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An investigation into whether the South African and Mauritian preferential holding company regimes may undermine fiscal transparency

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Abstract

Investor interest in the untapped growth offered by the African continent is increasing dramatically. The South African Headquarter Company and the Mauritian Global Business Licence regimes, offer the most expansive double tax treaty networks of all African holding company regimes. Therefore, both of these regimes are attractive to international investors wanting to establish a gateway into Africa.

Governments have identified the need to share ownership information in respect of corporations so as to curb base erosion and profit shifting and to prevent fiscal losses arising from unintended deliberate abuse of double tax treaty benefits.

This dissertation examines whether Africa's two favourable holding company regimes, the South African Headquarter Company and the Mauritian Global Business Licence, have characteristics and installed measures to ensure the fiscal transparency so desired by the international community at large.

The examination commences with a review of features within the Mauritian and South African holding company regimes which perpetuate the concealment of the identities of the owners of these holding companies. Without measures in place to overcome these anonymity features, the Headquarter Company and Global Business Licence corporation regimes would undoubtedly undermine fiscal transparency. Therefore, this dissertation investigates the legal and administrative measures in place to overcome these roadblocks to fiscal transparency. This examination established that sufficient measures are in place to facilitate the recording and maintenance of ownership information for headquarter companies and global business licence corporations.

Without an effective means to obtain and share accurate ownership information of headquarter companies and global business licence corporations, the identities of the owners effectively would be concealed. Given the administrative and legal elements installed by these jurisdictions, further examination identifies that the South African and Mauritian authorities employ appropriate means for gathering ownership information for these holding company regimes. Both South Africa and Mauritius have concluded enforceable double tax and tax information exchange agreements which enable the South African Revenue Service and the Mauritius Revenue Authority to share ownership information with foreign treaty partners. South Africa and Mauritius are committed to transparency standards and continue to expand the number of double tax agreements and tax information exchange agreements to

enable the effective exchange of information relating to the ownership of headquarter companies and global business licence corporations.

This dissertation has identified that measures employed to date and the continued efforts of South Africa and Mauritius to further the sharing of ownership information will ensure the identification of owners of headquarter companies and global business licence corporations and will enable the sharing of this information with foreign tax authorities. In so doing, the fiscal transparency of these preferential holding company regimes is unlikely to be undermined.

Abbreviations used

CFC	Controlled foreign company
FSC	Financial Services Commission of Mauritius
GBL1	Category 1 Global Business Licence
GBL2	Category 2 Global Business Licence
GBL corporations	Corporations licenced under the Global Business Licence regime
MRA	Mauritius Revenue Authority
OECD	Organisation for Economic Co-operation and Development
SADC	Southern African Development Community
SARS	South African Revenue Service

Table of Contents

1. Introduction	1
1.1 Background	1
1.1.1 Africa's holding company offerings.....	1
1.1.2 Tax advantages offered by preferential holding company regimes	2
1.1.3 South African Headquarter Company and Mauritian Global Business Licence regimes as preferred African holding company regimes.....	3
1.1.4 Headquarter companies and global business licence corporations as premiere Africa holding company regimes	7
1.1.5 The international community's drive to improve tax transparency to counter tax avoidance and tax evasion.....	7
1.2 Research question.....	8
1.3 Scope limitations of this dissertation.....	8
1.4 Limitations of this dissertation.....	9
1.5 Research method	9
1.6 Structure of the dissertation	9
2. South Africa as a fiscally transparent holding company regime.....	11
2.1 South Africa's Headquarter Company regime	11
2.2 Criteria for qualifying as a headquarter company.....	11
2.2.1 South African tax resident company	11
2.2.2 Shareholder composition	14
2.2.3 Foreign asset holding.....	14
2.2.4 Income requirements	14
2.3 Factors presented by headquarter companies which may roadblock the identification and exchange of ownership information.....	15
2.3.1 Corporate form of a headquarter company	15
2.3.2 Foreign incorporated companies	17
2.3.3 Foreign foundations and foreign trusts.....	17
2.3.4 Issuing of bearer shares.....	17
2.3.5 Registration of nominee shareholders	19
2.3.6 Conclusion - identification of inherent factors presented by headquarter companies which may roadblock transparency standards	19
2.4 Measures undertaken by the South African Legislature and South African authorities to remove impediments to identifying owners of headquarter companies	20

2.4.1	Obtaining and maintaining information regarding private limited liability companies and close corporations	20
2.4.2	Obtaining and maintaining ownership information of co-operatives.....	24
2.4.3	Obtaining and maintaining ownership information where foreign companies qualify as headquarter companies	26
2.4.4	Obtaining and maintaining ownership information where foreign foundations or foreign trusts qualify as headquarter companies	27
2.4.5	Obtaining ownership information where nominee shareholders are appointed.	29
2.4.6	Means employed by South Africa as an effective manner for gathering ownership information.....	30
2.5	The capability of South African authorities to share ownership information with foreign jurisdictions.....	37
2.5.1	Effectiveness of South African exchange of information agreements	37
2.5.2	Exchange of ownership information with all relevant partners	39
2.5.3	Conclusion as to whether ownership information of headquarter companies may be effectively shared.....	40
2.6	Conclusion - South African Headquarter Companies regime as a fiscally transparent holding company regime	41
3.	Mauritius as a fiscally transparent holding company regime	42
3.1	Mauritian Global Business Licence regime.....	42
3.2	Qualifying criteria for a corporation obtaining a GBL1 or GBL2 licence	42
3.2.1	Mauritian resident corporation.....	42
3.2.2	Additional qualifying criteria for GBL1 registration	45
3.2.3	Additional qualifying criteria for GBL2 registration	46
3.3	Factors presented by the Global Business Licence regime which may roadblock the identification and exchange of ownership information.....	46
3.3.1	Form of GBL1 and GBL2 corporations.....	46
3.3.2	Mauritian and foreign trusts.....	47
3.3.3	Mauritian and foreign foundations	47
3.3.4	Mauritian and foreign limited liability partnerships.....	47
3.3.5	Issuing of bearer shares.....	48
3.3.6	Registration of nominee shareholders	48
3.3.7	Conclusion - identification of inherent factors presented by the Global Business Licence regime which may roadblock transparency standards.....	48
3.4	Measures undertaken by the Mauritian Legislature and Mauritian authorities to remove impediments to identifying the owners of GBL1 and GBL2 corporations....	49

3.4.1	Obtaining and maintaining information regarding private limited liability companies.....	49
3.4.2	Obtaining and maintaining beneficial ownership information for Mauritian and foreign trusts.....	54
3.4.3	Obtaining and maintaining information for Mauritian and foreign foundations	59
3.4.4	Obtaining and maintaining information for local and foreign limited liability partnerships	62
3.4.5	Obtaining beneficial ownership information where nominee shareholders are registered for GBL1 and GBL2 companies	66
3.4.6	Means employed by Mauritius as an effective manner for gathering ownership information.....	67
3.5	The capability of Mauritian authorities to share ownership information with foreign jurisdictions.....	75
3.5.1	Effectiveness of Mauritian exchange of information agreements.....	76
3.5.2	Exchange of ownership information with all relevant partners	77
3.5.3	Conclusion as to whether ownership information of GBL corporations may be effectively shared.....	78
3.6	Conclusion – The Mauritian Global Business Licence regime as a transparent holding company regime	78
4.	Conclusion – the fiscal transparency of the South African and Mauritian preferential holding company regimes	80
	Appendix A: Table of African Preferential Holding Company Regimes.....	82
	Appendix B: South Africa – double tax treaty network	85
	Appendix C: Mauritius – double tax treaty network.....	89
	Appendix D: Botswana – double tax treaty network.....	92
	Appendix E: Cape Verde – double tax treaty network.....	93
	Appendix F: Republic of Congo – double tax treaty network.....	94
	Appendix G: Seychelles – double tax treaty network	95
	Appendix H: Tax information exchange agreements concluded by South Africa.....	97
	Appendix I: Tax information exchange agreements in the process of negotiation by South Africa	99
	Appendix J: Tax information exchange agreements concluded by Mauritius	100
	Appendix K: Tax information exchange and double tax agreements in the process of negotiation by Mauritius.....	101
	Bibliography	102

1. Introduction

1.1 Background

1.1.1 Africa's holding company offerings

Current and anticipated increased interest in Africa by foreign investors is clear to see. In the decade from 2000 to 2010, the collective flow of foreign direct investment, portfolio investment and official development assistance is estimated to have increased from US\$ 27 billion to US\$ 126 billion.¹ African states are competing to secure this much needed foreign investment and in so doing employ various strategies.

African states offer holding company regimes in vying for the position as the “gateway to Africa”. South Africa introduced its Headquarter Company offering and continues to tailor this offering to lure foreign corporations into using South Africa as a holding company jurisdiction. Mauritius has proved to be a popular jurisdiction to establish holding companies through its Global Business Licence offering. Botswana and the Seychelles have also joined their SADC partners. Botswana offers multinational corporations its International Financial Services Centre regime, whilst the Seychelles offers its International Business Companies regime to multinational corporations looking for a country to host international businesses. Other African states offering holding company regimes are Cape Verde and the Republic of Congo.²

To entice owners of geographically-spread corporations, jurisdictions may offer a regime under which these internationally-based owners can house their corporations in a beneficial manner. The benefits offered by holding company regimes include their availability as a vehicle to raise finance internationally, to reduce barriers presented by exchange control, asset protection, ease of group reorganisations and in particular to maximise local and international tax advantages.³

¹ African Development Bank, Organisation for Economic Co-operation and Development, United Nations Development Programme, United Nations Economic Commission for Africa. 2011. *African Economic Outlook 2011* at 44. Available: http://www.oecd-ilibrary.org.ezproxy.uct.ac.za/development/african-economic-outlook-2011_aeo-2011-en [21 August 2012]

² Refer to Appendix A to this dissertation which sets out African states offering regimes aimed at promoting these countries as holding company jurisdictions.

³ Legwaila, T. 2010. *The Suitability of the South African Corporate Tax Regime for the Use of South African Resident Intermediary Holding Companies*. University of Pretoria (Doctor of Laws) at 44 -56.

1.1.2 Tax advantages offered by preferential holding company regimes

Various tax benefits may be offered by regimes to entice the use of that country as a holding company jurisdiction.

In motivating Belgium as an effective holding company jurisdiction, Dierckx, states two-key tax factors offered to qualifying Belgium holding companies – an exemption from direct tax for dividends received; and an exemption from capital gains tax.⁴ Dierckx motivates Belgium further by identifying features which promote Belgium as a preferred jurisdiction for international holding companies. Tax specific features explained by Dierckx include an advance ruling offering allowing an element of certainty for taxpayers, accessibility to elimination of double tax through the use of Belgium's extensive double tax treaty network and beneficial tax treatments for expatriates employed in Belgium.⁵ Ultimately, however, Dierckx notes that a preferred holding company regime would benefit investors by offering a complete tax-neutral outcome.⁶

Olivier and Honiball summarise the following essential characteristics of an ideal intermediary holding company regime:⁷

- Access to a favourable network of double tax treaties which reduce withholding taxes applied on dividends paid from investments made in other countries.
- No or low tax imposed on dividend or other income earned by the holding company.
- No or low withholding tax imposed on dividends paid to the owners of the holding company.
- No capital gains tax payable on the sale of the holding company.
- No CFC imputations should cause tax for the holding company in its host country.
- No or low tax imposed on the introduction of or additions to share capital of the holding company.
- The lack of exchange controls faced by the holding company and its shareholders.

Legwaila notes that the double tax treaty network and the extent of relief offered by these treaties are vital in assessing the suitability of a holding company jurisdiction. The double tax

⁴ Dierckx, F. 2008. Belgium's holding company regime – past, present and future. *Bulletin for International Taxation*. 62 (8) at 411.

⁵ Dierckx (2008: 412).

⁶ Dierckx (2008: 411).

⁷ Olivier, L & Honiball, M. 2011. *International Tax A South African Perspective 2011*. Siber Ink CC at 697.

treaty networks offered by holding company jurisdictions enables the reduction or alleviation of tax applied to dividends paid to the holding companies.⁸ If withholding taxes are not set at a sufficiently low level, any tax efficiency gained through transferring income through a holding company on a tax-neutral basis will be significantly reduced. Therefore, whilst a number of tax advantages may be offered by holding company regimes, it is particularly important for a holding company jurisdiction to negotiate as wide a network as possible of favourable double tax agreements.

1.1.3 South African Headquarter Company and Mauritian Global Business Licence regimes as preferred African holding company regimes

1.1.3.1 Double tax treaty network

South Africa's Headquarter Company regime and the Mauritian Global Business Licence regime are the only African holding company regimes which offer a significant treaty network allowing for reduced withholding tax rates. South Africa has 77 double tax agreements,⁹ whilst Mauritius has concluded 46 such agreements.¹⁰ This is in comparison to Botswana, Cape Verde, the Republic of Congo and the Seychelles concluding 11, 2, 4 and 26 agreements respectively.¹¹ Furthermore, South Africa and Mauritius have concluded 24 and 19 agreements respectively with sister African nations.

The tax agreement networks of South Africa and Mauritius allow the Headquarter Company and Global Business Licence Regimes to provide the best possible bases in Africa from which profits can be remitted with the least imposition of withholding taxes. Other preferential tax treatments offered to entities registered and licensed as headquarter companies and global business licence corporations are discussed further.

1.1.3.2 Other Preferential tax implications offered for a Headquarter Company

1.1.3.2.1 Relief on the repatriation of profits in the form of dividends

Dividends declared by South African tax resident companies will constitute a "dividend" in the hands of the recipient or shareholder.¹²

⁸ Legwaila, T. 2012. Tax characteristics of an ideal holding company location. *De Jure*. Available: <http://www.dejure.up.ac.za/images/files/vol45-1-2012/Chapter%202.pdf> [27 November 2013]

⁹ Refer to Appendix B to this dissertation for further details.

¹⁰ Refer to Appendix C to this dissertation for further details.

¹¹ Refer to Appendix D-G to this dissertation for further details.

¹² *Income Tax Act, No 58 of 1962*. 1962. Pretoria: Government Printer ("the Income Tax Act").

A headquarter company must be resident in South Africa and therefore distributions received by shareholders from such headquarter companies should be exempt from South African income tax.¹³

Furthermore, dividends withholding tax is not applied on dividends declared by a headquarter company.¹⁴

The South African Headquarter Company regime therefore offers shareholders a tax-free distribution of the profits of these companies.

1.1.3.2.2 Relief from CFC imputation for foreign subsidiaries

South African tax legislation imputes the taxable income of foreign subsidiaries to South African resident shareholders, if these foreign subsidiaries constitute a CFC. A foreign subsidiary would constitute a CFC if any South African tax resident shareholder directly or indirectly holds more than 50% of the total participation rights or voting rights in such foreign subsidiary. However, a South African resident shareholder, which is a headquarter company, is excluded when determining whether more than 50% of the participation rights or voting rights in a foreign subsidiary are controlled by South African residents.¹⁵

The net income of foreign subsidiaries of headquarter companies is therefore not subjected to South African income tax in terms of CFC imputation.

1.1.3.2.3 Relief from transfer pricing adjustments arising from financial assistance

Inward financial assistance received by headquarter companies from foreign companies which hold at least 10% of the equity shares and voting rights in that headquarter company may not be subjected to transfer pricing adjustments.¹⁶

Furthermore, outward financial assistance granted by headquarter companies to foreign companies in which the headquarter company holds at least 10% of the equity shares and voting rights is not subjected to transfer pricing adjustments.¹⁷

Headquarter companies are therefore free to receive and grant financial assistance on terms which aid the movement of that assistance without imposing additional South African income tax cash outflows.

¹³ Subsec 10(1)(k) of the Income Tax Act.

¹⁴ Subsec 64E(1) of the Income Tax Act.

¹⁵ Subsec 9D(1) of the Income Tax Act.

¹⁶ Subsec 31(5)(a) of the Income Tax Act.

¹⁷ Subsec 31(5)(b) of Income Tax Act.

1.1.3.2.4 Relief from capital gains tax

Headquarter companies are free from capital gains tax which otherwise would be imposed on the disposal of equity interests in foreign companies.¹⁸

Further relief from capital gains tax is available for non-resident shareholders of headquarter companies. Capital gains tax on the disposal of shares in South African resident companies is only imposed on non-resident shareholders if those shares constitute an interest in immovable property situated in South Africa.¹⁹ An interest in immovable property would only exist where 80% or more of the market value of the shares in the headquarter company is attributable to immovable property situated in South Africa.²⁰ In terms of the qualifying criteria, headquarter companies, must invest more than 80% (measured on a cost basis) in assets attributable to foreign investments.²¹ Therefore it is unlikely that the disposal by a foreign shareholder of an investment in a headquarter company will attract South African capital gains tax.

