

An assessment of offshore tax structure opportunities for South African companies

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“Many are the plans in a person's heart, but it is the Lord's purpose that prevails”

Proverbs 19:21

God has provided me with not only the opportunity and means to complete my MBA but more so spoilt me with extraordinary people that carried me through this journey.

I dedicate this to:

- My Hero, best friend and wonderful partner Gary, thank you for your understanding, sacrifice and continuous support. Thank you for your unconditional love, patience and willingness to invest in me and push me to greater heights.
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ABSTRACT

Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is no duty, not even a patriotic duty to increase one's taxes. ~ Learned Judge Hand (UK)

Tax avoidance had recently encountered scrutiny from government officials, wilfully misinterpreting the rights and responsibilities of big corporates to support their own tax collection agendas and counter their fiscal deficits (Wilson, 2015). To this end the study investigates the real duty imposed on directors to maximise profits of shareholders by unlocking a strategic advantage over its competitors by utilising foreign tax jurisdictions and international holding structures.

The focus of the paper is based on dynamic management principles with the objective of utilising all resources and opportunities as efficiently as possible. The international holding jurisdictions Malta and Mauritius were compared, using the weighted average tax model presented herein, comparing both tax opportunities and non-tax factors which would add to its business appeal as preferred tax jurisdiction.

A hypothetical company structure connected to an international holding company was used to test the advantages presented by the respective holding jurisdictions of Malta and Mauritius. This study implements a cross-sectional qualitative approach by reviewing the latest legislation and academic opinions to construct a tax model to evaluate the tax framework at hand, based on weighted principles identified in practice as key tax structure considerations.

Capital sensitive issues and bottom line taxes received the greatest weight as the reduction of a company's tax footprint was the primary objective. Strategic business and non-tax related concerns were also identified and weighted according to the overall strategic advantage presented to the hypothetical company.

Using the weighted average tax model, Mauritius and Malta preformed equally well and reached a tie at 61.5 points. Although not indicating a clear winner the model provided great insights as to the strengths and weaknesses of each jurisdiction.

The board of the hypothetical company however chose to establish itself in Mauritius due to its bottom line tax advantage supporting its growth objections as well as jurisdictions ease of obtaining credit.

Malta boast with its effective tax rate of 5%, this effective rate is however only applicable should the imputation system be applied. The application can only be activated if funds are distributed to shareholders. Any residual funds that remain in the company will be taxed at a flat rate of 35%. As such Malta is a great shareholder jurisdiction but does not necessarily support the growth needs of a new company.

KEY TERMS

Double Taxation Treaties, Tax Framework, Strategic Tax Advantage, Fiduciary Duty, Shareholder Wealth Maximisation, Tax Comparisons, Preferential Tax Jurisdiction, Tax Model.

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LIST OF ABBREVIATIONS

BEPS	Base Erosion and Profit Shifting
CEO	Chief Executive Officer
CFC	Controlled Foreign Company
CFO	Chief Financial Officer
CGT	Capital Gains Tax
CIT	Corporate Income Tax
DTA	Double Taxation Agreement
GBC	Global Business Companies
GDP	Gross Domestic Product
IFRS	International Financial Reporting Standards
ITCI	International Tax Competitiveness Index
MOU	Memorandum of Understanding
MRA	Mauritius Revenue Authority
OECD	Organisation for Economic Co-operation and Development
ROI	Return on Investment
SA	South Africa/South African
SBC	Small Business Corporations
SARS	South African Revenue Service
SCA	Supreme Court of Appeal
UK	United Kingdom

DEFINITIONS

Asset Base Cost: Is the amount against which any proceeds upon disposal are compared in order to determine whether a capital gain or loss has been realised. It includes the following cost: Acquisition cost, costs actually incurred in acquiring or creating an asset, Incidental costs of acquisition and disposal, Cost of a surveyor, auctioneer, accountant, broker, agent, consultant or legal advisor, for services rendered, Transfer costs, Stamp Duty, Transfer Duty, Securities Transfer Tax or similar duty or tax, Advertising costs to find a seller or to find a buyer, Cost of improvements or enhancements. (SARS, 2017)

Branch Company: In the context of this paper is a South African incorporated company in terms of Section 23(2)(a) of the Companies Act, Act 71 of 2008. Considered to be an extension of the foreign and/or holding company and not deemed a separate legal entity and therefor often referred to as a registered external company (Lumsden, 2014).

Capital Gains: Refers to tax levied on the profit realised on a non-inventory asset at the time of its disposal.

Controlled Foreign Company (CFC): A CFC is a foreign company in which South African residents directly or indirectly hold more than 50% of rights to participate in the share capital / profit of the foreign company or more than 50% of the voting rights in that foreign company are directly or indirectly exercisable, by one or more South African residents. (SAICA, 2016)

Corporate Tax: Is the tax that is legally payable by law in a specific country by a company and/or corporation.

Depreciation on Assets: Is an accounting method used to allocate and decrease the cost of a tangible asset over its useful life (The Economic Times, 2016)

Double Taxation Relief: Is tax relief offered to a natural and/or legal person who, due to its cross-border activities, may be taxed on the same source of income by both jurisdictions. (Lexis Nexis, 2017)

Exempt Income: Refers to income that is fully and/or partially exempt for corporate and/or statutory tax (Investopedia, 2017).

Exit Taxes: An expatriation tax or emigration tax paid when a company moves to a different jurisdiction. Considered a once and for all tax. (SIAT, 2012)

Head Quarter (HQ) Jurisdiction: Refers to the physical land area or geographical district within which the Holding Company is established.

Holding Company: is often referred to as a parent company with its primary function holding investments and/or controlling shares in a variety of companies, commonly known as subsidiary and/or operating companies.

Holding companies are usually not involved in day-to-day operations of the operating company, but through its majority holding in the subsidiary, lend initial or ongoing financial support via cash reserves or stock sales and may assist in restructuring the operational model to ensure profits. Holding companies offer protection and flexibility to the group as a whole by ring-fencing activities, protecting assets, absorbing financial losses and limiting liabilities". (Businessdictionary.com, 2018)

Jurisdiction: The physical land area or geographical district within which authority is exerted over a legal body and/or where justice is administered. (YourDictionary.com, 2017)

Non- Resident Company : Is a company as directed by Section 1 of the Income Tax Act No. 58 of 1962 (Income Tax Act, 1962) and read with Article 4 of the Double Taxation Agreement (DTA) International Instruments. (SARS, 2017). This company is regarded as a non tax resident of South Africa and not effectively managed in South Africa and therefor tax resident in its jurisdiction of incorporation and/or effective management.

Operating Company: also refed to as an Subsidiary, are companies owned by the holding company. Operating companies preform and manage all of its own day-to-day operations with the aim of generating profits for the holding company. These companies offer the holding company the freedom to manage liabilities and isolate risks. (Businessdictionary.com, 2018)

Profit Shifting: "Refers to tax planning strategies used by multinational companies, that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity". (OECD, 2013)

Related Parties / Connected Entities: Refers to a group of companies under the same ownership umbrella. Where one company usually owns more than 50% in the other company and/or group of companies.

Risk Rating: Organizations such as Standard & Poor's, Moody's or Fitch Ratings express their opinions about the ability and willingness of a corporation, state or government to meet its financial obligations in full and on time and award a risk and/or credit rating accordingly (Standard and Poor's, 2011a:1).

Royalty Tax: Refers to a tax levied on the payment made by a connected company for the use of another's Intellectual Property.

SA Resident Company: Refers to a company which is incorporated, established or formed in the Republic or which has its place of effective management in the Republic, therefore regarded as a tax resident in the Republic. This however does not include any entity who is deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation. (OECD, 2016)

Shell Company or Corporation: "Is a company or corporation without any active business operations or substantial assets" (Investopedia, 2016).

Branch Company: Is a South African incorporated company in terms of Section 23(2)(a) of the Companies Act, Act 71 of 2008. Considered to be an extension of the foreign and/or holding company and not deemed a separate legal entity and therefor often referred to as a registered external company (Lumsden, 2014).

Stakeholder: Is any person who has an interest in a company or corporation, who can either affect or be affected by the company's or corporation's business. Primary stakeholders usually are the investors, employees and customers" (Investopedia, 2016).

Subsidiary Company: Is a distinct legal entity functioning with its own board of directors, stocks and certificates. It operates in and is bound by the relevant laws and regulations of its incorporated and effective management jurisdiction. (Timothy, 2018)

Tax Avoidance: Is the legal method by which companies structure their taxes to either defer or to reduce tax, as provided for in legislation and government incentive schemes.

The use of these methods are transparent and reflected in financial and/or shareholding reports. (Dr Murry, 2018)

Tax Base: “Total of taxable income of a company within the tax jurisdiction of a government” (Business Dictionary, 2017).

Tax Evasion: Is the illegal or fraudulent practice of evading taxes by *inter alia* claiming less income than received, failing due payment, falsely reporting on income and expenditures, inflating debt by way of transfer pricing, receiving payment in cash and not reporting or paying taxes thereon and misrepresenting or not reporting the true financial position of the company. (Dr Murry, 2018)

Tax Incentive: A tax incentive is an government initiative designed to incentivise or encourage a particular economic activity by individuals or companies that is to the benefit of the state. (Collins Dictionary, 2015)

Tax Inversion: A strategic relocation of a company’s headquarters to a lower tax jurisdiction. This is done by becoming a subsidiary of a new holding and/or parent company in another country for the purpose of falling under more beneficial tax laws. (Business Dictionary, 2014)

Tax Residency: For the purpose of this study tax residency is the jurisdiction in which the entity is registered, incorporated and deemed to be effectively managed and liable to pay tax. For the purpose of this study the holding companies will be tax resident in Mauritius and Malta.

Thin Capitalisation: In this instance refers to a holding company that finances the activities of a subsidiary by providing the subsidiary with an interest-bearing loan where the subsidiary has a relatively high level of debt compared to its equity. (OECD, 2016) Which in turn creates a tax loss as the subsidiary displays an inflated debt to equity ratio, allowing it to pay less taxes.

Withholding Tax: Are taxes levied by the country of operations (In this case the South African Subsidiary) on the gross amount of dividends, royalties, interest or other payments made by the country of operations to its beneficial owner company (in this case Mauritius /Malta). The tax is collected and paid to the revenue service of the country of operations (In this case SARS). (Müller, 2013)

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CHAPTER 1: OFFSHORE TAX PLANNING - THE COMPETITIVE ADVANTAGE

1.1 Introduction

The Panama Papers and Paradise Papers have drawn a lot of negative attention to offshore tax structures. Causing the masses, enraged by wealth inequality, to accuse any company or individual implicated in these structures of foul play (El-Erian, 2016)

Tax planning methods and more so tax avoidance tactics have however been used since ancient Rome, where shipment companies, being one of the very first shareholding structures, travelled to different ports to avoid high import taxes under the rule of Julius Caesar who was one of the first rulers to levy taxes (Adams, 1993). These tax avoidance measures were implemented to remain competitive and retain the balance between investment risk and the expected return on investment.

Corporate structures and the law governing it have come a long way since ancient Rome as the globalisation of markets has dramatically influenced the ability to sell products across timelines. Transforming the market place into a highly competitive and integrated environment eliminating borders, leaving corporations stateless (Hosmer, 2016)

Not only is tax avoidance legal but is it encouraged by tax and corporate laws around the world, offering rebates and incentives to corporations and individuals alike (Deloitte on Tax, 2016). In an attempt to lower government expenditures associated to medical and pension grants, governments encourage individuals to have medical aid and/or retirement annuities, by offering tax incentives and rebates for those individuals who incur these expenses.

Governments likewise encourage certain behaviour from corporations; South Africa, in an attempt to encourage economic growth and combat unemployment offer Small Business Corporations (SBC) a progressive tax rate starting at 7% on profits below R550 000 in the year of assessment, instead of the normal 28% tax on profits. (Van Schalkwyk, 2017).

South Africa also launched its headquarter company regime to encourage multinationals to use South Africa as an attractive Head Quarter (HQ) jurisdiction to promote investment in and monetary flow into South Africa. Offering companies, who qualify as a HQ, exemption from withholding tax on dividends and royalties, capital gains tax on the sale of shares and Controlled Foreign Company (CFC) legislation used to combat profit shifting (ENS, 2013).

Many countries use tax relief incentives to encourage industry and infrastructure development. This is not only evident in developing countries like India with its renewable energy, mineral and oil development tax incentive scheme but also developed countries like the United States of America (US) who offered Tesla a \$1.25 billion tax relief incentive to build its manufacturing plant in Nevada whilst offering Boeing a \$8.7 billion tax relief incentive to continue its operations in Seattle, Washington (Damon, 2014).

The essential difference between tax incentives and tax avoidance is the locus of control associated thereto. Tax incentives is a government implemented measure often used to stimulate certain behaviour which is essentially beneficial for the government and/or which drives a certain government objective. Tax avoidance on the other hand is legal measures implemented by companies to create and/or derive beneficial tax treatment for the company within the governmental laws provided.

Companies all around the world invest in, and develop methods to capitalise on incentives and tax avoidance strategies as a competitive business advantage over competitors. Mr Eric Schmidt, the chairman of Google, when confronted in an interview with Bloomberg regarding Google's tax structures leading to savings of around \$ 2 billion in global taxes in 2014, said: (Womack, 2012)

“We pay lots of taxes; we pay them in the legally prescribed ways. I am very proud of the structure that we set up. We did it based on the incentives that the governments offered us. The company isn't about to turn down big savings in taxes. It is called capitalism, we are proudly capitalistic. I'm not confused about this”

The legality of tax avoidance is well entrenched in global corporation law and best described and supported by the well cited judgment of Judge Hand, stating that: (Gregory v. Helvering 293 U.S. 465 1935)

“There lies no obligation upon any individual and/or entity, legally or patriotically, to pay the maximum taxes - especially if legal structures that enhance deductions and/or incentives are available.”

Judge Hand continued to emphasise that transactions should however not only be performed to avoid taxes but that it should establish both economic substance and business purpose.

The Swiss president Ueli Maurer (World Economic Forum 2013 - improving the state of nations, 2013) in his address to the World Economic Forum stressed the importance of competition between governments and its competitive tax and infrastructure incentives. He contributed Switzerland's success to its liberal approach to legislation and democratic tax system and celebrates competition between governments, arguing that this not only benefits individuals and businesses, but also governments.

As such it can be argued that there is value in utilising competitive tax structures, not only for companies but also for governments as growth by one, result in growth for all.

Considering the proposed competitive advantage this study will investigate two prominent holding jurisdictions, Malta and Mauritius, to identify the holding jurisdiction with the smallest tax consequence and greatest strategic advantage.

Due to the specific nature of taxation, a hypothetical company case will be presented to identify, on a case specific basis, the optimum holding jurisdiction for the proposed South African subsidiary. Various tax and non-tax factors will be identified and weighted according to the importance associated thereto by professionals and as approved by the Chief Financial Officer (CFO) of the hypothetical company. Expected transactions associated to the hypothetical case will be simulated to calculate and compare the expected tax payable in each jurisdiction.

1.2 Problem statement

Financial managers cannot afford to ignore the importance and need of strategic tax planning, especially considering that tax is the single biggest long-term “expense” of any company (Dogen, 2016). Companies need to remain relevant and actively pursue the

opportunities presented within tax legislation and leverage these tax opportunities to unlock a competitive advantage over its competitors (Bresch, 2015).

Considering this, this study will briefly touch on how strategic tax planning aligns with the duties of management to act within the best interest of shareholders. The study will then identify the advantages of using company structures for growth and tax planning and explore the tax avoidance opportunities available to companies in Mauritius and Malta to gain a competitive advantage.

1.3 The Hypothetical Case

A management company has been approached by International investors looking to invest and establish a range of luxury game resorts and supreme game breeding facilities in South Africa. It is the intention of the Investors to offer the managing company an equity stake in its holdings for facilitating the setup and management of its future investments.

