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**Fostering Transparency and Accountability in the Administration of Mining
Tax Incentives in Zimbabwe.**

By

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Submitted in partial fulfilment of the requirements for the degree

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April 2023

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ACKNOWLEDGEMENTS

I would foremostly like to express my immense gratitude to my amazing, God-sent, mom and dad for their unwavering love, support, and encouragement particularly when the end was nowhere in sight. Many thanks are also due to my siblings both biological and adopted for guarding my sanity over the course of this degree (Titi, Faith, Ruva, Vari and Stacey). My aunts and uncles who have been my guardians over the course of my tertiary education, I appreciate you beyond measure. A special thanks goes to my niece Ati, your calls kept me going and motivated through the difficult times (this one is for you cute stuff). To my cousin and soul-sister Taffy thank you for enduring my daily mixtapes of complaints. Tiisetso, Thiruna, Vongai, Tarisai and Danai, my dearest friends thank you for checking up on the progress of this work religiously “we did it Joe!”. All thanks go to God almighty who began this good work in me and saw it to completion.

This work is dedicated to my dearly departed grandfather and champion of education in our family and to Sekuru Baba Simba who always knew I was a superstar. May their dearly departed souls continue to rest in peace.

ABSTRACT

Tax incentives have historically been used as an investment promotion tool in many sectors including the mining industry. Recently however, the global use of tax incentives has been associated with tax base erosion and viewed as highly susceptible to corruption. Mineral resources are further finite and they are further governed by the government of a country on behalf of all citizens. These factors including the high revenue potential bring into question the appropriateness of the use of tax incentives in the sector. The government of Zimbabwe has recently been questioned for its extension of seemingly generous tax incentives to mining companies such as Great Dykes Investments, within the context of a global health pandemic which resulted in the constriction of many economies. Acknowledging that the government of Zimbabwe views the extension of tax incentives to foreign investors as an indispensable investment promotion tool, this study sought to investigate the extent to which the governance of tax incentives in Zimbabwe lives up to international best practice aimed at limiting tax base erosion. Through a desktop analysis of the legal instruments through which tax incentives are granted to mining companies in Zimbabwe, this study established the fundamental characteristics of the governance regime applied in Zimbabwe towards the extension of tax incentives. The study went on to set each characteristic against international best practice that has been suggested by leading global financial and mining institutions. This study found that the governance regime applied in Zimbabwe fosters transparency and accountability and there by limits opportunities for tax base erosion by ensuring that the Minister of Finance holds the primary authority to grant incentives and that most incentives are granted through primary law. It was however found that the governance regime falls short of international best practice by not ensuring that all tax incentives are granted through a single primary law with clear eligibility criteria. Tax incentives granted to mining companies in Zimbabwe are further not monitored and the policy rational guiding their extension are not made publicly available. Lastly the governance of mining tax incentives in Zimbabwe fails to adhere to international best practice through the publishing of contracts.

LIST OF ACRONYMS

EDB- Economic Development Board

FARI – Fiscal Analysis of Resource Industries

G20 – Group of Twenty

GDI - Great Dyke Investments

GDP - Gross Domestic Product

ICMM - International Council on Mining and Metals

IGF – The Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development

IMF – International Monetary Fund

OECD - Organization for Economic Cooperation and Development

R&D- Research and Development

ZIC- Zimbabwean Investment Centre

ZIMASSET - Zimbabwe Agenda for Sustainable Socio-Economic Transformation

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KEYWORDS

Accountability

Governance

Income Tax

Mining

Tax Incentives

Transparency

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CHAPTER ONE: INTRODUCTION

1.1. Background

With over 40 recorded mineral occurrences, comprising precious metals, base metals, industrial metals and gemstones, the mining sector lies at the core of the Zimbabwean economy.¹ As of 2021, the sector accounted for approximately 16 per cent of the country's Gross Domestic Product (GDP) and almost 60 per cent of its foreign-currency earnings.² However, despite the country's significant mineral endowment, the government which is the custodian of the nation's mineral wealth, has struggled to position the sector as a key driver of sustainable development.³ To the public, Zimbabwe's mineral endowment has long been associated with increasing levels of inequality, conflict and corruption as the nation's resources have been a significant source of wealth for the political elite.⁴ During the historic commodity boom and bust cycles of 2001 to 2011 instead of maximizing profits from mining receipts, the country registered some of its worst economic performance in recent history.⁵

The Zimbabwean Government has over the past 10 years launched various economic programmes aimed at increasing the economic outputs of the industry, specifically through promoting both domestic and international investment in the sector.⁶ For example, the 2013 – 2018 Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZIMASSET) was aimed at fostering local ownership of mining projects in the strategic mineral groups through an indigenization law.⁷ More recently, in 2019, the Government launched an economic plan to transform the mining sector into a

¹ USAID Strategic Economic Research and Analysis 'Zimbabwe (SERA) Program Mining Sector Policy Study' 2012 17.

² 'More changes to Zimbabwe's mining earnings retention policy' The Economist 13 January 2021 [accessed http://country.eiu.com/article.aspx?articleid=1070598490&Country=Zimbabwe&topic=Economy&subtopic=_ on 2 January 2022].

³ Transparency International Zimbabwe 'US\$12 Billion mining economy by 2023: what are the key enablers?' 3 March 2021.

⁴ Transparency International Zimbabwe (n 3 above).

⁵ Transparency International Zimbabwe (n 3 above).

⁶ Transparency International Zimbabwe (n 3 above).

⁷ Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZIMASSET) October 2013 – December 2018 33 [accessed http://www.veritaszim.net/sites/veritas_d/files/Zimbabwe%20Agenda%20for%20Sustainable%20Socio-Economic%20Transformation%20%28ZIM-ASSET%29%20Oct%202013%20to%20Dec%202018.pdf on 21 February 2022].

US\$12 Billion economy by 2023, as part of a broader macroeconomic plan to transform the country into an Upper Middle -Income Economy by 2023.⁸ This plan is set to be achieved by addressing several challenges currently faced by the industry including power shortages, liquidity challenges as well as various policy uncertainties.⁹ Both this recent economic plan and ZIMASSET however have failed to investigate and address the impact of mining tax incentives and particularly their administration, on revenue losses.

In addition, following the 2000 Land Reform Programme, Zimbabwe has come into international disrepute as an investment destination and the country's failure to attract significant investment has largely been attributed to political instability as well as policy uncertainty.¹⁰ To attract especially Foreign Direct Investment (FDI), the government has increasingly granted tax incentives to mining companies under special mining licenses.¹¹ The employment creation and infrastructural development potential of these incentives have been heavily emphasized by State media channels.¹² Zimbabwean civil society has however increasingly flagged its concern with the lack of transparency surrounding the government's granting of tax incentives within the mining sector as well as their revenue diminishing potential.¹³ The Zimbabwean Environmental Law Association, in particular, has demanded that the government disclose the economic rationale behind the extension of tax incentives, especially to foreign investors but also tax revenue forgone as a result of tax incentives.¹⁴

Over the past five years, the Zimbabwean government has extended a number of fiscal and non-fiscal incentives to extractive companies operating in its jurisdiction. Amongst the most notable of these incentives have been those granted to Invictus Energy, an Australia Stock Exchange listed junior extractive firm exploring for oil in the Muzarabani area, as well as to Canadian listed Caledonia's Blanket Gold Mine, which is the 3rd largest gold producer in the country, accounting for about 14% of

⁸ 'The mineral of hopeUS\$12bn mining sector target to change the nations fortunes' The Herald 15 October 2019 [accessed at <https://www.herald.co.zw/the-minerals-of-hope-us12bn-mining-sector-target-to-change-nations-fortunes/> on 9 March 2022].

⁹ The Herald (n 8 above).

¹⁰ African Forum and Network on Debt and Development (AFRODAD) 'What has tax got to do with development a critical look at Zimbabwe's tax system' 2021 [accessed at <https://media.africaportal.org/documents/what-has-tax-got-to-do-with-development-zimbabwe.pdf> on 9 March 2022].

¹¹ AFRODAD (n 10 above).

¹² 'Govt offers incentives to mining investors' The Zimbabwe Independent 17 December 2021 [accessed at <https://www.theindependent.co.zw/2021/12/17/govt-offers-incentives-to-mining-investors> on 9 March 2022].

¹³ 'Strike a balance between tax incentives and development' NewsDay 10 December 2021 [accessed at <https://www.newsday.co.zw/2021/12/strike-a-balance-between-tax-incentives-and-development> on March 9 2022].

¹⁴ Newsday (n 13 above).

industrial production and about 9% of total gold production.¹⁵ However, the fiscal incentives that were offered to Great Dyke Investments (GDI) in 2021 appear to have attracted a substantial degree of civil society and public interest ostensibly because these seemingly generous incentives were extended to the company at a time when the Zimbabwean government was struggling to finance public health interventions in response to the COVID-19 pandemic.¹⁶ In 2021, the Zimbabwean Lawyers for Human Rights, filed an urgent application to the High Court, to suspend the Statutory Instrument through which these incentives were provided to GDI.¹⁷ The main legal ground for this application was that the provisions of these tax incentives, violated a Constitutional principle of public finance management that demands that “the burden of taxation must be shared equally amongst all tax payers.¹⁸ Further, it is commonly believed that a highly politically exposed Zimbabwean business man holds a 50% stake in GDI and this has sparked public debate on the legality of the extension of tax incentives to this project.¹⁹

1.2. Problem statement

Although literature on the effectiveness of tax incentives as an investment promotion tool is mixed, financial institutions such as the World Bank, International Monetary Fund and African Development Bank have increasingly discouraged their use.²⁰ Whilst some tax incentives have been linked to measurable economic and developmental gains, in some circumstances the direct and indirect costs of their use have been found to outweigh the investment benefits they may provide.²¹ A clear message arising from the study of tax incentives, however, is that poorly designed and governed tax incentives result in the worst economic outcomes for both implementing countries and regions at large.²² Acknowledging that the government of Zimbabwe appears committed to offering especially extractive companies tax incentives, this research will investigate the extent to which the government protects the domestic tax base by ensuring that incentives are well governed. This study will complement and

¹⁵ NewsDay (n 13 above).

¹⁶ ‘GDI tax holiday challenged in court’ Mining Zimbabwe 5 February 2021 [accessed at <https://miningzimbabwe.com/gdi-tax-holiday-challenged-in-court> on 9 March 2022].

¹⁷ Mining Zimbabwe (n 16 above).

¹⁸ Mining Zimbabwe (n 16 above).

¹⁹ Mining Zimbabwe (n 16 above).

²⁰ EM Zolt ‘Tax Incentives: Protecting the tax base’ (2015) Paper for Workshop on Tax Incentives and Base Protection New York, 23-24 April 2015.

²¹ Zolt (n 20 above) 12.

²² Zolt (n 20 above) 12.

broaden public discourse and knowledge on the use of tax incentives in the mining sector in Zimbabwe. It will also contribute to the wealth of knowledge surrounding the governance of tax incentives within the mining sector, by collating the most agreed upon best practices on their governance. The evaluation of the Zimbabwean tax incentive governance system will be conducted against the template of the international best practices that have been established by international financial institutions, on the use of tax incentives.

1.3. Aim and Objectives

1.3.1. Aim

Within the context of public and civil society concerns pertaining to the legality of the extension of fiscal incentives to mining companies operating in Zimbabwe, this research aims to investigate the administrative structure guiding the granting of incentives to mining firms in order to assess if it is line with international best practice.

1.3.2. Objectives

The study will consider a number of secondary objectives that underlie the aim of the study. These objectives will be consecutively addressed in the substantive chapters of the study, and will include:

- Identifying the main revenue risks caused by the poor administration of incentives in the mining sector.
- Exploring the administration of extractive industry tax incentives in Zimbabwe and comparing the administration structure applied in Zimbabwe to international best practices.
- Evaluating the strengths and weaknesses of the tax incentive governance system applicable to mining companies.

1.4. Research Questions

1.4.1. Primary Question

To what extent does the Zimbabwean government's administration of mining tax incentives adhere to international best practices on the governance of tax incentives?

1.4.2. Secondary Research Questions

- a) What are the common risks of poorly governed investment tax incentives within the mining sector and how does international best practice recommend that tax incentives should be administered to limit tax base erosion?

- b) What are the characteristics of the governance framework applied to the extension of mining investment tax incentives, to mining firms in Zimbabwe?
- c) In what ways if any, can the administration of tax incentives within the Zimbabwean extractive industry be better aligned with international best practices to better protect the country's tax revenue base?

