should the exchange control regulations become more stringent again.

Certain known tax havens do not impose withholding taxes on dividends declared. Should there be a tax treaty and the intermediary holding company is entitled to the treaty benefits, this would result in an overall reduction of tax. From a South African anti-avoidance point of view, section 80A-80L would not apply if the main purpose is the reduction of foreign withholding taxes. It would, however, apply if the main purpose were to avoid South African income tax. (Olivier & Honiball, 2008:301.)

Should the IHC's place of effective management be in the foreign country, and the tax treaty (should there be one in place) states that the country to which this entity is a resident is the place where the effective management is situated, SARS would not be able to tax such an entity by means of CFC regulations.

A further benefit to a South African investor who invests in an IHC might be that tax on operating income might be deferred creating an interest benefit. This would only be possible if there is a favourable tax treaty to avoid the CFC regulations. The investor could decide not to remit dividends to the investor country but rather to use the company to reinvest the dividends acting as a "dividend trap". (Olivier & Honiball, 2008:302.)

The principle features for an ideal country to set up an IHC are:

- favourable network of treaties. These treaties should limit withholding taxes on dividends by investment countries;

- low tax or no tax on income both dividend income and other income received by the intermediary holding company;
- no withholding taxes if a dividend is to be declared by the intermediary holding company to the investor;
- no CGT at the disposal or deemed disposal of an investment;
- there should not be a CFC regime; and
- there should be an absence of exchange controls (Olivier & Honiball, 2008:304).

If one compares above requirements to Mauritius (a known tax haven) as a potential country to set up an IHC, the following results are achieved:

- Mauritius has a favourable treaty with South Africa;
- Mauritius has favourable and even zero taxes in certain instances;
- dividends paid by tax incentive companies, companies fully taxable and companies listed on the Mauritius stock exchange are exempt from tax in the hands of the resident or non-resident shareholder (Legwaila, 2010:285);
- Mauritius only taxes capital gains on the disposal of land that is situated in Mauritius (Legwaila, 2010:313);
- there is no CFC regime in Mauritius (Legwaila, 2010:269); and
- Mauritius does not have exchange control provisions (Legwaila, 2010:301)

There are certainly more countries that have the characteristics to set up an IHC. This study does not explore all the different potential investment countries as this differs per investor. The purpose of the above comparison is merely to state that there is an opportunity of tax avoidance by means of an IHC should the National Treasury issue less stringent exchange regulations.

3.4 CONCLUSION

From this study it became evident that the only legal foreign investment opportunities in tax havens is for a South African investor to invest in fixed property or to provide independent personal services from a fixed property in a tax haven. This would only be

beneficial if the country has a lower tax rate than South Africa and if the treaty determines that income would be taxed in the country where the fixed property is situated. CFC legislation makes it extremely difficult if not impossible to invest in tax havens and as a result to reduce the investors' tax liability.

There are, however, benefits for multi-national companies to set up holding companies in a tax haven. Care should, however, be taken that such a company is not created to only hold shares with the purpose of evading tax as such a company can be seen as a CFC. Such companies should also provide head office services to prove to SARS that the main purpose of the company is not to evade tax.

Secrecy laws that exist in certain tax havens create an opportunity for an investor to evade taxes but this is illegal and poses the risk for criminal prosecution.

CHAPTER 4 CONCLUSION

4.1 INTRODUCTION

This study investigated the potential tax benefits for the South African investor (individual or corporate) by investing in tax havens. Currently exchange control regulations prohibit significant outflows of foreign currency. Should those regulations become less stringent, there would be an opportunity for the South African investor to transfer funds out of South Africa and make use of the favourable tax rates of other countries by means of double taxation agreements.

4.2 RESEARCH PROBLEM AND OBJECTIVES

The aim of this study was to determine the legal opportunities available for the South African investor to invest/earn income in tax havens to avoid tax without venturing into tax evasion.