Three separate companies have been incorporated to facilitate the business structure, each with its own purpose and function:

- Prop Co (Pty) Ltd;
 - Responsible entity and holder of all the immovable property.
 - Although this company can be incorporated as a branch when considering the exception provided for in Section 23(2A)(f) of the Companies Act, Act 71 of 2008, when dealing with the assumptions of an entity “conducting business”.
 - It has been decided to incorporate the company as a subsidiary due to the potential future need of BEE compliance and/or the establishment of a beneficiary trust.
- Game Co;
 - Responsible entity and holder of all game, breeding programs and sales.
 - This company is effectively managed from the holding company jurisdiction with no permanent establishment in South Africa.
 - This company is deemed a non-resident company as directed by Section 1 of the Income Tax Act No. 58 of 1962 (Income Tax Act, 1962) and read with

Article 4 of the Double Taxation Agreement (DTA) International Instruments. (SARS, 2017).

- It is accepted that the relevant authorities has considered all applicable factors and has issued a tax directive to the effect.
- Lodge Co (Pty) Ltd;
 - Responsible entity and holder of the business concern of all tourist activities, hospitality, restaurants and spas.
 - The company is registered as a Branch (external company) of the international holding company in compliance with Section 23(2)(a) of the Companies Act, Act 71 of 2008 as the company will be party to one or more employment contracts within the Republic.

None of the abovementioned companies will be treated as Controlled Foreign Company (CFC) due to South African participation rights and/or voting rights not exceeding 50%, as contemplated in Section 9D of the Income Tax Act. (Income Tax Act, 1962)

The international investors, with established head offices in both Mauritius and Malta, instructed the managing company to determine which holding jurisdiction would best compliment their proposed South African investment considering both tax and business concerns.

The proposed structure being:

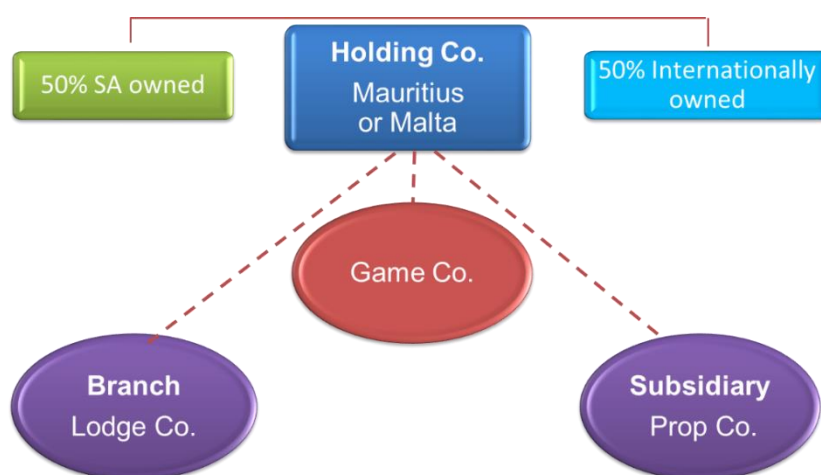


Figure 1: Basic hypothetical tax structure model

1.4 Objectives of the study

The focus of this paper is based on dynamic management principals with the objective of identifying tax avoidance opportunities available to South African companies in Mauritius and Malta to ultimately find the best holding jurisdiction for the hypothetical company.

Consideration of ethical issues will draw a clear line between tax avoidance and tax evasion. The intention of this paper is not to encourage or promote tax evasion but to rather identify possible advantages presented by current legislation, enabling management to legally reduce the company's tax footprint.

The primary research objective of the study is:

- To identify the optimal holding company jurisdiction, Malta or Mauritius, providing the best corporate tax savings for the hypothetical case company structure.

The secondary research objectives of the study are:

- To identify which structure is more cost effective to implement and maintain.
- To identify and weigh non-tax issues that may enhance business opportunities and/or contribute to long term benefits and sustainability of the company.

To meet both primary and secondary objectives a weighted average tax model will be implemented, scoring Mauritius and Malta on tax and non-tax issues, crowning the most beneficial holding tax jurisdiction for the hypothetical case.

1.5 Relevance and/or contribution to the field of study

This study will contribute to the business and academic understanding of integrated tax laws and treaties. It will extend and build on previous research conducted within its field and may emphasise and reveal the strategic value of effective offshore tax planning for South African multinational companies.

Practically, this study aims to provide financial managers with a weighted average tax model to help identify tax saving opportunities and aid in the decision making process when identifying an offshore holding jurisdiction.

1.6 Scope of the study

The countries and/or regions identified for the scope of the study will include the critical analysis of the Double Taxation Treaties, relevant legislation and procedures between:

- South Africa and Mauritius; and
- South Africa and the Malta.

Mauritius and Malta are well-known offshore bases providing favourable tax agreements for multinational companies and are often used to establish offshore tax residency (Fidelity Overseas, 2016).

The CFO supported by various other financial experts, identified the following aspects as crucial to the decision of a holding jurisdiction:

- Corporate tax rates;
- Withholding taxes;
- Exemption method;
- Minimum capital requirements;
- Initial setup cost;
- Annual admin and service fees;
- CFC legislation;
- Transfer Pricing;
- Capital Gains Tax;
- Currency and Country stability;
- Double tax treaties network;
- Actual office registration or company representation allowed;
- Submission of audit and accounting reports and the cost associated thereto;
- Ease of Registration and communication;
- Strategic advantages:
 - Ease of obtaining finance from banking institutions;
 - Import /Export advantages;

1.7 Assumptions

- The weighted average tax model will be used as a decision making tool for management and will not be deemed an expert opinion relating to tax principles;
- The structure and classification presented by the hypothetical case is accepted and approved by all relevant tax authorities as legally compliant and correct;
- The interpretation and application of the relevant Acts, Rules and Regulations as applied throughout this paper is approved as legally compliant and correct. (Kruger, 2018)
- The equations are accepted as correct and legally compliant. (Kruger, 2018)
- The status of the hypothetical company is that of a non-CFC and this interpretation is so accepted in law.
- Both Mauritius and Malta follow the latest Organisation of Economic Co-Operation and Development's (OECD) standards on tax and considered to be non-tax haven jurisdictions. It is also assumed that this status will not change in the near future;
- The legislation and treaties which form part of the study will not significantly change in the near future;
- That the legal compliance associated with the procedures of a particular country within the scope will not significantly change in the near future;
- That the interpretation of the various Acts remains uniform and static.

1.8 Limitations of the study

This study does not provide a specialised tax opinion but rather a strategic management framework, aimed at providing a holistic approach to tax and financial management.

Further to the above, it should be noted that it is impossible to deduce a “one size fits all” approach which would offer the maximum benefit for each and every business and/or all of its shareholders (Venter, 2013). As such the parameters, objectives and assumptions of the hypothetical company case should be acknowledged at all times.

This paper is limited in its analysis, by only comparing the benefits directly effecting the hypothetical company within the scope of the primary and secondary objectives. No analysis and/or consideration will be given to the eventual taxation of each of the shareholders on dividends declared by the hypothetical company.

It cannot be stated with certainty how the relevant tax authorities would treat a particular tax structure, since a wide discretion is afforded to tax authorities to assess each situation on a case to case basis.

Subject to the purpose and outcome of the study, the interpretation and application of the relevant legislation, as applied in this paper, was accepted by D.R. Kruger, a qualified Forensic Auditor with practical experience within the SARS audit team (Kruger, 2018). Considering this, no other interpretation will be considered for the purpose and outcome of this study.

1.9 Future studies

Considering dynamic management principles and the structure at hand, it is advisable to direct future studies to an in depth study of the actual impact on the overall performance of the company when applying the strategic and or weighted factors identified herein. The proposed study would add great value in quantitative form, linking the implementation of these factors to a direct impact on annual turnover, if any.

1.10 Research methodology

A cross-sectional qualitative study based on empirical methods was applied to best address the objective and answer the research question.

Data was collected from relevant legislation and treaties as well as from valued academic writers on the topic. Relevant terms and the implications thereof were highlighted and interpreted side by side. Factors relevant to the choice of a tax jurisdiction and structure was identified and weighted in terms of importance to the scope and objection of the study. Subjective and inductive problem solving was applied as warranted in Qualitative studies (Jones & Barlett, 2009, p. 40).

Initial conclusions were noted and regarded with an open mind and healthy scepticism (O'Connor, 2010). The tax footprint of each jurisdiction was calculated with the help of the financial statements of a hypothetical company to produce a measurable tax output. The

effective tax rate together with other weighted factors, presented in a tax structure, identified the best tax jurisdiction.

1.10.1 Nature of the data

Academic literature related to this topic is limited due to the complexities of tax law. Students of international taxation have studied and compared South Africa to its African and Asian counterparts. Academics have also explored the full extent of Base Erosion and Profit Shifting (BEPS), and Organisation for Economic Co-operation and Development (OECD) measures and have developed and suggested curbing methods against tax avoidance.

Academic literature on the strategic business effects of taxation and the advantage thereof has not enjoyed satisfactory attention. The most prominent South African writer on the topic of tax advantages and the strategic application thereof is Prof Thabo Legwaila.

Various corporate publication has contributed to the topic by emphasising the importance of tax risk management and asset protection from the financial advisor's point of view, providing some but limited practical application.

Malta and Mauritius have been part of previous studies but have not directly been compared to each other as Holding companies of a South Africa branch and/or subsidiary company. To perform the comparative study, the original copies of legislation will be reviewed as primary data. Previous studies in the field and corporate reports will be reviewed as secondary data. Using a combination of the literature reviewed a framework will be deduced to identify the best strategic tax jurisdiction, with the smallest tax footprint.

The nature of the data, although recently under heavy debate are of a non-volatile and fixed nature and comprises of the study of the following literature:

South Africa:

- Income Tax Act, 1962 (Act No. 58 of 1962) as amended;

- Government Notice No 18461 of 1997: Agreement Between the Government of The Republic of South Africa and The Government of Malta for The Avoidance of Double Taxation and The Prevention of Fiscal Evasion, as amended;
- Government Notice No 113 of 2015: Double Taxation Avoidance Agreement Between the Government of The Republic of South Africa And The Government of Mauritius;

Mauritius:

- The Income Tax (Foreign Tax Credit) Regulations 1996 GN 80 of 1996;
- Income Tax Act, Act No. 16 of 1995 as amended;
- The Mauritius Revenue Authority Act 2004.

Malta:

- Income Tax Act, Chapter 123 of 1949 as amended in 2017;
- Income Tax Management Act., Chapter 372 of 1994 as amended 2017;
- Protocol No 19 of 2014 as between the Government of The Republic of South Africa and the Government of The Republic of Malta.

1.10.2 Data collection

The research paper does not include statistical analysis and/or data received from third party members. As such no ethical clearance is necessary for the collection of data.

The data collected in this paper will include all applicable current legislation and tax treaties having an effect on the taxable position of a South African based multinational company. Information was obtained from public resources including *Government Gazettes* and official government websites, international online libraries and databases. To collect and interpret data the following observations and collection methods developed by Fraenkel and Wallen (Fraenkel, 2006), was applied:

- Defining the research problem as precisely as possible.
- Obtain and reading the relevant primary sources and note and summarize key points in the sources.
- Search the general references for relevant primary sources;
- Formulate search terms (key words or phrases) pertinent to the problem or question of interest;

- Evaluate relevant secondary sources;
- Select and peruse one or two appropriate general reference works;
- Comparisons were made between the different structures considering each factor within the unit of analysis. A thorough literature comparison was be done, summarising and concluding its findings.
- The Conclusion and the reasons thereto will be discussed in detail, indicating the various advantages and disadvantages of the relevant country's tax structure. The table figures indicating the favourability of each structure will be calculated and the best structure considering the scope of the study will be identified and displayed in the quick reference table as mentioned above.

1.10.3 Data analysing techniques

To effectively analyse the data collected a combination of Onwuegbuzie's and Leech (Onwuegbuzie, 2005) and Salimii (Salimi, 2015) processing techniques were used:

- **Data familiarisation:** The researcher studied the relevant legislation and treaties, familiarising herself with the content and understanding of such;
- **Generating initial codes:** Codes and key words were highlighted to establish patterns and consistency of the data;
- **Identifying factors:** Codes were identified, categorised and checked for corresponding topics. The topics were compared, identifying similarities and patterns between the different tax variables.
- **Constant comparison analysis:** By systematically and inductively comparing sources and eliminating data that does not fit the research question and/or structuring data in line with the objective.
- **Taxonomic analysis:** Creating a classification system that weighs factors according to the main effect and/or outcome in relation to the effect it would exert on the taxable income and/or maintenance of the tax structure.
- **Secondary data analysis:** Analysing managerial sources to understand the impact of not only the taxable income but also to understand the needs of management. Factors of implementation, maintenance, language and reporting standards was also considered herein;

1.10.4 Summary

The objective of the study is to identify the optimal holding jurisdiction, Malta or Mauritius, offering the greatest corporate tax savings and strategic business advantage to the hypothetical case;

The main topics covered will be:

- **Duty of Directors**
 - At the hand of applicable legislation and case law establish the duty of directors to increase company growth and shareholder return on investment.
 - To connect this duty imposed on directors to the advantages offered by strategic tax planning.
- **Tax planning core elements of financial strategy**
 - Establish strategic tax planning as an integral part of financial strategy;
- **Analyse applicable legislation and draw conclusions**
 - Consider tax and company legislation from SA, Malta and Mauritius;
 - Identify possible opportunities available for companies within legislation;
- **Identify key factors to be considered in creating a tax instrument**
 - Identify the most prominent factors considered by management when looking at a possible tax reduction structure;
 - Considering the scope and aim of the study weigh each factor;
- **Implement a hypothetical case to practically demonstrate the strengths and weaknesses of each structure.**
- **Implement a weighted average model to identify the best strategic tax jurisdiction**

CHAPTER 2: STRATEGIC OFFSHORE TAX PLANNING

Strategic offshore tax planning is about much more than just saving on taxes. Its ambit expands to good corporate governance, optimum resource utility, asset protection, sound financial planning and unlocking long term strategic advantages for the company.

In this section, International Tax Law and precedent are investigated to explore the duty of directors to favour shareholders interest above that of stakeholders. The conclusion is contextualised as the argument is made that directors have a duty to exploit all opportunities, including tax opportunities, to meet its fiduciary duty towards investors.

Thereafter the true value and need for strategic tax planning is established and the structure characteristic of an offshore tax model is explored. The leverage and utilisation of tax structures by governments are established and a clear line is drawn between tax avoidance and tax evasion.

Lastly, an introduction into the hypothetical tax structure and characteristics of each entity is identified and the need thereof explained.

2.1 Fiduciary Duties of Directors to increase company growth and shareholder return on investment.

The duties of a director are referred to in subsection 76(3)(b) of the *South African Companies Act, Act No 71* (2008, p. 37) (herein after the Act) states that a director must exercise the powers and perform his functions always with the company's best interest at mind.

The Memorandum of Incorporation (MOI) sets out the purpose and rules by which the company will be governed and also the objective of the company (Companies Act, No 71 of 2008, p. 14). The Act distinguishes between two types of companies, one being for non-profit purposes and the other for-profit purposes and specifically requires registration particular to the primary objective of the company.

A profit company is defined by the Act as "a company incorporated for the purpose of financial gain for its shareholders" (Companies Act, No 71 of 2008, p. 12). When considering Section 77(2)(b)(iii) of the Act, the responsibility of the director to act within the ambit of the company's objective and MOI becomes abundantly clear. The

aforementioned Section empowers shareholders to remove a director who acts outside of his mandate and/or not in line with the objective and rules of incorporation (Companies Act, No 71 of 2008, p. 38).