1.5. Research methodology

1.5.1. Methodology

This research will primarily be conducted through a desktop analysis of domestic and international legal and policy instruments. In particular, the study will focus on the manner in which mining companies are granted tax incentives through, the Zimbabwean Income Tax Act, Mines and Minerals Act as well as Statutory Instrument 26 of 2021, through which a range of fiscal incentives was extended to GDI. The study will also consider guidance notes published by the Organization for Economic Co-Operation and Development (OECD), as well as the Inter-Governmental Forum on Mining (IGF), the World Bank, and the International Monetary Fund (IMF), so as to ascertain the best practices in the governance of mining tax incentives. The OECD's "Principles To Enhance The Transparency And Governance Of Tax Incentives For Investment In Developing Countries" will be considered as the benchmark for international best practices. This is due to the organization's publicly recognised expertise in tax base erosion.²³ However because these principles are not targeted at the mining sector alone, special consideration will be granted to publications by the IGF and IMF, which both conduct sector-specific research on the use of tax incentives on a global scale.

1.5.2. Parameters of the study

This study will be confined to the extension of only fiscal (tax) incentives. The foundational documents to be examined in the case study will be the Income Tax Act, Statutory Instrument 26 of 2021 and other legislation through which tax incentives are granted. No mining agreements will be examined towards this study as these are generally not made available to the public.

1.5.3. Relevance of Study

Tax or fiscal incentives can broadly be understood as "...any special provisions, granted to mining investors, that provide a favourable deviation from the general tax treatment that applies to all

²³ Organization for Economic Cooperation and Development (OECD) 'Principles to Enhance the Transparency and Governance of Tax Incentives for Investment in Developing Countries' [accessed at <http://www.oecd.org/ctp/tax-global/transparency-and-governance-principles.pdf>. on 20 July 2022].

corporate entities”.²⁴ Despite the jurisdiction-specific definitions of tax incentives, it is commonly agreed that the aim of a tax incentive is to reduce the tax burden of the taxpayer either in the quantum or timing of their tax liability.

It is widely agreed that mining companies operating in developing economies have been historically granted generous tax incentives and subsidies.²⁵ Research has further found that when combined with Base Erosion and Profit Shifting practices, tax incentives have the potential to significantly diminish government revenue. For this reason, the administration of tax incentives in developing countries must be carried out meticulously.

1.6. Chapter Overview

This study will comprise five chapters. This chapter introduced the study by providing a broad overview of research context, the aim as subsequent research questions, as well as the methodology that will be applied to address the research problem.

Chapter Two will provide an overview of the leading governance challenges that governments face towards the administration of investment tax incentives. The chapter will then proceed to explore international best practices on the governance of tax incentives for developing economies.

Chapter Three will provide an overview of the governance structure guiding the extension of tax incentives to mining companies in Zimbabwe through the lens of Fiscal Instrument 21 of 2021, in order to determine the characteristics of the governance system applied to mining companies in Zimbabwe.

Chapter Four will then provide a comparative analysis of the governance structure applied in the granting of tax incentives in Zimbabwe vis a vis international best practices offering proposals towards the bolstering of the governance architecture where and if appropriate.

Finally, Chapter Five will provide a summary of the research findings, address the primary question of the study, and offer recommendations where applicable.

²⁴ United Nations Committee of Experts on International Cooperation in Tax Matters Nineteenth session 2019 [accessed at https://www.un.org/esa/ffd/wp-content/uploads/2019/10/19STM_CRP24_extractive-industries.pdf on 9 March 2022].

²⁵ The Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) ‘Tax Incentives in Mining: Minimising Risks to Revenue’ 2018 6.

CHAPTER TWO:

A GOOD GOVERNANCE FRAMEWORK TO THE EXTENSION OF TAX INCENTIVES TO MINING INVESTORS BASED ON INTERNATIONAL BEST PRACTICE

2.1. Introduction

The inherent characteristics of the mining industry have often been used as motivators for the special taxation of the sector.²⁶ Mining is both a high-risk and capital-intensive economic activity with significant investment in exploration and development often being sourced from the private sector.²⁷ The risk profile of the sector is further raised by the long periods of pre-production, during which a company makes no revenues and the further sensitivity of the business model to volatile commodity prices and exchange rates.²⁸ With these considerations in mind, governments — particularly in developing economies — have often offered tax incentives to mining companies to stimulate investment.²⁹

In light of the above, the objective of this chapter is to identify the main revenue risks caused by the poor administration of tax incentives, and to examine the established international best practice aimed at mitigating such risk. Accordingly, Section 2.2 will commence by discussing the rationale for granting tax incentives to mining companies. This will be followed in Section 2.3 by a discussion of the common governance issues associated with the granting of tax incentives to investors in the mining sector. In section 2.4, the study will examine various international guidelines with respect to the granting of tax incentives, before delineating international best practice in Section 2.5. The chapter will conclude in Section 2.6 by summarizing the findings of the preceding discussions and addressing the question of what international best practices suggests will limit tax base erosion through the granting of incentives.

2.2. Rationale for the granting of tax incentives to mining companies

Corporate Income tax is an important revenue source for many developing economies including Zimbabwe. The World Bank estimates that in 2015, tax revenue formed 17,6% of Zimbabwe's GDP

²⁶ J Calder *Administering fiscal regimes for extractive industries: A handbook* (2014) 2.

²⁷ Calder (n 26 above) 3.

²⁸ IGF (n 26 above).

²⁹ IGF (n 26 above).

which later decreased to 15% in 2018.³⁰ Corporate income tax in particular contributed between 10% to 11.3% to total government revenue in this period.³¹ Despite the risks posed to the revenue base of a country, tax incentives continue to be offered to investors within the extractive industries to encourage investment.

The effectiveness of tax incentives in attracting investment, particularly in the mining sector is highly contested.³² Some arguments against the use of tax incentives include that incentives are ineffective towards attracting investment because taxation policy is but one factor motivating investment decisions. Tax incentives are further viewed as being harmful to economic growth and development because they deprive developing countries of revenue that could be channelled towards financing public goods and services.³³

There are certain characteristics of the mining sector that could serve to make tax incentives an ineffective investment promotion tool. For example, as mineral resources are location specific it is conceivable that mining companies would be less influenced in the investment decisions by the availability of tax expenditures. In 2009, a survey conducted by the International Council on Mining and Metals (ICMM) concluded that most companies based their investment decisions on the presence of tax disincentives rather than the presence of tax incentives.³⁴ These disincentives included poor infrastructure, political instability and tax uncertainty.³⁵ It is thus important to note that tax incentives in general also do not have a compensatory effect on poor infrastructure and other regulatory weaknesses.

The quality of the available resource, state of infrastructure and the border regulatory governance of the sector as a whole have been identified as more important considerations to mining companies.³⁶ Mining companies nonetheless continue to request tax expenditures and often governments in

³⁰ The World Bank *Revenue as % of Revenue- Zimbabwe* International Monetary Fund, Government Finance Statistics Yearbook and data files, and World Bank and OECD (2022) [accessed at <https://data.worldbank.org/indicator/GC.TAX.TOTL.GD.ZS?locations=ZW> on 16 July 2022].

³¹ L Mushunje & M Mashasha 'Modelling the effects of variations in corporate tax effort on revenue output in Zimbabwe' (2018) 15 *Undergraduate Economic Review Journal* 10.

³² S Coulibaly & A Camara 'Taxation, Foreign Direct Investment and Spillover Effects in the Mining Sector' (2021) Working Paper Series N° 354, African Development Bank, Abidjan, Côte d'Ivoire 7.

³³ Coulibaly & Camara (n 32 above) 2.

³⁴ International Council on Mining and Metals (ICMM) 'Minerals Taxation Regimes—A Review of Issues and Challenges in their Design and Application' (2009) *London: International Council on Mining and Metals* 43 [accessed at: <https://www.icmm.com/document/520> on 16 July 2022].

³⁵ ICMM (n 34 above) 44.

³⁶ ICMM (n 34 above) 44.

developing countries feel obligated to grant them, partly due to the inherent power and information asymmetries between companies and governments as well as the fear of resource sterilization.

Arguments in favour of the use of tax incentives often justify their costs by proposing that any experienced costs will be compensated for by the new investment, jobs and spill overs created by the firms attracted into the jurisdiction by these fiscal concessions³⁷. However, arguments along these lines are seldom based on proper economic evaluation and evidence.³⁸ On the contrary, at a global level, a negative relationship between the offering of generous corporate tax incentives by a country and its corporate tax revenue as a share of GDP has been observed.³⁹

The continued relevance of tax incentives within the sector could be challenged by the ongoing energy transition.⁴⁰ This is because the technologies facilitating the energy transition including solar panels, electric vehicles, and wind turbines, are highly reliant on stable access to critical minerals such as copper, lithium, nickel, cobalt and other rare earth elements.⁴¹ These mineral resources are typically located in developing countries. Zimbabwe for example hosts the world's second largest platinum deposit.⁴² The growing demand for these minerals could grant governments greater negotiation power, making them less obliged to concede to requests for tax expenditures or view them as a necessary investment promotion tool.⁴³

The continued appropriateness of mining tax incentives will further be impacted by the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting which aims to introduce a global minimum tax.⁴⁴ Pillar 2 of the GloBE framework in particular will result in the redundancy of several

³⁷ H Kronfol & V Steenbergen 'Evaluating the Costs and Benefits of Corporate Tax Incentives- Methodological Approaches and Policy Considerations' (2020) *World Bank Group*, Washington, The United States of America 3.

³⁸ Kronfol & Steenbergen (n 37 above) 2.

³⁹ Kronfol & Steenbergen (n 37 above) 2.

⁴⁰ A Cosbey et al 'Mining a mirage: Reassessing the shared-value paradigm in light of the technological advances of the mining sector' *International Institute for Sustainable Development and the Colombia Centre for Sustainable Investment* [accessed at <https://www.iisd.org/sites/default/files/publications/mining-a-mirage.pdf> on 30 July 2022].

⁴¹ Cosbey et al (n 40 above) 14.

⁴² USAID (n 1 above) 17.

⁴³ Cosbey et al (n40 above) 34.

⁴⁴ OECD 'Tax Incentives and the Global Minimum Corporate Tax: Reconsidering Tax Incentives after the GloBE Rules' 2022 *OECD Publishing, Paris* [accessed at <https://doi.org/10.1787/25d30b96-en.on> 30 October 2022].

profit-based tax expenditures as all in-scope MNE's will be subject to at least a 15% tax rate no matter where they operate, which will diminish the investment attracting qualities of these incentives.⁴⁵

Despite this divergence in thought, tax incentives continue to be widely used in the mining sector and Zimbabwe is no exception. In order to maximize their benefit, governments need to carefully consider the necessity, design and administration of these incentives, to minimize their cost to government revenue.

2.3. Common governance issues in the extension of tax incentives to mining investors

The most well-designed and fiscally justifiable tax incentives may easily be undercut in their effectiveness and efficiency by poor administration. Research by the IMF suggests that African countries lose between USD 450-730 million in CIT revenue as a result of profit shifting by mining Multinational Enterprises.⁴⁶ Although the abuse of tax expenditures is not the only enabler of profit shifting it is a significant contributor.⁴⁷

Granting tax expenditures within the mining sector carries some inherent governance risks due to the high value of mining investments and the importance of the sector to many economies.⁴⁸ The poor governance of incentives within the sector is particularly enabled by the historically secretive manner through which many governments negotiate natural resource contracts.⁴⁹

Some of the most pertinent governance issues commonly faced in the extension of tax incentives to mining companies include firstly the risk of resource rent-seeking behaviours and corruption, particularly where there is no public or parliamentary oversight as to the allocation of investment tax incentives.⁵⁰ Such risks are particularly high where countries have undefined eligibility criteria for the

⁴⁵ OECD (n 44 above) 35.

⁴⁶ MG Albertin et al 'Tax Avoidance in Sub-Saharan Africa's Mining Sector' *The international Monetary Fund Departmental Paper No 2021/022* (2021) 30.

⁴⁷ Albertin (n 46 above) 30.

⁴⁸ Albertine (n 46 above) 30.

⁴⁹ IGF (n 26 above) 9.