The study was guided by the following specific research objectives:

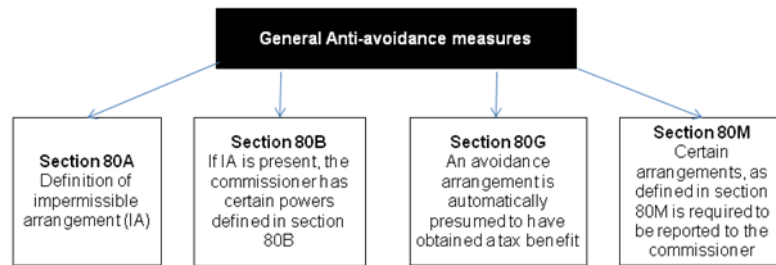
- to identify South African legislation applicable to investments/income earning opportunities in tax havens as well as a discussion on the problematic interpretation of such legislation. This was discussed in Chapter 2 ; and
- to identify countries that are tax havens in relation to South African that presents the South African investor with investment opportunities. This was discussed in Chapter 3. In Chapter 3 methods on how the South African investor could obtain these investment opportunities without venturing into tax evasion were discussed.

4.3 SUMMARY OF FINDINGS

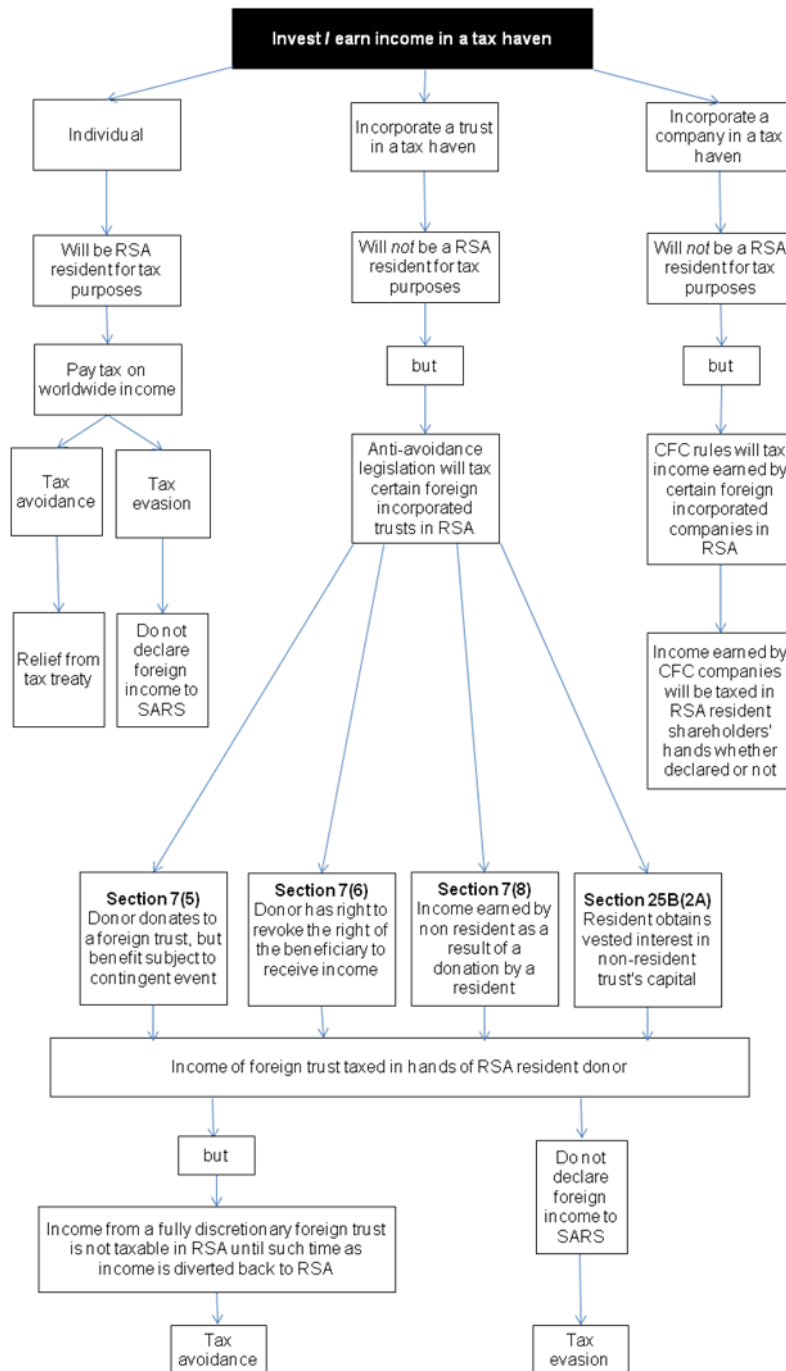
Given CFC and South African anti-avoidance legislation, it is almost impossible to legally invest in other countries without being taxed in South Africa. The only method is by