The headquarter company regime therefore offers foreign persons a shield from the South African capital gains tax arising from the disposal of foreign investments and from the disposal of shares held in a headquarter company.

1.1.3.3 Preferential tax implications offered under the Global Business Licence regime

1.1.3.3.1 Low income tax rate on local income

Mauritius is a low tax regime taxing residents on a world-wide basis and non-residents on Mauritian sourced income at a rate of 15%.

Under the Global Business Licence regime, depending on the licence granted, an entity can enjoy further preferential income tax concessions on foreign sourced income.

1.1.3.3.2 Foreign tax credits on foreign income

Income from foreign sources derived by a corporation issued with a GBL1 automatically entitles the entity to a foreign tax credit of 80% of the Mauritian tax rate. This effectively imposes a maximum tax rate of 3%.²² The resulting foreign tax credit of 12% would be

¹⁸ Paragraph 64B(2) of the Eighth Schedule to the Income Tax Act.

¹⁹ Paragraph 2(1)(b)(i) of the Eighth Schedule to the Income Tax Act.

²⁰ Paragraph 2(2) of the Eighth Schedule to the Income Tax Act.

²¹ Refer to chapter 2.2.3.

²² Income Tax Act, No. 16 of 1995. Regulation. 1996. *Government Gazette*. Government Notice 80 of 1996. Port Louis: Government Printing Department. (Mauritius).

utilised even if the income has been subject to foreign tax of less than 12%. The use of GBL1 corporations to hold investments in low or no tax jurisdictions therefore creates a tax efficient holding structure for international investments.²³

The foreign tax credit regime therefore offers GBL 1 entities relief from Mauritian taxes imposed on foreign income. Effectively, this relief ensures that the maximum Mauritian income tax rate payable on foreign sourced income is 3%.

In the case of a Mauritian tax resident GBL2 entity, foreign sourced income will receive unilateral relief from foreign taxes on that income. The relief is in relation to the foreign taxes suffered and for which the GBL2 corporations can provide written proof.²⁴

1.1.3.3.3 Availability of double tax agreements

Mauritian tax resident entities, which are GBL1 corporations, can utilise double tax agreements concluded by Mauritius to lower income tax exposure on income derived from foreign states. Such a dispensation is not available to GBL2 corporations.²⁵

1.1.3.3.4 Relief from taxes on dividends and interest paid

No withholding taxes are imposed on the payment of dividends to persons not resident of Mauritius. Furthermore, dividends paid between entities issued with Global Business Licences are exempt from Mauritian tax.²⁶

If a non-resident does not conduct business in Mauritius and earns interest from a GBL1 corporation, no Mauritian withholding tax will be imposed.²⁷

In the case of a GBL1 entity, it is therefore possible for investment income to pass through this entity to a non-resident free of tax.

1.1.3.3.5 No capital gains tax

Mauritius does not impose capital gains tax and therefore disposals made by Mauritian tax resident entities will not attract this tax.

²³ Koeleman, M.F. 2012. *A critical review of the South African Headquarter Company regime in light of its stated objective of attracting foreign investment*. Cape Town, South Africa. University of Cape Town. (Master of Commerce) at 65 – 66.

²⁴ *Income Tax Act, No. 16 of 1995*. 1995. Port Louis: Government Printing Department. (Mauritius) – “the Mauritian Income Tax Act”. Refer to Subsec 77(1).

²⁵ S 73A of the Mauritian Income Tax Act.

²⁶ S 7 and S 111B, read with subpart B of Part II to the Second Schedule to the Mauritian Income Tax Act.

²⁷ *Ibid.*

1.1.4 Headquarter companies and global business licence corporations as premiere Africa holding company regimes

It is submitted that the tax relief offered by these regimes together with access to established double tax agreement networks places the South African Headquarter Company and Mauritian Global Business Licence regimes as the front runners for favourable holding company regimes within Africa.

1.1.5 The international community's drive to improve tax transparency to counter tax avoidance and tax evasion

1.1.5.1 Addressing base erosion and profit shifting

There is a strong perception that Governments are losing vital tax revenues as a result of corporations funnelling taxable profits from higher tax jurisdictions to more friendly tax jurisdictions.²⁸ This perception has led to the inclusion of the issue of base erosion and profit shifting on the agenda of the G20²⁹ meetings.

The opportunity to use corporate structures to accomplish base erosion has been specifically identified.³⁰ The fight against base erosion requires constant efforts in improving transparency in tax matters. Without tax transparency, international cooperation would be ineffective and would therefore thwart any understanding of the workings of international corporation structures.³¹

1.1.5.2 Restricting the entitlement to treaty benefits

As part of the 1998 OECD Report on Harmful Tax Competition, harm caused by the abuse of treaty benefits by unintended persons was highlighted.³² The establishment of conduit companies in countries with preferential double tax agreements in order to exploit treaty benefits was specifically identified as a harmful tax practice. Recommendation nine of this

²⁸ Organisation for Economic Co-operation and Development. 2013. *Addressing Base Erosion and Profit Shifting*. OECD Publishing.

²⁹ The G20 comprises 19 developed and emerging economies and the European Union. The G20's role is to coordinate policy-making at an international level.

³⁰ Organisation for Economic Co-operation and Development (2013:44).

³¹ Ibid at 83.

³² Organisation for Economic Co-operation and Development. 2012. *R(17). Restricting the entitlement to treaty benefits, in Model Tax Convention on Income and on Capital 2010: Full Version* at R(17) – 2. Available: http://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2010/r-17-restricting-the-entitlement-to-treaty-benefits_9789264175181-110-en [21 August 2012]

report suggested that states amend their double tax agreements in order to prevent residents of third-party states, that are considered tax havens or which have harmful preferential tax regimes, from abusing these agreements.³³

To counter this abuse of conduit companies it is recommended that only the beneficial owner of the said income may potentially be able to claim treaty benefits. However, a pitfall in this approach is that the absence of reliable information to determine the identity of the beneficial owner, will lead to the continual abuse without detection and corrective action.³⁴ In this regard treaty partners are harmed by unintended use of double tax agreements, where the beneficial owner cannot be identified due to a lack of transparency.

1.1.5.3 Fiscal transparency– relevance to holding company regimes

The international community is promoting and advocating improved fiscal transparency measures aimed at countering tax avoidance and tax evasion. Appropriate fiscal transparency measures must be implemented by holding company regimes to prevent these vehicles from being abused to perpetuate tax avoidance and evasion through the concealment of the beneficial owners of these holding companies.

1.2 Research question

With the anticipated growth in economic activity on the African continent and with the African holding company offerings available to be used not only as a springboard into Africa but also undoubtedly as a springboard internationally, interest in these offerings is bound to intensify.

The question is whether Africa's two favourable holding company regimes, the South African Headquarter Company and the Mauritian Global Business Licence, have characteristics and installed measures to ensure the fiscal transparency so desired by the international community at large?

1.3 Scope limitations of this dissertation

This dissertation does not seek to investigate the measures taken by other African preferential holding company regimes, such as those offered by the Seychelles and Botswana. In view of

³³ Organisation for Economic Co-operation and Development. 1998. *Harmful Tax Competition: An Emerging Global Issue*. Available: <http://www.oecd.org/tax/transparency/44430243.pdf> [9 October 2012] at 47.

³⁴ Organisation for Economic Co-operation and Development (2012: R(17) 23-24).

the author's perceived preference of the South African and Mauritian holding company jurisdictions within Africa, the scope of this dissertation focuses solely on these jurisdictions. In view of the author, as the perceived desirability of the other African holding company jurisdictions increases, it will also intensify the necessity to place the fiscal transparency of these regimes under the microscope.

1.4 Limitations of this dissertation

The official Code Civil Mauricien and the Code de Commerce of Mauritius is written in French. As such these Codes have not been reviewed. The relevant provisions of these Codes have been identified and interpreted from literature reviewed during the preparation of this dissertation.

1.5 Research method

The research method employed in this dissertation is of a legal nature. A review is undertaken of the laws, regulations and codes employed by the South African and Mauritian jurisdictions. Literature prepared following the OECD Global Forum peer reviews of South Africa and Mauritius and court decisions are reviewed to substantiate the practical application and enforcement of these laws, regulations and codes. Literature prepared by the OECD and other authors is also reviewed to provide a basis for assessing the requirements and characteristics to aid the successful implementation of fiscally transparent regimes.

1.6 Structure of the dissertation

Chapters 2 and 3, respectively, of this dissertation investigate whether appropriate measures have been enforced to promote the South African Headquarter Company and Mauritian Global Business Licence regimes as fiscally transparent regimes. Both chapters are structured in the same format.

Subchapter 2 of these chapters describes the qualifying criteria for these regimes and identifies qualifying persons.

Subchapter 3 seeks to identify inherent factors posed by these qualifying persons and criteria which may inherently prevent the identification of the beneficial owners of these entities.

Requirements to record and maintain information essential in identifying the beneficial owner of these entities are detailed in subchapter 4. This subchapter also details the provisions aimed at enforcing these recording requirements.

The review conducted in subchapter 4 highlights the means required for the authorities to ensure the collection and maintenance of information relating to beneficial ownership of entities. In this subchapter, the appropriateness of these means is evaluated in light of the circumstances facing the relevant states.

Subchapter 5 reviews the basis for sharing the beneficial ownership information in light of international transparency standards to form a view as whether this information once collected can be effectively shared with foreign authorities requiring this information.

Chapter 4 concludes with the findings from chapters 2 and 3 to present an answer to the research question posed.

2. South Africa as a fiscally transparent holding company regime

2.1 South Africa's Headquarter Company regime

The South African National Treasury introduced its holding company offering, in the form of headquarter companies, for years of assessment commencing on or after 1 January 2011.³⁵

2.2 Criteria for qualifying as a headquarter company

An election to be treated as a headquarter company under South African tax legislation is available. The qualifying criteria which must be met in order to elect such treatment are discussed briefly.

2.2.1 South African tax resident company

The first element which must be met before a company may be classified as a headquarter company is that the company must be resident for tax purposes.³⁶

2.2.1.1 What constitutes a company?

A company can include both foreign and locally incorporated associations, corporations and companies. Locally incorporated and registered close corporations also constitute a company.³⁷

Interestingly, the definition extends to foreign portfolios which are comparable to collective investment schemes in bonds and securities. However, these foreign collective investment schemes would only constitute a company for South African income tax purposes if participation in the scheme is offered to the general public.³⁸

A co-operative registered in terms of the Co-operatives Act No.91 of 1981 or Act No.14 of 2005 would also be a company in terms of South African tax legislation.³⁹

A "foreign partnership" would not constitute a company. A foreign association of persons which is transparent in determining the income tax liability in a foreign jurisdiction, thereby

³⁵ Taxation Laws Amendments Act, No. 24 of 2011. 2012. *Government Gazette*. 599. 10 January. Government notice no. 34927. Pretoria: Government Printer.

³⁶ Subsec 9I(1)(a) of the Income Tax Act.

³⁷ S 1 of the Income Tax Act.

³⁸ *Ibid.*

³⁹ *Ibid.*

imposing the foreign tax liability on each member or partner would constitute a "foreign partnership" and not a "company".⁴⁰

A trust and a company are distinguished for tax purposes as each term has its separate definition in the Income Tax Act.⁴¹

Foreign trusts and foreign foundations are not specifically considered in the Income Tax Act and the concepts of a foundation and a trust may vary in foreign jurisdictions.

Ordinarily a trust is a vehicle employed in common law jurisdictions through which the legal ownership of assets is settled with a legal person who controls the assets for the benefit of ascertained beneficiaries.⁴²

A foundation is the closest civil law equivalent to the common law trust. Assets would ordinarily be transferred to a foundation which is a separate legal entity formed for a defined purpose. The assets of the foundation would be applied towards that purpose under the management of a board of directors. Ordinarily, foundations would not have any shareholders or owners.⁴³ The goal of a foundation is to administer assets under the control of directors appointed in a fiduciary capacity for an ascertained purpose.

It is submitted that the definition of trust in the Income Tax Act serves as a means to differentiate a foreign trust or foundation from a "company". This definition reads widely as follows:

"means any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under the deed of trust or by agreement or under the will of a deceased person".⁴⁴

Given the concept of "trust" in the Income Tax Act it would be difficult for a foreign trust or a foreign foundation not to be treated as a "trust", should the assets of the trust or foundation be controlled by a person for the benefit of others.⁴⁵

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Organisation for Economic Co-operation and Development. 2001. *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* at 25. Available: <http://www.oecd-ilibrary.org.ezproxy.uct.ac.za/content/book/9789264195608-en> [21 August 2012]

⁴³ Ibid at 27.

⁴⁴ S 1 of the Income Tax Act.

⁴⁵ Olivier, L & Honiball, M (2011:135).

Therefore, both foreign established trusts and foundations should be treated as a trust for South African tax purposes unless the foundation or trust is specifically classified as a "company".⁴⁶

It would be possible for a foreign trust or foundation to constitute a "company" where the trust or foundation is seen to be a body corporate formed or established under the laws of a foreign country.⁴⁷ A number of countries have introduced laws, under which these foreign trusts and foundations are separately formed or established.⁴⁸ For instance, Mauritius has recently implemented legislation which permits the registration and separate legal status of foundations established in Mauritius.⁴⁹

In conclusion, it is submitted that a natural person, a foreign partnership and a local trust will not be treated as a company for South African income tax purposes and therefore would not qualify as a headquarter company.

2.2.1.2 Classifying a company as South African tax resident

A company would be South African tax resident should it meet the definition of "resident". The definition of "resident" relevant to a company reads as follows:

*"is incorporated, established or formed in the Republic or which has its place of effective management in the Republic...."*⁵⁰

However, the proviso to the definition of "resident" is relevant in classifying a company as South African tax resident. This proviso reads:

*"...but does not include any person 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."*⁵¹

A company incorporated in South Africa will be South African tax resident, unless a double tax agreement with a foreign country deems the company to be tax resident in that foreign country. A company may be incorporated in a foreign country but may still be South African

⁴⁶ Ibid.

⁴⁷ S 1 of the Income Tax Act.

⁴⁸ Olivier, L & Honiball, M (2011:135).

⁴⁹ *The Foundations Act, No. 8 of 2012*. 2012. Port Louis: Government Printing Department. (Mauritius). ("the Foundations Act").

⁵⁰ S 1 of the Income Tax Act.

⁵¹ Ibid.

tax resident should the company be effectively managed in South Africa and not deemed to be a resident of that foreign country in terms of a double tax agreement.

2.2.2 Shareholder composition

During the year of assessment in which the company elects to be treated as a headquarter company, each shareholder and, if applicable, other companies forming part of the same group of companies must hold at least 10% of the equity shares and voting rights in that headquarter company.⁵²

2.2.3 Foreign asset holding

At least 80% of the cost of the total assets of the company (excluding any cash or bank deposits payable on demand) must be attributed to:

- any interest in equity shares in;
- any amount loaned or advanced to; or
- any intellectual property that is licensed by that company to,

any foreign company in which the headquarter company (whether alone or together with any other company forming part of the same group of companies as such company) holds at least 10% of the equity shares and voting rights.⁵³

The investment by the headquarter company in these asset classes must be met at the end of the year of assessment in which the election is made and at the end of all previous years of assessment.⁵⁴

2.2.4 Income requirements

Lastly, should the gross income of the headquarter company exceed R 5 million, at least 50% of that company's gross income must be attributed to any combination of:

- any rental, dividend, interest, royalty or service fee paid or payable by any foreign company (in which the potential headquarter company holds more than 10% of the equity shares and voting rights as discussed in the second requirement);

⁵² Subsec 9I(2)(a) of the Income Tax Act.

⁵³ Subsec 9I(2)(b) of the Income Tax Act.

⁵⁴ Ibid.

- any proceeds from the disposal of an interest in equity shares in a foreign company (in which the potential headquarter company holds more than 10% of the equity shares and voting rights as discussed in the second requirement); or
- any proceeds from the disposal of intellectual property licensed by that company to any foreign company (in which the potential headquarter company holds more than 10% of the equity shares and voting rights as discussed in the second requirement).⁵⁵

This income requirement is to be satisfied by the end of the year of assessment in which the election application is made.⁵⁶

2.3 Factors presented by headquarter companies which may roadblock the identification and exchange of ownership information

The South African Headquarter Company regime contains factors which may inherently pose a threat to obtaining and sharing information on the beneficial owners of these companies. Inherent factors which are relevant to the South African Headquarter Company regime are discussed further.

2.3.1 Corporate form of a headquarter company

The first qualifying criteria for a headquarter company is that the entity constitutes a company under the Income Tax Act.