⁵⁰ IGF (n 26 above) 6.

extension of incentives, incentives can be granted through private negotiations and government officials are granted high levels of discretionary powers in offering tax incentives.⁵¹

Another governance risk stems from vesting authority to grant incentives to multiple government agencies that work in an uncoordinated manner and through various pieces of legislation.⁵² In such circumstances, incentives may overlap, be duplicated or work in an unharmonized way that poses a greater risk to the country's revenue base than anticipated.⁵³ Incentives administered concurrently by various agencies are further more difficult to comprehensively monitor.⁵⁴ Where the eligibility criteria for the extension of incentives are not prescribed by law, some investors may be treated more favourably than others and furthermore where mining contracts are not accessible to the public, it is difficult to hold the government accountable for how incentives are granted.⁵⁵

The fiscal risks emerging from the poor governance of tax incentives may further be compounded by poor fiscal design that creates opportunities for mining companies to gain greater fiscal benefits than envisioned by the government.⁵⁶ For example, in some instances, tax holidays may run longer than the average life of a mine which will result in a government never collecting income tax from the mine.⁵⁷ A design flaw in Guinea's tax holiday design resulted in the tax incentives being afforded to mining investments and not specific projects for a specific time frame.⁵⁸ A legal design loophole further allowed the tax incentives to restart every time ownership of the investment passed hands.⁵⁹ Companies could thus restructure their corporate affairs to ensure that the tax holiday would never expire by transferring the mining license to another local entity with the same beneficial owners every

⁵¹ IGF (n 26 above) 6.

⁵² P Guj et al *How to improve mining tax administration and collection frameworks: A sourcebook* (2013) 40 .

⁵³ Guj et al (n 52 above) 42.

⁵⁴ Guj et al (n 52 above) 42.

⁵⁵ Guj et al (n 52 above) 42.

⁵⁶ Albertin (n 46 above) 31.

⁵⁷ Albertin (n 46 above) 31.

⁵⁸ Albertin (n 46 above) 31.

⁵⁹ Albertin (n 46 above) 31.

time the expenditure was set to expire, thereby restarting it for another five years.⁶⁰ Projects could thus be shielded from Corporate Income Tax indefinitely.

2.4. International best practice on the governance of tax incentives

In granting tax incentives, governments must make significant trade-offs between offering investors a favourable business climate so as to raise revenues to fund social spending, and maintaining a sustainable corporate tax environment within the context of growing international tax competition.⁶¹ The poor governance of tax incentives has further been shown to present a major fiscal risk. To assist governments to avoid a race to the bottom and ultimately protect their tax revenue bases, some international best practices on the good governance of tax incentives, have emerged from the work of various international institutions based on their experiences in assisting governments in the design and implementation of tax incentives.

The following discussion does not attempt to explore every set of governance rules that have been proposed on this matter, but rather focusses on the prescripts of the main international institutions. These include proposal made by the International Monetary Fund, the World Bank, and the OECD to identify common characteristics. Proposals advanced by the IGF will also be considered due to its specialised focus on the extractive industry.

2.4.1. OECD

In 2011 the OECD, together with the IMF, United Nations and the World Bank published a joint report to the G20 exploring the various ways through which international co-operation could be fostered, to support effective taxation systems in developing countries.⁶² From this publication, the OECD's Task Force on Tax and Development proposed 10 "Principles to Enhance the Transparency and Governance of Tax Incentives for Investment in Developing Countries."⁶³ This discussion will only examine the first five principles which relate to the design and administration of tax incentives, as principles six through ten relate to the monitoring of tax incentives and the fostering of regional co-operation in their implementation.

⁶⁰ Albertin (n 46 above) 31.

⁶¹ The International Monetary Fund 'Empirical Evidence on the Effects of Tax Incentives' (2009) *IMF Working Paper Fiscal Affairs Department* 12.

⁶² Report to the G20 Development Working Group by the IMF, OECD, UN and World Bank 'Options for low income countries' effective use of tax incentives for investment' *IMF Policy Papers* 2015.

⁶³ OECD (n 23 above).

The Joint report firstly suggests that governments should make public statements for all tax incentives they offer for investment purposes, stating their objectives within a singular governing framework.⁶⁴ This framework should provide an overview of the projected costs and benefits of the incentives and should be used to assess the performance of granted incentives.⁶⁵ Secondly, it is proposed that investment tax incentives are provided through consolidated tax laws only, along with their eligibility criteria.⁶⁶ In addition to the provision of tax incentives under one legislative text, the third principle dictates that the power to grant tax incentives is placed under the authority of one government department.⁶⁷ Where such centralization is not possible, all levels of government involved in the granting of incentives should co-ordinate actively towards the extension of incentives. The fourth principle is that investment tax incentives are ratified through the country's law-making body.⁶⁸ The fifth principle suggests that tax incentives be administered in a transparent manner meaning that tax incentives should only be extended to investors who meet and follow the procedures set out in the law and not through any alternative or further negotiations.⁶⁹ It must furthermore be mandatory for all tax payers to file a tax return despite any partial or full exemption for Value Added Tax and Income Tax and in the case of other taxes, a statement on the duty of exemptions availed to them and how they have been used.⁷⁰

2.4.2. *International Monetary Fund*

At the request of the G20 Development Working group and stemming from consultations with the OECD and World Bank, the IMF also released a guidance document on the governance of tax incentives for developing economies.⁷¹ The IMF makes four main proposals towards the governance of tax incentives beginning with the first, that is the need for the awarding and monitoring of incentives to be guided by the rule of law within the context of clear eligibility criteria.⁷² The IMF's second proposal is that the rationale for tax incentives should be published in policy documents accessible to the public.⁷³ Thirdly, the institution suggests that the authority to grant tax incentives related to national taxes should rest with the Ministry of Finance but be informed by inter-government agency inputs.⁷⁴

⁶⁴ OECD (n 23 above) 3.

⁶⁵ OECD (n 23 above) 3.

⁶⁶ OECD (n 23 above) 3..

⁶⁷ OECD (n 13 above) 3.

⁶⁸ OECD (n 13 above) 3.

⁶⁹ OECD (n 13 above) 3.

⁷⁰ OECD (n 13 above) 3.

⁷¹ Report to the G20 Development Working Group by the IMF, OECD, UN and World Bank (n 62 above).

⁷² IMF (n 61 above) 19.

⁷³ IMF (n 61 above) 20.

⁷⁴ IMF (n 61 above) 20.

Finally, the IMF's fourth proposal is that the administration and evaluation of incentives should be conducted in a transparent manner.⁷⁵

2.4.3. *The World Bank*

In 2012 the World Bank's Investment Policy and Promotion team published a guidance document titled "Providing Incentives for Investment Advice for Policy Makers in Developing Countries."⁷⁶ The first proposal made by the World Bank is that incentives should be provided for in laws that have clear eligibility criteria, giving officials discretionary powers in very limited circumstances.⁷⁷ Secondly, it is suggested that all tax incentives should be consolidated in a country's tax code and finally that incentives should be controlled and monitored meticulously by ensuring that companies still complete tax returns and declarations so that incentives are not an excuse to avoid ordinary tax administration.⁷⁸

2.4.4. *Inter-governmental Forum on Mining*

In 2018 the IGF published a practice note titled "Tax Incentives In Mining: Minimising Risks To Revenue" in which it provided a "check-list" for good governance and the extractive industry.⁷⁹ The first proposal on this list was that governments should publish clear and measurable policy objectives underlying the extension of incentives.⁸⁰ This policy document should further be subject to public consultations and monitoring.⁸¹ Secondly, the IGF suggests that all relevant government departments be involved in the extension of incentives to investors with the involvement of the Ministry of Finance being of particular importance.⁸² The third proposal of the IGF is that incentives should be available to all mining investors in a non-discriminatory manner, with the eligibility criteria set out clearly in law.⁸³ Fourthly, mining contracts and license agreements should be publicly available to enable the public monitoring of project-level incentives.⁸⁴ The fifth requirement is that the final authority to grant incentives should not be vested in government officials with performance targets linked to the

⁷⁵ IMF (n 61 above) 21.

⁷⁶ The World Bank 'Providing Incentives for Investment Advice for policymakers in developing countries (2012) *Investment Climate in Practice* 3 accessed <https://openknowledge.worldbank.org/bitstream/handle/10986/10511/540170BRI0Prov10Box345635B01PUBLIC1.pdf?sequence=1&isAllowed=y>

⁷⁷ World Bank (n 76 above) 3.

⁷⁸ World Bank (n 76 above) 3.

⁷⁹ IGF (n 26 above) 18.

⁸⁰ IGF (n 26 above) 18.

⁸¹ IGF (n 26 above) 18.

⁸² IGF (n 26 above) 18.

⁸³ IGF (n 26 above) 18.

⁸⁴ IGF (n 26 above) 18.

attraction of new projects without review by other departments.⁸⁵ In a sixth and final requirement it is proposed that the government must calculate and publicly report on the revenue loss anticipated as a result of the incentives.⁸⁶

2.5. Overview of International best-practice on the governance of tax incentives

The discussion in the preceding section revealed common themes towards a consensus on how tax incentives should best be governed. Essentially, it can be deduced that a good governance framework fosters transparency and accountability towards the extension and administration of tax incentives through adherence to the rule of law.

Accordingly, the commonalities identified in the four frameworks will be highlighted in this section, accompanied by a brief explanation of how each proposal responds to the key challenges faced in the governance of tax incentives as highlighted in section 2.3. Table one provides a tally of the nine broad characteristics identified in the four governance frameworks above. For a characteristic to be deemed as “common” it must have been identified in at least three of the four frameworks. Though only identified in the IGF framework, two additional characteristics — X and Y —will also be examined due to their mining-specific nature.

Table 1- Consolidation of most commonly proposed good tax incentive governance characteristics

| Governance Characteristic | OECD | IMF | World Bank | IGF |
|--|------|-----|------------|-----|
| Public Policy Statements on investment incentives justification | x | x | | x |
| Available Tax Incentives prescribed in law with clear eligibility requirements | x | x | x | x |
| Tax incentives provided in a consolidated single tax code | x | x | | |
| Administration of incentives assigned to one government body, preferably the Ministry of Finance | x | x | | x |
| Fostering inter-departmental co-operation in extending tax incentives | x | x | | x |
| Administration of tax incentives in a transparent manner ie taxpayers must still submit returns and other tax declarations | x | x | x | x |
| The revenue administration should be in charge of the implementation and enforcement of tax incentive schemes | | x | | |

⁸⁵ IGF (n 26 above) 18.

⁸⁶ IGF (n 26 above) 18.

| | | | | |
|---|--|--|--|---|
| Mining contracts and license agreements should be publicly available | | | | X |
| Authority to grant incentives should not be vested solely in government officials with performance targets linked to the attraction of new projects | | | | X |

2.5.1. Publishing the policy rational and objectives of incentives

By publishing a regularly updated statement providing for the basis and performance of tax incentives offered to date, the government ensures that it can be held accountable for the incentives it offers and remedial action can be taken against it when necessary.⁸⁷ The rationale statements that governments publish on the extension of mining tax incentives should form part of a broader comprehensive policy rather than be stand-alone declaration.⁸⁸ The particular policy objectives that the government is pursuing by introducing new incentives or continuing pre-existing ones should be clearly spelt out. Common policy objectives that a government could support through the provision of tax incentives within the mining sector include job creation, regional development, or promotion of beneficiation.⁸⁹ More recently tax incentives within the sector have been used to promote the use of green technologies. For example, in 2018, the United States of America introduced tax credit Q45 which made substantial tax credits available to mining companies on condition that they invest in carbon capture, use and storage technology.⁹⁰

The public declaration of the policy objectives and rational for the extension of tax incentives limits the scope for corruption by fostering transparency.⁹¹ This is because the government can be held accountable should it extend incentives to companies that clearly do not further the stated policy objectives by for example not being in the target development area. The public declaration of the policy objectives supporting the extension of incentives further strengthens the trust of investors in the government’s commitment to the rule of law and enhances the public’s confidence in the fairness of the tax system.⁹²

⁸⁷ R Bird ‘Tax incentives for investment in developing countries’ in G Perry et al (eds) *Fiscal reform and structural change in developing countries* (2000) 210.

⁸⁸ R Bird ‘Tax incentives for investment in developing countries’ in Perry et al (n 87 above) 211.

⁸⁹ A Klemm ‘Causes, benefits, and risks of business tax incentives’ 17 (2009) *International Tax and Public Finance* 320.

⁹⁰ <https://www.iea.org/policies/4986-section-45q-credit-for-carbon-oxide-sequestration> [accessed 20 November 2022].

⁹¹ Klemm (n 89 above) 320.

⁹² Klemm (n89 above) 325.