investing in fixed property in a country that charges lower taxes than South Africa and earning an income thereon. Such income, in terms of most double taxation agreements would only be taxed in the country where the property is situated.

The avoidance legislation may be illustrated as follows:



Above measures are applicable to any of the following income earning opportunities



4.4 SUGGESTIONS FOR FURTHER RESEARCH

There are the following uncertainties in trust law that poses an opportunity for further research:

- when would a trust be seen as a person for tax treaty purposes?;
- is a foreign trust a resident that is subject to tax in South Africa? and
- when would a trust constitute a permanent establishment? (Olivier & Honiball, 2008:284 - 286).

Another opportunity for further research is that almost every country could be a tax haven given the complexities of international tax. If there is a double taxation agreement between South Africa and another country, there could be potential benefits for the South African investor. All countries with tax treaties with South Africa could be investigated to determine potential tax benefits for the South African investor.

LIST OF REFERENCES

Cohen v CIR, 1946 AD 174 (13 SATC 362).

Du Plessis, L. 2008. Tax haven or hell. *Accountancy SA*, September 2008.

Erasmus, D. 2009. Can SARS simply throw substance over form out there? *TAXtalk*, 17(Jul/Aug):22-23.

Fidelity corporate services. Not dated. *Seychelles special license company*. [Online] Available from: <http://www.seychellesoffshore.com/seychelles-csl-company.php> [Accessed: 2011-06-26].

Griscty, M. 2009. *Malta: Malta Companies*. [Online] Available from: <http://www.mondaq.com/article.asp?articleid=59774> [Accessed: 2011-06-23].

IRC v Duke v Westminster [1936] AC 1

KPMG. 2010a. *Malta: an ideal holding company location*. [Online] Available from: <http://www.kpmg.com/MT/en/IssuesAndInsights/Doing%20Business%20in%20Malta/Documents/Holding%20Companies.pdf> [Accessed: 2011-08-12].

KPMG. 2010b. *Mauritius of international executives*. [Online] Available from: http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/TIES/Documents/MAURITIUS_2010_TIES.pdf [Accessed: 2011-10-21].

Legwaila, T. 2010. *Suitability of RSA corporate tax for the use of intermediary holding companies*. [Online] Available from: <http://upetd.up.ac.za/thesis/available/etd-05222010-170510> [Accessed: 2011-06-23].

Legwaila, T. 2011. *The tax treatment of holding companies in Mauritius*. [Online] Available from: [http://www.up.ac.za/dspace/bitstream/2263/16751/1/Legwaila_Tax\(2011\).pdf](http://www.up.ac.za/dspace/bitstream/2263/16751/1/Legwaila_Tax(2011).pdf) [Accessed: 2011-06-23].

Louw, C. 2010. *Jurisdiction to tax*. Lecture to BEL 874 class on 18-08-2010.

Low Tax: Global Tax and Business Portal. Not dated. *Seychelles Executive summary*. [Online] Available from: <http://www.lowtax.net/lowtax/html/jsynews.html> [Accessed: 2011-10-26]

Ministry for Justice and Home Affairs (MJHA). 2011. *Residents scheme regulations*. [Online] Available from: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9386&l=1> [Accessed: 2011-10-21].

National Treasury. 2011a. *A review framework for cross-border direct investment in South Africa*. [Online] Available from: <http://www.treasury.gov.za/documents/national%20budget/2011/A%20review%20framework%20for%20crossborder%20direct%20investment%20in%20South%20Africa.pdf> [Accessed: 2011-04-25].