2.3.1.1 Private companies

Private limited liability companies are specifically identified as a vehicle to aid anonymity, as these companies ordinarily face less regulation.⁵⁷

Headquarter companies may take the form of private limited liability companies under the Companies Act.⁵⁸

Headquarter companies therefore inherently may offer a cloak of anonymity unless sufficient supervision and regulation exists over identifying and maintaining records regarding the ownership and control of these companies.

⁵⁵ Subsec 9I(2)(c) of the Income Tax Act.

⁵⁶ Ibid.

⁵⁷ Organisation for Economic Co-operation and Development (2001:23).

⁵⁸ *Companies Act, No 71 of 2008*. 2008. Pretoria: Government Printer ("the Companies Act") - refer to subsec 8.

2.3.1.2 Close corporations

Close corporations, much like private limited liability companies, face less regulation and therefore offer a means to hide the identity of beneficial owners unless sufficient supervision and regulation exists over identifying and maintaining records regarding the ownership and control of these entities.

2.3.1.3 Foreign collective investment schemes

Foreign collective investment schemes in participation bonds and equities, the membership of which is offered to the general public, would constitute a company for the purposes of the Headquarter Companies regime. However, given the public membership of these collective investment schemes, regulatory supervision over these vehicles is likely to prevent them from being misused to shelter the identity of the beneficial owners and persons in control of these vehicles.

2.3.1.4 Co-operatives

Co-operatives may only be established under the Co-operative Act No.14 of 2005. The use of the words "co-operative" or "co-op" may not be used in a business name whilst the business is not registered as a co-operative and this will constitute a punishable offence.⁵⁹

Co-operatives must have a minimum of five persons or two other co-operatives as members.⁶⁰

The number of co-operatives has escalated significantly in recent years, although few are active internationally. That could change in coming years as their popularity grows.⁶¹

The potential for co-operatives to engage in an international environment and the relatively low number of required members, may allow this vehicle to be used in hiding details of beneficial owners. That is, unless sufficient supervision and regulation exists over identifying and maintaining records regarding the ownership and control of these companies.

⁵⁹ *Co-operative Act, No. 14 of 2005*. 2005. Pretoria: Government Printer ("the Co-operative Act") - refer to s 12.

⁶⁰ S 6 of the Co-operative Act.

⁶¹ Organisation for Economic Co-operation and Development. 2012. *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: South Africa: Combined Phase 1+ Phase 2* at 34. Available: http://www.oecd-ilibrary.org.ezproxy.uct.ac.za/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews-south-africa-2012_9789264182134-en [20 January 2014]

2.3.2 Foreign incorporated companies

As previously noted, companies incorporated in foreign countries may be tax resident in South Africa and therefore may qualify to be a headquarter company.

The inherent implication of foreign incorporated companies being tax resident in South Africa is that their ownership information may not be available to South African authorities. Furthermore, where such ownership information is not immediately available, the question arises as to whether South Africa has either the means to gather such information or to request it from the relevant foreign authorities.

In the absence of such accurate ownership information or the ability to gather it either through persons subject to South Africa's jurisdiction or through foreign authorities who hold such information, foreign incorporated companies may use the Headquarter Company regime to conceal the identity of the beneficial owners of these companies.

2.3.3 Foreign foundations and foreign trusts

In a number of jurisdictions it is possible to create vehicles which assist in hiding the identity of the beneficial owners of the foundation or trust. For instance, blind trusts may be used to facilitate tax evasion through the non-disclosure of the beneficiaries in the trust deed.⁶²

Given the potential for these vehicles to be registered as a headquarter company, the South African Headquarter Companies regime may be utilised in the form a foreign foundation or trust, to hide the identity of the beneficial owner of the foundation or trust.

2.3.4 Issuing of bearer shares

2.3.4.1 Availability of bearer shares

Under the Companies Act, a person obtains the rights inherent in the shares of the company, should that person's name be entered into the company's securities register.⁶³ The predecessor to the 2008 Companies Act contained a similar provision.⁶⁴ As such South African corporate law did not permit the use of bearer shares.

⁶² Olivier, L & Honiball, M (2011:132).

⁶³ Subsec 37(9) of the Companies Act.

⁶⁴ *Companies Act, No. 61 of 1973*. 1973. Pretoria: Government Printer ("Companies Act 1973") - refer to subsec 103(2).

2.3.4.2 Share warrants issued under the Companies Act of 1973

The Companies Act of 1973 permitted the issuing of share warrants by public companies.⁶⁵

The share warrants would be issued for fully paid up shares and entitled the bearer of the warrant to the underlying shares and future dividends attributed to those shares. The

Companies Act of 1973 required the following details to be kept regarding share warrants:⁶⁶

- The fact that the warrant is issued.
- A statement of the shares included in the warrant.
- The date that the warrant was issued.

Companies that had previously issued share warrants, which are still in issue, were required to disclose this fact in an SWB001 return to SARS by 31 July 2013.⁶⁷

In terms of the Companies Act of 1973, only public companies could have issued share warrants.⁶⁸ As of 1 May 2011, the last date on which it was possible to issue share warrants under this Companies Act, approximately 3000 public companies were registered. This only represented 0.24% of all companies registered in South Africa at the time.⁶⁹

Importantly, Section 15 of the Exchange Control Regulations⁷⁰ specifically prohibits the acquisition, disposal or any other dealing in any bearer security and prohibits the payment of a dividend in respect of any bearer security.⁷¹ This regulation suggests that in practice, it has not been possible to issue share warrants. Furthermore, relevant South African authorities have no record of share warrants having been issued. The Director Issuer Regulation at the Johannesburg Stock Exchange has also confirmed that the stock exchange does not permit the issue or listing of share warrants to bearer shares and that such share warrants had never been encountered in practice.⁷²

⁶⁵ Subsec 101 of the Companies Act 1973.

⁶⁶ Subsec 105(3) of the Companies Act 1973.

⁶⁷ Tax Administration Act. Regulation.2013. *Government Gazette*. 14 June. Government notice No. 36565. Pretoria: Government Printer.

⁶⁸ Subsec 101 of the Companies Act 1973.

⁶⁹ Organisation for Economic Co-operation and Development (2012:16).

⁷⁰ Exchange Control Regulations. 1961. *Government Gazette*. 1 December. Government notice No. R.1111. Pretoria: Government Printer.

⁷¹ Organisation for Economic Co-operation and Development (2012: 25).

⁷² *Ibid* at 26.

2.3.4.3 Bearer shares and share warrants used as a device to conceal the identities of beneficial owners

Under previously and currently enacted South African company law, no valid bearer share may be issued.

If share warrants are in issue, SARS was required to be notified of this by 31 July 2013.

Due to the low proportion of companies that could have issued bearer shares and due to the legislated prohibition to deal in such instruments, the likelihood is very low that, in practice, share warrants may have been used as a device to conceal the identities of the beneficial owners of the warrants.⁷³

In conclusion bearer shares and bearer-like instruments are unlikely to pose a significant threat to the identification of owners of headquarter companies.⁷⁴

2.3.5 Registration of nominee shareholders

Nominee shareholders may be registered in terms of the Companies Act.⁷⁵ Furthermore, no legislated prohibition exists for service providers acting as nominee shareholders.⁷⁶

The possibility of concealing the identity of the beneficial owner of headquarter companies is increased as a result of the potential abuse of nominee shareholders. Measures may or may not be in place to identify the beneficial owner who has authorised the use of nominee shareholders.

2.3.6 Conclusion - identification of inherent factors presented by headquarter companies which may roadblock transparency standards

The South African Headquarter Companies regime presents certain inherent factors or loop holes to circumvent the effective exchange of information with respect to identifying the owners of these companies.

The following inherent undermining factors have been identified:

- Headquarter companies may take the form of a private limited liability company or a close corporation.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Subsec 56(1) of the Companies Act.

⁷⁶ Organisation for Economic Co-operation and Development (2012:24).

- Headquarter companies may take the form of a co-operative.
- Headquarter companies may be a foreign incorporated and registered company.
- Headquarter companies may be a foreign established foundation or trust.
- Headquarter companies may issue shares to nominee shareholders.

Measures taken by the South African Legislature and authorities are investigated in order to identify whether they are likely to overcome the roadblock presented by these factors.

2.4 Measures undertaken by the South African Legislature and South African authorities to remove impediments to identifying owners of headquarter companies

South African authorities, such as SARS and the Companies and Intellectual Property Commission,⁷⁷ can take administrative measures to ensure the availability of details regarding owners of headquarter companies.

The South African Legislature is responsible for providing a legal basis for the South African authorities to gather such ownership information.

Measures undertaken by the South African Legislature and South African authorities to diminish the effectiveness of roadblocks to obtaining information relating to the ownership of headquarter companies are discussed below.

The effectiveness of these measures is dependent on the implementation and enforcement of appropriate methods to enable transparency.

2.4.1 Obtaining and maintaining information regarding private limited liability companies and close corporations

Private limited liability companies and close corporations ordinarily face less regulation and supervision by authorities and therefore may be more readily used to conceal the identity of beneficial owners. Measures undertaken to obtain and maintain ownership information of headquarter companies is considered further.

⁷⁷ The Companies and Intellectual Property Commission is mandated by the Companies Act to administer and govern the Companies Act.

2.4.1.1 Measures to accurately record ownership information of private limited liability companies and close corporations

All companies incorporated in South Africa are required to maintain a register of issued shares. The information required to be entered into the share register is as follows:

- "the names and addresses of persons to whom securities have been issued".⁷⁸
- "the number of securities issued to each of them" [shareholders].⁷⁹

In order to obtain a certificate of incorporation, all close corporations are required to file with the Companies and Intellectual Property Commission (or its predecessor) information regarding the founding members.⁸⁰ This includes:

- The full name of each member and his or her identity number or if the member does not have an identity number the date of birth of the member.⁸¹
- The residential address of each member.⁸²

2.4.1.2 Measures to maintain ownership information of private limited liability companies and close corporations

All companies in South Africa are required to maintain a register of issued shares. The information required to be entered into the share register is as follows:

- The name and address of the person to whom a share is transferred.⁸³
- The description of the shares transferred.⁸⁴
- The date that the shares were transferred.⁸⁵

Upfront reporting to the Companies and Intellectual Property Commission is not required for changes in shareholding.⁸⁶

Where the membership of a close corporation is altered, the amended founding statement (including updated membership information) must be lodged with the Companies and Intellectual Property Commission within 28 days of the change in membership.⁸⁷

⁷⁸ Subsec 50(2)(b)(i) of the Companies Act.

⁷⁹ Subsec 50(2)(b)(ii) of the Companies Act.

⁸⁰ *Close Corporations Act, No. 69 of 1984*. 1984. Pretoria: Government Printer ("Close Corporations Act") - refer to s 13 – 14.

⁸¹ Subsec 12(d) of the Close Corporations Act.

⁸² Ibid.

⁸³ Subsec 51(5)(a) of the Companies Act.

⁸⁴ Subsec 51(5)(b) of the Companies Act.

⁸⁵ Subsec 51(5)(c) of the Companies Act.

⁸⁶ Organisation for Economic Co-operation and Development (2012:19).

Companies (including close corporations) resident in South Africa are obliged to register for income tax and to complete income tax returns annually. For unlisted (private) companies, SARS must be notified of changes in shareholdings. This notification is present in the form of a question to that effect at the end of the annual income tax return.⁸⁸ Changes in shareholdings must be detailed annually in a schedule supporting the income tax return in order for the taxpayer to comply with reporting obligations. Therefore, SARS is provided with information which should allow its systems to identify whether more details are required from a company with regard to changes in shareholdings.⁸⁹

The Legislature has provided for upfront disclosure of the ownership for headquarter companies. The Finance Minister may specify reporting requirements for companies electing to be treated as a headquarter company.⁹⁰ Therefore companies electing to be treated as a headquarter company are required to submit an RCH01 form.⁹¹ In terms of this RCH01 schedule, the legal name, the address, the country of residence and percentage shareholding for each registered shareholder of the headquarter company must be disclosed to SARS.

2.4.1.3 Enforcement of requirements to record and maintain ownership information

Maintenance of share registers and membership information is encouraged through a combination of threatened punitive actions and legislated restrictions on the rights enjoyed by shareholders.

Failure to keep a share register can result in fines or imprisonment. Any failure to comply with a notice by the Companies and Intellectual Property Commission may be referred to the courts for the imposition of an administrative penalty or referred for prosecution.⁹² The administrative penalty for failing to comply with a notice may not exceed the greater of 10% of the company's turnover or R 1 million.⁹³ In instances where prosecution is instituted, the

⁸⁷ Subsec 15(1) of the Close Corporations Act.

⁸⁸ For instance, a carry forward of assessed losses may be disallowed when income is derived by a taxpayer as a result of a change in shareholding - see subsec 103(2) of the Income Tax Act.

⁸⁹ Organisation for Economic Co-operation and Development (2012:20).

⁹⁰ Subsec 9I(4) of the Income Tax Act.

⁹¹ SARS. 2012. *RCH01 Schedule for Companies Electing to be a Headquarter Company*. Available: <http://www.sars.gov.za/AllDocs/OpsDocs/SARSForms/RCH01%20-%20Schedule%20for%20Companies%20Electing%20to%20be%20a%20Headquarter%20Company%20-%20External%20Form.pdf> [15 November 2013]

⁹² Subsec 171(7) of the Companies Act.

⁹³ Subsec 175(1) read with Subsec 175(5) of the Companies Act.

responsible officer (such as a director) may be subjected to a fine up to R 20 000⁹⁴ and may face imprisonment not exceeding 12 months.⁹⁵

The fines and penalties faced by close corporations is identical to those for companies.⁹⁶

Shareholders are generally not permitted to exercise their rights in terms of a shareholding in a company, such as a right to receive a declared dividend, unless that person's name is entered into the company's share register.⁹⁷

There is no legislation enabling the Companies and Intellectual Property Commission to require non listed companies to provide information automatically relating to shareholding.⁹⁸

On registering a company for income tax, no obligation exists to provide ownership information to SARS.⁹⁹ However the details of shareholders' of headquarter companies must be disclosed to SARS annually.¹⁰⁰

Penalties may be levied under tax legislation for persons failing to comply with the administrative provisions of the Act.¹⁰¹ A fixed amount administrative penalty may be imposed should a taxpayer fail to comply with an obligation under a taxing act and such non-compliance is identified by way of notice by the Commissioner for SARS.¹⁰² However to date, the Commissioner has identified only the failure of natural persons to file an income tax return as the default which is subject to this penalty.¹⁰³

The failure to notify SARS of a change in ownership as part of the annual tax return, including the details rendered in an RCH01 return, may render the public officer of the company guilty of an offence, if the omission is seen to be intentional or without just cause.¹⁰⁴ If convicted the public officer would face a fine or imprisonment not exceeding two years.¹⁰⁵

⁹⁴ Organisation for Economic Co-operation and Development (2012:35).

⁹⁵ Subsec 214(3) read with 216(b) of the Companies Act.

⁹⁶ S 82 of the Close Corporations Act.

⁹⁷ Subsec 37(9)(a) of the Companies Act.

⁹⁸ Organisation for Economic Co-operation and Development (2012:19).

⁹⁹ Ibid.

¹⁰⁰ Refer to chapter 2.4.1.2.

¹⁰¹ Organisation for Economic Co-operation and Development (2012: 35).

¹⁰² *Tax Administration Act, No.28 of 2011*. 2011. Pretoria: Government Printer ("the Tax Administration Act") - refer to s 210 read with s 211.

¹⁰³ Tax Administration Act. Regulation.2012. *Government Gazette*. 1 October. Government notice No. 35733. Pretoria: Government Printer.

¹⁰⁴ Subsec 234(j) read with subsec 246(5) of the Tax Administration Act.

¹⁰⁵ Subsec 234 of the Tax Administration Act.

There is evidence that South African authorities do impose convictions on intentional defaults. For the period 1 April 2011 until February 2012, over 230 taxpayers were prosecuted for various tax-related offences. These convictions resulted in imprisonment totalling 370 years and fines totalling nearly R 5 million.¹⁰⁶

2.4.1.4 Conclusion

Measures appear to exist which encourage the accurate recording and updating of ownership information of companies and close corporations. Specific details regarding changes in ownership are not required to be supplied automatically to the authorities in the case of companies. However, the legal owners of headquarter companies are disclosed to SARS annually in terms of an RCH01 schedule.

It is submitted that South Africa is largely reliant on upfront disclosure and investigative means for acquiring and maintaining information regarding ownership of headquarter companies. Whether these measures are an appropriate means for obtaining ownership information is discussed further in chapter 2.4.6.

2.4.2 Obtaining and maintaining ownership information of co-operatives

Unless sufficient supervision and regulation exists to ensure accurate records are kept and maintained to identify the ownership and control of co-operatives, elected headquarter companies, which constitute co-operatives, may be used to hide the identity of owners.