Not only must the policy rationale and objectives guiding the extension of tax incentives be made publicly accessible, but the policy documentation should also further be published in a simple and clear manner.⁹³ By ensuring that these policy documents are clear and understandable to the general public, the government fosters transparency in the granting of tax incentives by limiting discretion in the interpretation of the rules and policies underwriting them.⁹⁴

2.5.2. Granting tax incentives through a singular primary law

Tax incentives should be granted through primary laws. Prescribing tax incentives in the law ensures that parliament and the public have an opportunity to scrutinize the legal basis of the extension of any incentives.⁹⁵ Where incentives are negotiable and provided for through agreements and regulations that are not subject to public scrutiny, government officials and investors can apply undue influence towards the extension of incentives to certain investors.⁹⁶

It is further proposed that tax incentives are consolidated in a singular piece of law, most preferably the income tax code.⁹⁷ Where tax incentives are contained in several pieces of legislation the transparency of the extension of tax incentives is compromised because they are not easily traceable.⁹⁸ Consolidating tax incentives in a singular piece of legislation further reduces the likelihood that incentives will overlap or result in conflicting outcomes is minimized. Where tax incentives overlap this increases the possibility of unintended revenue losses.

The law that consolidates the tax incentives available to mining companies should further set out clear eligibility requirements for the extension of incentives.⁹⁹ The setting out of clear eligibility

⁹³ R Bird 'Tax incentives for investment in developing countries' in Perry et al (n 87 above) 211.

⁹⁴ M Keen & M Mansour 'Revenue mobilization in Sub-Saharan Africa: challenges from globalization' (2009) *IMF Working Paper* 09/157.

⁹⁵ Klemm (n89 above) 325.

⁹⁶ Keen & Mansour (n94 above) 10.

⁹⁷ Keen & Mansour (n94 above) 10.

⁹⁸ Keen & Mansour (n94 above) 10.

⁹⁹ Keen & Mansour (n94 above) 10.

requirements limits the discretionary powers that can be applied towards the awarding of incentives and so ensures that incentives are granted in a fair and non-discriminatory manner.¹⁰⁰

2.5.3. Granting the ministry of Finance primary authority to grant incentives

It is common for several government agencies to be involved in the approval of foreign investment-related deals.¹⁰¹ These different departments usually possess different specialized competencies that can be useful towards the design of tax incentives or in the evaluation of eligible government partners however they often have different objectives.¹⁰²

The ministries most involved in the granting of tax incentives include the Ministry of Finance, The Ministry of Mines and Minerals and the national Investment Promotion agency. The specialized functions of these departments make the Ministry of Finance the most well-suited custodian of mining tax incentives. For example, the mandate of an investment promotion agency, is to service investors through the streamlining of business registration and investment processes. The Ministry of Finance is primarily concerned with the regulation of the extraction of minerals. The Ministry of Finance in comparison must prioritize the protection of the country's revenue base for the good of the general public, taking a more holistic approach that champions broader national development strategies.¹⁰³ The Ministry of Finance further holds the necessary resources to measure and monitor the fiscal impacts of incentives.

Although the Ministry of Finance should hold the primary authority to grant incentives to mining investors, it is important that it does so in collaboration with other relevant ministries such as the Ministry of Mines and the investment promotion agency. The Ministry of Mines for example will hold the specialized knowledge as to which mines or mineral groups will benefit from the extension of incentives. Where the relevant ministries do not efficiently co-ordinate and over-arching responsibility is not centralized, incentives may be inconsistent, duplicated or work at cross-purposes, at the risk of great revenue losses than those originally intended.¹⁰⁴

¹⁰⁰ The United Nations (UN) & Inter-American Center of Tax Administrations (CIAT) 'Design and assessment of tax incentives in developing countries : Selected and a country experience' (2018) 44.

¹⁰¹ UN & CIAT (n 100 above) 45.

¹⁰² UN & CIAT (n 100 above) 45.

¹⁰³ UN & CIAT (n 100 above) 43.

¹⁰⁴ UN & CIAT (n 100 above) 44.

2.5.4. The need to monitor tax incentives

Tax incentives by their very nature are susceptible to abuse and so must be monitored carefully, especially by ensuring that companies continue to file tax returns and the carrying out regular audits.¹⁰⁵ This enables the government to monitor the use of incentives thereby fostering transparency in the system but such data collection will be of use towards the measurement of the efficiency and equity of the tax incentive regime.¹⁰⁶

The monitoring of tax incentives within the mining sector is commonly carried out on a project, by project basis however it is also possible to carry out sector wide evaluations.¹⁰⁷ The monitoring of tax incentives within the extractive sector unlike other sectors, is complicated by the fact that the fiscal terms of many mining projects are contained in contracts which have varying negotiated fiscal conditions, in addition to primary laws.¹⁰⁸ This makes it difficult to establish a industry wide benchmark against which to measure the impact of specific incentives.¹⁰⁹ The monitoring of tax incentives within the extractive sector is also impacted by volatility in commodity prices throughout the life of a mining investment in conjunction with other uncertainties such as, limits to geological data, delays and production cost increases.¹¹⁰

Although no specific methodology of tax incentive monitoring and evaluation has been developed particularly for the extractive sector, the use and importance of financial modelling within the sector cannot be overstated.¹¹¹ Most simply, a financial model is a system that simulates a simplified version of a real-world project.¹¹² Financial modelling has increasingly been used to assist governments towards making better informed decisions with regard to the extension of tax expenditures.¹¹³ It has

¹⁰⁵ UN & CIAT (n 100 above) 73.

¹⁰⁶ UN & CIAT (n 100 above) 73.

¹⁰⁷ The Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) 'Supplementary guidance how to use financial modelling to estimate the cost of tax incentives' (2008) 2.

¹⁰⁸ IGF (n 107 above) 2.

¹⁰⁹ African Natural Resources Center African Development Bank 'Running the number : How African governments model extractive projects' (2017) *African Development Bank, Abidjan, Côte d'Ivoire* 18.

¹¹⁰ African Natural Resources Center African Development Bank (n 109 above)18.

¹¹¹ African Natural Resources Center African Development Bank (n 109 above)19.

¹¹² African Natural Resources Center African Development Bank (n 109 above)19.

¹¹³ African Natural Resources Center African Development Bank (n 109 above)17.

also provided invaluable insights into the expected government revenues and investor returns that have shaped tax expenditure policies in many developing economies.¹¹⁴

Various international organizations are involved in the development of financial modelling resources within the sector such as the International Monetary Fund (IMF) that uses the Fiscal Analysis of Resource Industries (FARI) framework to evaluate extractive industry fiscal regimes.¹¹⁵ The Columbia Center on Sustainable Investment, Natural Resource Governance Institute, IGF as well as the Overseas Development Institute have also contributed significantly to the growing literature on financial modelling within the extractive sector.¹¹⁶

2.5.5. Publishing mining contracts and licenses

In many developing countries, tax incentives are granted to companies in mining contracts that are unavailable to the public and so the government cannot be held accountable for how incentives are granted. The revenue cost of the incentives further remains undisclosed and the general lack of oversight increases the risk of corrupt and rent-seeking practices.

Increasingly, the publishing of extractive contracts is emerging as a global norm.¹¹⁷ The IMF, World Bank, International Finance Corporation and the European Bank for Reconstruction and Development all require governments to adhere to certain contract disclosure requirements as a pre-requisite for eligibility for oil, gas and mining projects they finance.¹¹⁸ The Extractive Industries Transparency Initiative (EITI) requires that member governments document their policy on contract disclosure and further encourage countries to disclose all contracts. Over half of all EITI members disclose their contracts in practice or in adherence to a legislative provision.¹¹⁹

The benefits of publishing contracts for governments include that the prospect of public scrutiny could encourage mining companies to pursue fairer outcomes during the negotiation position.¹²⁰ If the

¹¹⁴ African Natural Resources Center African Development Bank (n 109 above)18.

¹¹⁵ LM Oana & DM Puyo 'Fiscal Analysis of Resource Industries:(FARI Methodology)' (2016) International Monetary Fund 3.

¹¹⁶ African Natural Resources Center African Development Bank (n 109 above)15.

¹¹⁷ UN & CIAT (n 100 above) 72.

¹¹⁸ UN & CIAT (n 100 above) 72.

¹¹⁹ Natural Resource Governance Institute (NRGI) 'Contract Transparency: Creating conditions to improve contract quality' (2018).

¹²⁰ NRGI (n 119 above).

public is aware that a mining company has received disproportionately unfair outcomes from the contract negotiation process, this could jeopardize that company's social license to operate in that jurisdiction or specific area. Contract disclosure accordingly can help to strengthen s companies social license to operate. Contract disclosure an also assist companies to managing the expectations of the local community with regards to the investment the intended to make. For local communities, contract disclosure can provide critical information necessary towards engaging in free prior and informed consent.¹²¹

2.5.6. Curtailing opportunities for abuses of office

Where the authority to grant incentives is vested only in government officials whose remuneration or bonuses are linked to the number of new projects they conclude with investors without any supervision from the Ministry of Finance, for example, such officials may grant incentives at any revenue cost, to meet their employment targets.

The vesting of authority to grant incentives in authorities who are not supervised further creates opportunities for corrupt and rent seeking behaviours by both the officials and mining companies.¹²² The opportunity for corruption in the tax incentive granting process is significantly increased where the officials further exercise unfettered discretionary authority.¹²³ It is important to remember that both broad and mining specific tax incentives are not only found in mining contracts and the general law but also within investment treaties.¹²⁴ Investment treaty negotiators accordingly must also be supervised and guided by the ministry of finance in their exercise of duties.

In addition to ensuring that government officials carry out their duties in a transparent manner and not for any personal gain, it could be useful to ensure that those officials who fail to grant incentives in an unethical manner face some consequences for their actions.¹²⁵ This is particularly important because authority over the resource wealth of a country is vested in the government on behalf of all citizens. This is a major responsibility that should not be taken lightly.

¹²¹ NRG (n 119 above).

¹²² IGF (n 26 above) 18.

¹²³ IGF (n 26 above) 18.

¹²⁴ IGF (n 26 above) 18.

¹²⁵ IGF (n 26 above) 18.

2.6. Conclusions

The objectives of this chapter were to identify the main revenue risks caused by the poor administration of tax incentives and to examine the established international best practice aimed at mitigating such risk. The chapter considered common governance issues based on an analysis of established research. The largest governance risks include that tax incentives may be granted unfairly and that the process of granting incentives will be subject to rent-seeking behaviours and corruption. These risks are most pertinent where there is no public or parliamentary oversight as to the allocation of incentives. Poor fiscal design can further compound these risks.

The discussion proceeded to analyse key international instruments related to best practice in the awarding of tax incentives. The findings of this analysis include that firstly, policy rational supporting the extension of tax incentives should be made publicly available and secondly that tax incentives are extended through primary laws. The third principle is that the Ministry of Finance should spearhead the process of granting tax incentives and the fourth is that tax incentives should be meticulously monitored. Finally, it is proposed that the final authority to grant incentives should not be vested in officials who are rewarded for concluding investment deals. The golden thread amongst these principles is that tax incentives in the sector should be extended in a transparent and accountable manner.

It can further be concluded that the good governance of incentives is critical towards enhancing investors' confidence in the government's tax administration regime but also towards the effectiveness and efficiency of the incentives themselves. A transparent system of awarding incentives will ensure that the government is held accountable for its actions and will reduce opportunities for rent-seeking and corruption.

Having determined the common characteristics of good governance as it relates to the granting of tax incentives within the mining sector, the following chapter will consider the particular legal framework through which tax incentives are granted in Zimbabwe.

CHAPTER THREE: THE GOVERNANCE OF MINING TAX INCENTIVES IN ZIMBABWE

3.1. Introduction

In many respects, the mining sector constitutes the cornerstone of the Zimbabwean economy. The sector accounted for approximately 16 per cent of the country's Gross Domestic Product (GDP) and almost 60 per cent of its foreign-currency earnings in 2021.¹²⁶ The mining sector further creates several forward and backward linkages with other sectors most notably with the manufacturing industry.¹²⁷ It is significant to note that Zimbabwe boasts the second largest platinum deposit and some of the vastest high-grade chrome ores in the world, with an estimated 2,8 billion tons of platinum group metals and about 10 billion tons of chrome ore.¹²⁸ However, the manner in which the mining sector has been governed has failed to propel the country towards its developmental goals despite this vast endowment. This failure brings into question the effectiveness of the fiscal regulation of the sector but particularly the governance of the widely extended tax incentives.¹²⁹

Chapter Two provided an analysis of the internationally agreed-upon best practices towards the governance of tax incentives to protect a country's revenue base from leakages. The objective of this chapter is to determine the legislative framework supporting the extension of tax incentives to mining companies in Zimbabwe. In particular, the chapter will draw some focus on an analysis of Statutory Instrument 2021-026 Income Tax (Exemption from Income Tax) (Great Dyke Investments (Private) Limited) Notice, 2021 which will be used to evaluate how this legislative framework is applied in practice. Section 3.2 will briefly review the history of the use of tax incentives as a fiscal tool in Zimbabwe. This will be followed in Section 3.3 by a discussion of the main legislative instruments through which incentives are granted to mining companies in Zimbabwe. Section 3.4 will provide an analysis of Statutory Instrument 2021-026 through which various tax incentives were granted to a mining investor so as to display how the legislative provisions are applied in practice. The chapter will conclude with Section 3.5 by summarizing the main legislative provisions through which mining companies can be granted tax incentives and thus answering the question on what the governance regime applied in Zimbabwe entails.