It is evident from the above that directors owe a specific duty to its shareholders to advance and protect shareholders interest as their primary objective. This school of thought is well known in the academic world as the “shareholder value” approach where wealth creation of shareholders is considered the primary objective. Shareholders are viewed as the true owners of the company and not its management and/or stakeholders. (Joubert & Lombard, 2014, p. 7)

On the opposite of the coin, the ideology of the “stakeholder approach” promotes stakeholders interest by reaffirming the concept of the company as a means of achieving economic and social benefit (Geach, 2012). Some followers of this ideology however agrees that benefiting stakeholders can in effect only transpire if the company remains profitable and operational (Grové, 2012). This ideology identifies two stakeholder groups; corporate stakeholders, being employees and creditors, and social stakeholders, being the community at large (Harduth, 2016).

To settle the debate as to whether the corporate constituency should be expanded to provide for the interests of corporate stakeholders, senior law lecturers Sulette Lombard and Tronel Joubert (2014, p. 12) from the University of Australia and Pretoria, completed a comparative study of the legislation and judiciary decisions of four countries. In their SA analysis, they highlighted the incorporation of social objectives in Section 7 of the South African Companies Act 71 of 2008 and continued to note the conservative approach of the legislator in its traditional description of the duties of the director, opting not to include social objectives as part of these duties but rather leaving the interpretation thereof to the court. See also (Gwanyanya, 2015, p. 13)

According to Nastascha Harduth (2016, p. 2), a director at Werksmans Attorneys, specialising in Commercial Litigation and Corporate Governance, the Act has adopted the “enlightened shareholder value approach”, explaining that the new amendments to the Act requires directors to promote the success of companies, whilst also considering the legitimate interests of the corporate stakeholders and to some degree social stakeholders.

To truly understand the interpretation and consequence of the duty of directors in practice one has to look at South African as well as International case law, especially considering multinational holding and subsidiary structures.

In the South African context, the court made a ruling in *South African Fabrics Ltd v Millman* 4 SA 592 (A) (1972) on the best interest of the company and continued to define what exactly these interest would entail. The court held that a company's "interests" only includes the interest of the corporate entity and that of its shareholders. This ruling was supported by *Fisheries Development Corporation v Jorgensen* 4 SA 156 (W) 165 (1980) wherein it was found that the common law places a duty on directors, to act within the best interest of the shareholders as a collective.

The abovementioned case law still enjoys precedent with the underlining principle that all actions whether performed by a legal entity or not should comply with the rights and responsibilities as set out by the South African Constitution (*Pharmaceutica Manufacturer v President of the Republic of South Africa*, 2000). Companies as such cannot in the pursuit of profit transgress on the rights of others (Gwanyanya, 2015). This however does not expand the duty of directors to account for the interest of stakeholders but rather emphasize that a company cannot conduct its business at the expense of the environment and/or the health of others under the ambit of its fiduciary duties.

In the Australian Supreme Court judgment of *AWA Ltd. versus Daniels t/a Deloitte Haskins & Sells* (1992, p. 37 par 69), the Court distinguished between the duty of a trustee and a director stating that, "while the duty of a trustee is to exercise a degree of restraint and conservatism in investment judgments, the duty of a director may be to display entrepreneurial flair and accept commercial risks to produce sufficient return on the capital invested".

The United States of America (US) and United Kingdom (UK) appears to include non-shareholder interest into their rationale; however precedent clearly states that non-shareholder interest may never be placed above that of shareholders and may only be part of company's decision making when it is to the benefit of the shareholder (Joubert & Lombard, 2014)

The US case precedent was set in *Dodge v Ford Motor Company* (Dodge v. Ford Motor Company, 204 Mich. 459, 170 N.W. 668 Mich., 1919). Hendry Ford announced in 1916

that he was going to forego the special dividend as customarily paid to shareholders, consuming some of the manufacturing cost in an attempt to produce a lower costing vehicle in the interest of its consumers (Bainbridge, 2015). The court held that Ford's first responsibility would be to his shareholders and that others could not benefit at the cost of shareholder investments.

The UK precedent set in *Hutton v West Cork Railway*, (Hutton v West Cork Railway Co 23 Ch D 654, 1883) Judge Bowen LJ and Cotton LJ held that:

“Charity has no business to sit at boards of directors. There is, however, a kind of charitable dealing which is for the interests of those who practice it, and to that extent and in that garb, (I admit not a very philanthropic garb), charity may sit at the board, but for no other purpose. The law does not say that there are to be no cakes and ale, but that there are to be no cakes and ale, except as are required for the benefit of the company.”

The principle that stakeholders may benefit, but only insofar as it aids shareholders interest, is incorporated in section 172 of the UK *Companies Act, Act 146* (UK Companies Act, Act 146 of 2006, 2006).

In the words of Prof Maleka Femida Cassim (2013): “Directors are allowed to have a social conscience only if it is in the interest of the company”

In balancing the different interest of shareholders and stakeholders the US court acknowledged in *AP Smith Manufacturing Co v Barlow* (1953) that, “modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate.” This case highlighted the possible long term benefits that might be enjoyed by shareholders in short term charitable actions.

The argument has also been made that good corporate governance requires directors of for-profit companies to prioritise shareholder wealth maximisation as their sole objective (Sharfman, 2015).

After analysis on the four most forward-thinking countries on stakeholder relations, it was concluded that Corporate Law, judiciary decisions and enforcement mechanisms have no intent to alter the law of corporations or the traditional fiduciary duty of directors. A pattern of strong legislative support for the shareholder value approach was identified in the jurisdictions analysed.

To contextualise the fiduciary duties of directors within this study it can be reasoned that the primary duty of a director remains to act in the best interest of the shareholders and that directors must maximize profits for shareholders by any legal means possible. This being said, there is no legal duty placed on the director to advance government spending and/or contribute to the social welfare of citizens through greater tax contributions.

This does not exclude the company from performing acts of corporate social responsibility. Doctor Hoffmann (2001), during his physiological study into multinational enterprises behaviour, found a positive correlation between companies that invest in tax avoidance strategies and companies who greatly contribute to corporate social responsibility.

Notwithstanding the above-mentioned governments and more so British Members of Parliament continue to criticize multinationals, Google and Starbucks, for their perceived “Immoral” tax structures (The Telegraph, 2012). Professor Douma from Leiden University (Rethinking International Tax Law - International Corporate Tax Planning, 2015), however warns against this political incitement, stating that one should not forget the vested interest of governments in collecting international taxes.

It is thus concluded that directors need not only generate sufficient returns on investment but should also curb expenses and mitigate risks and liabilities in order to sustain a long term optimized return for investors. Directors must be forward thinking in their approach to resources and opportunities in all spheres of the company, inclusive of tax liabilities. Directors are required to apply their minds and utilise the resources and international opportunities available to the company to derive the best possible return for its shareholders. Value creation for shareholders will in turn aid in the continued solvency of the company, enabling it to expand operations, directly benefiting its employees, customers and suppliers.

2.2 Strategic tax planning as part of financial management objectives

Long gone are the days where tax was only discussed in secret and not a hot topic at the boardroom table (Buys, 2014) (PwC, 2015). In the ever-changing business environment it has become essential to have a proactive tax strategy that is well communicated throughout the organisation, aligning with the short and long-term strategies of the company as a whole (Botha, 2015).

Tax planning is an essential and integrated part of financial management. (Bishoff, 2014). With tax being one of the single largest long-term expenses of any company it is imperative to manage this expense with expertise and strategic insight (Eberhart, 2017).

The biggest mistake financial managers make is to only consider tax after transactions. Tax needs to be aligned and planned alongside operational and expansion strategies, understanding how each element will affect the other. It cannot be applied in a vacuum and needs to be viewed holistically. (Johnson, 2016)

Managing tax correctly can increase positive cash flow (Wilkinson, 2013). Higher cash flows related to tax avoidance strategies result in lower cost of acquiring equity (Goh et al, 2016). The legislation found in tax haven countries also provides critical asset protection and access to better finance opportunities and lending rates (Baker, 2016). This provides companies with a competitive advantage over its competitors.

In an interview with Fortune Finance, Chief Executive Officer (CEO) Heather Bresch (Fortune Finance Powerfull Women Summit, 2015) commented that it is absolutely necessary to develop a competitive tax structure to remain competitive and grow within the market. "If you put on your business hat, you can't maintain competitiveness by staying at a competitive disadvantage...The odds are just not in your favour".

To activate the competitive advantage within tax planning, financial managers should apply the three main theories of strategic management:

- Utilising resources optimally and continuously search for new tax relief opportunities (Almand, 2016).
- Prepare and respond effectively towards external pressure by being informed of legislation changes and communicating strategies, in line with corporate governance principles, to shareholders. (Teece et al, 1997).
- Apply dynamic principles by leveraging resources to create a competitive advantage in the ever-changing competitive environment (Almand, 2016).

An example of the competitive advantage obtained through strategic offshore tax structures is one of Malay Pharmaceuticals. By creating a tax inversion to the Netherlands, they were able to defend a hostile takeover from Israeli TEVA Pharmaceuticals. By performing the tax inversion Malay Pharmaceuticals optimized their

resources, freeing up vital cash and relying on asset protection legislation offered within the new jurisdiction. In effect, the tax inversion saved 5000 (five thousand) US employees from possible unemployment. (Bresch, 2015)

Asset and currency protection is highlighted by boards as one of the main attractions to competitive offshore tax jurisdictions (Douma, 2015). Specialists advise investors to consider offshore investments for growth prospects, considering long term return of investment instead of short term political and economic instability (Isa, 2017).

In 2015, the South African Rand depreciated by 30% against that of other world currencies, with an average of 6% depreciation per annum over the last 10 years. Furthermore, South Africa contributes less than 1% to global Gross Domestic Product (GDP), this being a major risk for South African companies who risk 100% of their capital in SA currency. (Paine C. , 2016)

The strategic appeal of offshore tax structures lies in its ability to decrease tax liabilities, free up cash flow and provide asset protection. In the case of South African companies its appeal stretched to protection against currency depreciation.

2.3 Tax evasion versus Tax Avoidance

Tax **avoidance** (own emphasis) is the strategic utilisation of tax regulations, capitalising on legal deductions, incentives and structure advantages offered by tax jurisdictions, to reduce the company's overall tax footprint. All strategic avoidance tactics are within the legal parameters and should be fully disclosed and properly documented in terms of the relevant country's legislation and rules. (Musviba, 2016)

From a business perspective it can be seen as the full utilisation of resources to gain a specific competitive advantage, by both company and country.

Many countries specifically structure their tax legislation to attract major multinational companies as a means to boost their GDP (William, 2016). Each country has the right to proclaim its own legislation and define the terms to which its own residents and international citizens have to adhere to, giving countries the freedom to compete in the global market for multinational investors ensuring the maximum economic benefit for that country (Devereux A. a., 2008) (Morris, 2010).

Approximately 15% of countries are labelled as tax havens, having either very low tax rates or certain incentives appealing to investors *via* extensive tax treaties. Studies show that these countries have on average twice as high GDP *per capita* than that of other countries (Dharmapala, 2008).

It is submitted that countries gain more than just possible international investment from tax treaties as these treaties establishes trade networks and aid the development of new technology and infrastructure between treaty countries (Weeghel, 1998).

In an insightful study between 67 source countries and 223 host countries by Sun (2008) from the Business Management University of Singapore on the relation between tax havens and competitive advantage. Sun concluded that previous studies overstated the link between offshore tax jurisdictions and illegal activities.

Tax **evasion** (own emphasis) is the illegal act of evading the payment of taxes, with criminal prosecution consequences. This is associated with the submission of false returns, not filing or deliberately not declaring income and/or over stating deductions such as charitable contributions or claiming for business expenses not actually incurred. (Musviba, 2016)

The Organisation for Economic Co-operation and Development (OECD) is the international body behind the drive to identify and curb tax evasion and avoidance. The international platform is a conglomerate of 36 partner countries who develop policies to promote the economic and social well-being of countries worldwide (OECD, 2017).

Professor Douma from the International Tax University of Leiden, points out that countries also compete among each other to develop and grow into established economies (Douma, 2015). As such governments compete by presenting legislation and regulations which create favourable trade, tax and labour environments as incentives to attract international investors (Devereux, 2008).

Countries can be compared to non-profit corporations in that they need to secure as much resources as possible and use these resources optimally to the benefit of its members or citizens. On this topic Professor Douma highlighted the questionable timing of OECD

member countries in which they chose to launch their campaign after recent economic recessions which depleted government cushions (Douma, 2015).

Seeing that countries and businesses apply the same strategies from different perspectives give merit to the words of Lord President Clyde, the Justice President of Scotland from 1920 to 1935, stating that:

“Countries should be allowed to arrange their legislation in such a way as to ensure the maximum economic benefit for that country, as so should companies be able to arrange their tax affairs in such a manner that prevents, so far as honestly possible, the in-land revenue of the depletion of its profits.”

It is thus in the best interest of governments and citizens for businesses to succeed and use every advantage available to them, may it be technological or financial (Davis, 2003).

2.4 Elements of companies that facilitates organisational growth

The law of corporations was designed to facilitate organisational growth through combined resource investment and ownership in the form of shareholder structures (Davis, 2009).

Various modifications of the key elements of companies are found around the world. The most common features to all structures are however, the combination of resources between individuals, limited liability and perpetual existence (Douma, 2015).

According to Armour (2009) the structural characteristics of companies that appeal as instruments of business are:

- (1) **Legal personality:** The ability to enter contracts and pursue legal action in the name of the firm and/or corporation. This includes financing contracts with financial institutions;
- (2) **Limited liability:** Separating the firm's debts and assets from that of its shareholders;
- (3) **Unlimited lifespan:** The company's existence is not linked to any natural person and can continue to exist with interchangeable shareholders;

- (4) **Transferable shares:** Various different class shares can be issued and freely traded between shareholders internally or on the open market, depending on the type of corporation – private or public;
- (5) **Centralised management:** Directors receive a mandate to act on behalf of shareholders interest in line with the objective and MOI of the corporation.

2.5 Structural features of companies as vehicles for offshore tax planning applicable to the current hypothetical case

The structure as presented in the hypothetical case – enables the reader to compare the features, possibilities and responsibilities of a branch versus subsidiary as well as that of a non-resident company.

The key structural elements of this structure appoints a holding company, containing a subsidiary (Prop Co), branch (Lodge Co) and non-resident (Game Co), of which Prop Co and Branch Co are operational in South Africa and Game Co fully operational from the holding company jurisdiction.

The features of each of these structural elements are discussed in summary below.

2.5.1 Holding Company

Also known as a parent company is a company that “holds” or controls the stock of a conglomerate of companies and/or limited partnerships. The entity holds ownership in the form of shares in a conglomerate of companies’ real estate, patents, trademarks, stocks and other assets. It does not manufacture or sell any goods and/or services. (Investopedia Academy, 2017)

In choosing the correct jurisdiction for a holding company, from a strategic tax planning perspective, consideration must be given to an array of factors including business, economic and operational requirements (Deloitte, 2017).

Holding companies have two main purposes, (1) ring-fencing financial risks and (2) optimising taxable deductions. The holding company structure assists companies to hold vested interest in an array of different industries. The subsidiaries held by the holding company allows the holding company to shield and/or contain the risks of a new venture

from that of its other subsidiaries, allowing high risk and possible growth without compromising the financial integrity of the other interests. (Botha, 2015)

The primary attributes of the holding company are that it vests in a politically stable jurisdiction with a strong currency and low inflation rate. Furthermore, it should be resident in a low tax jurisdiction with low or no Capital Gains Tax (CGT), no CFC legislation and preferential dividend tax treatment whilst offering a wide network of tax treaties. (Legwaila, 2012)

Financial managers are drawn to countries like Mauritius and Malta as they embody the attributes sought, minimising overall risk and often providing competitive financing rates due to the stability and growth rate of the country and the minimal risk associated with its holdings (Van den Berg, 2011).