2.4.2.1 Measures to accurately record ownership information of co-operatives

Upon registration, a co-operative must submit to the Companies and Intellectual Property Commission a list of its members.¹⁰⁷

Each co-operative must maintain a registered office in South Africa and the Companies and Intellectual Property Commission must be notified where this registered office is and must be updated when this office changes locations.¹⁰⁸ A list of members must be maintained at the registered office of the co-operative. This list of members contains significant information and must include the following details:¹⁰⁹

- The name and address of each member.

¹⁰⁶ Organisation for Economic Co-operation and Development (2012:37).

¹⁰⁷ Subsec 6(2)(b) of the Co-operative Act.

¹⁰⁸ S 20 of the Co-operative Act.

¹⁰⁹ Subsec 21(1)(d) of the Co-operative Act.

- The date on which each member became a member.
- The dates that membership was terminated.
- The membership fees paid, the number of membership shares owned and the amount of member loans.

Maintenance of the member register is enforced through threatened punitive actions.

Should a co-operative or its responsible officers fail to maintain a membership register, they may be liable to a fine, imprisonment up to 24 months or both.¹¹⁰

2.4.2.2 Measures to maintain ownership information of co-operatives

No requirement exists for co-operatives to submit changes of membership to the Companies and Intellectual Property Commission.¹¹¹

But co-operatives resident in South Africa are obliged to register for income tax and complete an income tax return annually. As in the case of South African resident companies, SARS must be notified of changes in shareholdings. Changes in shareholdings must be detailed annually in a schedule supporting the income tax return in order for the taxpayer to meet its reporting obligations. Therefore, SARS is provided with information which should allow its systems to identify whether more details are required from a co-operative regarding changes in its shareholding.

Furthermore, co-operatives electing treatment as a headquarter company are required to annually submit an RCH01 form in which the legal owners of the co-operatives are disclosed.

The intentional failure to notify the SARS of a change in membership may expose responsible persons at the co-operatives to fines and imprisonment.¹¹²

The requirement to maintain a membership register with the related threatened punitive action for failing to do so under the Co-operative Act may encourage the maintenance of ownership information for co-operatives.

2.4.2.3 Conclusion

South Africa is primarily reliant on upfront disclosure and investigative means for obtaining information regarding ownership of co-operatives electing treatment as headquarter

¹¹⁰ Subsec 92(3) of the Co-operative Act.

¹¹¹ Organisation for Economic Co-operation and Development (2012: 34).

¹¹² See chapter 2.4.1.3.

companies. Whether these measures are an appropriate means for obtaining ownership information is discussed further in chapter 2.4.6.

2.4.3 Obtaining and maintaining ownership information where foreign companies qualify as headquarter companies

A company incorporated in a foreign country may be resident in South Africa and therefore qualify for election as a headquarter company. The risk posed is that South African authorities may not have the means to collect ownership information maintained by persons beyond South Africa's information gathering legislation.

2.4.3.1 Measures to accurately record ownership information of foreign companies

All companies tax resident in South Africa must register for income tax.¹¹³

However, on initial registration for income tax, no ownership information is required from the company.¹¹⁴

2.4.3.2 Measures to maintain ownership information of foreign companies

As in the case of South African incorporated companies and co-operatives, SARS must be notified of changes in shareholdings. These changes must be detailed annually in a schedule supporting the income tax return in order for the taxpayer to meet its reporting obligations. Therefore, SARS is provided with information which should allow its systems to identify whether more details are required from a company regarding changes to its shareholdings.¹¹⁵

Furthermore, foreign companies electing to be treated as a headquarter company are required annually to submit an RCH01 form in which the legal owners of the foreign company are disclosed.

2.4.3.3 Enforcement of requirements to record and maintain ownership information

As with South African incorporated companies and co-operatives, a public officer would need to be appointed by a foreign incorporated company, which is South African tax

¹¹³ Organisation for Economic Co-operation and Development (2012:22) read with subsec 67(1) of the Income Tax Act.

¹¹⁴ Organisation for Economic Co-operation and Development (2012:22).

¹¹⁵ Organisation for Economic Co-operation and Development (2012:23).

resident.¹¹⁶ Public officers of a foreign company would be held responsible for defaults of that company.¹¹⁷

The public officer of a foreign company which is tax resident in South Africa, who is convicted of failing to record and disclose changes in its ownership, would be subject to a fine or imprisonment not exceeding two years.¹¹⁸ South African authorities have in recent times successfully sought convictions against persons for tax-related offences. It would appear that the South African authorities do effectively impose the punitive actions of tax legislation.¹¹⁹

2.4.3.4 Conclusion

South African tax legislation contains punitive provisions which may encourage the accurate recording and updating of ownership information of foreign incorporated companies.

South Africa is primarily reliant on upfront disclosure and investigative means for acquiring and maintaining information regarding ownership of foreign incorporated, headquarter companies. Whether these measures are an appropriate means for obtaining ownership information is considered further in chapter 2.4.6.

2.4.4 Obtaining and maintaining ownership information where foreign foundations or foreign trusts qualify as headquarter companies

A trust or a foundation established in a foreign country may qualify as a South African resident company for tax purposes thereby qualifying for election as a headquarter company. A significant risk posed is that the South African headquarter companies regime may be utilised, in the form a foreign foundation or trust, to hide the identity of the beneficial owner of the headquarter company.

¹¹⁶ Subsec 246(1) of the Tax Administration Act requires every company undertaking business or having an office in South Africa to be represented by a public officer. It is submitted that a foreign company which is effectively managed in South Africa, would be undertaking business or would have an office in South Africa.

¹¹⁷ Subsec 246(5) of the Tax Administration Act.

¹¹⁸ Subsec 234(d)-(e) of the Tax administration Act.

¹¹⁹ Refer to chapter 2.4.1.3.

2.4.4.1 Measures to accurately record ownership information of and foreign trusts

A foreign foundation or foreign trust which wishes to elect to be treated as a headquarter company must register in South Africa for income tax.¹²⁰

As in the case of other companies, on initial registration for income tax, no ownership information is required to be supplied.¹²¹

2.4.4.2 Measures to maintain ownership information of foreign foundations and foreign trusts

Foreign trusts or foreign foundations electing headquarter company treatment are required to submit an RCH01 form. In order to complete the RCH01 form it is submitted that the details of the beneficiaries of these vehicles must be maintained.

2.4.4.3 Enforcement of requirements to record and maintain ownership information

Registration as a South African resident company would require the appointment of a public officer, who is South African tax resident.¹²² Public officers of a foreign foundation or foreign trust would be held responsible for defaults of that company.¹²³

A public officer of a South African tax resident company, would face the threat of penalties and imprisonment.¹²⁴

2.4.4.4 Conclusion

South African tax legislation contains punitive provisions which may encourage the accurate recording and updating of ownership information of foreign foundations and trusts.

South Africa is primarily reliant on upfront disclosure and investigative means for acquiring and maintaining information regarding ownership of foreign foundations and trusts electing headquarter company treatment. Whether these are appropriate means for obtaining ownership information is considered further in chapter 2.4.6.

¹²⁰ Subsec 67(1) of the Income Tax Act.

¹²¹ Organisation for Economic Co-operation and Development (2012:22).

¹²² Subsec 246(1) of the Tax Administration Act requires every company undertaking business or having an office in South Africa to be represented by a public officer. It is submitted that a foreign company which is effectively managed in South Africa, would be undertaking business or would have an office in South Africa.

¹²³ Subsec 246(5) of the Tax Administration Act.

¹²⁴ Subsec 234(d)-(e) of the Tax administration Act.

2.4.5 Obtaining ownership information where nominee shareholders are appointed

Nominee shareholders, including service providers, may be appointed in terms of the Companies Act. Measures in place to identify the beneficial owner who has authorised the use of nominee shareholders is discussed further.

2.4.5.1 Legislated notification by nominee shareholders of the legal owner

Nominee shareholders of public companies are required to notify the company of the identity of the legal owner of the shares within five days of the end of the month in which such legal ownership in the shares changed.¹²⁵

All companies which have reason to believe that nominee shareholders have been appointed may require the nominee shareholders to disclose the legal owner of the said shares.¹²⁶ The nominee shareholder has ten business days from the requested date to provide the legal owner's identity.¹²⁷

In instances where a nominee shareholder provides false or misleading information about the legal owner of the shares and with fraudulent intent, that nominee shareholder may be subject to any combination of a fine and imprisonment of up to ten years.¹²⁸

Service providers, such as lawyers, accountants and financial institutions, may act as nominee shareholders.

Service providers that are "accountable institutions" are subject to the Financial Centre Intelligence Act.¹²⁹ Where these "accountable institutions" act professionally as nominee shareholders, the service providers would need to take steps to identify who they are acting for and they would need to maintain such ownership information.¹³⁰ Failure to do so could expose them to a significant fine not exceeding R 100 million or a period of imprisonment not exceeding 15 years.¹³¹

Notably members of accounting bodies, such as the South African Institute of Chartered Accountants, are specifically excluded from acting as "accountable institutions".¹³² Prudent

¹²⁵ Subsec 56(3) and subsec 56(4) of the Companies Act.

¹²⁶ Subsec 56(5) of the Companies Act.

¹²⁷ Subsec 56(6) of the Companies Act.

¹²⁸ Subsec 214(1)(b) and subsec 216(a) of the Companies Act.

¹²⁹ First Schedule to the *Financial Centre Intelligence Act, No. 38 of 2001*. 2001. Pretoria: Government Printer ("the Financial Centre Intelligence Act").

¹³⁰ Subsec 22 and subsec 23 of the Financial Centre Intelligence Act.

¹³¹ Subsec 68(1) the Financial Centre Intelligence Act.

¹³² First Schedule to the Financial Centre Intelligence Act.

members of recognised professional bodies should however consider their ethical responsibilities under their respective codes of conduct, when acting in a nominee capacity. The considerable threat of the punitive actions imposed by professional bodies for acting improperly through intentionally or negligently concealing the identity of shareholders may ensure that these service providers keep accurate records and share information regarding legal owners. Furthermore, these providers may be wary of provisions in South African tax legislation which permit SARS to alert professional bodies of instances where professionals have failed to meet rules or codes of conduct.¹³³

2.4.5.2 Conclusion

Sufficient upfront disclosure by persons acting as nominee shareholders needs to be provided to both private and public companies, thereby creating a mechanism for identifying the true legal owners of companies. Significant enforcement provisions are in place both in terms of the Financial Centre Intelligence Act and the extensive penalties imposed by professional bodies on service providers who act as nominee shareholders and who fail to maintain and share details of who they are acting for. These provisions should act as a significant deterrent to the abuse of nominee shareholders.

Ownership information provided by nominee shareholders to companies would not be automatically provided to authorities. Information about the identity of the legal owner of shares would therefore be required to be gathered through investigative means. Whether this is an appropriate means for obtaining ownership information is considered further in chapter 2.4.6.

2.4.6 Means employed by South Africa as an effective manner for gathering ownership information

Measures exist both in South African taxation and company legislation which require maintenance of ownership information related to entities which may qualify as headquarter companies.

For all of these qualifying entities, upfront disclosure and investigative means are required to obtain such ownership information. In particular, an investigative means must be employed to

¹³³ Subsec 241(1)(c) of the Tax Administration Act permits SARS to report any person to a professional body should that person's conduct contravene a rule or code of conduct of the professional body for which disciplinary action may be taken.

identify the beneficial owners of headquarter companies where nominee shareholdings are present.

The following discussion sets out whether the South African legal and administrative system is best suited to use upfront disclosure and investigative means for obtaining ownership information.

2.4.6.1 Adequacy of steps taken to confirm accuracy of upfront disclosures

When relying on upfront disclosure to identify the owners of corporate vehicles, the identities of these owners must be accurately disclosed throughout the vehicle's existence.¹³⁴

This information must be provided on a timely basis, preferably in the form of a declaration, to ensure the accuracy of this disclosure.¹³⁵ Effective enforcement of punitive measures must ensure that persons making declarations are encouraged to supply necessary information and are deterred from supplying inaccurate information.¹³⁶ Furthermore, there must be sufficient competent staff to vet the ownership submissions and to ensure that they are submitted on time.¹³⁷

In the case of headquarter companies, the ownership of these entities has to be disclosed annually in an RCH01 declaration and therefore ownership information is declared throughout the existence of these entities.

As discussed in chapter 2.4.1.3 South Africa has significant punitive measures and has the will to use these measures. It is therefore submitted that sufficient punitive measures are in place to encourage accurate and timely disclosure of ownership information for headquarter companies.

Whether personnel at SARS routinely verify the accuracy of ownership information declared is uncertain. However, it is submitted that if South Africa has an effective legal and administrative environment to promote an investigative means for obtaining information, these ownership details declared, can be vetted.

Therefore, if South Africa's legal and administrative environment contains necessary elements, it is submitted that the combined upfront disclosure and investigative means employed by South Africa to obtain ownership information for headquarter companies will

¹³⁴ Organisation for Economic Co-operation and Development (2001:79)

¹³⁵ Ibid at 80.

¹³⁶ Ibid at 81.

¹³⁷ Ibid at 80.

be appropriate. Whether the necessary elements are in place to ensure the effectiveness of South Africa's investigative means is discussed below.

2.4.6.2 South Africa's compulsory powers to obtain information

A system relying on investigative means for obtaining information would require strong powers vested in authorities to gather such information and a comprehensive and a competent investigative unit.¹³⁸

The Tax Administration Act contains the primary legislative authority for SARS to obtain information from persons. Section 46(1) of the Tax Administration Act reads:

"SARS may for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires."

A request for information by the SARS must therefore satisfy five elements:

1. The request must be for the purposes of the administration of a tax Act.
2. A taxpayer must be the subject of the administration under a tax Act.
3. The taxpayer must be identified by name or otherwise objectively identifiable.
4. The request may be made to the taxpayer or any other person.
5. The request must be for relevant material.

It is submitted that the final element of this information gathering provision would be met if the first two elements are in place. The words, "for the purposes of" in element 1, qualify the phrase "relevant material", contemplated in element 5. Therefore "relevant material" would include information required for the purposes of the administration of a tax Act in relation to a taxpayer. So should ownership information of a headquarter company be required for the administration of a tax Act in relation to a taxpayer, element 5 would be met.

The application of these remaining elements is discussed further in light of ownership information relevant to a headquarter company.

¹³⁸ Organisation for Economic Co-operation and Development (2001:84).

2.4.6.2.1 Is ownership information of headquarter companies required for the administration of a tax Act?

A tax Act would include both the Tax Administration Act and the Income Tax Act.¹³⁹

It is submitted that ownership information of headquarter companies would be required for the administration of these companies in terms of the Income Tax Act.

Section 9I (1) of the Income Tax Act which provides administrative provisions in relation to headquarter companies reads:

"9I. Headquarter companies.—(1) Any company that—

(a) is a resident; and

(b) complies with the requirements prescribed by subsection (2),

may elect in the form and manner determined by the Commissioner to be a headquarter company for a year of assessment of that company."

It is submitted that the use of the words "in the form and manner" in this provision would permit SARS a discretion to request information that is relevant in determining whether the entity qualifies as a headquarter company. The information which may be gathered to assess whether these qualifying criteria are met would include the details of the ownership of the headquarter company.¹⁴⁰ The details of the owners in the share register of companies may be required by SARS to verify whether in fact all shareholders of the company hold equity shares and voting rights which would qualify the company for headquarter company election.

It is further submitted that this ownership information may be required by SARS to fulfil its obligations to provide information requested under an international tax agreement. South Africa is obliged to provide information rendered for tax purposes to assist the administration of a foreign country with which South Africa has a tax agreement providing for the exchange of information.¹⁴¹ A request by a foreign country with which South Africa may exchange

¹³⁹ Subsec 1 of the Tax Administration Act read with subsec 4 of the *SARS Act, No 34 of 1997*. 1997. Pretoria: Government Printer.

¹⁴⁰ Refer to chapter 2.4.1.3 for previous discussions in this regard.

¹⁴¹ Subsec 108(1) of the Income Tax Act.

information under an international tax agreement may include a request for ownership information relevant to the administration or collection of taxes in that foreign country.¹⁴²

It is therefore submitted that information regarding the ownership of a headquarter company may be required for the administration of a tax Act.

2.4.6.2.2 Would a person holding ownership information of a headquarter company be a taxpayer?

The definition of "taxpayer" includes a person who is the subject of a request to provide assistance under an international agreement.¹⁴³

As noted in chapter 2.4.6.2.1, a request from a foreign country to share ownership information under an international tax agreement would be for the purpose of administering the Income Tax Act.

Therefore any person who has access to ownership information of a headquarter company and is required by SARS to provide that information in terms of a request under an international tax agreement would be considered a "taxpayer".