¹²⁶ 'More changes to Zimbabwe's mining earnings retention policy' *The Economist* 13 January 2021 1.

¹²⁷ P Gochero & S Boopen 'The effect of mining foreign direct investment inflow on the economic growth of Zimbabwe' (2020) 9(1) *Journal of Economic Structures* 10.

¹²⁸ Transparency International (n3 above).

¹²⁹ Gochero & Boopen (n 127 above) 11.

3.2. History of Tax incentives in Zimbabwe

In terms of Zimbabwean law, tax incentives are generally understood as all fiscal measures that are used to attract local or foreign investment capital to certain economic activities or particular areas in the country.¹³⁰ The major goals of all fiscal incentives in Zimbabwe include income generation, export promotion, employment creation and skills transfer, small business development, industrial development and revenue inflows.¹³¹ Tax incentives in Zimbabwe, are broadly administered by sector, type of economic activity, the form of the organization, and geographical location of the investment.

In 1980, when the country gained independence, the government of Zimbabwe inherited an economy that had been characterized by protectionism under colonial rule. The subsisting macro-economic conditions pre-1980 included “... price controls, labour market restrictions and investment control procedures unfavourable to foreign investors.”¹³² In an effort to promote foreign direct investment (FDI), the new post-independence Zimbabwean government almost immediately adopted the IMF-sponsored Economic Structural Adjustment Programme.¹³³ The policy was aimed at liberalizing trade by dismantling investment controls and trade restrictions, to increase FDI flows.¹³⁴ Pursuant to these policy objectives, in 1992, the Zimbabwean Investment Centre (ZIC) was established as a “... one-stop-shop” for FDI mobilization.¹³⁵ The offering of tax incentives was at the time championed as the key driver of foreign capital investment.¹³⁶

FDI continues to be viewed as an essential facilitator of economic growth in the country. Accordingly in 2019, the Zimbabwe Development Agency was established to revive the work of the ZIC towards strengthening the country’s relations with foreign investors.¹³⁷ The various National Development Plans championed by the government of Zimbabwe, including, The Transitional Stabilization Programme (2018 – 2020) and the following National Development Strategy (2021-2025), also reinforced the importance of tax incentives towards attracting foreign direct

¹³⁰ Zimbabwe Revenue Authority (ZIMRA ‘Fiscal Incentives Made Available for Investors’). n.d.. [Online] [accessed at: <https://www.zimra.co.zw/16-tax/company/1756-fiscal-incentives> on 19 Sep. 2021].

¹³¹ ZIMRA (n 130 above).

¹³² G Kanyenze & T Kondo ‘Mining’ in G. Kanyenze et al (eds) *Beyond the Enclave: Towards a Pro-Poor and Inclusive Development Strategy for Zimbabwe* (2011) 160.

¹³³ S Regret ‘Growth Effects of Foreign Direct Investments in Zimbabwe: Do Sources Matter?’ (2021) *African Journal of Economic Review* 9(4) 148.

¹³⁴ P Robinson ‘Macroeconomic performance under the economic Structural Adjustment Program: an essay on iatrogenic effects’ in *Macroeconomic and Structural Adjustment Policies in Zimbabwe* (2002) 23.

¹³⁵ Robinson (n 134 above) 23.

¹³⁶ Regret (n 134 above) 149.

¹³⁷ Regret (n 134 above) 148.

investment.¹³⁸ Ostensibly as a result of these policies between 2018 and 2020 the country received an average of US\$244.88 million in FDI.¹³⁹ Between 2010 and 2019, Zimbabwe's FDI stock as a percentage of GDP averaged 26.83%. This is comparable to FDI inflows in developing countries such as Italy (17.94%), Germany (25.59%) and France (26.69%).¹⁴⁰ Despite this high incidence of FDI, the growth and size of Zimbabwe's economy do not reflect the same. In particular, the contribution of the mining sector to the national fiscus is minimal compared to other mining sectors in comparable economies in the region.¹⁴¹ This calls to question the governance of foreign investment in the country.

3.3. Administration of mining tax incentives in Zimbabwe

The tax incentives available to large-scale mining companies in Zimbabwe include a reduced tax rate or total exemption from corporate income tax for holders of special mining leases¹⁴², exemptions from certain taxes¹⁴³, a special capital expenditure deduction regime¹⁴⁴, a special accelerated depreciation regime,¹⁴⁵ and exemptions from customs duty.¹⁴⁶ These tax incentives are administered through three key pieces of legislation namely, the Income Tax Act¹⁴⁷, the Mines and Minerals Act¹⁴⁸ and the Zimbabwe Investment and Development Agency Act.¹⁴⁹ The Minister of Finance, the President and the CEO of the Zimbabwe Investment Development Agency are empowered through these pieces of legislation to extend tax incentives, with varying degrees of discretion.

3.3.1. Income Tax Act

The following tax incentives are available to all taxpayers that carry out mining operations in Zimbabwe. Firstly, according to section 15 2(f), a deduction of all capital expenditure on exploration, development and operating incurred wholly and exclusively for mining operations is allowable in full.

¹³⁸ Robinson (n 134 above) 23.

¹³⁹ Robinson (n 134 above) 24.

¹⁴⁰ Regret (n 134 above) 148.

¹⁴⁰ Robinson (n 134 above) 23.

¹⁴¹ Regret (n 134 above) 148.

¹⁴¹ Robinson (n 134 above) 23.

¹⁴² Zimbabwe Income Tax Act [Chapter 23:06] sec 36 (1) & (2).

¹⁴³ Zimbabwe Income Tax Act [Chapter 23:06] schedule 5 sec 3(1).

¹⁴⁴ Zimbabwe Income Tax Act [Chapter 23:06] sec 15 2(f).

¹⁴⁵ Zimbabwe Income Tax Act [Chapter 23:06] sec 15 2(f)

¹⁴⁶ ZIMRA (n 130 above) .

¹⁴⁷ Zimbabwe Income Tax Act of Zimbabwe[Chapter 23:06].

¹⁴⁸ The Mines and Minerals Act of Zimbabwe [Chapter 21:05].

¹⁴⁹ Zimbabwe Investment and Development Agency Act [Chapter 14:37].

Holders of special mining leases may claim this allowance over four years.¹⁵⁰ There is further no restriction on the carryover of tax losses incurred by a taxpayer carrying out mining operations and these can be carried forward indefinitely. In other non-mining sectors the loss carryover period is capped at six years.¹⁵¹ The taxable income of holders of special mining leases is taxed at a special rate of 15% whereas all other corporate entities are taxed at a rate of 24.72%.¹⁵² Mining lease holders are further provided with a ninety-day deferment of collection of VAT on imported capital goods as well as a rebate on the duty of imported goods.¹⁵³

In terms of Schedule 3 section 3(g) of the Income Tax Act, income tax exemptions may be granted in terms of any agreement entered by the Government of Zimbabwe with any other government or organization on condition that such an exemption is "... approved by the Minister by notice in a statutory instrument."¹⁵⁴ In consultation with the Minister of Mines and Minerals, the Minister of Finance may further exempt special mine lease holders in whole or in part from certain taxes.¹⁵⁵ The Minister may however only exercise such powers where he is satisfied that it is in the interest of Zimbabwe to do so.¹⁵⁶ In particular, he may exempt special mining lease holders from Non-resident shareholders tax¹⁵⁷, Non-residents tax on fees¹⁵⁸, Non-residents tax on remittances¹⁵⁹ and Non-residents tax on royalties.¹⁶⁰ Any such determination by the Minister of Finance must be made through a statutory instrument.

3.3.2. *The Mines and Minerals Act*

Section 254 of the Mines and mineral Act grants the President of the Republic of Zimbabwe the discretionary powers to "... remit in whole or in part, the royalty payable..." on any mineral or mineral-bearing product or any mineral or mineral-bearing product won from any specified registered mining location.¹⁶¹ The President may order this remission for any period, not exceeding four years, where he deems it necessary to where he believes that it will encourage:

¹⁵⁰ Zimbabwe Income Tax Act section 2(f).

¹⁵¹ Zimbabwe Income Tax Act section 3 (iv)(b).

¹⁵² ZIMRA (n 130 above) .

¹⁵³ Zimbabwe Customs and Excise Act [Chapter 23:02] Section 120 (1) (b) as read with Statutory Instrument 154 of 2001 Section 113(1).

¹⁵⁴ Zimbabwe Income Tax Act [Chapter 23:06] schedule 3 sec3(g).

¹⁵⁵ Zimbabwe Income Tax Act [Chapter 23:06] sec 36 (1) & (2).

¹⁵⁶ Zimbabwe Income Tax Act [Chapter 23:06] sec 36 (2).

¹⁵⁷ Zimbabwe Income Tax Act [Chapter 23:06] sec 36 (1) & section 26.

¹⁵⁸ Zimbabwe Income Tax Act [Chapter 23:06] sec 36 (1) & section 27.

¹⁵⁹ Zimbabwe Income Tax Act [Chapter 23:06] sec 36 (1) & section 31.

¹⁶⁰ Zimbabwe Income Tax Act [Chapter 23:06] sec 36 (1) & section 32.

¹⁶¹ The Mines and Minerals Act of Zimbabwe [Chapter 21:05] section 254.

- the commencement or continuation of mining operations,¹⁶²; or
- the processing or refining within Zimbabwe of minerals or mineral-bearing products;¹⁶³/ or
- the development of any export market.¹⁶⁴

3.3.3. *The Zimbabwean Investment and Development Agency Act*

In terms of Section 30 of the Zimbabwe Investment and Development Agency Act, the Zimbabwe Investment and Development Agency, may in consultation with the Minister of Finance, publish guidelines for investment which shall mention general incentives that may be applicable to licenced investors.¹⁶⁵ ZIDA is further tasked to take reasonable steps to ensure that any incentives agreed upon by itself and the Minister of Finance are granted to the licensed investors concerned.¹⁶⁶

3.4. **Case Study : Great Dykes Investments**

3.4.1. *Background*

On the 27th of January 2021, the Government of Zimbabwe, through the Ministry of Finance and Economic Development, granted a 5-year tax exemption to Great Dyke Investments (GDI) through Statutory Instrument 26/2021.¹⁶⁷ This exemption is of significance because Zimbabwe holds the world's 3rd largest Platinum deposit. This project has been valued at a total of USD2 billion with an investment of USD650 million to be injected into the economy by 2022.¹⁶⁸ The sheer economic magnitude of this project has brought much public attention to the tax incentives that have been offered to GDI by the Government. The mining project is designed to include the development of underground mine shafts as well as multiple processing facilities.

The Zimbabwean Lawyers for Human Rights, in 2021 filed an urgent application to the High Court to suspend the Statutory Instrument through which these incentives were provided.¹⁶⁹ The main legal ground for this application was that the provisions of the Statutory Instrument in question violated a Constitutional principle of public finance management that demands that "... the burden of

¹⁶² The Mines and Minerals Act of Zimbabwe [Chapter 21:05] section 254 1(b)(i).

¹⁶³ The Mines and Minerals Act of Zimbabwe [Chapter 21:05] section 254 1(b)(ii).

¹⁶⁴ The Mines and Minerals Act of Zimbabwe [Chapter 21:05] section 254 1(b)(iii).

¹⁶⁵ Zimbabwe Investment and Development Agency Act [Chapter 14:37] section 30.

¹⁶⁶ Zimbabwe Investment and Development Agency Act [Chapter 14:37] section 30.

¹⁶⁷ Statutory Instrument 26/2021 cited as Income Tax (Exemption from Income Tax) (Great Dyke Investments (Private) Limited) Notice, 2021, effective from 1 January 2021.