The current risk rating provided by international financial services company Standard and Poor, rates South Africa as a negative to stable investment market whereas both Mauritius and Malta are regarded as stable and growing markets (Standard and Poors, 2018).

2.5.2 Subsidiary

Is a distinct legal entity functioning with its own board of directors, stocks and certificates. An subsidiary or operating company sells services and/or products within its chosen jurisdiction. It operates in and is bound by the relevant laws and regulations of its incorporated jurisdiction. (Timothy, 2018) The jurisdiction of the subsidiary is ideally associated with preferential manufacturing cost and/or labour relations and/or where natural resources are easily procured or exclusive to the chosen jurisdiction (Cinnamon, 2004).

To be deemed a subsidiary, 50% or more of the voting stock of the company must be owned by a parent or holding company. If the holding company owns 100% of the subsidiary it is referred to as a wholly owned subsidiary. (Investopedia Academy , 2017)

This is done to shield the holding company and its various other holdings from the potential risk posed by any one subsidiary at a time. This also allows the Holding Company to treat the acquisition and sale of subsidiaries as its “stock”, creating fluid

transactions without compromising the organisational integrity of its structure, ring fencing transactions so to speak. (Douma, 2015)

Summary treatment of a subsidiary in South Africa: (Income Tax Act, 1962) (Companies Act, No 71 of 2008)

- Subsidiaries are liable for taxes on all worldwide income at a flat rate of 28%;
- They are subject to a 15% dividend tax on dividends declared;
- Double Taxation Agreement may reduce the rate of dividend tax payable;
- Subsidiaries are subject to transfer pricing rules and the arms length principal;
- Capital Gains Tax (CGT) applies to all disposal of immovable asset and/or disposals of shares related to immovable property;
- However, the non-resident holding company would not be subject to CGT on the sale of its shares in the subsidiary. Subject to the subsidiary not being a fixed property company – where more than 80% of its asset comprises of fixed property (Timothy, 2018).

The use of a subsidiary is a crucial instrument within the strategic tax planning structure as it creates operational flexibility, maintaining the flow of capital within the group whilst utilising the advantages of transactions at arms length. The relationship between the holding company and subsidiary allows for exchange control of assets into or out of a specific country with little to no tax implications (Van den Berg, 2011).

2.5.3 Branch

The branch is considered an extension of the foreign and/or holding company and not deemed a separate legal entity and therefor often referred to as a registered external company. All actions preformed by the branch directors, employees and agents are binding upon the foreign and/or holding company, exposing shareholders to additional risk. (Timothy, 2018)

A branch cannot be used in instances where the company wishes to establish a share incentive scheme or need to comply with BEE requirements as this will prompt shared ownership with South African resident company and/or beneficiaries. (Lumsden, 2014)

Summary of treatment of a branch company in South Africa: (Income Tax Act, 1962) (Companies Act, No 71 of 2008, p. Section 23)

- Branches are liable to pay taxes on income derived from a South African source at a rate of 28%;
- Branches are however exempt from paying dividend tax, on income paid over to holding company as they are considered by SARS to be one and the same entity;
- Subject to taxes paid on SA derived sources, profits can flow freely between the branch and holding company;
- No transfer pricing rules apply as the entity cannot sell goods to itself;
- Capital Gains Tax would apply to the branch, only if the branch disposed of an asset related to a permanent establishment in South Africa. As such the holding company would be liable to pay CGT on the disposal of shares in the branch as the shares relate to assets of a permanent establishment in South Africa. (Timothy, 2018)

The structural features of the a branch does not allow for a separation of risk between itself and the holding company. This however, enables the holding company to consume losses and initial start-up cost by conciliating these expenditures and losses against the group's income and profits (ENS, 2015).

2.5.4 Non-resident Foreign companies

A foreign non-resident company is not regarded as a tax resident of South Africa and is subject to the applicable Double Tax Agreement (DTA) as entered into between South Africa and the foreign company.

The concept of effective management is crucial to the establishment of tax residency of a company. This aspect will be discussed in more detail under paragraph 3.4 of the paper.

On the assumption that the foreign company will not be effectively managed from South Africa, the foreign company will be regarded as a non-resident in South Africa and will be governed by the rules of the country of incorporation subject to the following treatment by South Africa: (Income Tax Act, 1962) (Companies Act, No 71 of 2008)

- Non-residents are liable to pay taxes on income derived from a South African source at a rate of 28%, subject to the applicable DTA's which could decrease this rate to as little as 3%;
- Withholding taxes may be applicable to dividends, royalties and interest transactions between SA residents and a non-residents the percentage deducted being subject to DTA between the countries;
- Capital Gains Tax would apply to the non-resident on the disposal of immovable property (or a right or interest in immovable property) situated in South Africa, subject to DTA between the countries.

How the non-resident will be treated and taxed will largely depend on the requirements of the respective countries as well as the terms and interpretation of the DTA directing rights, responsibilities and actions of all stakeholders. (van Wyk, 2015)

2.6 Summary

Directors have a duty to create shareholder wealth and apply their minds to opportunities presented. Using all resources to the advantage of shareholder interest.

The structural features of companies and more so offshore tax structures present companies with a possible strategic advantage. The primary goal of the structure is to allow the group to engage in high risk ventures to access possible growth without compromising the financial integrity of the other interests, optimising taxable deductions and exemptions whilst protecting shareholder interest from unstable economies and currency depreciation, facilitating preferable tax rates to free up cash flow and optimise return on investment and value creation for shareholders.

CHAPTER 3: ANALYSIS OF LEGISLATION AND TREATIES

3.1 Introduction

This chapter will discuss the tax relief opportunities available to the hypothetical case with an established holding company in Malta and Mauritius. An analysis of the applicable tax rules and regulations of Malta and Mauritius will be performed to identify possible tax relaxations.

The purpose of this chapter is threefold:

- To provide the reader with an basic overview of the principles of tax and elements influencing the effective tax rate of a company; and
- To present a basic construct of the tax rules and regulations applicable to Malta and Mauritius; and
- To demonstrate the effects of the double taxation treaties as between South Africa and that of Malta and Mauritius;

To provide the reader with a basic understanding of the relevant legislation and to maintain a logical structure, the researcher will first explain the tax levied and discuss the legislation directing the payment of these taxes. Consideration will be given to the implementation of the relevant tax in SA, Mauritius and Malta. The Double Taxation Agreement (DTA) will be applied to derive and compare the effective tax rates.

3.2 Double taxation

Mauritian, Maltese and South African residents are taxed on their worldwide income subject to double taxation agreements between the countries (PKF, 2016).

The matter of double taxation can be demonstrated by the example below, where no primary residency has been established and both countries treat the transaction as wholly taxable within their jurisdiction.

Please note that a subsidiary in South Africa with its holding company in Mauritius will be used for purposes of this example. Prop Co (subsidiary) declares all profits to the

Mauritian holding company via dividends. Should no DTA be in effect the subsidiary would be liable for the following taxes:

- 28% corporate tax in South Africa, as well as
- 15% dividend tax on dividends paid to the holding company (subject to the holding company holding at least 10% or greater share in the subsidiary), and
- Another 15% corporate tax in Mauritius.

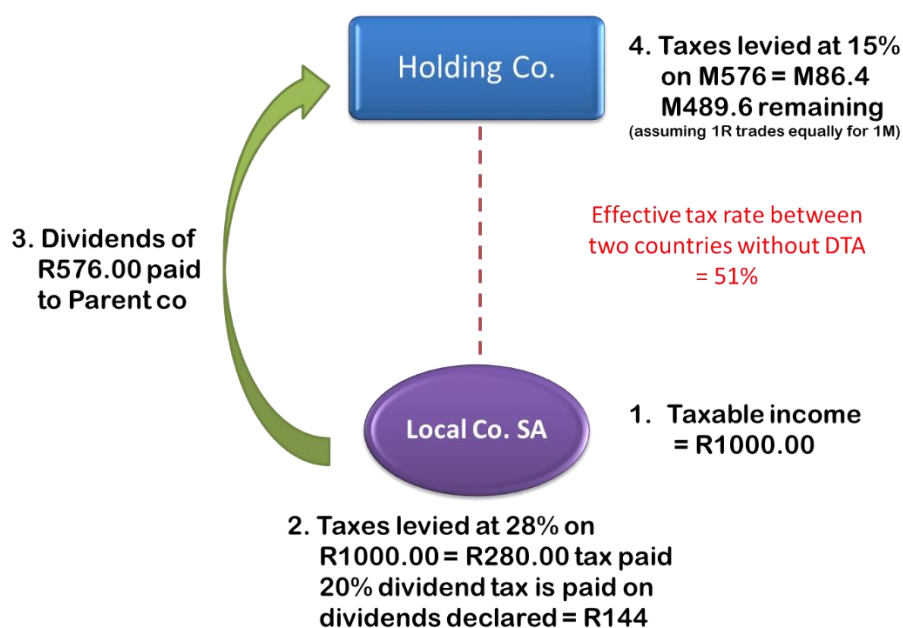


Figure 2: Applicable Tax rate if no DTA enforced

Prop Co effectively being taxed on the same income by both countries, instead of a 28% corporate tax for income derived out of South African activities and 5% dividend tax in South Africa with a 3% corporate tax in Mauritius for income derived from foreign investments as in accordance with the applicable DTA. (Government Gazette No. 471, 2015)

Considering this, it is imperative for countries to engage in DTA's to relieve double taxation on income activities and to stimulate economic growth by allowing cross border trade and investment without undue tax payments.

3.3 Double Taxation Agreements

A DTA and/or treaty is an international agreement entered into between two countries, conferring rights and imposing obligations on one another, in an attempt to mitigate the

taxing right both countries have on the same value creation activity (PKF, 2016, p. 30). The objective of tax treaties is to facilitate cross border trade and investment by removing obstacles that would deter companies from expanding international trade channels (Arnold, 2015, p. 15).

Following the basic rules of treaty interpretation, as set out in *Article 31(1) of the Vienna Convention*; “A treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose” (United Nations, 1969).

International tax legislation is pivotal in supporting the growth of the global economy (OECD, 2013), enabling countries and companies to manage the risks of double taxation and to protect their tax base.

Tax authorities and domestic courts within each jurisdiction should take care in the interpretation of treaties, as the interpretation of terms may vary between jurisdictions. Interpretation and application of tax treaties should in essence give effect to the perceived purpose of the treaty, being relieving in nature as opposed to the limitations set by domestic rules and legislation. (Arnold, 2015, p. 13)

Countries agree that double taxation should be eliminated and that international rules should be clear and easily understandable, providing certainty to revenue authorities, Courts and companies engaged in cross-border activities (OECD, 2014).

To prevent the double taxation consequence as demonstrated in paragraph 3.2 above, SA in its DTA's with other countries, provide a tax credit and/or deduction to foreign companies on income generating activities.

The DTA's as agreed between South Africa and both Mauritius and Malta are discussed in summary below, focusing on key changes as recently effected. The intention of this summary discussion should not be regarded as sufficient for tax planning purposes but should rather direct to the different handling of key aspects between jurisdictions and the key elements to be considered.

3.3.1 Double tax treaties between SA and Mauritius

The original Memorandum of Understanding (MOU) was signed between the Mauritius Revenue Authority (MRA) and the South African Revenue Service (SARS) in 1996 addressing avoidance of double taxation and fiscal evasion. A new DTA was negotiated and entered into force on 17 June 2015 aligning the original agreement with the OECD principals (Croome, 2015).

Key aspects addressed in the new treaty is the revised test for establishing residency, the calculation of withholding taxes on interest and royalties, as well as the liability of companies primarily engaged in real estate (Government Gazette No. 471, 2015).

Withholding taxes on interest and royalties paid by a South African entity to a Mauritius entity was increased from zero, taxable in the country receiving the income, to 5% with a maximum of 10% if left unsettled between the jurisdictions (Government Gazette No. 471, 2015, p. 2 Article 2).

Mauritian companies having a vested interest in the ownership of immovable property in South Africa, who disposes of more than 50% of the value of the immovable property in shares, will be liable for capital gains tax on the disposal of those shares in SA. (Government Gazette No. 471, 2015, p. 7 Article 6)

3.3.2 Double tax treaties between SA and Malta

South Africa and Malta originally entered into their first tax treaty during 1997 (Government Notice No 18461 of 1997) with the aim to strengthen trade networks and encourage investment between countries (Deloitte, 2017). The tax treaty between SA and Malta was thereafter amended in 2014 to comply with OECD principals.

Key aspects addressed in the amended treaty entered into force on 24 January 2014 were the calculation of withholding taxes on dividends. Amendments were also made to the requirements to exchange information in an attempt to curb tax evasion and illegal activities (Government Gazette Protocol No 19 of 2014).

Withholding taxes on dividends paid by a South African entity to a Maltese entity (who is the beneficial owner of the dividend) was increased from a flat 5% tax rate on the gross

amount of the dividends to the following (Government Gazette Protocol No 19 of 2014, p. 2 Article 2):

- (i) Where beneficial owner is a company which holds at least 10% capital in the SA Subsidiary, a Withholding Tax of 5% of the gross amount of the dividends will be payable in South Africa;
- (ii) In all other cases a Withholding Tax of 10% of the gross amount of the dividends will be payable in South Africa.

3.4 The Residency Factor

South African implements a territorial taxation scheme where legal entities are deemed to be resident in the place of effective management, where it was incorporated, established or formed (SARS, 2016).

3.4.1 Legal interpretation by Courts and Authorities in South Africa:

In the case of Oceanic Trust (Oceanic Trust Co. Ltd N.O. and the Commissioner for the South African Revenue Service , 2011), a declaratory order was sought by the trust, being a legal entity, to rule that the trust was not tax resident in South Africa, on the basis that it did not conduct business in South Africa. The High Court applied the test as laid down in the Smallwood case, and outlined the salient features considered to be:

- The place of effective management, being the place where key management and commercial decisions that are necessary for the conduct of business are made.
- The place of effective management will ordinarily be the place where the most senior group of persons (such as the board of directors) makes its decisions, and where the actions to be taken by the entity as a whole are determined.
- It was reiterated that a company can have more than one place of effective management and that each case should be made on a case by case basis.

Section 1 of the Income Tax Act was supplemented with the *Interpretation Note 6 (Issue 2) dated 3 November 2015 Resident: Place of Effective Management (Companies)* stating that a company's place of effective management is the place where key management and commercial decisions for the business as a whole are made. This

approach is in line with the commentary of the OECD, regarding the term “place of effective management” (SARS, 2015).

3.4.2 Mauritius residency for the purposes of tax

Mauritius has implemented a territorial taxation regime where companies incorporated in Mauritius can apply for residency status to the relevant authorities. Each application is decided upon a case by case basis and should be accompanied by a business plan and disclosure of the beneficial ownership (Orca Worldwide, 2016).

For the purposes of this study cognisance will be given to a Type 1 Global Business Company (GBC1). The legal framework of a GBC1 is set up under *The Mauritian Companies Act 2001* and licensed under *The Financial Services Act 2007*. (Tax World, 2017)

Generally, a Mauritius GBC1 is considered to be tax resident in Mauritius if its management and control is exercised from Mauritius (Deloitte, 2017). Notwithstanding the latest OECD’s drive against tax avoidance, the regulations in this respect has remained the same.

3.4.3 Malta Residency for the purposes of tax

Section 2 of the Malta Income Tax Act regards a corporation to be a resident if it is registered or incorporated within its jurisdiction. It also (own emphasis) regard a company to be a resident if it is managed within the borders of Malta, regardless of its country of incorporation. (Deloitte, 2017) This also being in line with the OECD requirements, as detailed in its BEPS action plan. (OECD, 2014)

The Malta Inland Revenue and Malta Tax Act do not define the words “managed and controlled”. To determine this Inland Revenue follows the OECD’s principals on the subject, being the primary place where all board meetings of the company are held and primary decisions are made (Malta Inland Revenue, 2017). Providing certainty in the classification of deemed company residency.