2.4.6.2.3 Is the "taxpayer" of a headquarter company readily identifiable?

All entities wishing to elect treatment as a headquarter company would need to be a company as defined in the Income Tax Act.¹⁴⁴ A company as defined in the Income Tax Act bears the same meaning in the Tax Administration Act.¹⁴⁵ All companies would require the appointment of a public officer who would be responsible for complying with the provisions of taxing Acts. Furthermore, the appointed public officer must reside in South Africa.¹⁴⁶

In practice it should be possible to identify and burden the public officer of a headquarter company with the request for ownership details of that company.

It is therefore submitted that the "taxpayer" burdened with a request for information would be readily identifiable.

¹⁴² In *CSARS v Werner van Kets* (2011) 74 SATC 9 no argument was placed before the Court or considered by the Court limiting the information which could be provided under an international tax agreement.

¹⁴³ Subsec 151(e) of the Tax Administration Act.

¹⁴⁴ Refer to chapter 2.2.1.

¹⁴⁵ Subsec 1 of the Tax Administration Act.

¹⁴⁶ Subsec 246 (1) and subsec 246 (5) of the Tax Administration Act.

2.4.6.2.4 Could the request for ownership be directed to another person other than the taxpayer?

The request may require the taxpayer or any other accountable person to provide the requested information. The information may therefore be obtained from any accountable person without any apparent limitation.

The common law duty of confidentiality which may exist between persons and a company would be overridden by the Tax Administration Act. Furthermore, attorney-client privilege in South African law would not permit a service provider to ignore a request to share confidential information due to secrecy provisions.¹⁴⁷

2.4.6.2.5 Conclusion as to whether South Africa has compulsory powers to share ownership information of headquarter companies

The Tax Administration Act read with the Income Tax Act provides a mechanism which in practice should allow SARS to gather ownership information in relation to headquarter companies.

No secrecy provisions exist which can prevent any accountable person from denying a request to share this particular information.

2.4.6.3 Availability of resources to gather information relating to the ownership of headquarter companies

Adequate resources should be in place to further the effective collection of ownership information.¹⁴⁸

The Division of Enforcement Risk Planning within SARS is empowered to obtain information and exchange information under an exchange of information request.¹⁴⁹

The officers of this division have direct access to the SARS core systems and other external systems. In complicated cases where such information is not available, an audit specialist from the local branch office of SARS will be tasked to obtain the information from the taxpayer.¹⁵⁰

¹⁴⁷ Organisation for Economic Co-operation and Development (2012:55).

¹⁴⁸ Organisation for Economic Co-operation and Development (2001:84).

¹⁴⁹ Organisation for Economic Co-operation and Development (2012:50).

¹⁵⁰ Organisation for Economic Co-operation and Development (2012:51).

Both the audit specialists and officers of the Enforcement Risk Planning Division receive training in exchange of information.¹⁵¹

Results of exchange of information requests in practice show that 80% are resolved within 90 days and a further 10% are resolved within 180 days.¹⁵² These statistics appear to indicate that there is sufficient adequately trained and resourced staff available to investigate matters concerning ownership information.

The delegation of responsibility to obtain ownership information to dedicated and skilled staff should ensure the supply of ownership information under South Africa's investigative system.

In conclusion, it does appear that South Africa has sufficient resources to facilitate investigations into the ownership of headquarter companies.

2.4.6.4 Effectively functioning judicial system enforcing access to ownership information

An effective judicial system should be in place in South Africa to enforce record keeping requirements and to enforce accessing of information.¹⁵³

As identified in chapter 2.4.1.3, the South African judicial system has successfully imposed convictions on persons who intentionally disregard responsibilities imposed on them by South African tax legislation.

The Cape High Court handed down a decision requiring a South African resident to provide information under the double tax agreement between South Africa and Australia.¹⁵⁴

This and other instances suggests that the judicial system is capable of enforcing punitive measures and provisions aimed at accessing information both in terms of local legislation and international tax agreements.

¹⁵¹ Organisation for Economic Co-operation and Development (2012:77).

¹⁵² Organisation for Economic Co-operation and Development (2012:73).

¹⁵³ Organisation for Economic Co-operation and Development (2001:84).

¹⁵⁴ *CSARS v Werner van Kets* (2011) 74 SATC 9.

2.5 The capability of South African authorities to share ownership information with foreign jurisdictions

It should not be possible for information to be exchanged between countries unless a legal basis exists for doing so.¹⁵⁵

To ensure that South Africa is capable of exchanging ownership information of headquarter companies efficiently, it is necessary for South Africa to have a sufficiently developed network of agreements which provide a basis for sharing ownership information.

Furthermore, legislation should ensure that such agreements are effective and binding in law.¹⁵⁶

2.5.1 Effectiveness of South African exchange of information agreements

2.5.1.1 Effect of international information sharing agreements in South African law

Section 108(1) of the Income Tax Act provides a means for the South African Government to conclude international agreements which provide for exchange of information on tax matters. Approval of such agreements by Parliament and notice of the conclusion of the agreements in the Government Gazette ensures that such agreements are effective as part of South African law.¹⁵⁷

All of the international agreements providing for exchange of information, currently in force, have been given effect as required by the South African Constitution. Therefore information exchange agreements in force are effective in South African law.¹⁵⁸

2.5.1.2 Agreements concluded permit the exchange of foreseeably relevant information

A number of South Africa's agreements facilitating the exchange of information have been concluded without the express term that information which is "foreseeably relevant" should be exchanged.¹⁵⁹

The "foreseeably relevant" standard has been implemented to permit as widely as possible the exchange of information which would be requested by a contracting state.¹⁶⁰

¹⁵⁵ Organisation for Economic Co-operation and Development (2012:59).

¹⁵⁶ Ibid.

¹⁵⁷ Organisation for Economic Co-operation and Development (2012:67).

¹⁵⁸ Ibid.

¹⁵⁹ Ibid at 62.

¹⁶⁰ Ibid at 61.

Despite the express absence of the terms “foreseeably relevant” in certain double tax agreements, South Africa will in most instances interpret the provisions of an agreement in a manner that is consistent with the standard of foreseeable relevance.¹⁶¹

However, a concern is noted in the double tax agreement with Switzerland. This agreement provides for the sharing of information only if the information requested relates to carrying out taxing provisions in response to tax fraud.¹⁶² This limitation may severely impair the ability of South African authorities to share information relating to the ownership of headquarter companies with Swiss authorities, as presumably not all requests for this information would pertain to tax fraud investigations.

South African authorities have not denied a request for information in the past three years, on the grounds that the information is not “foreseeably relevant”.¹⁶³ So despite the limitations imposed in the double tax agreement with Switzerland, South Africa may provide information in the spirit of such information exchange agreements. What would remain to be seen is whether that spirit would remain unbroken should Switzerland refuse a request from South Africa in light of the request not being in relation to a tax fraud investigation.

2.5.1.3 The South African authority’s ability to share ownership information under international tax agreements

Effective exchange of information requires that ownership information be provided regardless of any domestic restrictions which may prevent the obtaining and sharing of sensitive information, including ownership information.¹⁶⁴

As noted in chapter 2.4.6.2, measures exist in South African law to permit the fiscal authorities the right to gather ownership information without interference from any confidentiality and secrecy laws.

There should be no cause for concern that South Africa is incapable of obtaining and sharing ownership information of headquarter companies in response to a request for an exchange of information.¹⁶⁵

¹⁶¹ Ibid at 62.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid at 63.

¹⁶⁵ Ibid at 64.

2.5.1.4 No domestic tax interest requirement for exchange of information

A number of the double tax agreements concluded by South Africa do not explicitly require information to be shared, if this information is not relevant to the enforcement of its own tax laws.¹⁶⁶ However, there are no restrictions in South African law to the effect that a request from a treaty partner would be denied for the reason that South Africa is not interested in that information.¹⁶⁷

2.5.1.5 Dual criminality as a requirement for exchange of information

Exchange of information should not be stifled due to a requirement that information be shared only in cases where dual criminality exists. The principle of dual criminality requires the conduct that is being investigated to constitute a criminal offence in both states.¹⁶⁸

Only the double tax agreement with Switzerland would possibly derail a request for an exchange of ownership information on the basis that the conduct being investigated does not constitute a criminal offence subject to imprisonment under the laws of both contracting states.

As a result a request for exchange of ownership information would be significantly hampered should a Swiss resident hold an ownership interest in a headquarter company in South Africa. It is for this reason that it is recommended that this double tax agreement be amended to remove the dual criminality principle.¹⁶⁹

2.5.2 Exchange of ownership information with all relevant partners

Sharing ownership information of headquarter companies should be possible with all relevant partners.¹⁷⁰

South Africa has actively concluded and enforced international agreements containing exchange of information measures with more than 90 countries.¹⁷¹ South Africa is able to

¹⁶⁶ Ibid at 64.

¹⁶⁷ Ibid at 65.

¹⁶⁸ Ibid at 65.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid at 68.

¹⁷¹ Article 26 of the Model Tax Convention on Income and on Capital 2010, provides for an effective means to share information between the competent authorities of contracting states. The majority of double tax agreements concluded by South Africa contain similar if not identical wording to article 26 of the Model Tax Convention and therefore South Africa can effectively exchange information with its treaty partners. Where double tax agreements do not include this wording, protocols amending the exchange of information articles have been or are in the process of being negotiated to amend the exchange of information articles. Where South Africa has not concluded a double tax agreement, 16 tax exchange of information agreements have

exchange information through agreements with its major trading partners, all of the G20 member countries and the majority of OECD member countries.¹⁷²

In conclusion South Africa has a significant tax treaty network which allows for exchange of information. Further development of this treaty network would assist in preventing the Headquarter Company regime from being used to conceal owners' identities through investing via a jurisdiction with which South Africa does not have an international agreement allowing for exchange of information.

2.5.3 Conclusion as to whether ownership information of headquarter companies may be effectively shared

South Africa has measures in place to give effect to international agreements which provide for exchange of information between states. These measures are passed into and form part of South African law thereby providing a means for ownership information of headquarter companies to be shared.

South Africa has actively pursued the conclusion of international agreements allowing the exchange of information and should continue to expand these information exchange agreements to prevent the concealment of ownership information of headquarter companies through investment channelled via non-treaty partners.

To a large extent, international agreements concluded by South Africa provide an effective means to share ownership information which is “foreseeably relevant” in the administration of taxing acts both at home and in other countries.

However, the double tax agreement between South Africa and Switzerland could undermine the effective exchange of information relating to the ownership of headquarter companies. The double tax agreement concluded with Switzerland should, therefore, be amended to permit the exchange of information beyond that required in investigating criminal, fraud tax cases. This double tax agreement should also remove the principle of dual criminality.

been and or are in the process of being concluded. South Africa has focussed on concluding tax information exchange agreements with traditional secrecy and low-tax jurisdictions. Refer to appendices H and I for further details regarding tax information exchange agreements which have been concluded or are in the process of negotiation.

¹⁷² Ibid at 68.

2.6 Conclusion - South African Headquarter Companies regime as a fiscally transparent holding company regime

Measures in South Africa require the ownership information of headquarter companies to be maintained. Punitive action under tax and other legislation provides a means to enforce the maintenance of ownership information.

Ownership information of headquarter companies is currently required to be submitted to SARS, in terms of an annual RCH01 declaration. This annual declaration must be completed and submitted to secure the headquarter company status.

South Africa relies on an upfront disclosure and an investigative system to obtain ownership information of headquarter companies. Practice and legislated measures in place in South Africa should ensure an effective means for obtaining ownership details for headquarter companies.

South Africa would to a large degree be capable of sharing ownership information of headquarter companies. It is recommended that South Africa seek to conclude more international agreements providing an effective means to share ownership information which is “foreseeably relevant” in the administration of taxing acts in other countries. The double tax agreement concluded with Switzerland needs to be amended to reflect transparency standards to prevent investments being made via Switzerland into the South African headquarter companies regime with the goal to conceal the identity of owners.

It is submitted that to a large extent the South African headquarter companies regime does not permit the concealment of owners’ details and therefore should bear the imprint of a fiscally transparent holding company regime.

3. Mauritius as a fiscally transparent holding company regime

3.1 Mauritian Global Business Licence regime

Mauritius has sought to attract foreign investment and secure employment of its skilled, professional workforce. A significant effort in this regard has been the introduction of the Global Business Licence (GBL) offering which exists in its current form under the enactment of the Financial Services Act.¹⁷³

The GBL regime offers investors a number of options in which to implement the holding of foreign entities. Coupled with the flexibility of the legal form of these entities, the regime offers lucrative tax concessions.

3.2 Qualifying criteria for a corporation obtaining a GBL1 or GBL2 licence

If an applicant meets the qualifying criteria and specific requirements, global business licences are issued by the Financial Services Commission of Mauritius (FSC). These requirements and criteria are discussed further.

3.2.1 Mauritian resident corporation

Only a Mauritian resident corporation conducting business outside of Mauritius may apply for a GBL1 or GBL2 registration.¹⁷⁴

3.2.1.1 What is envisaged by a Mauritian resident corporation?

Any of the following persons qualify as a Mauritian resident corporation:¹⁷⁵

- A company incorporated under the Companies Act¹⁷⁶.
- A company registered under the Mauritian Companies Act.
- A *société* registered in Mauritius.
- A partnership registered in Mauritius.
- A trust.
- Any other body of persons established under the laws of Mauritius.

¹⁷³ *The Financial Services Act, No.14 of 2007*. 2007. Port Louis: Government Printing Department. (Mauritius) (“the Financial Services Act”).

¹⁷⁴ Subsec 71(1) of the Financial Services Act.

¹⁷⁵ Subsec 71(7) of the Financial Services Act.

¹⁷⁶ *Companies Act, No.15 of 2001*. 2001. Port Louis: Government Printing Department. (Mauritius). (“Mauritian Companies Act”).

Incorporation under the Mauritian Companies Act

The Mauritian Companies Act allows for the incorporation of both public and private companies which may be:

- limited by the value of unpaid shares¹⁷⁷; or
- limited by a guarantee given by its members¹⁷⁸; or
- limited by a combination of the value of unpaid shares and members' guarantees¹⁷⁹; or
- an unlimited company¹⁸⁰.

Registration under the Mauritian Companies Act

A foreign company would be registered under the Mauritian Companies Act, if that company carries on business or has its place of business in Mauritius.¹⁸¹

No exhaustive list exists as to what constitutes carrying on a business in Mauritius.¹⁸²

However, the mere meeting of directors and the maintenance of a bank account in Mauritius would not in itself mean that the foreign company is carrying on business in Mauritius.¹⁸³

Whilst in law it is possible for a foreign company to register under the Mauritian Companies Act, it is the practice of the FSC to reject global business licence applications by foreign companies.¹⁸⁴

A société registered in Mauritius

A *société* is a partnership which may be formed under *Titre Neuvième* of *Livre Troisième* of the Code Civil Mauricien and *Titre Troisième* of *Livre Premier* of the Code de Commerce.

Partners of a general partnership, known as a *société en nom collectif*, are fully exposed to the liabilities of the partnership. General partners of a limited partnership, known as a *société en commandite simple*, are fully exposed to the partnership's liabilities, whilst the limited partners are only liable for the partnership's debts to the extent of their capital contributions.¹⁸⁵

¹⁷⁷ Subsec 21(2)(a) of the Mauritian Companies Act.

¹⁷⁸ Subsec 21(2)(b) of the Mauritian Companies Act.

¹⁷⁹ Subsec 21(2)(c) of the Mauritian Companies Act.

¹⁸⁰ Subsec 21(2)(d) of the Mauritian Companies Act.

¹⁸¹ Subsec 276 of the Mauritian Companies Act.

¹⁸² Refer to Subsec 274 of the Mauritian Companies Act.

¹⁸³ Subsec 274(b)(ii)-(iii) of the Mauritian Companies Act.

¹⁸⁴ Organisation for Economic Co-operation and Development. 2011. *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Mauritius: Combined Phase 1+ Phase 2*. OECD Publishing. Footnote 11 at 20.

¹⁸⁵ *Ibid* at 27.

A limited partnership registered in Mauritius

A limited partnership may be established to do business within Mauritius with persons within and outside of Mauritius.¹⁸⁶

The activities of a société would continue to be regulated by the Code Civil Mauricien or the Code de Commerce and not the Partnerships Act.¹⁸⁷ However, where a société is a partner of a limited partnership, the société must comply with the Partnerships Act in respect of its partnership interest in the limited partnership.