¹⁶⁸ 'Great Dyke earmarks US\$650m investment in Zimbabwe platinum project by 2022' *BussinessLive* 13 December 2021.

¹⁶⁹ Mining Zimbabwe (n 16 above).

taxation must be shared equally amongst all tax payers.”¹⁷⁰ Furthermore, that there should be transparency in the management of public finance.¹⁷¹ It is commonly believed that a highly politically exposed Zimbabwean business man holds a 50% stake in GDI and this has sparked public debate on the extension of tax incentives to this project.¹⁷²

3.4.2 An analysis of Statutory Instrument 26 of 2021

In terms of the agreement between GDI and the Government of Zimbabwe, Great Dykes Investments will be exempted from paying :

“... (a) income tax for a period of five years commencing from the date of receipt of income from mining operations and sales of mining output¹⁷³; and

(b) resident shareholders’ tax payable on dividends paid to shareholders of Great Dyke Investments (Private) Limited resident in Zimbabwe in connection with special mining lease operations of Great Dyke Investments (Private) Limited¹⁷⁴; and

*(c) additional profits tax for a period of five years commencing from the date of receipt of income from mining operations and sales of mining output payable in respect of the special mining lease area for any year of assessment”.*¹⁷⁵

Great Dykes Investments is a special mining lease holder, which enables the Minister of Finance to exempt the company from the payment of certain taxes.¹⁷⁶ In exercising his power to grant tax incentives, the Minister of Finance must have been convinced that doing so was in the best interest of Zimbabwe¹⁷⁷ however no policy rational was publicized by the Minister to this effect. There is further no publicly available evidence of Statutory Instrument 26/2021 having been reviewed by Parliament or flagged as being unconstitutional by the Parliamentary committee. The full terms of this company’s special mining lease are further not available to the public.

¹⁷⁰ Constitution of Zimbabwe 2013 section 298(1).

¹⁷¹The Constitution of the Republic of Zimbabwe, 2013 section 298(1).

¹⁷² Mining Zimbabwe (n 16 above).

¹⁷³ SI 2021-026 Income Tax (Exemption from Income Tax) (Great Dyke Investments (Private) Limited) Notice, 2021.

¹⁷⁴ SI 2021-026 Income Tax (Exemption from Income Tax) (Great Dyke Investments (Private) Limited) Notice, 2021.

¹⁷⁵ SI 2021-026 Income Tax (Exemption from Income Tax) (Great Dyke Investments (Private) Limited) Notice, 2021.

¹⁷⁶ Mining Zimbabwe (n 16 above).

¹⁷⁷ Zimbabwe Income Tax Act [Chapter 23:06] sec 36 (1) & (2).

It is conceivable that the economic importance of scaling up Zimbabwe's platinum production justified the extension of the above tax incentives to Great Dykes Incentives. However, the lack of transparency relating to the exercise of the Minister's discretionary powers serves to instigate public speculation as to the justifiability of the incentives. This example points to a legislative gap in governance framework guiding the extension of tax incentives within the mining sector as the law firstly does not prescribe the clear pre-conditions under which the Minister may grant tax incentives. The minister is further not obligated by law to provide the policy rationale for the extension of the tax incentives and a reading of Statutory Instrument 26 of 2021 shows that he does not provide any such rationale even in the absence of such a legal obligation.

The nature through which the government granted tax incentives to Great Dykes Investment is indicative of the manner through which the Zimbabwean government broadly extends tax incentives. In recent times, Statutory Instrument 26 of 2021 is comparable to the Petroleum Exploration Development and Production Sharing Agreement, that the government entered into with Invictus Energy in 2021.¹⁷⁸ This agreement also granted tax incentives to an extractive industry investor with no public oversight.¹⁷⁹ The specific terms of the agreement as well as the policy rationale for the incentives were not provided to the public.

Initial development work on the project began in early 2020 however the project's operations were halted shortly after due to low capital. In June 2022 Russia's Vi Holdings which held 50% shareholding in the project withdrew from the arrangement and its former partner Kuvimba Mining house has since struggled to secure another investment partner.¹⁸⁰ As the project has not begun operations and hence has no income, there remains an opportunity for the agreement under which these incentives were offered to be revisited.

3.5. Conclusions

This Chapter established that tax incentives have been a fiscal tool used by the Zimbabwean Government to attract investment since the early 1980s in an attempt to undo the harmful effects of the protectionist regime that had subsisted during colonialism.

Towards establishing the nature and characteristics of the governance framework guiding the extension of mining tax incentives in Zimbabwe, this chapter established the following. Firstly, in section 3.3 it was established that the Income Tax Act, The Mines and Minerals Act as well as the

¹⁷⁸ 'Invictus raises \$10,4m for Muzarabani' *The Herald* 31 March 2021.

¹⁷⁹ The Herald (n 178 above).

¹⁸⁰ 'Russia exits Zimbabwe's biggest platinum project' *Mining Technology* 6 June 2022.

Zimbabwe Investment Development Agency Act are the main legislative instruments through which mining investors may be granted tax incentives. Whilst there are tax incentives that apply to all mining lease holders indiscriminately according to the Income Tax Act, holders of special mining leases may be offered additional incentives. In section 3.3, it was further ascertained that the three relevant pieces of legislation delegate authority to varying degrees to the Minister of Finance, The President and the Investment Development Agency to grant incentives to mining investors. Whilst the grounds upon which the President may rescind the payment of royalties may be objectively applied, the Minister of Finance's determination of when he can extend incentives to holders of special mining lease holders and in particular, what would be in the interest of Zimbabwe is a subjective adjudication.

Section 3.4 provided an example of how tax incentives are granted in practice. In this section it was established that the government of Zimbabwe does not publish the policy rationale for the extension of tax incentives extended in terms of the Income Tax Act. In this example parliament does not appear to have overseen the incentive granting process either.

This chapter established the key pieces of legislation enabling the extension of tax incentives to mining companies but more importantly the manner through which the role players enabled to grant tax incentives are mandated to exercise their powers. Chapter 4 of this study will now go on to contrast the manner through which incentives are extended to mining lease holders in Zimbabwe and international best practices on the extension of tax incentives.

CHAPTER 4:

ZIMBABWEAN TAX INCENTIVES IN COMPARISON TO INTERNATIONAL BEST PRACTICE

4.1. Introduction

The effectiveness of tax incentives towards attracting sustainable investment continues to be highly contested as was explained in section 2.2 of this study. However, countries — including Zimbabwe — continue to use tax incentives as a central policy tool.¹⁸¹ The use of tax incentives within the extractive industries has been linked to significant uncalculated revenue losses, particularly where they are extended through non-transparent governance frameworks.¹⁸² It is however also widely believed that tax incentives may result in notable development gains where they are administered fairly and transparently.¹⁸³

The aim of Chapter Two was to map out the most universally agreed upon best practices concerning the administration of tax incentives within the extractive sector. Chapter Three then went on to lay out the legislative regime governing the granting of mining incentives in Zimbabwe. Accordingly, the objective of this chapter is to ascertain the extent to which the governance processes followed in Zimbabwe towards the awarding of incentives, are aligned with international best practices aimed at protecting the fiscus from base erosion. Section 4.2 will examine the six most common principles of international best practice guiding the extension of mining tax incentives. Section 4.3 will then go on to offer an evaluation as to the extent to which the governance framework applied in Zimbabwe adheres to international best practice.

¹⁸¹ UN & CIAT (n 100 above) 34.

¹⁸² Zolt (n 20 above) 12.

¹⁸³ S James 'Tax and non-tax incentives and investments: evidence and policy implications' (2009) *FIAS, The World Bank Group*.

4.2. Assessing Zimbabwean tax incentive governance regime in the context of international best practices

Chapter Two, section 2.5 identified six common governance principles that have been identified by the OECD¹⁸⁴, IMF¹⁸⁵, World Bank¹⁸⁶ and IGF¹⁸⁷ as pre-requisites of a tax governance system that fosters transparency and accountability in the extension of tax incentives. Each of these characteristics will now be set against the administration process followed in Zimbabwe, to ascertain the extent to which the Zimbabwean government adheres to international best practices. Where possible, the implementation of these best practices will be illustrated through examples from resource-rich jurisdictions other than Zimbabwe.

4.2.1 Publishing the policy rational and objectives of incentives

Section 2.5.1 highlighted the importance of publishing the policy rational supporting the extension of tax incentives to mining companies so as enable public oversight of the governance process. By enabling public oversight, the government fosters transparency and accountability in its tax administration system.

Presently, the Zimbabwean government does not publicly publish the policy rational guiding the extension of tax incentives to operators in the mining sector. For example, fiscal Instrument 26 of 2021, through which Great Dykes Investment was granted a number of tax incentives, further provided no policy rational for this decision either. The extension of mining tax incentives in Zimbabwe thus falls short of this best practice.

The IMF proposes that governments publish a statement through the budgetary or other fiscal-related processes that indicate the public policy purpose of each tax incentive, its duration, as well as the intended beneficiaries.¹⁸⁸ Except for particularly complex cases, the economic cost of major tax incentives should also be quantified.¹⁸⁹ Where possible the estimated results of previous tax incentives compared with their policy purposes should also be made available to the public.¹⁹⁰ The IMF surveyed tax incentive reporting in twenty-six countries and established that it is a statutory

¹⁸⁴ OECD (n 23 above).

¹⁸⁵ Report to the G20 Development Working Group by the IMF, OECD, UN and World Bank (n 62 above).

¹⁸⁶ S James 'Providing Incentives for Investment: Advice for policymakers in developing countries' (2010).

¹⁸⁷ IGF (n 26 above) 18.

¹⁸⁸ CJ Heady *et al* 'Tax Expenditure Reporting and Its Use in Fiscal Management: A Guide for Developing Economies' (2019) 4 .

¹⁸⁹ Heady (n 183 above) 4.

¹⁹⁰ Heady (n 183 above) 5.

requirement in thirteen jurisdictions and that except for the Philippines, Ghana and Mauritania, all countries report the impact and outcomes of tax incentives on an annual basis.¹⁹¹

Other jurisdictions such as South Africa have successfully established a systematic method of publishing the policy rationale supporting tax incentives on an ongoing basis. In addition to publishing a tax incentive statement for each budget year, the South African National Treasury goes on to publish public discussion documents on the main tax incentives available to mining investors periodically.¹⁹² These policy discussions are open to public consultation for comments.¹⁹³ The discussion document on the Research and Development (R&D) Tax Incentive, for example, provides the rationale for the incentive, its policy objectives, and a timeline of its impact since it was instituted before going on to discuss the main policy and administrative factors influencing its administration.¹⁹⁴ The South African R&D tax incentive regime aims to provide an additional 'super' 50% income tax deduction on eligible R&D expenditure in the mining industry, which would equate to a saving of 14% tax on every rand of identified R&D expenditure.¹⁹⁵ The R&D tax incentive is aimed at encouraging mining houses and businesses to spend more on R&D in the field of mineral beneficiation, thereby improving the local technology and skills base and enhancing local minerals beneficiation.¹⁹⁶

4.2.2 Granting incentives through a singular primary law

Section 2.5.2 explained the importance of granting tax incentives for the mining industry through a primary law that clearly set out eligibility criteria for each incentive. The benefits of so doing include firstly that parliament is provided an opportunity to monitor the types of incentives being granted to mining companies. The provision of eligibility criteria in the law also limits opportunities for abuse of authority in the exercise of discretionary powers.

In Zimbabwe, the tax incentives available to all mining operators are extended through the Income Tax Act.¹⁹⁷ These tax incentives are set out in a law that has gone through parliamentary supervision and the only eligibility requirement is that the tax payer must be carrying out mining operations. The tax incentives available to special mine lease holders are partly legislated. For example, the special

¹⁹¹ Heady (n 183 above) 5.

¹⁹² South Africa National Treasury. n.d.. 'Reviewing the Design Implementation and Impact of South Africa's Research and Development Incentive'[Online]. Available at http://www.treasury.gov.za/comm_media/press/2021/TaxPolicyDiscussion/2021121501%20Discussion%20Document%20-%20Research%20and%20Development%20Tax%20Incentive.pdf [Accessed 21 Sep. 2022].

¹⁹³ South Africa National Treasury (n 192 above) 4.

¹⁹⁴ South Africa National Treasury (above n. 83) 4.

¹⁹⁵ South Africa National Treasury (above n. 83) 4.

¹⁹⁶ South Africa National Treasury (above n. 83) 4.