3.4.4 South Africa DTA Override

Preference is however given to the interpretation of Double Taxation Agreements (DTA's) as concluded between SA and other countries (South African Government, 2016). If a company, in terms of the DTA, is regarded as an exclusive resident of a country other than South Africa, it will not be deemed resident for tax purposes in SA regardless of meeting all the requirements of a resident company of SA (Vermeulen, 2013).

South Africa will consider the following questions, being in line with the 2014 BEPS action plan, when establishing the tax residency of companies who operate across boarder: (OECD, 2014)

1. Where does the board of directors or equivalent body hold their meetings;
2. Where does the CEO and other senior executives usually carry on their activities;
3. Where does the senior day to day management take place;
4. Where is the headquarters located;
5. Which country's laws governs the legal status of the company; and
6. Where is its accounting records kept?

Should the questions not establish a clear jurisdiction, it is agreed that; "the competent authorities shall endeavour to determine by mutual agreement where a company will be deemed resident, having regard to its place of effective management. The place in which it is incorporated or otherwise constituted and any other relevant factors" (Government Gazette, 2017).

In the absence of an agreement the company will effectively be taxed by both countries and will not be entitled to any relief or exemption ordinarily provided for by the DTA (Cliffe Dekker Hofmeyr, 2013).

This creates uncertainty as companies are left to the mercy and wide discretion of the tax authorities, without any clear indication as to what will be considered sufficient residency (Blum, 2016). The DTA also fails to set out clear guidelines as to the procedure to be followed if no agreement can be reached between the countries. This ambiguity undermines the goal and purpose of the general rule of law (Maxeiner, 2008).

This uncertainty being in contradiction of the OECD's principles and its commitment to the rule of law, stating that it will "first and foremost seek to emphasize the necessity of establishing a rule-based society in the interest of legal certainty and predictability" (Blum, 2016).

Notwithstanding the abovementioned, the status of the subsidiary companies as detailed in the the hypothetical case is accepted and deemed inline with all statutory requirements.

3.5 Taxes payable

Taxes payable by a company is made up of two main elements.

1. Taxable Income; and
2. Effective Tax Rate.

The taxable income of corporations is generally defined as all sources of income accrued by a company within the year of assessment, minus all deductible business expenses (Douma, 2015).

The effective tax rate refers to the net taxes paid by a corporation after all taxes and tax deductibles have been accounted for (Business Dictionary, 2017). The effective tax rate consists of *inter alia*: (LexisNexis, 2017)

$$\begin{aligned} &\text{Corporate Tax Rate \%} \\ &- \text{Double taxation relief \%} \\ &+ \text{Withholding tax\%} \\ &+ \text{Plus capital gains tax \%} \\ &= \text{Effective tax rate \%} \end{aligned}$$

In line with the objective of this study offshore tax opportunities as presented by Mauritius and Malta will be utilised to decrease the effective tax rate of the hypothetical company.

3.6 Corporate Tax Rate

The corporate tax rate refers to the standard tax rate applied to all companies deemed resident within the applicable jurisdiction of incorporation before the application of any DTA's or incentives offered.

SA resident companies are taxed at 28% on worldwide income accrued by the company whereas non-resident companies are taxed at 28% on that income accrued by the company from SA sources (Deloitte, 2016).

3.6.1 Corporate tax rate Mauritius

Mauritius applies a 15% corporate tax rate on the worldwide income accrued by a Mauritian company from foreign sources outside of its tax jurisdiction. GBC1 companies are however entitled to a foreign tax credit equivalent to the highest of 80% of the Mauritius tax chargeable or the actual tax suffered abroad (Tax World, 2017).

Mauritius effectively having a maximum corporate tax rate of 3% as an 80% rebate is allowed on the imposed tax rate of all profits accrued internationally. Calculating the rebate:

$$\begin{aligned} 80\% \times 15\% &= 12\% \text{ (Rebate)} \\ 15\% - 12\% &= 3\% \text{ (Effective Tax Rate)} \end{aligned}$$

3.6.2 Corporate tax rate Malta

Malta makes use of an imputation system whereby it offers a foreign credit on income distributed making it desirable as the ultimate holding company. To qualify for a refund, the profits must be distributed either to non-resident shareholders or to a Maltese holding company wholly owned by non-residents. This principle supports the fiduciary duty of a director and/or board of the company to maximise shareholder wealth and actively distribute this wealth (Bainbridge, 2015).

Malta effectively has a corporate tax rate of 5% as a 6/7 rebate is allowed on the imposed tax rate. Calculating the rebate:

$$6/7 \times 35\% = 30\% \text{ (Rebate)}$$

$$35\% - 30\% = 5\% \text{ (Effective Tax Rate)}$$

However it should be noted that this rebate is only applicable to income received from foreign sources upon which dividends has been declared and distributed. Should dividends not be declared a flat rate of 35% tax applies (Caruana, 2013).

Table 1: Corporate tax rate and Effective Tax rate after DTA application

Country of residence	Corporate tax	Effective Corporate tax Rate
South Africa ⁽¹⁾	28%	N/A
Mauritius ⁽²⁾	15%	*3%
Malta ⁽³⁾	35%	*5%

- (1) Income Tax Act, Act No. 58 of 1962 as amended;
(2) Income Tax Act, Act No. 16 of 1995 as amended;
(3) Income Tax Act, Chapter 123 of 1949 as amended;

3.7 Withholding Tax

Withholding taxes are payable on a range of taxes, for the scope of this study the withholding taxes applicable to dividends, interest and royalties will be discussed.

South Africa levies a 20% withholding tax on all dividends and a 15% withholding tax interest and royalties paid from SA resident company to non-resident companies (SARS, 2017) (PKF, 2016). These withholding taxes may however be subject to tax treaties enabling a company to either reduce or eliminate the levied withholding taxes. (Deloitte, 2016)

3.7.1 DTA and Withholding Tax between South Africa and Mauritius

Treaty arrangements between South Africa and Mauritius reduce the withholding tax rate applicable to dividends to 5%, subject to the Mauritian company holding at least 10% of the shares in the South African company making the dividend payments (Deloitte Treaty International, 2016). The DTA directs that the two countries may settle on a maximum rate of 10% (Government Gazette No. 471, 2015, p. 2 Article 2). Mauritius does not impose

withholding tax on dividends paid to local companies or non-resident companies (Tax World, 2017).

Under the new DTA as between the two contracting countries the interest paid by the South African company to the Mauritian lender is capped at 10% on the gross amount of the interest paid (PWC, 2017). Mauritius does not impose withholding tax on interest paid by a GBC1 company to a non-resident company. As such no withholding tax would be levied against the interest paid to another jurisdiction from a Mauritian borrower (Bouwer, 2015).

Royalties were historically not taxed between the two contracting countries. The new DTA however levies a maximum rate of 5% on royalty fees paid by a South African company to a Mauritian company (Bouwer, 2015). Mauritian GBC1 companies do not impose withholding tax on royalties (Tax World, 2017).

3.7.2 DTA and Withholding Tax between South Africa and Malta

Treaty arrangements between South Africa and Malta direct Withholding taxes on dividends paid by a South African entity to a Maltese beneficial owner entity at 5% subject to the Maltese company holding at least 10% capital in the South African company. In all other instances a Withholding Tax of 10% is payable on the gross amount of dividends declared. (Government Gazette Protocol No 19 of 2014)

Malta charges no tax on dividends declared and therefor no withholding taxes are levied on the payment of dividends between Malta and a foreign beneficial owner company (Deloitte, 2016).

Under DTA rules the interest paid by a South African company to a Maltese lender is capped at 10% withholding tax on the gross amount of the interest paid. No withholding taxes are levied for interest paid by a Maltese company to a foreign lender.

A 10% withholding tax is charged on royalties paid to a Maltese company for the use to its IP. Malta charges no withholding taxes on royalties paid to a foreign company. (Deloitte, 2017)

3.8 Effective tax rate and withholding tax rate after application of DTA's

After successful establishments of jurisdiction and application of the relevant DTA's the effective tax rates as between Mauritius, Malta and South Africa can be seen in the tables below. The percentages shown summarises the corporate tax and withholding tax payable by a South African subsidiary in the event of payment of dividends, interest and royalties to a (Malta / Mauritius) holding company.

Table 2 Effective Tax Rate between treaty parties

Transactions between SA and	Corporate tax Rate	Withholding Tax on Dividends	Withholding Tax on Interest	Withholding Tax on Royalties
Non-Treaty (1)	28%	20%	15%	15%
Mauritius (2)	3%	5%	10%	5%
Malta (3)	5%	5%	10%	10%

Should the Mauritian and/or Maltese subsidiary in turn wish to transact to any other foreign company and/or holding company no taxes and/or withholding taxes will be levied on such transactions.

Table 3: Tax Rate imposed by country of residence

Country of residence	Corporate tax Rate	Tax on Dividends	Tax on interest	Tax on royalties
South Africa (1)	28%	20%	15%	15%
Mauritius (2)	15%	0%	0%	0%
Malta (3)	35%	0%	0%	0%

(1) Income Tax Act, Act No. 58 of 1962 as amended;

(2) Income Tax Act, Act No. 16 of 1995 as amended; and

(3) Income Tax Act, Chapter 123 of 1949 as amended.

The change between no DTA (as depicted in paragraph 3.2) above and the effects of the application of a DTA on the effective tax rate is evident as depicted in the figure below. Please note that a subsidiary in South Africa with its holding company in Mauritius will be used for purposes of this example.

Prop Co (subsidiary) declares all profits to the Mauritian holding company via dividends.

Should according to the DTA in effect, the subsidiary would be liable for the following taxes:

- 28% corporate tax in South Africa on all world wide income;
- 5% dividend tax on dividends paid to the holding company (subject to the holding company holding at least 10% or greater share in the subsidiary), and
- Another 3% corporate tax in Mauritius.

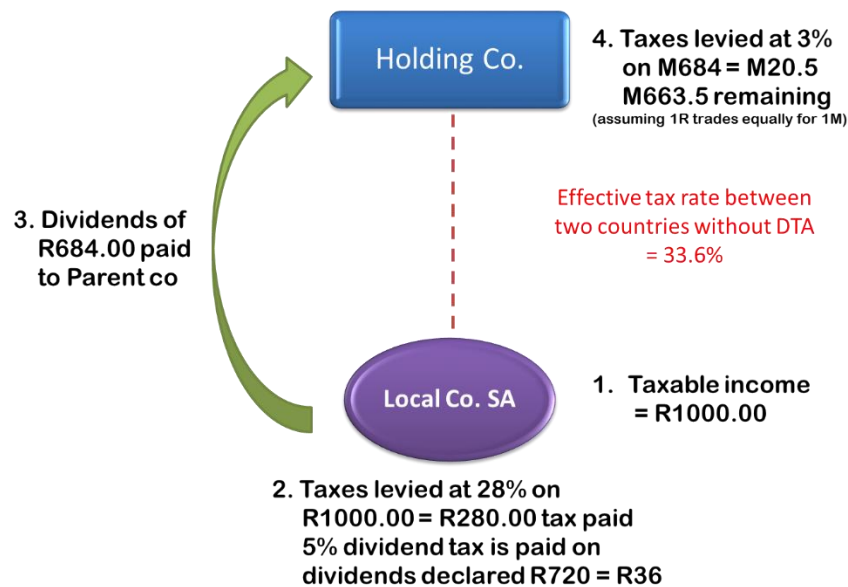


Figure 3: Effects of DTA on Tax rate applied

3.9 Capital Gains Tax (CGT)

Capital gains tax is a tax levied on the profit made on an asset at the time of disposal and/or transfer of ownership thereof (Eighth Schedule to the Income Tax Act 58 of 1962, as amended). South African Tax law dictates that a resident company is liable to pay CGT on assets located both inside and outside of South Africa, this however subject to the DTA between the respective countries (SAIT, 2015).

A non-resident is liable for CGT on the disposal of immovable property held in SA or on the disposal of an assets of a permanent establishment or branch of the non-resident. Shares held in a property company are also deemed to be immovable property and as such the disposed thereof would also trigger CGT. (SARS, 2017)

Considering the Hypothetical Case, Prop Co. (a subsidiary) will be the holder of all property concerns in SA. Should a sale of any property holdings be performed, Prop Co. will be liable for CGT on the property sold.

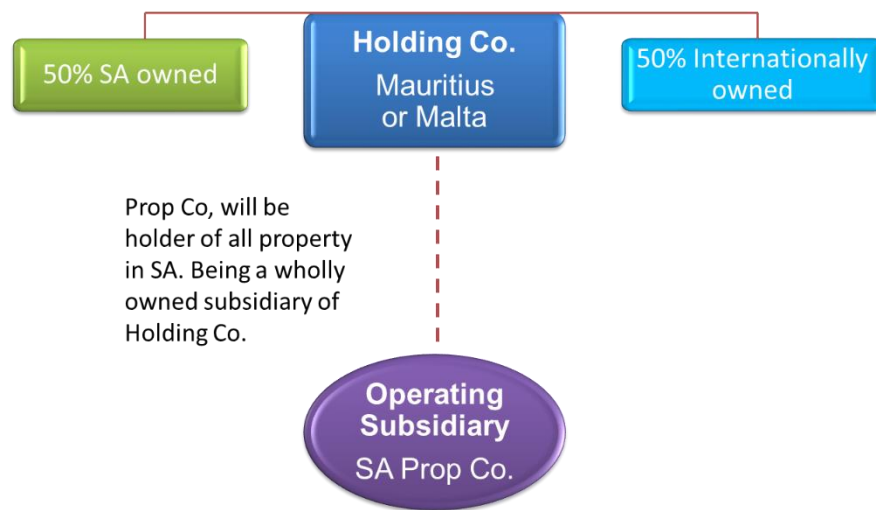


Figure 4: SA Prop Co. CGT structure

The general calculation of the taxable gain includes determining the base and/or acquisition cost of the asset which include the realised expenditures minus the new sale price (Retief, 2017). The detailed description of what cost are included in the calculation of the asset base cost can be found in the definitions under “Asset Base Cost”.

$$\textbf{Asset Base Cost} = \text{Acquisition Cost} + \text{Realised Expenditures}$$

$$\textbf{Taxable base} = \text{Price sold} - \text{Asset Base Cost}$$

$$\textbf{CGT} = \textbf{Taxable base} \times \textbf{CGT tax Rate}$$

Considering the CGT equation, the financial manager needs to either decrease the taxable base by aligning the Asset Base Cost as closely as possible with the sale price ensure that the jurisdiction of incorporation has a low CGT with options to defer and/or offset profits against losses (Investopedia, 2016).

To remain competitive companies need to be able to react quickly with minimal tax consequence for shareholders. Favourable CGT legislation allows for fast transactions and the liquidation of property with asset protection legislation in place. (Deloitte, 2017)

Although South Africa does not have the most competitive CGT regime, the holding company will have to incorporate Prop Co as a subsidiary, due to the need of BEE compliance to mitigate future risks.

3.9.1 Determining the base cost of an asset

The acquisition price is regarded as either the total creation and/or total acquiring cost of an asset. This includes any incidental cost to the acquisition or disposal, advisory, transfer and transport cost associated with the asset. (SARS, 2010)

Improvements made on the asset are also regarded as reasonable deductible expenses on the condition that these expenses have not been deducted for tax purposes in previous returns. (Gangat, 2014)

The wider the ambit of expenses included, the bigger the base value and the smaller the actual realisation of profits will be. This in turn translates to a smaller CGT foot print. The aspects of CGT will only be discussed in summary to provide the reader with a basic understanding of CGT. A practical flow chart to CGT is annexed hereto as Annexure A.