The partners may elect that the limited partnership be treated as a separate legal entity.¹⁸⁸

A limited partnership comprises both general and limited partners. The general partners are fully exposed to the liabilities of the partnership, despite its registration as a separate legal entity.¹⁸⁹ A limited partner is not generally exposed to the debts of the partnership in excess of the partner's contribution. Exceptions are if the partnership fails to comply with the Partnerships Act or if the partnership agreement specifies otherwise.¹⁹⁰ Both general and limited partners may be an individual, an incorporated or an unincorporated person and may include a *société* or another partnership.¹⁹¹

A trust

A trust recognised in terms of the Trusts Act¹⁹² could receive a global business licence.¹⁹³

A trust would exist where a person ("trustee") holds or has vested rights in assets, but not as the owner, and is obliged to control these assets for the benefit of another person (a beneficiary).¹⁹⁴

A foreign trust is recognised and enforceable under the Trusts Act, subject to its activities not contravening the laws of Mauritius; that they are not immoral or contrary to public policy; and to the extent that the foreign trust does not control immovable property in

¹⁸⁶ *The Limited Partnerships Act, No. 28 of 2011*. 2011. Port Louis: Government Printing Department. (Mauritius). ("the Partnerships Act") - see Subsec 10(1).

¹⁸⁷ Subsec 3 of the Partnerships Act.

¹⁸⁸ Subsec 11 of the Partnerships Act.

¹⁸⁹ Subsec 12(1)(a)(ii) of the Partnerships Act.

¹⁹⁰ Subsec 12(1)(b)(iii) of the Partnerships Act.

¹⁹¹ Subsec 12(2) and subsec 12(3) of the Partnerships Act.

¹⁹² *The Trusts Act, No. 14 of 2001*. 2001. Port Louis: Government Printing Department. (Mauritius). ("the Trusts Act").

¹⁹³ Subsec 1 of the Financial Services Act – see definition of "trust".

¹⁹⁴ Subsec 3 of the Trusts Act.

Mauritius.¹⁹⁵ Therefore a foreign trust which meets the definition of a trust in the Trusts Act could qualify as a Mauritian resident corporation.

Any other body of persons established under the laws of Mauritius

There is no exhaustive list of bodies of persons which would qualify under these criteria.

A foundation established and registered under the Foundations Act, is an example of a body of persons established under the laws of Mauritius.¹⁹⁶ A foundation may be established in Mauritius to undertake the purposes specified in its charter.¹⁹⁷ A foundation may conduct charitable or non-charitable purposes for the benefit of identified persons or classes of persons; or it may conduct specific purposes.¹⁹⁸

Until the foundation has applied to be registered, it will not be seen to be a person distinct under the laws of Mauritius.¹⁹⁹

3.2.1.2 Mauritian resident corporation must envisage conducting business outside of Mauritius

A Mauritian resident corporation must show that its purpose includes undertaking business outside of Mauritius. The ultimate purpose test, with relevant circumstances must indicate that the corporation is to conduct global business. This ultimate purpose test effectively enquires into whether the ultimate purpose of the company is investing or providing services outside of Mauritius.²⁰⁰

3.2.2 Additional qualifying criteria for GBL1 registration

In approving a GBL1 registration, the FSC will consider whether the conduct of the corporation is managed and controlled from Mauritius.²⁰¹ It will make its judgement based on the following factors:²⁰²

- Does the corporation have at least two directors, resident in Mauritius, of sufficient calibre to exercise independence of mind and judgement?

¹⁹⁵ Subsec 60 of the Trusts Act.

¹⁹⁶ *The Foundations Act, No. 8 of 2012*. 2012. Port Louis: Government Printing Department. (Mauritius). ("the Foundations Act").

¹⁹⁷ Subsec 3(1) of the Foundations Act.

¹⁹⁸ Subsec 3(3) of the Foundations Act.

¹⁹⁹ Subsec 5(2) of the Foundations Act.

²⁰⁰ Financial Services Commission of Mauritius. 2007. *Circular Letter CL 201207: New Conceptual Approach to Global Business*. Available: <http://www.fscmauritius.org/media/52922/cl201207.pdf> [4 September 2013]

²⁰¹ Subsec 71(4)(a) of the Financial Services Act.

²⁰² Subsec 71(4)(b) of the Financial Services Act.

- Does the corporation maintain at all times its principal bank account in Mauritius?
- Does the corporation keep and maintain, at all times, its accounting records at its registered office in Mauritius?
- Does the corporation prepare or proposes to prepare its statutory financial statements and causes or proposes to have such financial statements audited in Mauritius?
- Does the corporation provide for meetings of directors to include at least two directors from Mauritius?

3.2.3 Additional qualifying criteria for GBL2 registration

Only private companies incorporated under the Mauritian Companies Act may apply for a GBL2 registration. Furthermore, a GBL2 corporation may not conduct the following activities:²⁰³

- Banking.
- Financial services.
- Carrying out the business of holding or managing or otherwise dealing with a collective investment fund or scheme as a professional functionary.
- Providing of registered office facilities, nominee services, directorship services, secretarial services or other services for corporations.
- Providing trusteeship services by way of business.

3.3 Factors presented by the Global Business Licence regime which may roadblock the identification and exchange of ownership information

The Mauritian Global Business Licence regime contains factors which may inherently pose a threat to obtaining and sharing information relating to the owners of these corporations.

Inherent factors which are relevant to this regime are discussed further.

3.3.1 Form of GBL1 and GBL2 corporations

The definition of a Mauritian resident corporation allows a number of corporate entities to qualify for a GBL1 registration. However, only a private company incorporated under the Mauritian Companies Act may qualify for a GBL2 registration.

The form of these qualifying corporations exhibits characteristics which may prevent the identification of beneficial owners.

²⁰³ Subsec 71(3) of the Financial Services Act.

As private limited liability companies ordinarily face less regulation, these entities have been specifically identified as a vehicle in which to aid anonymity.²⁰⁴

Both GBL1 and GBL2 corporations may take the form of private limited liability companies. GBL1 and GBL2 private companies therefore inherently offer the cloak of anonymity unless sufficient supervision and regulation requires the identity of these owners to be accurately recorded and maintained.

3.3.2 Mauritian and foreign trusts

A trust which may qualify as a GBL1 corporation would be established by contractual arrangements between a founder and designated trustees. Given the limited number of parties who are subject to the rights and obligations established under a trust and given the private nature of a trust, trusts are left largely unregulated by authorities.²⁰⁵ This lack of regulation creates the opportunity for the settlors and beneficiaries of trusts to go unrecorded.

In a number of jurisdictions it is possible to create trusts which assist in hiding the identity of the beneficiaries of the trust. For instance, blind trusts may be used in certain jurisdictions to facilitate tax evasion through the non-disclosure of the beneficiaries in the trust deed.²⁰⁶

3.3.3 Mauritian and foreign foundations

Foundations may also face little supervision and regulation by authorities. Where supervision and regulation is absent the foundation's documents would not be publicly available and nominee founders could be used to conceal the identities of founders and beneficiaries.²⁰⁷

Foundations holding a global business licence could be utilised to hide the identities of beneficiaries and founders.

3.3.4 Mauritian and foreign limited liability partnerships

Authorities may not require limited partners to register with authorities. The concealment of a beneficial owner of a limited liability partnership can be furthered where a limited partner

²⁰⁴ Organisation for Economic Co-operation and Development (2001:23).

²⁰⁵ Organisation for Economic Co-operation and Development (2001:25).

²⁰⁶ Olivier, L & Honiball, M (2011:132).

²⁰⁷ Organisation for Economic Co-operation and Development (2001:27-28).

appoints a nominee general partner or where a limited partner is in *de facto* control of the general partner.²⁰⁸

Should registration of the limited partners not be required, both foreign and local limited liability partnerships offer the inherent ability to conceal the limited partners' identities.

3.3.5 Issuing of bearer shares

Bearer shares may not be issued by companies or a *société*. Therefore bearer shares are not available to conceal the identities of the beneficial owners of these corporations.²⁰⁹

3.3.6 Registration of nominee shareholders

Nominee shareholders are recognised by the Mauritian Companies Act. Furthermore, no legislation exists prohibiting service providers from acting as nominee shareholders.²¹⁰

It is therefore possible to conceal the identity of the beneficial owner of a global business licenced company through the use of nominee shareholders.

3.3.7 Conclusion - identification of inherent factors presented by the Global Business Licence regime which may roadblock transparency standards

The Mauritian Global Business Licence regime presents certain inherent factors which may prevent the identification of the owners of these corporations. The following inherent factors have been identified:

- GBL1 and GBL2 corporations may take the form of a private limited liability company.
- A GBL1 corporation may take the form of a local or a foreign trust.
- A GBL1 corporation may take the form of a local or a foreign foundation.
- A GBL1 corporation may take the form of a local or a foreign limited liability partnership.
- A company licenced as a GBL1 or GBL2 corporation may issue shares to nominee shareholders.

Measures implemented by the Mauritian Legislature and authorities are investigated to assess whether means exist to identify the beneficial owners of global business licence corporations.

²⁰⁸ Organisation for Economic Co-operation and Development (2011:28-29).

²⁰⁹ Organisation for Economic Co-operation and Development (2011:26).

²¹⁰ S 1 of the Mauritian Companies Act – see definition of “nominee”.

3.4 Measures undertaken by the Mauritian Legislature and Mauritian authorities to remove impediments to identifying the owners of GBL1 and GBL2 corporations

The Mauritian authorities, in particular the FSC, may take administrative steps to ensure the availability of details regarding the owners of these corporations.

The Mauritian Legislature is responsible for providing a legal basis for the Mauritian authorities to gather such ownership information.

Measures undertaken by the Mauritian Legislature and Mauritian authorities are discussed further to assess whether ownership information for these corporations is likely to be available.

3.4.1 Obtaining and maintaining information regarding private limited liability companies

Measures which assist with enforcing the recording and maintenance of records reflecting the ownership information of GBL1 and GBL2 private limited liability companies is considered further.

3.4.1.1 Measures to accurately record ownership information of GBL1 and GBL2 private limited liability companies

Ownership information for these companies is not disclosed to the Mauritius Revenue Authority (MRA).²¹¹

An application for incorporating a company with the Registrar of Companies in Mauritius, requires the following relevant details to be provided:²¹²

- The full name and residential address of the legal shareholders.
- The number of shares issued to each of the shareholders and the consideration paid for the shares.

The Registrar of Companies takes no further steps to authenticate that the legal shareholders of these companies are in fact the beneficial owners of the companies.²¹³

GBL1 and GBL2 applications must be lodged via licensed management companies.²¹⁴

²¹¹ Organisation for Economic Co-operation and Development (2011:18).

²¹² Subsec 23(2)(d) of the Mauritian Companies Act.

²¹³ Organisation for Economic Co-operation and Development (2011:18).

²¹⁴ Subsec 72(1)(a) of the Financial Services Act.

In the case of an application for GBL1 registration, the company must provide supporting, certified copies of customer due diligence documents to a licenced management company.²¹⁵ To fulfil its responsibility to supervise and enforce compliance by a “financial institution” with the Financial Intelligence and Anti-Money Laundering Act²¹⁶, the FSC issued the FSC’s Code on the Prevention of Money Laundering & Terrorist Financing (“the Code”).²¹⁷ As management companies are licenced in terms of section 77 of the Financial Services Act, they must obtain and keep customer due diligence documents required under the Code.²¹⁸

In the case of an application for a GBL2 corporation, supporting customer due diligence documents must be obtained by the licenced management company. The management company must perform effective customer due diligence measures and risk profiling procedures throughout the relationship with the corporation and would be required to lodge the details of the beneficial owners of GBL2 corporations with the FSC.²¹⁹

In terms of the Code, management companies must verify the existence and must identify the principals of the company. In doing so, the management company must take reasonable steps to understand the ownership and control structure of the company, verify and establish the existence of the company and determine the identities of the principals of the company. The principals of the company include the promoters, the beneficial owners and ultimate beneficial owners and the directors of the company.²²⁰

The following guideline to achieve this verification and identification process is given:²²¹

- “Obtaining an original or appropriately certified copy of the certificate of incorporation or registration;”
- “Checking with the relevant companies registry that the company continues to exist;”

²¹⁵ Financial Services Act, No.14 of 2007. Financial Services (Consolidated Licensing and Fees) Rules 2008. 2008. *Government gazette*. 26. 22 March. Government notice no. 47/2008.

²¹⁶ *Financial Intelligence and Anti-money Laundering Act, No. 6 of 2002*. 2002. Port Louis: Government Printing Department. (Mauritius). (“the FIAL Act”) – see subsec 18(1)(c).

²¹⁷ Financial Services Commission of Mauritius. 2012. *Code on the Prevention of Money Laundering & Terrorist Financing*. Available: http://www.fscmauritius.org/media/69027/new_fsc_codefinal12.pdf [5 September 2013]

²¹⁸ “Financial institution” include persons who are licenced or registered in terms of subsec 77 of the FSC Act – see definition of “financial institutions” in s 1 of the FIAL Act.

²¹⁹ Financial Services Commission of Mauritius. 2010. *Circular Letter CL03022010*. Available: [http://www.fscmauritius.org/media/52934/new%20additional%20measures%20for%20gbc%20%20\(c103022010\).pdf](http://www.fscmauritius.org/media/52934/new%20additional%20measures%20for%20gbc%20%20(c103022010).pdf) [5 September 2013]

²²⁰ Financial Services Commission of Mauritius (2012:25).

²²¹ Financial Services Commission of Mauritius (2012:28).

- “Reviewing a copy of the latest report and accounts if available (audited, where possible);”
- “Obtaining details of the registered office and place of business;”
- Verifying the identity of the principals of the company through measures prescribed for natural persons or legal persons, depending on the legal nature of the principal.

These due diligence procedures require the management company to identify the beneficial owners of the company as well as the ultimate beneficial owners of the company.

Furthermore where the beneficial or ultimate beneficial owner is a legal person, the management company must drill down to identify and verify the individuals who are in control of that legal person.²²² An original or a certified copy of that individual’s national identity card, current passport or current driver’s licence may be used to verify the date of birth and the nationality of these individuals. The permanent physical addresses of these individuals must be verified through an original or a certified copy of a recent utility bill, a recent credit card or bank account statement or a recent bank reference.²²³

3.4.1.2 Measures to maintain ownership information of GBL1 and GBL2 private limited liability companies

Private limited liability companies incorporated in Mauritius are required to maintain a register of each class of issued shares. The information required to be entered into the share register is as follows:²²⁴

- The name and the last known address of each person who has been a shareholder within the past seven years.
- The number of shares of that class held by each shareholder within the last seven years.
- The date of any issue of shares to, repurchase or redemption of shares from or transfer of shares by or to each shareholder within the last seven years.

Changes in shareholding in the register of the company would reflect changes in the legal shareholder and would not necessarily record changes in the beneficial owner of the company.

²²² Financial Services Commission of Mauritius (2012:26).

²²³ Financial Services Commission of Mauritius (2012:24-25).

²²⁴ Subsec 91(3)(a)-(c) of the Mauritian Companies Act.

Management companies lodging an application for a GBL1 registration undertake to maintain customer due diligence documentation relating to controlling shareholders. A controlling shareholder is considered to be any person who is able to exercise control over 20% or more of votes at a company's general meeting or is able to appoint and remove directors who hold a majority voting right at directors' meetings.²²⁵

Management companies must notify the FSC of changes in the beneficial ownership of GBL2 companies within one month of the change.²²⁶

Depending on the assessed risk, management companies must continue to perform customer due diligence procedures throughout the business relationship.²²⁷ Management companies are also required to maintain transactional records for at least seven years. These transactional records would include the name and address of the customer, the beneficial owner and the underlying principal, any instructions received, the destination of funds, the forms of authority, the nature of the transactions and sale and purchase agreements.²²⁸ In maintaining these transactional records, a management company is well placed to identify changes in the beneficial owner of these companies.

3.4.1.3 Enforcement of requirements to record and maintain ownership information

The Mauritian Registrar of Companies has no enforcement authority for GBL1 and GBL2 corporations.²²⁹

The FSC is empowered through relevant laws and regulations to undertake the necessary administrative actions to ensure compliance by FSC licenced persons.

The FSC may cancel a global business licence where it believes on reasonable grounds that this action is required to preserve the good reputation of Mauritius as a financial services centre; to protect or mitigate damage to the integrity of its financial services industry; or to protect the public at large.²³⁰

Between 2004 and 2011, the FSC performed investigations into between 10 and 15 licensees per annum. In these instances, ordinarily the licensee would correct any troublesome actions

²²⁵ Organisation for Economic Co-operation and Development (2011:21).

²²⁶ Financial Services Commission of Mauritius (2010:1-2).

²²⁷ Financial Services Commission of Mauritius (2012:34).

²²⁸ Financial Services Commission of Mauritius (2012:51).

²²⁹ Organisation for Economic Co-operation and Development (2011:33).