¹⁹⁷ Zimbabwe Income Tax Act [Chapter 23:06].

reduced tax rate applicable to special mine license holders.¹⁹⁸ However, in practice most are provided through special statutory instruments through the exercise of discretionary authority exercised by the Minister of Finance per Schedule 3 section 3(g) of the Income Tax Act.¹⁹⁹ In granting holders of special mining leases, the Minister of Finance must only be satisfied that granting any such incentive will be in the “...best interest of Zimbabwe”.²⁰⁰ The Income Tax Act does not delineate the eligibility requirements for the granting of special mining leases beyond this criteria. The eligibility requirements for mining operator's royalty payments to be remitted are legislated. However, the President may still exercise his discretion in granting any such remission.²⁰¹ Accordingly, the governance of mining tax incentives in Zimbabwe is partially in line with international best practice as far as some of the generic tax incentives are provided through laws that have been passed by parliament, however, the governance regime still goes on to grant particularly the Minister of Finance broad discretionary powers with regards to holders of special mining leases through the Income Tax Act.

Two African countries have incorporated tax incentive eligibility requirements into their legislation in distinct manners. For example, Zambian law provides for both financial and sectoral eligibility requirements for the extension of tax incentives.²⁰² Presently, a foreign investor must invest no less than five hundred thousand United States Dollars or equivalent in a priority sector, to qualify for incentives under the Customs and Excise Act or Income Tax Act.²⁰³ Tax incentives are further capped for five years from the granting of the relevant licence, permit or certificate unless the Minister prescribes otherwise.²⁰⁴

Sierra Leone in comparison, imposes both financial and employment eligibility requirements for the extension of tax incentives in the extractive industries.²⁰⁵ For example, only a petroleum refinery investing a minimum of twenty million United States Dollars and employing at least fifty Sierra Leonean citizens shall be eligible for corporate tax relief for a period not exceeding five years.²⁰⁶ Tax incentives for the sector are thus also capped.

¹⁹⁸ ZIMRA (n 130 above) .

¹⁹⁹ Zimbabwe Income Tax Act [Chapter 23:06] schedule 3 sec3(g).

²⁰⁰ Zimbabwe Income Tax Act [Chapter 23:06] sec 36 (2).

²⁰¹ The Mines and Minerals Act of Zimbabwe [Chapter 21:05].

²⁰² The Zambia Amendment Development Act of 2021 s56(1).

²⁰³ The Zambia Amendment Development Act of 2021 s56(1).

²⁰⁴ The Zambia Amendment Development Act of 2021 s55.

²⁰⁵ Sierra Leone Finance Act 2013 sec 47.

²⁰⁶ Sierra Leone Finance Act 2013 sec 47.

4.2.3 *Granting the ministry of Finance primary authority to grant incentives*

Section 2.5.3 found that the Ministry of Mines and Minerals, Ministry of Finance as well as Investment Promotion agencies all have direct interest extension of tax incentives to mining investors. It was however concluded that the Ministry of Finance is however the best positioned to exercise the final decisions on the extension of incentives. This is because unlike other agencies and ministeries, the Ministry of Finance is mandated to protect the national fiscus and furthermore has the resources to estimate the potential cost of incentives to the country. The Ministry of Finance is further able to monitor the financial impacts of tax incentives regarding both revenue and investment impacts.

In Zimbabwe, the Ministry of Finance and the Minister, in particular, hold the primary authority to grant tax incentives to mining operators.²⁰⁷ The Ministry of Finance extends discretionary tax incentives in consultation with the Ministry of Mines and Minerals²⁰⁸ as well as with the Zimbabwean Investment Development Agency.²⁰⁹ However, in exercising his discretion to remit the payment of royalties, it does not appear that the President must consult any other Ministry.²¹⁰

The governance of tax incentives in Zimbabwe is accordingly compliant with this best practice as the Minister of Finance is the key role player in the extension of most incentives except for the remittance of royalty payments.

4.2.4 *Monitoring the use of tax incentives*

In light of the high susceptibility of the mining sector to corruption and rent-seeking behaviours, section 2.5.4 emphasized the importance of meticulously monitoring the impacts of mining tax incentives. Effectively monitoring tax incentives includes ensuring that companies continue to fill out tax return forms despite being exempt from certain taxes as well as carrying out regular audits of these. For the extractive industries it is further particularly important for the government to model the potential fiscal impacts of incentives both before and during their extension.

At present all tax payers in Zimbabwe must fill out tax-return forms and so there is some governmental control on the use of incentives.²¹¹ In the 2019 Budgetary Statement, the Minister of Finance noted that an assessment of the Zimbabwean Tax Administration process through the

²⁰⁷ Zimbabwe Income Tax Act [Chapter 23:06] sec 36 (1) & (2).

²⁰⁸ Zimbabwe Income Tax Act [Chapter 23:06] sec 36 (1) & (2).

²⁰⁹ Zimbabwe Investment and Development Agency Act [Chapter 14:37] section 30.

²¹⁰ The Mines and Minerals Act of Zimbabwe [Chapter 21:05] section 254.

²¹¹ ZIMRA (n 130 above) .

auspices of the IMF Tax Administration Assessment Tool (TADAT) initiative had been conducted.²¹² This assessment revealed that the absence of a tax incentives monitoring and evaluation framework is a major contributor to tax base erosion in the country.²¹³ A further challenge that the assessment revealed was the inadequacy and inaccuracy of the taxpayer registration database.²¹⁴ In the Budgetary Statement, the government committed to developing a tax incentive monitoring and evaluation framework to facilitate the management of times tax expenditures as well as to inform Cost-Benefit Analysis of tax expenditures.²¹⁵ This framework should have been implemented in the first half of 2019 which is yet to happen.

The Zimbabwe Revenue Authority's 2020 annual report included an estimated revenue expenditure report that revealed that approximately ZWL\$111.55 billion was foregone through tax incentives in 2020, which was an increase of 555,79% from the ZWL\$17,01 billion lost in 2019.²¹⁶ At the official bank exchange rate in August 2022, the tax revenue forgone in 2020 was equivalent to US\$1.29 billion.²¹⁷ The lack of a monitoring system in light of the high revenue losses is demonstrative of a poorly managed tax incentive governance regime especially because the real economic effects of these tax incentives are further unmonitored. The governance of tax incentives in Zimbabwe thus falls short of the best practice that requires the monitoring and control of the use of tax incentives.

The monitoring of tax incentives may be difficult however other jurisdictions such as Singapore and the Philippines have developed useful monitoring and evaluating frameworks. In Singapore, tax incentives are monitored by the Economic Development Board (EDB).²¹⁸ Investors that benefit from any tax incentive must submit regular progress reports to the board for performance evaluations.²¹⁹ Where material breaches of the conditions of performance are noted, the tax incentive may be revoked and any associated benefits received through it, immediately recovered.²²⁰ Revenue

²¹² Zimbabwe 2019 National Budget Statement 'Austerity for Prosperity' Presented to the Parliament of Zimbabwe On Thursday, November 22, 2018 By Hon. Prof. Mthuli Ncube Minister of Finance and Economic Development.

²¹³ Zimbabwe 2019 National Budget Statement (n above 212).

²¹⁴ Zimbabwe 2019 National Budget Statement (n above 212).

²¹⁵ Zimbabwe 2019 National Budget Statement (n above 212).

²¹⁶ Zimbabwe Revenue Authority (ZIMRA) 'Annual Report 2020'. [Online]. Available at <https://www.zimra.co.zw/vacancies/category/2-annual-reports> [Accessed 25 Sep. 2022].

²¹⁷ Zimbabwe Revenue Authority (ZIMRA) 'Annual Report 2020'. [Online]. Available at <https://www.zimra.co.zw/vacancies/category/2-annual-reports> [Accessed 25 Sep. 2022].

²¹⁸ IM Valderrama, M Balharová *et al* 'Tax incentives in developing countries: a case study—Singapore and Philippines' in Taxation, International Cooperation and the 2030 Sustainable Development Agenda (2021) 119

²¹⁹ Valderrama et el (n 228 above) 119.

²²⁰ Valderrama et el (n 228 above) 119.

and expenditure analysis is further provided by the treasury and submitted to Parliament for evaluation through the budgetary process.²²¹

In the Philippines, the Department of Budget and Management prepares an annual “Budget of Expenditures and Sources of Finances” Report through which incentives are monitored.²²² This follows the passing of the Tax Incentives Management and Transparency Act in 2015, whose aim was to promote accountability and transparency in the administration of tax incentives.²²³ Through this act, a single database system has been created to record and evaluate the impact of incentives in the country.²²⁴ This database makes it possible to track the incentives granted to companies by the various governmental departments as well as to measure the performances companies pledge in exchange for the incentives.²²⁵

4.2.5 *Publishing of mining contracts and license agreements*

For tax incentives to be effectively monitored particularly by the public, the specific contracts and licenses through which they are granted should be publicly available. Section 2.5.5 highlighted how the secretive nature through which mining contracts are concluded harms both the government and local communities. By not publishing contracts the government not only creates opportunities for corruption and rent-seeking but it also undermines its own investor confidence ratings. Furthermore, by not publishing contracts, the government creates opportunities for mining companies to be protected from the public outrage that may result from unfair conditions that could threaten its social licence to operate. When contracts are published local communities can also participate in the oversight of company obligations made during contract negotiations.

In Zimbabwe, only the specific incentives granted to mining companies are published in the government gazette and not the entire licenses granted to the mining companies.²²⁶ The specific terms and conditions, if any, through which these incentives are granted as well as the true scope of the projects are not publicly available. The Zimbabwean government thus does not fully adhere to this best practice.

Furthermore, because the licenses are not publicly available and Zimbabwe does not mandate the disclosure of beneficial ownership, it is difficult for civil society to monitor the beneficiaries of

²²¹ Valderrama et al (n 228 above) 119.

²²² Valderrama et al (n 228 above) 119.

²²³ Valderrama et al (n 228 above) 119.

²²⁴ Valderrama et al (n 228 above) 119.

²²⁵ Valderrama et al (n 228 above) 119.

²²⁶ Zimbabwe Income Tax Act [Chapter 23:06] schedule 3 sec3(g).

these incentives. Within the context of the Great Dykes investment project, it has long been speculated that a politically exposed Zimbabwean businessman is a major shareholder in the project and that the government extended various tax incentives to the project as a personal favour to him and in return for kickbacks.²²⁷ Without access to the specific contact and further information on the beneficial ownership of the project, it is difficult to dispel these rumours which have fuelled public dissatisfaction with the fiscal management of the project.

Section 16 of the Mines and Minerals Amendment Bill proposes the introduction of a centralised Cadastre Register of Mining Rights and Titles.²²⁸ Through this system, it is envisaged that the name of every right holder as well as the nature of his mineral right will be made publicly available.²²⁹ This system presents a step in the right direction towards making license agreements available to the public however it does not go far enough as the licenses themselves will not be published and the system is undercut by the fact that beneficial ownership is not disclosed.

Countries with particularly large mining sectors have historically encountered challenges in managing public oversight of contracts.²³⁰ Whilst no single country has entirely mastered this challenge, developing countries tend to fair much worse.²³¹ There has however been a growing trend of contract disclosure in both developing and developed countries.²³² In 2002 only 3 countries globally published their mining and oil contracts and by 2016 this number had grown to 22.²³³ In Africa, Burkina Faso, The Republic of Congo, The DRC, Ghana, Guinea, Liberia, Mozambique, Senegal, Niger and São Tomé and Príncipe all legislate the public disclosure of contracts and licenses as well as fulfil this legal requirement.²³⁴ The degree of publication however varies from country to country. In most cases, the mandated publication in the government gazette presents only a summary of the key terms of the contract rather than the full details.²³⁵ In Niger, for example, publicly available documents pertaining to contracts are often the “strategic partnership” details of the contract.²³⁶ Ivory Coast, Tanzania and the Central African Republic legislate the public disclosure of contracts but fail to do so in practice.²³⁷

²²⁷ Mining Zimbabwe (n 16 above).

²²⁸ Zimbabwe Mines and Minerals Amendment Bill section 16 (2)(a).

²²⁹ Zimbabwe Mines and Minerals Amendment Bill section 16 (2)(a).

²³⁰ E Smith & P Rosenblum, 'Enforcing the rules' (2011) *Revenue Watch Institute Report* 32 .

²³¹ Smith & Rosenblum (n 230 above) 33.

²³² D Hubert & R Pitman, 'Past the tipping point? Contract disclosure within EITI' (2017) *Natural Resources Governance Institute* 18.

²³³ Hubert & Pitman (n above 233) 19.