South Africa regulates CGT under *section 32 of the South African Income Tax Act* and includes the following in considering its base cost calculation:

Asset Base Cost

*= Original acquisition cost + transfer fees
+ licence or registration fee + legal fees or advisory fees
+ cost of improvements + conveyancing cost
+ any incidental cost incurred in the acquisition or disposal thereof.*

3.9.2 Offset of Capital Losses

Legislation that allows for the offset of capital losses against capital gains are preferable. *The South African Income Tax Act* provides that losses in excess of R1, 000.00 may be carried over to future years of assessment. (SAIT, 2015)

A capital loss on the disposal of an asset is; “The amount by which the base cost of that asset exceeds the proceeds received or accrued in respect of that disposal, during the year of assessment”. (SARS, 2010)

Mauritian Tax law provides for losses being carried forward for a period of five years. Losses arising out of annual allowances may be carried forward indefinitely. No loss may be carried back. Malta Tax law provides for losses being carried forward indefinitely. No loss may be carried back. (PWC, 2017)

3.9.3 Inclusion and effective CGT

South Africa allows for an 80% inclusion rate to capital gains on company assets where the assets are held by a SA Company. This means that should a company realise a R50,000.00 capital gain within the year of assessment that only 80% of the realised capital gain will be taxable (Honibal et al, 2016).

The statutory rate levied on companies for CGT is equal to that of corporate tax being 28%. Considering the inclusion rate as mentioned above the effective tax rate can be calculated as flows:

$$\begin{aligned} & \text{Inclusion Rate } 80\% \times \text{Statutory rate } 28\% \\ & = \text{Effective Rate of } 22.4\% \end{aligned}$$

Section 35A of the Income Tax Act directs that, in the event of the sale of a South African property with the sale price exceeding R2 mil, owned by non-resident company, a Withholding Tax of 10% is to be withheld on the whole sale amount of the property (SARS, 2017). This withholding tax is regarded as an advance on the non-resident's normal tax for the year of assessment during which that immovable property was sold. (Ernst & Young, 2017)

Mauritius does not charge CGT on property sold within its jurisdiction and as such no CGT is levied on property owned and sold by a Mauritian company. All sales would be subject to the country's laws in which the property is situated (PWC, 2017).

Malta includes the capital gains made as part of the company's normal income being subject to the imputation system, reducing the effective tax rate to 5%, on the world wide

income. An 8% withholding tax was also introduced in the event of disposal of Maltese property to foreign nationals (Deloitte, 2017).

Considering the effective CGT:

Table 4: Effect of CGT and the effective tax rate

Company owning property	Inclusion rate%	Statutory rate%	Effective tax rate%
South African	80%	28%	22.4%
Mauritius	Withholding Taxes	10%	10% to be withheld on transaction in SA
Malta	Imputation system	35%	5% payment in Malta
	Withholding Taxes	10%	10% to be withheld on transaction in SA

3.10 Controlled Foreign Company (CFC)

The basic application and principles of CFC will be discussed in summary and no real application will be made to the hypothetical case as it is accepted that the none of the operations will be treated as a Controlled Foreign Company (CFC) due to South African participation rights and/or voting rights not exceeding 50%, as contemplated in Section 9D of the Income Tax Act. (Income Tax Act, 1962)

CFC legislation has recently enjoyed various amendments across the globe in an attempt by government authorities to ensure monies are taxed in the hands of the benefactor (Vermeulen, 2013) .

In South Africa section 9D of the Income Tax Act sets out the specific legislation applying to CFC's for South African tax purposes (Income Tax Act, 1962). This section requires a South African resident to pay tax on the income generated by the company, registered abroad but managed domestically, at the percentage equal to the ownership, subject to certain exclusions. (Deloitte, 2012, p. 41)

In order for a foreign entity to qualify as “controlled,” more than 50% of the company’s participation rights, to vote and access capital and/or profits are owned jointly and/or individually held by South African residents (Engel, 2002).

Should the company qualify as a CFC, each individual will be taxed, in their personal capacity, on the percentage of participation rights of the CFC’s net income (Naude, 2015).

In terms of *Section 9D(2) of the Income Tax Act*, a South African tax resident will be exempt from CFC tax in the following instances: (Income Tax Act, 1962)

- If a resident, together with all of its connected persons, holds less than 10% of the total voting and/or participation rights of a CFC at the end of the CFC’s tax year or the day immediately before the CFC cease to exist.
- If the participation rights in a CFC are indirectly held by the South African tax resident through another tax resident company.
- Resident holds 50% or less, control and profit share must be more than 50%;

Investors normally shy away from countries that impose strict CFC legislation. In this regard SA’s CFC legislation is found to be complex and restrictive. Holding companies are most often registered in countries without CFC legislation. (Legwaila T. , 2012)

Neither Malta nor Mauritius has any CFC legislation. (PWC, 2017, p. 1582 & 1594)

Considering the abovementioned, it is substantiated that the hypothetical case company will not be a CFC as in terms of *Section 9D(2) of the Income Tax Act*, as the South African shareholding company

3.11 Transfer Pricing

Transfer Pricing rules are adopted by countries to ensure that companies do not over or under charge “related parties” or rather connected entities for the transfer of goods, services or property in an attempt to avoid taxes. This is done by shifting tax profits to a low-tax jurisdiction and/or tax incentive jurisdiction and in turn shifting tax losses to a high taxing jurisdiction. (Vann, 1998, p. 781)

Starbucks is an excellent example of strategic Transfer Pricing, where they capitalise on the full economic advantage of the value chain:

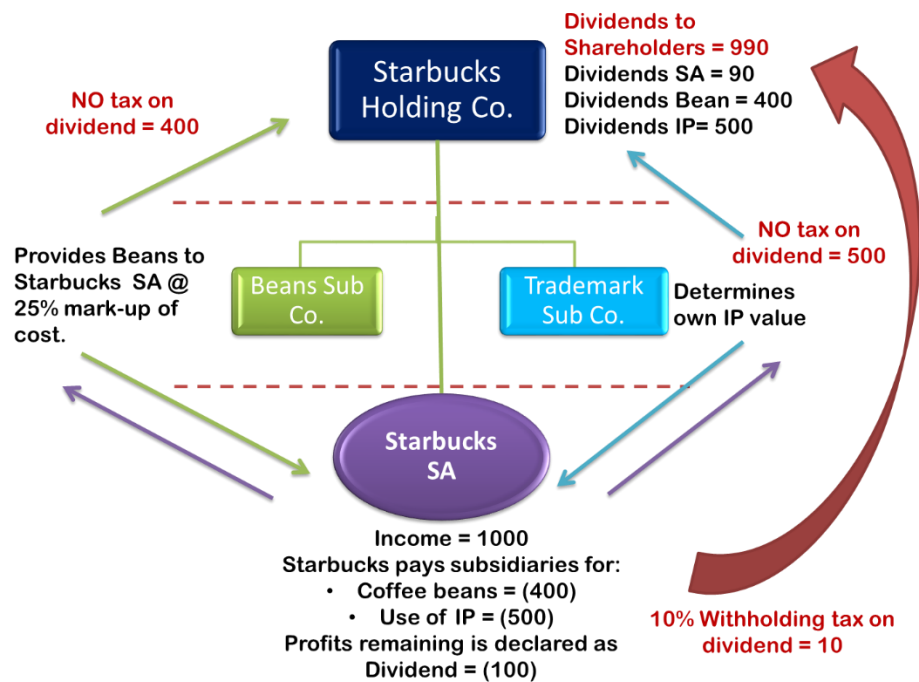


Figure 5: Transfer pricing model

Companies use transfer pricing methods to move funds throughout the organisation in an attempt to defer and/or avoid taxes (Patel, 2015). These transactions do not in a commercial sense create profits for the group but rather have the sole aim of avoiding taxes. To curb this tax avoidance Transfer Pricing rules dictates that where goods or services are supplied or rendered between related entities in a cross-border transaction, that these prices be market related and fair.

To ascertain whether transfer pricing rules should apply to any given transaction, authorities identify two primary elements, being (1) that the transaction took place across borders and (2) that it occurred between related entities (Legwaila T. , 2012).

3.11.1 Cross-Border Transactions

To obtain the deferred tax benefit a transaction is made between two related entities, in different tax jurisdictions, leveraging the different tax rates to obtain a tax benefit, resulting in an across border transaction of goods, services or property. This includes agreements between two non-residents for the supply of goods or services in a different country in which they are established. (Vann, 1998, pp. 481-484)

3.11.2 Transactions between related Entities

This refers to transactions which are made between holding and subsidiary, as explained in figure 4 above. Related transactions allow the related entities to capitalise on the opportunity to be both the supplier and buyer of goods and/or services, setting its own market price. To establish if parties are related countries evaluate the effect of the transaction on the ultimate shareholders. (Vann, 1998, p. 482).

3.11.3 Transfer Pricing vs. Transfer mispricing

Transfer pricing in itself is not an illegal or classified as an abusive tax practice but rather a consequence of global trade. It is estimated that approximately 65% of all transactions happen within or rather than between multinationals, trading across national boundaries but within the same corporate group. (Tax Justice Network, 2013)

Transfer mispricing is evident when companies sell goods or services at excessive prices that is not market related and preformed as method to evade taxes. Mispricing also relates to false invoicing where no real service or goods exchanged between the parties. To distinguish between legal and illegal transfers the OECD published guidelines to help regulate transfer pricing, stating that they acknowledge real business activities with economic substance that is fairly priced and legal (Tax Justice Network, 2013).

3.11.4 At an Arm's Length

The arm's length principal, is also applied in South Africa, dictates that related entities should be treated at "an arm's length", meaning that transactions between these companies should reflect that of an open market environment and be transacted as if the entities where not related (Adams & Adams, 2016). This principal is widely used and endorsed by the OECD, forming the basis of assessment in treaties as between countries, including that of Mauritius and Malta (Tax Justice Network, 2013).

3.11.5 Thin Capitalisation

Thin capitalisation works on the same principle as transfer pricing and as such is also regulated in terms of *section 31 of the Income Tax Act*, in South Africa. In this instance a related company; usually a holding company finances the activities of a subsidiary company by providing the subsidiary with an interest-bearing loan. Often the interest is

subject to a reduced tax rate as a result of the application of tax treaties. (Ernst & Young, 2016)

By doing this, the holding company provides its subsidiary company with a competitive finance option whilst maximising profits in its low tax jurisdiction. Many tax treaties also offer a reduced tax rate on interest received from non-jurisdiction entities. The finance option is activated between parties rather utilising share capital or equity (Legwaila T. , 2012).

3.11.6 South African Transfer Pricing and Thin Capitalisation Provisions

The South African Transfer Pricing and Thin Capitalisation rules aims to curb tax avoidance but also allow transactions with real economic substance between Headquarter Companies and its Subsidiaries. (PKF, 2016)

Prior to 1 April 2012, the South African rules on thin capitalization provided a safe harbour ratio of 3:1 for debt-to-equity, this rule has however been replaced by the current transfer pricing legislation. Without this clear rule entities are kept to real market standards on a case by case basis. (Lockem, 2017)

According to the Draft Interpretation Note on Section 31 of the Income Tax Act 58 of 1962, the arm's length nature of the loan agreement must be assessed from both the borrower and lender's perspective (SARS, 2013). The practical application and question for this will be how much an ordinary finance institution would be willing to loan to the subsidiary, assessing all of its debt and risk associated to the transaction.

For instance: Should the market, on the assessment of the debt to equity ratio of the company, only be willing to lend 30 million to the subsidiary and the holding company lends 50 million to its subsidiary – the holding company, in terms of transfer pricing principles, would not be able to deduct interest on the excess of R20 million loaned to the subsidiary (Lockem, 2017).

3.11.7 Mauritius Transfer Pricing and Thin Capitalisation Provisions

Mauritius has no transfer pricing or thin capitalisation provisions but request that intercompany transactions be done at an arm's length at fair market related prices (Deloitte, 2017).

3.11.8 Malta Transfer Pricing and Thin Capitalisation Provisions

Malta do not have recorded Transfer Pricing rules but it is widely accepted that transactions be done at an arm's length between related companies. No rules are however applicable between unrelated companies. No Thin Capitalisation rules apply. (PWC, 2017, p. 1581)

3.12 Structure Application

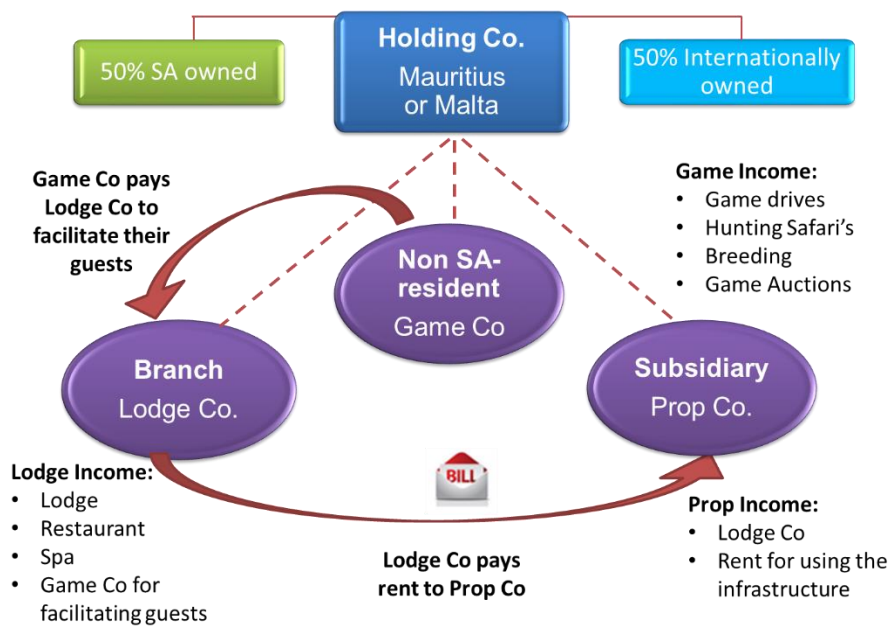


Figure 6: The Arm's length principal explained

Applying our Hypothetical Case together with the principals of transfer pricing and at an arm's length transactions, no extraordinary tax benefit is evident out of the transfer of goods and services.

However the structure is set up in such a way that:

- Competitive but still market related prices for the use of Prop Co assets by Lodge Co can be negotiated;
- Income received by Prop Co (SA Tax resident) can be used towards maintenance and infrastructure development, being a base cost capital gains tax consideration;

- Lodge Co is the cornerstone of the operation and identified as high turnover asset, being a branch funds can flow freely between the holding and subsidiary allowing easy access to funds if and when required.
- Lodge Co will however be liable to pay taxes on all SA derived sources at 28%.
- Game Co is a capital intensive company with low overheads and great profit margins. Being a non resident with no operational base in SA allows for taxation at a lower tax rate.

3.13 Summary

Considering the relevant legislation, both Mauritius and Malta present tax and strategic benefits. On paper both jurisdiction look appealing. However, to ascertain which of the two jurisdictions present the best overall advantage for our hypothetical case, a practical test will have to be applied. This will allow the researcher to test the reactions of each structure and measure the outcome of each accordingly.

CHAPTER 4: TAX FOOTPRINT AND STRATEGIC ADVANTAGE

4.1 Introduction

This chapter will apply facts of the hypothetical company case, to practically identify the tax structure with the smallest tax footprint. Malta and Mauritius will be compared using the weighted average tax model. Favourable tax characteristics will be rewarded with a point allocation, which in turn will be weighted to provide managers with a holistic view of the tax

4.2 Hypothetical company case

The hypothetical company case will be applied to the Mauritian GBC 1 and a Maltese public company as both these tax vehicles have similar attributes and objectives. Thereafter hypothetical company case will also be tested on a South African tax resident company to demonstrate the difference in tax saving and strategic advantage of utilising offshore tax structures, if any.