²³⁰ Subsec 74(5) of the Financial Services Act.

or the management company would prefer to stop the activities of the global business licensee to avoid its own licence being revoked.²³¹

The FSC may take disciplinary action against management companies for failing to comply with the Financial Services Act. This disciplinary action includes issuing private warnings or public censure; temporarily barring a management company from holding a licence; or the cancellation of a management company's licence and the imposition of an administrative penalty. The FSC can also disqualify an officer of a management company from a specified office or position in the management company for a specified period.²³²

Where a person fails to give the FSC information requested, that person faces a fine up to 1 million Mauritian rupees ("rupees") if convicted.²³³ Furthermore, where no specific penalty is stated, a person who fails to comply with the Financial Services Act or its regulations could face a fine of up to 500 000 rupees or imprisonment of no more than five years if convicted.²³⁴

Practice indicates that the FSC does take punitive measures. In 2010, five global business licences were revoked. Whilst in 2011 and 2013 respectively one and two global business licences were revoked. In 2010 and 2013 respectively one and four non-global business licenses were revoked or suspended. Furthermore in 2013, four persons were disqualified from acting as officers of a person licenced under the Financial Services Act for a period of five years.²³⁵

3.4.1.4 Conclusion as to the recording and maintenance of ownership information for GBL1 and GBL2 private limited liability companies

Measures under the Mauritian Companies Act require the legal owners of these companies to be recorded and for these records to be updated.

Recording of the beneficial ownership of these companies is the domain of the FSC. Through anti-money laundering codes and rules imposed on management companies, a basis exists for recording and maintaining the details of the beneficial owners of these companies.

²³¹ Organisation for Economic Co-operation and Development (2011:34).

²³² Organisation for Economic Co-operation and Development (2011:33).

²³³ Subsec 75(6) of the Financial Services Act.

²³⁴ Subsec 90 of the Financial Services Act.

²³⁵ Financial Services Commission of Mauritius. *Media Corner*. Available: <http://www.fscmauritius.org/media-publications/press-releases-communiques.aspx> [10 November 2013].

Therefore, measures are in place requiring details of the legal and beneficial owners of these companies to be recorded and updated. The enforcement of these measures is supported by punitive actions, for which there is recent evidence of implementation by the FSC. Therefore these enforcement measures are being practised to discourage non-compliance with the Financial Services Act and thereby to prevent GBL1 or GBL2 companies from being abused to shelter the identities of beneficial owners.

The Global Business Licence regime is largely reliant on service providers (i.e. licensed management companies) to acquire and maintain information regarding the beneficial ownership of the licenced companies. Whether this is an appropriate means for obtaining ownership information is discussed further in chapter 3.4.6.

3.4.2 Obtaining and maintaining beneficial ownership information for Mauritian and foreign trusts

Mauritian authorities may not exercise sufficient supervision over Mauritian and foreign trusts and as a result GBL1 trusts may be used to conceal the identities of beneficial owners. The concealment of these beneficial owners could be perpetuated further should Mauritius permit the registration of trusts with anonymity features, such as a blind trust. These factors are considered further.

3.4.2.1 Measures to accurately record ownership information of Mauritian and foreign trusts

Requirements for recording the details of beneficiaries of GBL1 trusts are set out in terms of the Trusts Act, the Mauritian Income Tax Act, the FSC Act and the FIAL Act. These requirements are discussed further.

In terms of the Trusts Act, four types of trusts may be formed. Each type of trust has specific requirements for recording beneficiaries' details.

A general trust will be valid and enforceable only if a trust instrument is written.²³⁶ This trust instrument must contain the details of the beneficiaries.²³⁷ The beneficiaries of this type of trust must be identified by name or ascertainable by reference to a class of persons or by reference to a relationship between the beneficiary and some other identified person.²³⁸

²³⁶ Subsec 6(1)(b) of the Trusts Act.

²³⁷ S 6 and subsec 12(2)(c) of the Trusts Act.

²³⁸ Subsec 14(1) of the Trusts Act.

Protective trusts allow a beneficiary's interest to be safeguarded in the event that the beneficiary's assets may be seized to settle creditors' claims.²³⁹ The trust instrument under which a protective trust is written, must contain details of the beneficiaries.²⁴⁰

Beneficiaries may disclaim their interest, but such disclaimer must specify in writing the duration of the disclaimer or the circumstances under which the disclaimer is no longer effective.²⁴¹ Until such time as the disclaimer in writing is delivered to a trustee, a beneficiary's rights remain undisturbed.²⁴²

A valid and enforceable purpose trust may be formed, despite a lack of identified or ascertainable beneficiaries.²⁴³ The purpose trust must hold objects which are specific, reasonable and capable of fulfilment and which are not immoral, unlawful or contrary to public policy.²⁴⁴ The purposes of the trust must be applied by an appointed enforcer.²⁴⁵ These types of trusts may hold infinite purposes and do not require beneficiaries to be recorded. Therefore there is a real concern that persons benefitting from the activities of the purpose will not be identified.

A charitable trust may be established, if that trust holds the exclusive purpose of charitable activities for the benefit of the general public. These activities are deemed to include the relief of poverty, the advancement of religion and education, the protection of the environment and the advancement of human rights.²⁴⁶ As the exclusive purpose of these trusts is to benefit the general public, charitable trusts would not be used to conceal the identities of its beneficiaries and creators.

Mauritian tax resident trusts which make distributions must submit a declaration to the MRA by 31 March of the year in which the trust's income tax year ends. This declaration would require the full name of each beneficiary and the amount distributed to the beneficiary.²⁴⁷

All GBL1 trusts must be managed and controlled from Mauritius.²⁴⁸ In order to enjoy the benefits of double tax agreements concluded by Mauritius, the GBL1 trust must be tax

²³⁹ S 18 of the Trusts Act.

²⁴⁰ S 6 and subsec 12(2)(c) of the Trusts Act.

²⁴¹ Subsec 16(2) of the Trusts Act.

²⁴² Subsec 16(3) of the Trusts Act.

²⁴³ Subsec 12(2)(c) of the Trusts Act.

²⁴⁴ Subsec 19(2)(a) of the Trusts Act.

²⁴⁵ Subsec 19(2)(b) of the Trusts Act.

²⁴⁶ Subsec 20(1) of the Trusts Act.

²⁴⁷ Subsec 119(1)(a) of the Mauritian Income Tax Act.

²⁴⁸ Refer to 3.2.2.

resident in Mauritius. Furthermore, at least one qualified trustee must be appointed. A qualified trustee must be a management company registered by the FSC or some other Mauritian resident person authorised by the FSC to provide trusteeship services.²⁴⁹ In practice the majority of qualified trustees are registered management companies.²⁵⁰

It is highly likely that GBL1 trusts will be tax resident in Mauritius as these trusts will by necessity be administered in Mauritius with a majority of Mauritian resident trustees.²⁵¹ Therefore beneficiaries' details must be submitted to the MRA when GBL1 trusts make distributions.

Usually at least one trustee will be a management company licenced by the FSC. Furthermore, applications to be licenced with the FSC must be conducted through a licenced management company.²⁵²

As discussed in chapter 3.4.1.1, management companies are required to comply with the Code and must therefore perform customer due diligence in line with this Code throughout their performance of an engagement.

The Code, requires management companies to verify the legal trust arrangement and identify the principals of the arrangement. In order to do so, the management company must take reasonable steps to understand the ownership and control structure of the trust, verify and establish the existence of the trust and determine the identities of the principals of the trust. The principals of the trust include the settlors or contributors (even if these are unnamed), the trustees, the beneficiaries, the protectors and the enforcers of the trust.²⁵³

The following guideline is given to achieve this verification and identification process:²⁵⁴

- “Obtaining an original or appropriately certified copy of the trust deed or pertinent extracts thereof;”
- “Where the trust is registered – checking with the relevant registry to ensure that the trust does exist;”
- “Obtaining details of the registered office and place of business of the trustee;”

²⁴⁹ Subsec 28(1) read with s 1 of the Trusts Act.

²⁵⁰ Organisation for Economic Co-operation and Development (2011:31)

²⁵¹ In terms of the definition of resident in s 73 of the Mauritian Income Tax Act, a trust is resident in Mauritius where the trust is administered from Mauritius and a majority of the trustees are resident in Mauritius.

²⁵² Subsec 72(1)(a) of the Financial Services Act.

²⁵³ Financial Services Commission of Mauritius (2012:27-28).

²⁵⁴ Ibid at 28.

- “Verifying the identity of the principals of the trustee” through measures prescribed for natural persons or legal persons, depending on the legal nature of the trustee.

These due diligence procedures require the management company to identify the trustee and the beneficiaries of the trust. Furthermore where the principal is a legal person, the management company must drill down to identify and verify the individuals who are in control of that legal person.²⁵⁵

Information to be collected for the individuals is discussed in chapter 3.4.1.1.²⁵⁶

3.4.2.2 Measures to accurately record ownership information of Mauritian and foreign trusts

A beneficiary’s interest may, subject to the terms of the trust, be transferred to another person through any means, including a sale or a pledge.²⁵⁷ Whilst there is a requirement to include the beneficiaries’ details in the trust instrument, there does not appear to be any requirement to record a transfer of a beneficiary’s interest. It is therefore possible for a beneficiary to sell his or her interest in a trust to another person, without this change being recorded in the trust instrument or being recorded by the trustees.

Where distributions have not occurred or have occurred since the beneficiaries have changed, their details may not be recorded by the MRA or the records held by the MRA may not be current. Therefore the MRA may not always have reliable records of the beneficiaries of GBL1 trusts.

Depending on the assessed risk, management companies must continue to perform customer due diligence procedures throughout the business relationship.²⁵⁸ Management companies are also required to maintain transactional records for at least seven years. These transactional records would include the name and address of the customer; the beneficial owner and the underlying principal; any instructions received; the destination of funds; the forms of authority; the nature of the transactions; and sale and purchase agreements.²⁵⁹ In maintaining these transactional records, the management company is well placed to identify changes in the identity of the beneficial owner of these trusts.

²⁵⁵ Ibid at 26.

²⁵⁶ Ibid at 24-25.

²⁵⁷ S 17 of the Trusts Act.

²⁵⁸ Financial Services Commission of Mauritius (2012:34).

²⁵⁹ Financial Services Commission of Mauritius (2012:51).

3.4.2.3 Enforcement of requirements to record and maintain ownership information

As in the case of GBL1 companies, enforcement of measures to obtain and maintain beneficial ownership information for GBL1 trusts rests solely with the FSC. In terms of the Financial Services Act, punitive measures are in place and appear to be enforced to discourage non-compliance.²⁶⁰

The existence and implementation of enforcement measures would greatly assist in preventing the use of GBL1 trusts to hide the identities of beneficial owners.

3.4.2.4 Conclusion as to whether details of beneficiaries are recorded and maintained for GBL1 trusts

Whilst all trust instruments, other than a trust instrument for a purpose trust, will require beneficiaries to be disclosed in the trust instrument, there appears to be an opportunity for beneficiaries to sell their interest to a new beneficiary without the new beneficiary's details being recorded.

In the case of a purpose trust, the beneficiaries' details are not recorded. A multitude of persons could benefit from the decision of an enforcer if that enforcer believes that a distribution to these persons fulfils the purpose of the trust.

The record of distributions available to the MRA may be historic, if distributions have not been made in recent periods or may be non-existent where distributions have not been made at all.

Measures imposed on management companies to record the details of the trustees, settlors, enforcers and beneficiaries of trusts create a means for obtaining the details of beneficial owners of trusts. The obligations imposed on management companies to record and report changes in the principals of GBL1 trusts also create a means to maintain the details of the beneficial owners of GBL1 trusts.

Punitive measures which are applied by the FSC discourage non-compliance with the Financial Services Act by licensees, including management companies. Recent history indicates that the FSC enforces these punitive measures.

The Global Business Licence regime is largely reliant on service providers (i.e. licensed management companies) to acquire and maintain information regarding the beneficial

²⁶⁰ Refer to chapter 3.4.1.3 for further information as to the enforcement measures implemented by the FSC.

ownership of GBL1 trusts. Whether this is an appropriate means for obtaining ownership information is discussed further in chapter 3.4.6.

3.4.3 Obtaining and maintaining information for Mauritian and foreign foundations

Foundations ordinarily face less regulation and supervision from authorities, increasing the opportunity for beneficial owners to go unrecorded. Nominee founders may also be used to conceal the identities of founders and beneficiaries. Measures undertaken to obtain and maintain information of beneficial ownership of GBL1 foundations is considered further.

3.4.3.1 Measures to accurately record beneficial ownership information of GBL1

Mauritian and foreign foundations

Both Mauritian and foreign foundations lack separate legal capacity until the foundation has registered with the Registrar of Companies in Mauritius.²⁶¹

In order to register, the foundation must submit a charter of foundation to the Registrar of Companies.²⁶² This charter requires the following relevant details to be documented:²⁶³

- The founder's name and address.
- Where the founder is a body corporate, the legal name and registered address and particulars of its directors and controlling members.
- The beneficiary must be named or the manner in which to appoint or remove a beneficiary must be specified.
- The name and address of the secretary.
- The procedure to be followed to appoint the Council or a protector.
- The address of the registered office for the foundation.

This charter of foundation specifies the beneficiaries or specifies the means for identifying beneficiaries who may be appointed. Furthermore the charter clearly states the founder's name and address. The beneficial owners of a foundation can be determined from the charter of foundation.

The charter of foundation, minutes of Council meetings and the name and address of the founder and members of the Council must be kept at the registered office.²⁶⁴ Therefore the record of the beneficial owners of a foundation is recorded and available.

²⁶¹ S 5 read with s 24 of the Foundations Act.

²⁶² Subsec 23(1)(b) of the Foundations Act.

²⁶³ Subsec 8(1) of the Foundations Act.

In applying for a GBL1 licence, the foundation must complete registration through a licensed management company²⁶⁵ in accordance with the Financial Services Rules of 2008. As previously elaborated in chapters 3.4.1.1 and 3.4.2.1, management companies are therefore obliged to perform customer due diligence procedures for foundations wishing to obtain a GBL1 licence. The guideline procedures are specified in the Code. The Code does not specifically identify the customer due diligence information to be kept for a foundation. However, the Code is a guide to assist management companies to comply with the FIAL Act and therefore the management company must still perform sufficient procedures.

In terms of the principles of the Code, management companies must verify the existence and must identify the principals of the foundation. In order to do so, the management company must take reasonable steps to understand the ownership and control structure of the foundation, verify and establish the existence of the foundation and determine the identities of the principals of the foundation. Essentially, the principals include the founder, the beneficiaries and ultimate beneficiaries and the Council members of the foundation.

These due diligence procedures would require the management company to identify and verify the beneficial owners of the foundation and the ultimate beneficial owners of the foundation against original or certified copies of supporting documents such as its charter. Furthermore where the beneficial or ultimate beneficial owner is a legal person, the management company must drill down to identify and verify the individuals who are in control of that legal person.²⁶⁶ Information to be collected for the individuals is discussed in chapter 3.4.1.1.²⁶⁷

3.4.3.2 Measures to maintain ownership information for GBL1 Mauritian and foreign foundations

The charter of foundation must contain the details of all beneficiaries. Where a beneficiary is added or removed, the charter must be amended. The Registrar of Companies in Mauritius must be notified of amendments made to the charter and must update the foundation register

²⁶⁴ Subsec 37(1) of the Foundations Act.

²⁶⁵ Subsec 72(1)(a) of the FSC Act.

²⁶⁶ Financial Services Commission of Mauritius (2012:26).

²⁶⁷ Ibid at 24-25.

accordingly.²⁶⁸ Therefore a means exists to maintain changes in the details of beneficiaries of foundations.

For every foundation, a secretary must be appointed. The secretary must be a management company licenced with the FSC or another person authorised by the FSC to act as a secretary.²⁶⁹

Where a management company acts as the secretary for a foundation, the management company must continue to perform customer due diligence procedures.²⁷⁰ These management companies are also required to maintain transactional records for at least seven years. These transactional records include the name and address of the customer, the beneficial owner and the underlying principal, any instructions received and the destination of the foundation's funds.²⁷¹ In maintaining these transactional records, the management company is well placed to identify changes in the beneficial owner of these foundations.

3.4.3.3 Enforcement of requirements to record and maintain ownership information

As in the case of GBL1 companies, enforcement of measures to obtain and maintain beneficial ownership information for GBL1 foundations rests solely with the FSC. In terms of the Financial Services Act, punitive measures are in place and appear to be enforced to discourage non-compliance.²⁷²

The existence and implementation of enforcement measures would greatly encourage compliance in keeping the details of the beneficial owners of these foundations.

3.4.3.4 Conclusion as to the recording and maintenance of ownership information for GBL1 foundations

Measures exist under the Foundations Act to record and maintain the records of the beneficiaries, founders and Council members of foundations.

Recording and the maintaining the beneficial owners' details of GBL1 foundations is further reinforced through anti-money laundering codes imposed on management companies during the global business licencing process and when they act as secretaries for the foundation.