²³⁴ Hubert & Pitman (n above 233) 19.

²³⁵ Hubert & Pitman (n above 233) 20.

²³⁶ Hubert & Pitman (n above 233) 19.

²³⁷ Hubert & Pitman (n above 233) 19.

The source of the legal obligation to disclose contracts or licenses varies from jurisdiction to jurisdiction. In many countries including the Central African Republic, Niger and the Philippines, it derives from the Constitution meanwhile in Mozambique it emanates from the broader investment laws and in Liberia and Tanzania the broader investment law.²³⁸ However, for an overwhelming majority of countries, the legal requirement is contained in the general mining or petroleum law.²³⁹

Practice shows that it is preferable to host contract disclosure legal requirements in durable legal instruments such as the Constitution, cross-cutting access to information laws or principal sector legislation rather than in parliamentary resolutions, decrees or regulations.²⁴⁰ In some jurisdictions, the requirements are contained in different legal documents which is workable to the extent that there are no contradictions. In Mozambique for example, disclosure requirements are held in both the mega-projects law of 2011 and are reinforced in the mining and petroleum laws of 2014.²⁴¹

4.2.6 *Curtailing opportunities for abuse of public office*

Section 2.5.6 it was established that where the final authority to grant tax incentives is granted to government officials who are rewarded simply for attracting new investment projects, they may be overzealous in their extension of tax incentives to mining companies. Furthermore, where these officials are not well supervised there may be opportunities for them to abuse their positions and award tax incentives to investors who do not meet the eligibility requirements.

In Zimbabwe, the final authority to grant incentives is vested in the Minister of Finance²⁴² who works in consultation with the Minister of Mines and Minerals²⁴³ as well as ZIDA²⁴⁴. In the case of royalties, the President holds the final authority to grant incentives²⁴⁵. Neither the President nor the Minister of Finance in the normal exercise of their duties has performance targets linked to the attraction of new projects however it must be noted that the President may have the incentive to attract new projects particularly as the country draws nearer to an election year.

Zimbabwe broadly appears to comply with International best practices with regards to not placing the final authority to grant tax incentives to government officials with performance targets linked to attracting new projects. Greater transparency in the granting of tax incentives could

²³⁸ Hubert & Pitman (n above 233) 22.

²³⁹ Hubert & Pitman (n above 233) 23.

²⁴⁰ Hubert & Pitman (n above 233) 23.

²⁴¹ Hubert & Pitman (n above 233) 32.

²⁴² Zimbabwe Income Tax Act [Chapter 23:06] section 2(f).

²⁴³ Zimbabwe Income Tax Act [Chapter 23:06] section 2(f).

²⁴⁴ Zimbabwe Investment and Development Agency Act [Chapter 14:37].

²⁴⁵ The Mines and Minerals Act of Zimbabwe [Chapter 21:05] section 254.

however be further achieved by offering incentives that apply automatically in terms of objective performance requirements as far as possible.

4.3 Conclusion

The objective of this chapter was to benchmark the administration of tax incentives in Zimbabwe with international best practices. Section 4.2 examined the 6 most common best practice characteristics in turn with varying results. In section 4.2.1 it was concluded that despite various justifications for the publishing of the policy rational guiding the extension of tax incentives, the government of Zimbabwe fails to apply this characteristic into its governance regime. The example of the South African Research and Development Incentive was used to display how another jurisdiction engages the public constantly on the offering and continuation of a mining related incentive. In section 4.2.2 it was established that the government of Zimbabwe fails to grant tax incentives through one singular law. Whilst there is one clear eligibility requirement for general tax incentives, the tax incentives applicable to holders of special mining lease holders are granted through the discretionary powers of the Minister of Finance. The country thus fails to completely comply with this best practice. Section 4.2.3 found that by placing primary authority to grant mining tax incentives in the Ministry of Finance, the government of Zimbabwe complied with this international best practice. Section 4.2.4 reemphasized the importance of monitoring mining tax incentives and found that whilst the government of Zimbabwe does not exempt mining companies from filling out tax returns when they are granted incentives, there is no further monitoring of the use and impact of incentives. The government thus falls foul of this international best practice. In Section 4.2.5 the difficulty of publishing contracts as well as the benefits of so doing were reemphasized. It was further established that the requirement to publish contracts is best placed in durable pieces of legislation such as the constitution or other primary laws. Contract disclosure was identified as a growing norm within the sector however the Zimbabwean government does not publish any resource contracts. Finally in section 2.4.6 it was established that the final authority to grant incentives should not be placed with authorities who are not supervised and who have motivation to promote investment as part of their performance agreements. In Zimbabwe, the final authority to grant tax incentives is granted in the Minister of Finance and the President who are ordinarily not rewarded for promoting investment.

In answering the question pertaining to the extent to which the Zimbabwean governance regime lives up to international best practice, it can be concluded that the Zimbabwean government complies fully with only two out of six characteristics of a good governance framework. These two characteristics are that firstly the final authority to grant incentives should be vested in the Ministry of finance and

secondly that the authority to grant incentives should not be vested in officials who are rewarded for attracting investment.

This chapter established that the governance regime applied to the extension of tax incentives in Zimbabwe complies to international best practice to a limited extent. The next and final chapter will provide an overview of the findings of this study and provide some recommendations as to how the Zimbabwean governance regime can be better aligned to international best practice.

CHAPTER 5: SUMMARY AND CONCLUSIONS

5.1. Introduction

The aim of this study was to investigate the administrative structure guiding the granting of tax incentives to mining firms in Zimbabwe, so as to assess the framework's conformity with international best practice.

The extension of significant tax incentives to the Great Dykes Investment project in 2020 sparked considerable public interest in Zimbabwe. This was particularly because these incentives were granted amid a global health pandemic that crippled many economies worldwide. Moreover, in the year of the granting of these incentives, the national revenue authority reported that the cost of tax expenditures in Zimbabwe was equivalent to half the public health budget. To date, at least two civil suits have been brought against the government for the granting of tax incentives to GDI, with the initial claimants basing their arguments on the transgression of a Constitutional mandate that requires the burden of taxation to be spread equally amongst all taxpayers and the second case yet to be heard by the court. Within this context, the study sought to establish whether the government takes reasonable steps to protect the national fiscus from uncalculated losses in the extension of tax incentives, by adhering to international best practice.

5.2. Summary of the findings

The primary question underlying this research was centred around evaluating the extent to which the tax incentive governance system applied in Zimbabwe within the mining sector, complied with international best practice. Through an investigation of the tax governance system applied in Zimbabwe, this research came to various conclusions.

Chapter 2 commenced by considering the rational and continued relevance of tax incentives within the extractive industry. To this end it was established that the inherent characteristics of the mining industry in particular such as the location specific nature of mineral resources and their potential contribution to the national fiscus may make incentives an ineffective tool to promote investment. Nonetheless tax incentives continue to be used in the sector. The chapter went on to address the first secondary question which sought to identify the most common governance risks posed by the poor administration of mining tax incentives and how these can be mitigated by international best practices on the governance of tax incentives. In addition to unforeseen revenue

losses, resource rent seeking behaviours as well as creating an enabling environment for corruption were identified as the main risks created by poorly governed incentives. Chapter two went on to identify the most commonly agreed upon international best practices towards the governance of tax incentives in section 2.4. At their core, the international best practices identified by the OECD, World Bank, IMF and IGF towards the administration of tax incentives, suggest that any tax incentive governance system should be underwritten by transparency and accountability. These institutions commonly agree that this is achieved through the following measures. Firstly, in section 2.4.1, that the government publishes the justification of its granting of tax incentives, secondly that incentives are granted through primary laws, in section 2.4.2 and thirdly that the sole authority to grant tax incentives vests in the Ministry of Finance, in section 2.4.3. It is further suggested fourthly in section 2.4.4 that tax incentives should be monitored meticulously, fifthly in section 2.4.5 that contracts should be made publicly available and finally in section 2.4.6 that the authority to grant tax incentives is not vested in officials employed to promote investment.

Having identified the benchmark international best practices, this research went on to set them against the tax incentive governance system applied in the mining sector in Zimbabwe in Chapter 3. This research conducted an analysis of the Income Tax Act, Mines and Minerals Act as well as the Zimbabwe Investment Development Act so as to establish the main characteristics of the system applied in the extension of mining tax incentives. To illustrate how these legislative provisions are applied practically, in section 3.4 an analysis of Statutory Instrument 26 of 2021 was conducted. This chapter concluded firstly that the Minister of Finance holds the primary authority to grant mining investors tax incentives. The chapter went on to establish that whilst the Income Tax Act and the Mines and Mineral Act provide basic eligibility requirements for the extension of tax incentives to holders of ordinary mining leases, the extension of tax incentives to special lease holders is conducted through the exercise of discretionary authority. The rationale of the granting of tax incentives to mining companies is further not made public.

Chapter four provided an evaluation of the governance system applied in Zimbabwe, in comparison to international best practice. Broadly, it was found that the governance framework applied in Zimbabwe fails to foster transparency and accountability in the granting of tax incentives. The administration system applied in Zimbabwe largely does not comply with international best practice on the governance of tax incentives. This conclusion is supported particularly by the following, firstly that the government is not obligated to publicly disclose the policy rationale for the extension of tax incentives. Decision makers and particularly the Minister of Finance are granted broad discretionary powers towards the extension of tax incentives. In particular, the tax incentives granted to special mining licenses are administered in a highly subjective manner with no clear qualification

criteria. Tax incentives in Zimbabwe are further not monitored or evaluated and so their true cost remains unknown and finally, contracts and licenses are not made publicly available. As has been noted in the chapter 4, the government is currently working towards establishing monitoring and evaluating mechanism for the granting of mining tax incentives which is a commendable development but well overdue.

The Zimbabwean government should however be applauded for ensuring that tax incentives are granted through primary laws in the case of general mining tax incentives and that the Minister of Finance holds the primary authority to grant incentives. The Zimbabwean government further does not place the final authority to grant incentives in authorities who could have ulterior motivations to grant companies investment incentives. The publishing of the tax incentives granted to companies in the government gazette is further commendable although it would be preferable for the public to be informed and granted participation rights before the incentives are granted. The Mines and Minerals Act further does well in delineating the powers of the president in relinquishing the payment of royalties as well as the non-discretionary incentives available to ordinary licence holders.

The primary research question of this research sought to establish the extent to which the Zimbabwean tax incentive governance system adhered to international best practice. Drawing from the above conclusions, this research has found that the governance system applied in Zimbabwe largely does not adhere to international best practice.

The lack of transparency and accountability fostered by the governance system applied could encourage companies to engage in aggressive tax planning to reduce their financial burden, particularly because their use of incentives is not monitored. The lack of public access to contracts and licence disclosure coupled with the significant discretionary powers granted to the Minister of Finance could create opportunities for patronage or corrupt practices. Together these risks legitimize the public concern surrounding the granting of tax incentives in Zimbabwe.

5.3. Recommendations

The Ministry of Finance should accelerate and prioritize the formulation of a system to measure, monitor and evaluate the cost of tax incentives. This system should be able to track the cost of incentives as well as monitor any behavioural responses induced by the granting of tax incentives.

Greater transparency and accountability should be built into the contract negotiation process in Zimbabwe by for example ensuring substantive parliamentary oversight into the granting of tax incentives as well as allowing for public participation. Greater public participation can only be fostered where the public is furnished with a cost analysis justifying the granting of such incentives as well as

access to final negotiated contracts. Public information disclosures will both enable civil society to hold the government accountable and also manage public expectations on the potential benefits of mining projects. Community involvement in the granting of tax incentives may further strengthen a mining companies' social licence to operate. The ongoing review of the Mines and Minerals Amendment Bill further provides an opportunity for the envisioned licence cadre system to be used to extend public access to licenses and contracts.

Learning from the manner through which the powers of the president to relinquish royalty payments are constrained, the powers of the Minister of Finance to advance tax incentives to holders of special mine leaseholders should be guided by specific eligibility requirements, set out in the law.

5.4. Final comments

Whilst the effectiveness of tax incentives towards promoting investment within the mining sector continues to be contested, many developing countries, including Zimbabwe continue to use them as an investment facilitation tool. Where tax incentives are not well governed, they create opportunities for companies to engage in base erosion and profit-shifting practices. Governments may also suffer greater revenue losses than they envisioned at the granting of these incentives. Within the context of the significant economic contribution of the mining sector to Zimbabwe's sustainable development, this research proposes that greater accountability and transparency are fostered in the tax governance system particularly with regard to the extension of tax incentives in the mining sector.

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