National Treasury. 2011b. *Treasury Budget Speech, 2011*, ISBN: 978-0-621-39859-5.

OECD. Not dated. *Tax haven criteria*. [Online] Available from: http://www.oecd.org/document/23/0,3343,en_2649_33745_30575447_1_1_1_1,00.html [Accessed: 2012-01-04].

Olivier, Lynette & Honiball, Michael. 2008. *International tax: A South African perspective*, fourth edition, Cape Town, Siberink.

Palan, R. 2002. *Tax Havens and the Commercialization of State Sovereignty*. International Organization, 56(10), pp 151-176.

Paparinis Milonas. 2011. *A new double tax treaty between Cyprus and Germany*. [Online] Available from: <http://www.pmccorporatelaw.com/news-read/a-new-double-tax-treaty-between-cyprus-and-germany> [Accessed: 2011-10-10].

PKF. 2011. *Mauritius Tax Guide*. [Online] Available from:
<http://www.pkf.com/media/387149/pkf%20mauritius%20tax%20guide%202011.pdf>
[Accessed: 2011-08-13].

PKF. Not dated. *Trust registration in Malta*. [Online] Available from:
<http://www.pkfmalta.com/trust%20registration.htm> [Accessed: 2011-12-01].

PWC. 2010. *Malta Tax rates and dates 2010*. [Online] Available from:
http://www.pwc.com/mt/en/tax-rates/assets/tax_rates_dates_2010.pdf [Accessed: 2011-10-21].

PWC. 2011. *Tax facts and figures 2011 – Cyprus*. [Online] Available from:
<http://www.pwc.com/cy/en/publications/assets/pwc-cy-TFF11-eng.pdf> [Accessed: 2011-08-12].

South African Income Tax Act 58 of 1962.

SARS. 1997a. *Agreement between the government of the Republic of South Africa and the Government of Malta for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income*. [Online] Available from:
<http://www.sars.gov.za/home.asp?pid=3919> [Accessed: 2011-06-23].

SARS. 1997b. *Agreement between the government of the Republic of South Africa and the government of the Republic of Mauritius for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income*. [Online] Available from:
<http://www.sars.gov.za/home.asp?pid=3919> [Accessed: 2011-06-23].

SARS. 1998. *Agreement between the government of the Republic of South Africa and the Republic of Cyprus for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital*. [Online] Available from:
<http://www.sars.gov.za/home.asp?pid=3919> [Accessed: 2011-06-23].

SARS. 2002a. *Agreement between the government of the Republic of South Africa and the government of the Republic of Seychelles for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income*. [Online] Available from: <http://www.sars.gov.za/home.asp?pid=3919> [Accessed: 2011-06-23].

SARS. 2002b. *Resident: Place of effective management (persons other than natural persons)*. [Online] Available from: <http://www.sars.gov.za/home.asp?pid=54958> [Accessed: 2011-06-28].

SARS. 2011. Tax rate tables 2011. [Online] Available from: <http://www.sars.gov.za/home.asp?pid=57785> [Accessed: 2011-08012].

Seychelles Revenue Commission (SRC). 2011. *Income and non-monetary benefits tax*. [Online] Available from: <http://www.src.gov.sc/pages/incometax/incometax.aspx>. [Accessed: 2011-10-26].

SIBA. Not dated. *Guidelines for CSL*. [Online] Available from: <http://www.siba.net/index.php?s=company-special-licenses> [Accessed: 2011-06-27].

Sterling Offshore Ltd. Not dated. *Seychelles special license company*. [Online] Available from: <http://www.sterlingoffshore.com/about-offshore/offshore-company/seychelles-csl.html> [Accessed: 2011-06-28].

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd, 1977 SA 534 (A).

Stiglingh, M. Koekoemoer, A.D. Van Schalkwyk, L. Wilcocks, J.S. De Swardt, R.D. Jordaan, K. 2011. *Silke : South African income tax 2011*. Durban. LexisNexis.