For the purpose of the application it is accepted that all transactions complied with the relevant laws, corporate governance principles (King IV, 2016) and that all transactions were completed at an arm's length. The setup cost and maintenance cost of each structure will also be considered for purposes of determining the bottom line.

The hypothetical company subsidiaries concluded the following transactions during the year of assessment:

Table 5: Lodge Co transactions (Foreign tax resident status - Branch)

No.	Hypothetical Transactions in year of assessment	Amount
1	Income as derived from business activities	15 mil
2	Running Expenditures Salaries, Stock etc.	(14 mil)
3	Rent paid for the premises owned by Prop Co	(5.5mil)
	Loss	(4.5 mil)
	Income tax @ 28% (No income tax payable on a Loss)	0
Note:	Holding Co has budgeted running loss of R7 million for the branch as it is only expected to turn a profit within 3 years of operations. There is no interest payable on	

	any transaction where the holding supplies funds to the branch as it is a intra group transaction and considered an extension of the holding company. As such the holding company suffers a loss through its branch.
--	--

Table 6: Prop Co transactions (South African Tax Resident)

No.	Hypothetical Transactions in year of assessment	Amount
4	Rent Income from Lodge Co	5.5mil
5	Property maintenance and infrastructure development	(700 000)
6	Holding Co provided the funds needed to acquire the immovable property valued at R120 million. This loan is provided against the security of the assets at prime 10.25% minus 5% = [5.25%per anum] over 25 years. This being inline with market related terms and rates for agricultural and/or game resorts.	(7.32mil)
	Loss	(2.52mil)
	Income tax @ 28% (No income tax payable on a Loss)	0
	Dividends declared	0

Table 7: Game Co transactions (Mauritian / Malta Tax Resident)

No.	Hypothetical Transactions in year of assessment	Amount
7	Income for sale of offspring and breeding genetics	30.5 mil
8	Income form Game and Hunting Safari's	9 mil
9	Expense paid to Lodge Co for game and hunting services	(2.7mil)
10	Game capturing and moving cost	(1.6mil)
11	Insurance at 10% of sale price	(3.05mil)
12	Running Expenditures veterinary and game protection services	(3.5mil)
	Profit	28.65 mil
Note:	This company is not a SA tax resident and therefor not liable for tax payment in SA. However the tax residency status may change on ruling of SARS, after considering the nature and location of activities of the business.	

4.3 The Mauritius vs Malta Holding

Considering the information in the company case and the Hypothetical Transactions as above, the following taxes are payable when utilizing the respective holding structures:

Table 8: Tax footprint under Mauritian holding

No	Estimation of Mauritian group tax footprint:	Amount
1	Prop Co Loan repayments received	7 320 000
2	Game Co dividends	30 000 000
3	Loss Lodge Co	(4 500 000)
4	Total income	32 820 000
5	Tax losses brought forward	-
7	Net Profit before tax	32 820 000
8	Mauritian Corporate Tax levied @3% (15%*80%)	(984 600)
9	Profit after Tax	31 835 400
10	Dividends declared	(10,000,000)
11	No dividend withholding applicable in Mauritius	(0)
12	Cash flow for reinvestment	21 835 400
	Total tax footprint	984 600

Table 9: Tax footprint under Malta holding

No	Total taxes	Amount
1	Prop Co Loan repayments received	7 320 000
2	Game Co dividends	30 000 000
3	Loss Lodge Co	(4 500 000)
4	Total income	32 820 000
5	Tax losses brought forward	-
7	Net Profit before tax	32 820 000
8	Malta Corporate Tax levied @35%	(11 487 000)
9	Profit after Tax	21 333 000
10	Dividends declared	(10 000 000)
11	Imputation credit (10 mil x (6/7*35%))	3 000 000
12	No dividend withholding applicable in Malta	(0)
13	Cash flow for reinvestment	14 333 000
	Total tax footprint	8 487 000

4.4 Results without an international holding

Table 10: South African owned company tax footprint

No	Estimation of tax footprint if all activities was combined in one SA tax resident company without a holding structure:	Amount
1	Prop Co Loss	(2.52mil)
2	Loss Lodge Co	(4.5mil)
3	Profit Game Co	28.65 mil
4	Income	21.63 mil
6	Tax losses brought forward	-
7	Net Profit before tax	21.63 mil
8	Corporate Tax levied @28%	(6 056 400)
9	Profit after Tax	15 573 600
10	Dividends declared	(10,000,000)
11	Withholding tax on Dividends @ 20%	(2 000,000)
12	Cash flow for reinvestment	3 573 600
	Total tax footprint	8 056 400

4.5 Case comparison

Using the company case and running the same transactions through each structure provides some insights into how each structure handles and computes taxable income. The results from the taxes above can be summarised as follows:

Table 11: Tax footprint Mauritius, Malta and South Africa comparison

Country	Effective Tax Rate on taxable income	Equity/Cash on hand after declaring a dividend of 10 mil	Taxes paid
Mauritius	3%	21 835 400	984 600
Malta	35% / 5%*	14 333 000	8 487 000
South Africa	28%	3 573 600	8 056 400

*Only on dividends declared

considering the findings as above, Mauritius offers the smallest tax foot print and greatest tax saving opportunity for the hypothetical company a South African company. However, the bottom line is not complete without considering the setup and maintenance cost.

4.6 Setup and maintenance cost of international structures

The setup and maintenance cost of the offshore structure cannot be ignored as the option to utilise the structure must be both viable and sustainable.

Mauritius has a fixed annual fee, regardless of the amount of capital raised and/or value of shares issued. Malta however approaches it fees on a share capital scale, escalating the registration and annual licencing fee accordingly.

The latest scale, as issued in the *Maltese Companies Act* (2009) amended from time to time, directs the following payments:

Table 12: Malta company registration fee scale (Focus Business Services, 2016)

Share Capital (Authorised)	Registration Fee
Up to € 1500	€ 245
Exceed € 1,500 but not € 5,000	€ 245 plus € 15 for each part over € 500 or part thereof in excess of € 1500
Exceed € 5,000 but not € 10,000	€ 350 plus € 20 for each part over € 1,000 or part thereof in excess of € 5,000
Exceed € 10,000 but not € 50,000	€ 450 plus € 20 for each part over € 2,500 or part thereof in excess of € 10,000
Exceed € 50,000 but not € 100,000	€ 770 plus € 20 for each part over € 10,000 or part thereof in excess of € 50,000
Exceed € 100,000 but not € 250,000	€ 870 plus € 10 for each part over € 15,000 or part thereof in excess of € 100,000
Exceed € 250,000 but not € 500,000	€ 970 plus € 10 for each part over € 10,000 or part thereof in excess of € 250,000
Exceed € 500,000 but not € 1,000,000	€ 1,220 plus € 20 for each part over € 20,000 or part thereof in excess of € 500,000
Exceed € 1,000,000 but not € 2,500,000	€ 1,720 plus € 10 for each part over € 50,000 or part thereof in excess of € 1,000,000
Exceeds € 2,500,000	€ 2,250

Considering the data in the hypothetical case and also not to restrict the company at any one point the researcher identified the € 2,00,000 plus cap as the most appropriate. The

fee connected to this scale was thereafter converted to US Dollar currency, allowing the following comparison:

Table 13: Registration fee summary of Malta and Mauritius

Country of structure	Setup Cost	Annual licence & Return fees
Mauritius (1)	500 USD	2100 USD
Malta (2)	2653.09 USD	1650 USD

(1) (PWC, 2017)

(2) (Malta Companies Act (fees), 2009)

Malta's initial setup cost is almost five times that of Mauritius. However, the annual licencing and return fees are on average 20% cheaper than that of Mauritius.

In a South African context, a Company should be able to put down approximately R40,000.00 to register a company in Malta. To register GBC 1 in Mauritius a SA company should be able to pay approximately R7,000.00.

It should be noted that the fees as stated above is the actual fee charged by the country to register a company within its borders. This does not include fees of management brokers assisting in the setup of bank accounts and paperwork.

4.7 Factors considered when choosing a strategic tax structure

In his study of the ultimate Holding Company jurisdiction, Professor Legwaila (2012) identified various tax and non-tax characteristics of favourable tax jurisdictions for holdings companies. He concluded that boards of director's primary consideration is the bottom-line tax expense.

However, Legwaila argues that without confidence in the jurisdictions' Rule of law, certainty of a constitution that protects its ownership rights and a working judicial system and/or alternative dispute resolution platform, the jurisdiction should not be considered as the investment risk would outweigh the potential tax advantage. (Legwaila T. , 2012)

Considering this, Legwaila (2012) identified the following favourable tax and legal characteristics needed in a tax structure:

- Low income taxes;
- Double taxation treaties;
- No or low tax on dividends;
- The absence of foreign company legislation;
- Favourable capital gains tax regime;
- Favourable tax treaty network;
- Favourable thin capitalisation and transfer pricing regime; and
- Established Rule of Law and/or alternative dispute resolution platform.

Non- tax factors, not directly linked to the bottom line but certainly needed for operational efficacy was identified as: (Cinnamon, 2004)

- Economic and political stability;
- Adequate physical, business, accounting infrastructure;
- Limited bureaucratic interference (red tape);
- Sufficient communication channels and chosen commercial language;
- The ability to distribute profits freely; and
- Effective financial institution system;

Strategic decisions consider both tax and business or non-tax factors (Buys, 2014). South African Chief Financial Officer's (CFOs) look towards the following characteristics when considering strategic tax jurisdictions: (Clark Schafer Hackett CPA's and Advisors, 2017)

- Asset protection;
- GDP growth;
- Shareholder value growth;
- State imposed ownership requirements; for example, Broad-Based Black Economic Empowerment (BBBEE) in South Africa;
- Practical legal requirements and procedure for registering an entity within the jurisdiction;
- Annual statutory cost to remain within the jurisdiction; and
- Local finance or credit access;
- Reputation connected to the Jurisdiction:

From the various sources reviewed the hypothetical case CFO found that it is evident that there are important tax and non-tax factors that should be taken into account by

directors and investors when considering foreign tax jurisdictions. These factors will be analysed and weighed in terms of the scope of the study, forming the basis of the weighted average model and hypothetical company test to identify the best foreign tax jurisdiction.

4.8 Classification of key factors identified

Key factors identified were grouped and categorised according to corresponding topics and/or effect on the company's bottom line and strategic advantage.

Relevant legislation and the business environment of Mauritius and Malta were compared, identifying similarities and patterns between the different tax structures. Recurring codes were identified and sorted into sub themes which in turn correlated 4 main themes. Each main theme received a weighted value indicating its relevance in identifying a favourable tax jurisdiction and its relation to the scope of this study. The table below depicts the codes, themes and weights appropriated.

Table 14: Weighted average model with Themes and codes considered

Weight	Themes	Sub-themes	Codes	Sub Codes
5	Bottom line	Cash in Hand	Taxable Rate Par 4.2 - 4.6 above	• Exemption method • Corporate tax % • Withholding Tax on transactions • Dividend Tax • Capital Gains Tax • Taxation of Subsidiary profits • Exemption method
		Maintenance	• Initial setup cost • Annual registration and return fees	
		Ease of Management	• Language • Taxable period • Tax return requirement • Tax return due date • Resident Bank Acc • Board meetings to be held • Tax residency requirements	

1.5	Business Friendly		• Ease of doing business rating • Time zone	
		Reporting	• Resident Auditor • Annual return • Filing of Audited Accounts • Consolidated tax return • Accounting principles for financial statements	
		Structure Requirements	Minimum requirements	• Minimal Capital • Min Directors • Min Shareholders • Restriction on nationality/residency of shareholders? • Corporate shareholders allowed?
			Compliance	• Registered office • Resident Secretary • Local director requirement? • Corporate directors allowed? • Directors meeting • Shareholders' meeting requirement? • Shareholders' meetings location • Corporate shareholders • Off the shelf companies allowed? • Company incorporation time
2	Strategic Advantage	Trade	• Treaty Access • Currency • Finance rate • Ease of obtaining Credit / Finance	
		Structure	• CFC legislation • Transfer Pricing • Asset protection	

			• Capital losses • Carry forward of ordinary tax losses?	
1.5	Risk Management	Privacy	• Publicly accessible records of directors? • Publicly accessible records of shareholders? • Publicly accessible financial statements • Beneficial ownership disclosure?	
		OECD & Reputation	• OECD Compliant • Regarded as a tax haven?	
		Political	• Political stability • State imposed ownership requirements	
		Economical	• Currency depreciation • GDP growth	
		Legal	• Rule of law • Dispute resolution	
Total Weight Allocation = 10				

The weights as displayed above were allocated to each main theme according to the importance in relation to that of other main themes.

- A weight of 5 (five) was allocated to the bottom line as this is considered the greatest influencer at the board room table. Identifying the jurisdiction with the smallest tax footprint also correlates with the primary objective of this study.
- A weight of 2 (two) was allocated to factors affecting the strategic advantage of the jurisdiction as this translates to future monetary advantage and growth of the company.
- A weight of 1.5 (one and a half) was allocated to both business friendly and risk management themes, as these themes are underlining to the success and sustainability of the tax structure.

Each code and/or sub-codes represents a comparable factor between the two tax jurisdictions. The jurisdiction with a most favourable approach to the factor, at all-times considering the objective of the main theme, received a 1 (one). The less favourable received a 0 (zero).

In the event of both jurisdictions displaying a favourable approach, both received a 1 (one) and as such should both approaches be negative both received a (zero).

At the end of each main theme the total of each jurisdiction will be added and multiplied with the weight allocated to the theme, providing a weighted average for each main theme. The total weighted average of each section will be added to compute and identify the best overall tax jurisdiction.

4.9 Table comparison of Mauritius and Malta

The table below provides comparative view of some of the most important factors to be considered when choosing a tax jurisdiction. It acts as a quick comparison tool for financial managers to assess holding jurisdictions on non-tax factors by attaching applicable weights to each factor and/or theme considered.

All information contained in the table was sourced and cited according to the super text number indicated in each column. The list of references attached hereto as annexure B.

Table 15: Weighted average model for Malta and Mauritius

Sub-themes	Codes	Sub Codes	Malta	W	Mauritius	W
Bottom line	Tax footprint and Cash in Hand		Imputation system only applicable if the funds are distributed to shareholders	0	Smallest tax footprint and most Cash on hand for reinvestment	1
	Maintenance		Initial set up cost 2653 USD ²	0	Initial set up cost 500 USD ⁴	1
			Annual Registration Cost 1650 USD ²	1	Annual Registration Cost 2100 USD ⁴	0
Weighted Factor 5			5	1	10	2
Ease of Management	Language		Maltese & English ⁹	1	English ⁸	1
	Taxable period		Calendar year (01/01 - 31/12) ⁹	0	Calendar or accounting year ⁸	0
	Tax return requirement		Yes ⁹	0	Yes ⁸	0
	Tax return due date		9 months after the tax year-end ⁹	1	6 months after the tax year-end ⁸	0
	Resident Bank Account		Yes ⁹	0	Yes ⁸	0

	Board meetings to be held		Anywhere ⁹	1	Anywhere, but should include at least 2 directors from Mauritius ⁸	0
	Tax residency requirements		Management and control to be exercised in Malta ⁹	0	Management and control to be exercised in the Mauritius ⁸	0
	Ease of doing business rating		76 out of 160 countries ¹⁰	0	49 out of 160 countries ¹⁰	1
	Time zone		GMT +1	0	GMT+4	0
Reporting	Resident Auditor		Licenced Auditor ⁹	0	Licenced Auditor ⁸	0
	Annual return		Yes, return should be submitted to the Registrar of Companies ⁹	0	Yes ⁸	0
	Filing of Audited Accounts		Yes, return should be submitted to Maltese Financial Services Authority within nine months from the end of the accounting period ⁹	0	Yes, to Financial Services Commission only ⁸	0
	Consolidated tax returns		Allowed, Maltese tax system allows for Maltese resident companies to form a group for tax purposes whereby tax losses may be transferred between members of the tax group. ⁹	1	Not allowed ⁸	0
	Accounting principles for financial statements		IFRS ²	1	IFRS ⁴	1
Structure Requirements	Minimum requirements	Minimal Capital	€46,587 ²	0	US\$1 ⁴	1
		Min Directors	1 ²	1	1 ⁴	1
		Min Shareholders	2 ²	0	1 ⁴	1
		Restriction on nationality/re	None ⁹	1	None ⁸	1

		sidency of shareholders?				
		Corporate shareholders allowed?	Yes ⁹	1	Yes ⁸	1
	Compliance	Registered office	In Malta ⁹	0	In Mauritius ⁸	0
		Resident Secretary	Compulsory, must be a registered agent in Malta ¹¹	0	Yes, may be natural person of corporate ³	1
		Local director requirement?	No ⁹	1	Yes, 2 directors must be Mauritian ⁸	0
		Corporate directors allowed?	Yes ⁹	1	No ⁸	0
		Directors meeting	Anywhere ⁹	1	Anywhere, but include at least 2 directors from Mauritius ⁸	0
		Shareholders' meeting requirement?	Yes ⁹	0	Yes ⁸	0
		Shareholders' meetings location	Anywhere ⁹	1	Anywhere ⁸	1
		Corporate shareholders	Allowed ⁹	1	Allowed ⁸	1
		Off the shelf companies allowed?	Yes but difficult to find due to high minimum capital requirement ⁹	1	No ⁸	0
		Company incorporation time	2 - 4 days ⁹	1	15/20 days ⁸	0
	Weighted Factor 1.5		22.5	15	16.5	11
Trade	Treaty Access		To 70 countries ²²	1	To 44 countries ¹	0
	Currency		Euro (€) ⁹	1	Mauritian Rupee (MUR) but any currency allowed ⁸	1
	Finance rate		3.82%	1	8.50%	0

	Ease of obtaining Credit / Finance	Getting Credit Ranking: 142 out of 190 countries ¹²	0	Getting Credit Ranking: 52 out of 190 countries ¹²	1
Structure	CFC legislation	No ¹⁹	1	No ²⁰	1
	Transfer Pricing	No rules, generally accepted at arm's length ¹⁹	1	No rules, generally accepted at arm's length ²⁰	1
	Asset protection	Limited liability is ensured for shareholders and assets protected from debtor of SA Subsidiary Company ¹⁹	1	Limited liability is ensured for shareholders and assets protected from debtor of SA Subsidiary Company ²⁰	1
	Capital losses	Can be carried forward indefinitely ¹⁹	1	Not tax-deductible since capital gains are not taxable ²⁰	1
	Carry forward of ordinary tax losses?	Yes, indefinitely ¹⁹	1	Yes, 5 years ²⁰	1
Weighted Factor 2		16	8	14	7
Privacy	Publicly accessible records of directors?	Yes ¹⁹	0	No ²⁰	1
	Publicly accessible records of shareholders?	Yes ¹⁹	0	No	1
	Publicly accessible financial statements?	Yes ¹⁹	0	No ²⁰	1
	Beneficial ownership disclosure?	Yes, to service provider ¹⁹	1	Yes, to service provider and Authorities ²⁰	1
OECD & Reputation	OECD Compliant	Yes. White list status ²³	1	Yes. White list status ²³	1
	Regarded as a tax haven?	No ²³	1	No ²³	1
Political	Political stability	Good ¹³	1	Good ¹³	1
	Political Stability and Absence of Violence/Terrorism: Range (-2.5 to 2.5)	1.1 ¹⁸	1	1 ¹⁸	0
	Government Effectiveness: Range (-2.5 to 2.5)	0.9 ¹⁸	0	1 ¹⁸	1
	Control of Corruption: Range (-2.5 to 2.5)	0.7 ¹⁸	0	0.3 ¹⁸	1

	Special levies	None ²²	1	Banks pay: 1.5% of turnover and 1.70% on book profit; Mobile network pay: 5% of book profit, and 0.50% on operating income ¹	0
	Government Type	Parliamentary republic ¹⁷	1	Parliamentary republic ¹⁷	1
	State imposed ownership requirements	None ¹⁸	1	None ¹⁸	1
Economical	Global competitive ranking	40 out of 138 countries ¹⁴	1	45 out of 138 countries ¹⁴	0
	Index of Economic Freedom	Ranking: 15 / Score: 62.5 (Moderately free) (2016) ¹⁶	1	Ranking: 15 / Score: 74.73 (Mostly free) (2016) ²¹	0
	GDP growth	USD 9.8 billion (2017), estimate ¹⁷	0	USD 12.5 billion (2017), estimate ¹⁷	1
	Rule of law: Range (-2.5 to 2.5)	1.1 ¹⁴	1	0.8 ¹⁴	0
Legal	Enforcing contracts	Established rule of law: Enforcing Contracts Ranking: 37 out of 190 countries ¹⁵	0	Established rule of law: Enforcing Contracts Ranking: 27 out of 190 countries	1
	Dispute resolution	Well established forum: Follows the EU Arbitration Convention (90/436/EEC) guideline in dispute resolution tax matters ¹⁹	1	Established forum: Mauritius Revenue Authority has 30 days to give a ruling which should be published. A ruling is binding on the MRA. ²⁰	1
Weighted Factor 1.5		18	12	21	14
		61.5		61.5	

Mauritius started with a substantial lead due to its preferential tax bottom line. This result supported by the hypothetical company case that was performed. Malta won the ease of doing business sections due to its relaxed regulations, little to no restrictions and its easy compliance measures.

The jurisdictions performed equally well on reputation and risk. Mauritius presented privacy to its shareholders and directors as well as a well-established and efficient judicial system, whereas Malta presented a robust political and economic environment. Both jurisdictions are also OECD compliant and not considered to be tax havens.

The strategic advantage section was won by Malta due to its well established treaty network and exceptionally low interest rate offered by banks. Mauritius was however not far behind, also presenting good strategic prospects.

The weighted tax framework concluding a tie between Malta and Mauritius at 61.5 points each.

4.10 Conclusions and recommendations

All the congress, all the accountants and tax lawyers, all the judges, and a convention of wizards all cannot tell for sure what the income tax law says- Walter B. Wriston

Your perception of tax law depends on your mandate. It is the mandate of Government to collect taxes and apply these funds to protect its citizens, grow its economy and combat unemployment (Slaughter, 2017).

Company directors however owe a fiduciary duty to its shareholders to create shareholder wealth and offer competitive return on investment, subject to the constitution and statutory principals. (Lombard, 2014)

What governments and companies however have in common is its drive and purpose to actively pursue all legal opportunities that would aid their cause. The opportunities available to companies to further their mandate was explored and it was concluded that a tax strategy, utilising tax avoidance tactics and tax structuring strategies could:

- Decrease one of the single largest long term expenses in any company (Eberhart, 2017);
- Increase positive cash flow which creates growth, flexibility and cheaper financing options (Kokemuller, 2017);
- Lower cost of acquiring equity (Goh et al, 2016);
- Provide asset protection and access to better finance opportunities and lending rates (Baker, 2016);

- Encourage dynamic management principles and optimal utilisation of all resources to create a competitive advantage (Almand, 2016);
- Hedge against currency depreciation (Paine, 2016).

To unlock this competitive advantage an international investment company requested a hypothetical company case test. The parameters of the test was set to simulate the companies expected operations, restricting its analysis to Mauritius and Malta. Various assumptions and limitations were made as no one size fits all solution is imaginable.

To provide management with a holistic picture of both tax and non-tax opportunities available, a weighted average tax model was implemented to identify the jurisdiction that would offer the greatest overall strategic advantage.

By duplicating and running the same transactions through each structure the hypothetical case could be compared to one another, revealing interesting and insightful characteristics. When compared to the South African structure Mauritius presented a 87.77% tax saving whereas Malta, on the facts of the hypothetical case, presented no tax saving but however provided greater funds available to the cash flow.

The importance of non-tax factors was also established. These factors although not directly linked to an immediate saving for the company ensure the sustainability and effectiveness of the structure.

Factors were weighted in relation to the importance attached thereto by the academics and the CFO of the international investment company. Four main themes were identified and used as the basis for comparing the two tax structures:

1. The tax bottom line – weight 5
2. Business friendliness – weight 1.5
3. Risk & reputation - weight 1.5
4. Strategic Advantage - weight 2

The result of the weighted average tax model resulted in a tie with both Mauritius and Malta scoring 61.5.

The board of directors reviewed the sections won by each jurisdiction, summarised as follows:

1. The Tax Bottom Line – Mauritius
2. Business Friendliness – Malta
3. Risk & Reputation
 - a. Privacy - Mauritius
 - b. Well-established and efficient judicial system - Mauritius
 - c. Stable political environment - Malta
 - d. Robust economic environment – Malta
 - e. OECD compliant – Mauritius & Malta
4. Strategic Advantage – Malta (by one point)

Considering the groups capital intense operations and its need to raise capital the board elected to add an additional weight to the ease of obtaining credit with the jurisdictions. Malta placed 142 out of 190 countries and Mauritius 52 out of 190 in a survey done by the World Bank. The substantial tax saving offered by Mauritius can also not be ignored and as such Mauritius was elected as the preferent holding jurisdiction.

In concluding comments, Malta shows ideal characteristics for shareholders an/or holding companies that declare full dividends to its shareholders that does not place a need on cash flow or reinvesting cash on hand for future investment.

In forming the conclusion of this study, it should be noted that tax legislation is under great pressure to change and is subject to the wide ambit of discretion afforded to SARS to rule on the tax residency status of a company. Considering this a tax saving cannot be guaranteed as the location base activity will have to be BEPS approved by SARS. Notwithstanding the above mention scrutiny, the weighted average tax model may guide the considerations of management and provide a holistic view of the opportunities available to companies in strategic tax planning.

Considering the tied result it is recommended that the weighted average tax model be refined to only examine and weigh only the factors directly influencing the board decisions.

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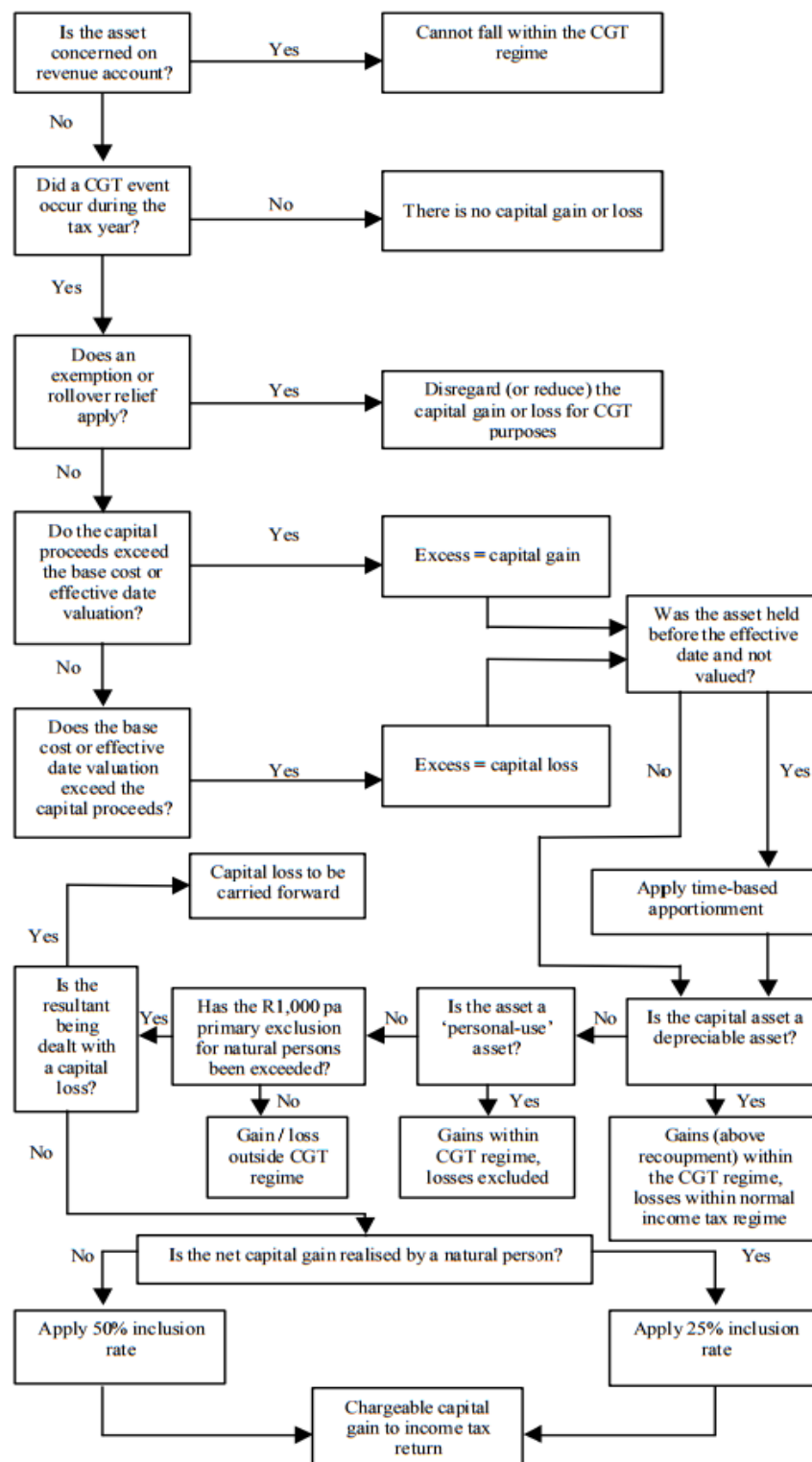
FLOWCHART – Simplified overview of the CGT process

Figure 7: FCF Flowchart

Annexure B

1.	http://www.ocra.com/jurisdictions/mauritius01.asp
2.	http://www.fbsmalta.com/malta-company-formation/
3.	http://www.mra.mu/download/OutlineofMauritiusIncomeTaxSystem.pdf
4.	https://www.fscmauritius.org/en/being-licensed/applying-for-a-licence/global-business
5.	https://openknowledge.worldbank.org/bitstream/handle/10986/25097/108582.pdf?sequence=7
6.	https://www.imf.org/external/pubs/ft/weo/2016/02/weodata/index
7.	https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-maltaguide-2014.pdf
8.	https://www.world.tax/comparisons/compare-companies.php
9.	https://www.world.tax/countries/malta/malta-tax-system.php
10.	https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?end=2016&locations=SG&name_desc=false&start=2016&view=bar
11.	http://gstaxconsultants.com/setting-up-a-maltese-company/
12.	http://www.doingbusiness.org/data/exploretopics/getting-credit
13.	http://databank.worldbank.org/data/reports.aspx?source=worldwide-governance-indicators
14.	http://databank.worldbank.org/data/reports.aspx?source=worldwide-governance-indicators
15.	http://www.doingbusiness.org/data/exploretopics/enforcing-contracts
16.	http://www.heritage.org/index/visualize?cnts=malta&type=1
17.	http://info.worldbank.org/governance/wgi/#home
18.	http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf
19.	https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-maltahighlights-2017.pdf
20.	https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-mauritiushighlights-2017.pdf
21.	http://www.heritage.org/index/visualize?cnts=maritius&type=1
22.	http://www.ey.com/Publication/vwLUAssets/EY-doing-business-in-malta-new/\$FILE/EY-doing-business-in-malta-new.pdf
23.	http://www.oecd.org/countries/monaco/listofunco-operativetaxhavens.htm