²⁶⁸ Subsec 9(2) and subsec 9(4) of the Foundations Act.

²⁶⁹ Subsec 13(1) of the Foundations Act.

²⁷⁰ Financial Services Commission of Mauritius (2012:34).

²⁷¹ Financial Services Commission of Mauritius (2012:51).

²⁷² Refer to chapter 3.4.1.3 for further information as to the enforcement measures implemented by the FSC.

Measures are in place requiring the legal and beneficial owners of these foundations to be recorded and updated. These measures are reinforced through punitive actions undertaken by the FSC where management companies and GBL1 foundations do not comply with the Financial Services Act and where foundations are abused. Recent FSC practice of carrying out punitive actions should discourage those who wish to hide the details of beneficial owners through circumventing the Financial Services Act and or through not conducting sufficient customer due diligence.

The Global Business Licence regime is largely reliant on service providers (i.e. licensed management companies) to acquire and maintain information regarding the beneficial ownership of the licenced corporations. Whether this is an appropriate means for obtaining ownership information is discussed further in chapter 3.4.6.

3.4.4 Obtaining and maintaining information for local and foreign limited liability partnerships

Where authorities do not require the identity of a limited liability partner to be registered, this person's identity can be concealed. Furthermore, the limited partner can appoint a nominee partner to cloak the fact that the limited partner is in *de facto* control of the limited liability partnership.

Measures undertaken by the Mauritian Legislature and authorities to obtain and maintain beneficial ownership information of GBL1 registered limited liability partnerships is considered further.

3.4.4.1 Measures to accurately record beneficial ownership information of GBL1 limited liability partnerships

A *société en commandite simple*, is registered once the following documentation is submitted to the Registrar of Companies in Mauritius:²⁷³

- The name of the partnership.
- The full name, address and designation of the partners who are authorised to manage, administer and sign on behalf of the partnership.
- The partnership contribution of each partner.

²⁷³ Organisation for Economic Co-operation and Development (2011:27-28).

Article 48 of the Code de Commerce requires that partnership deeds contain the full information of each partner.²⁷⁴

The beneficial ownership of an interest in a *société en commandite simple* is not required to be disclosed to the Registrar of Companies with the result that beneficial ownership of these partnerships can be concealed if the partner is a nominee partner.²⁷⁵

A limited partnership, which is not a *société en commandite simple*, may elect to be registered as a legal person. The general partners must register the limited partnership with the Registrar of Companies of Mauritius to secure the separate legal identity of the limited partnership.²⁷⁶ The information to be provided to the Registrar of Companies must contain such information as is required.²⁷⁷ For all registered limited partnerships, the Registrar of Companies must keep a register containing the details of all of the partners. An individual partner's full name, the assignee's full name and their addresses must be included in the register. For partners who are not individuals, the name and the registered office address or place of business must be included in the register.²⁷⁸ Therefore information regarding the registered general and limited partners will be placed on record. However no information is required to be disclosed where a partner is acting as a nominee.

Both a *société en commandite simple* and a limited partnership must be registered in order to be licensed as a GBL1 corporation. Unless other measures exist, a nominee partner may be used to conceal the identities of the partners of a *société en commandite simple* and a limited partnership.

Where a limited partnership does not have at least one general partner who is resident in Mauritius or who is domiciled in Mauritius, a registered agent must be appointed.²⁷⁹ In the case of a GBL1 limited partnership, this registered agent may be a management company licensed by the FSC.²⁸⁰ Furthermore, any limited partnership or a *société en commandite*

²⁷⁴ Ibid at 28.

²⁷⁵ Ibid.

²⁷⁶ Subsec 11(1) – 11(2)(a) of the Partnership Act.

²⁷⁷ Subsec 19(2)(b) of the Partnerships Act.

²⁷⁸ Subsec 21(3)(c)-(d) of the Partnerships Act.

²⁷⁹ Subsec 12(6) of the Partnerships Act.

²⁸⁰ S 2 of the Partnerships Act – refer to the definition of “registered agent”.

simple wishing to be licensed as a GBL1 corporation must use the services of a licensed management company to submit the application to the FSC.²⁸¹

In terms of the Code a management company is required to perform due diligence procedures on its clients.²⁸² A management company submitting a GBL1 application for a *société en commandite simple* or a limited partnership or which acts as a registered agent for a limited partnership must identify the beneficial owners of the partnership.²⁸³

The Code requires that the management company verify the existence of the principals of a *société en commandite simple*. To comply with this requirement, the *société* partnership agreement (the *acte de société*) must be kept and all of the partners' identities must be verified.²⁸⁴

The existence of all of the principals of a limited partnership must be verified by the management company that provides services to that limited partnership. The identities of both general and limited partners must also be verified. As support for the GBL1 application, the partnership agreement and the customer due diligence documentation collected for the general partners and limited partners, whose interest is 20% or more of the partnership, must be submitted to the FSC.²⁸⁵

Where the partner of a *société en commandite simple* or a limited partnership is an individual, the information required for that individual is discussed in chapter 3.4.1.1.²⁸⁶

Where the partner is a legal person, the management company must perform further investigations to identify the individuals or other persons who ultimately control the *société en commandite simple* or limited partnership.²⁸⁷

²⁸¹ Subsec 72(1)(a) of the Financial Services Act.

²⁸² Refer to chapter 3.4.1.1 for further detail as to why such customer due diligence must be performed by management companies.

²⁸³ Financial Services Commission of Mauritius (2012:23).

²⁸⁴ *Ibid* at 27.

²⁸⁵ Financial Services Commission of Mauritius. 2012. *Circular Letter CL 200112: Limited Partnerships – Application for a Global Business Licence*. Available: <http://www.fscmauritius.org/media/65582/cl200112.pdf> [10 November 2013]

²⁸⁶ Financial Services Commission of Mauritius (2012:24-25).

²⁸⁷ Financial Services Commission of Mauritius (2012:26).

3.4.4.2 Measures to maintain ownership information for GBL1 limited liability partnerships

A change in the partners of a registered limited partnership does not affect the legal existence of the limited partnership.²⁸⁸

A limited partnership, may require a management company to act as its registered agent.

Where a management company acts as the registered agent for a limited partnership, customer due diligence procedures must be performed.²⁸⁹ These management companies are required to maintain transactional records for at least seven years. These transactional records would include the name and address of the customer, the beneficial owner and the underlying principal, any instructions received and the destination of the limited partnership's funds.²⁹⁰ In maintaining these transactional records, the management company is best placed to identify changes in the identity of the beneficial owner of these limited partnerships.

3.4.4.3 Enforcement of requirements to record and maintain ownership information

As in the case of GBL1 companies, enforcement of measures to obtain and maintain beneficial ownership information for GBL1 limited liability partnerships rests solely with the FSC. In terms of the Financial Services Act, punitive measures are in place and appear to be enforced to discourage non-compliance.²⁹¹

The existence and implementation of enforcement measures would greatly assist in preventing GBL1 limited liability partnerships from being used to hide the identities of its beneficial owners.

3.4.4.4 Conclusion as to the recording and maintenance of ownership information for GBL1 limited liability partnerships

Both limited partnerships and *société en commandite simple* require the details of the general and limited partners to be registered with the Registrar of Companies in Mauritius.

The risk resulting from the concealing of the identities of the beneficial owners of both forms of limited liability partnerships can be increased through using nominee general partners or where the partners are foreign persons. However, thorough customer due diligence

²⁸⁸ Subsec 11(3) of the Partnerships Act.

²⁸⁹ Financial Services Commission of Mauritius (2012:34).

²⁹⁰ Financial Services Commission of Mauritius (2012:51).

²⁹¹ Refer to chapter 3.4.1.3 for further information as to the enforcement measures implemented by the FSC.

procedures performed by a management company should be sufficient to uncover the identities of all of the partners, including those who are foreign. Furthermore, these procedures would require the beneficial owners' details to be verified where a partner is a legal person or a legal arrangement, such as a trust.

Incentives to ensure diligent recording of the detail of the beneficial partners of limited liability partnerships licensed to conduct global business, would be strengthened through punitive measures imposed by the FSC on those that fail to comply with measures aimed at providing a means to identify these partners.

The identification of beneficial owners of both limited partnerships and *société en commandite simple* is largely dependent on the work of management companies. Whether this is an appropriate means for obtaining information on the beneficial owners is discussed further in chapter 3.4.6.

3.4.5 Obtaining beneficial ownership information where nominee shareholders are registered for GBL1 and GBL2 companies

Nominee shareholders can effectively hide the details of the beneficial shareholders of a GBL1 and GBL2 company, unless there is legislative means to require a nominee shareholder to disclose the identity of the persons they acting for.

The Mauritian Registrar of Companies does not ascertain the identities behind nominee shareholdings.²⁹²

Whilst nominee shareholders are not required to disclose upfront who they are acting for, management companies are obliged to probe arrangements where it is known or ought to be known that a nominee arrangement is being utilised. Where this information is not provided or where the appropriate investigations are not performed by the management company, the FSC will refuse the global business licence application.²⁹³

Management companies which are found to be deliberately collaborating in concealing a nominee arrangement will be subject to disciplinary action.²⁹⁴ The enforcement of these punitive actions in recent history may serve to discourage nominee shareholders and

²⁹² Organisation for Economic Co-operation and Development (2011: 18 and 33).

²⁹³ Ibid at 25.

²⁹⁴ Ibid.

management companies from utilising nominee arrangements to hide the identities of beneficial owners.²⁹⁵

Once again the responsibility for determining the beneficial owner of companies rests with management companies and the FSC. Whether it is appropriate to obtain information on these beneficial owners through the agency of service providers is discussed further in chapter 3.4.6.

3.4.6 Means employed by Mauritius as an effective manner for gathering ownership information

Customer due diligence requirements imposed on management companies is the primary means to identify the beneficial owners of GBL1 and GBL2 corporations. Ideally, if the legal system and professional environment is suitable and requisite elements apply, it may be possible to rely on service providers to record and maintain accurate details of beneficial owners and to share such information timeously with authorities.

Whether the Mauritian legal system and professional environment promotes the sharing of beneficial ownership information for GBL1 and GBL2 corporations is examined further.

3.4.6.1 Compulsory powers and institutional capacity to monitor compliance by management companies

A system relying on service providers to obtain ownership information must empower the fiscal authorities to coerce service providers to comply with their investigative, recording, maintenance and reporting obligations. Furthermore, the empowered authority must have the capacity to fulfil a compliance monitoring function.²⁹⁶

A management company is obliged to provide the information, records and documents requested by the FSC in order for it to exercise its functions mandated under legislation.²⁹⁷ These functions include ensuring that management companies comply with the FIAL Act.²⁹⁸ Therefore the FSC has the power to request that management companies provide any customer due diligence information, records and documents it considers necessary to ensure that management companies are collecting and maintaining information in respect of beneficial owners.

²⁹⁵ Refer to chapter 3.4.1.3 for further information as to the enforcement measures implemented by the FSC.

²⁹⁶ Organisation for Economic Co-operation and Development (2001:82)

²⁹⁷ Subsec 42(1) and subsec 42(2) of the Financial Services Act.

²⁹⁸ Subsec 18(1)(c) of the FIAL Act.

The FSC may further conduct on-site inspections and audits at the premises of the management company, with the aim of assessing the degree of compliance of the company with applicable legislation and guidelines.²⁹⁹

The FSC's licensing and surveillance departments has a professional staff complement, which includes lawyers, accountants and economists who are responsible for monitoring compliance.³⁰⁰

For each GBL1 application, a management company must submit certified copies of the customer due diligence documentation, the incorporation documentation and the constitution of the corporation applying for that licence.³⁰¹ This documentation would be submitted on request in the case of a GBL2 application.³⁰² As a result, the FSC can use the global business licence application process to monitor the quality of customer due diligence documentation kept by management companies.

Depending on the complexity of the corporate structure of the applicant, a GBL2 licence application will be completed within one to two days, whilst a GBL1 licence application will be completed in three to seven days.³⁰³ This short turnaround time indicates that the FSC has the capacity to supervise and monitor that management companies are up to speed with regards to customer due diligence for global business licence applications.

In conclusion, the Mauritian legislation provides an absolute means for the FSC to ensure that management companies are maintaining the required customer due diligence documentation. Furthermore, the FSC departments monitoring this compliance are equipped with suitably qualified professionals who have the capacity to perform quality reviews of customer due diligence documentation submitted.

3.4.6.2 Pool of service providers to possess suitable skills, experience and capacity

To ensure the quality of records maintained for beneficial owners, it is essential that service providers possess staff with the necessary experience and qualifications and that these service providers have sufficient resources.³⁰⁴

²⁹⁹ Subsec 43(1) of the Financial Services Act.

³⁰⁰ Organisation for Economic Co-operation and Development (2011:33).

³⁰¹ Financial Services (Consolidated Licensing and Fees) Rules 2008. Rules 12(1)(d)-(e).

³⁰² Financial Services Commission of Mauritius (2010:2).

³⁰³ Organisation for Economic Co-operation and Development (2011:33).

³⁰⁴ Organisation for Economic Co-operation and Development (2001:82).

3.4.6.2.1 Experience and qualifications of persons in control of management companies

Persons in control of management companies have to set the standards required to monitor compliance with internal controls, procedures and policies necessary to maintain the quality of customer due diligence reporting performed by staff.³⁰⁵ Therefore it is essential that these persons possess suitable skills and experience to implement and monitor these measures.

Persons applying for a management company licence must comply with the same licensing regulations as persons providing financial services under the Financial Services Act.³⁰⁶ A licence to practice as a management company will therefore not be granted unless the applicant can satisfy the FSC that the persons who are the beneficial owners and who are in control of the management company are fit and proper to control its activities.³⁰⁷

In evaluating whether these persons are fit and proper, the FSC will consider if they have “relevant education, qualifications and experience”, the “ability to perform the relevant functions properly, efficiently, honestly and fairly” and a fit “reputation, character, financial integrity and reliability”.³⁰⁸

A Personal Questionnaire must be completed for the FSC to gauge whether the individual is fit and proper to control the management company applying for the licence. The information to be declared by these persons includes:³⁰⁹

- Listing current affiliations and memberships of professional bodies and the year that admission was granted.
- Details of other relevant skills and qualifications.
- Listing any positions held at other institutions providing financial services.
- Particulars of any convictions by a court of law.
- Particulars of any cases where the individual has personally been subject to punitive action, been refused a licence to perform activities, had a licence to perform activities revoked, been censured or publicly criticised or been subject to an investigation.
- Declaring particulars of any cases where a financial services entity, which the individual is associated with,³¹⁰ has been subject to punitive action, has been refused

³⁰⁵ Financial Services Commission of Mauritius (2012:47).

³⁰⁶ Subsec 77(2) of the Financial Services Act.

³⁰⁷ Subsec 18(2)(c), subsec 18(2)(d) and subsec 18(2)(e) of the Financial Services Act.

³⁰⁸ Subsec 20(1)(a) of the Financial Services Act.

³⁰⁹ Financial Services Commission of Mauritius. *Personal Questionnaire*. Available: http://www.fscmauritius.org/media/52782/personal_questionnaire.pdf [16 November 2013]

a licence to perform activities, has had a licence to perform activities revoked, has been censured or publicly criticised or has been subject to an investigation.

- Declaring cases where the individual has been declared bankrupt or has entered into compromises with his or her creditors.
- Declaring cases where the individual is associated with a financial service entity and that financial service entity has been compulsorily wound up, has entered into a compromise with its creditors or has ceased trading.
- Declaring cases where the individual is personally engaged in disputes arising from the management of any business entity.
- Declaring cases where the individual has in the past 7 years been subject to any financial services, regulatory supervision.

The professional affiliations, skills, competence and experience declared by these individuals can be verified by the FSC contacting references named in the declaration.

Any person who is found to have made a false declaration or who omits intentionally an item from the Personal Questionnaire, will be liable to a fine up to 500 000 rupees and to imprisonment not exceeding 5 years.³¹¹

3.4.6.2.2 Skills and knowledge of persons performing customer due diligence activities of management companies

Key to the customer due diligence process of management companies is the employment of alert competent staff. Therefore management companies must ensure that their staff performing customer due diligence procedures are sufficiently skilled and knowledgeable.³¹²

To this end management companies are required to screen staff to ensure that they are competent and of high integrity. Staff screening processes includes requesting and confirming references, verifying employment history and staff qualifications, obtaining details of any disciplinary action taken by previous employers or professional bodies and checking and verifying the details of criminal convictions.³¹³

Initial and ongoing training of staff is expected of management companies. This training covers maintaining customer due diligence documentation and the legal ramifications of

³¹⁰ An individual is associated to an entity if he or she acted as a director, secretary, controller, officer, a senior member of staff or as a controlling shareholder of that entity.

³¹¹ Subsec 19(2) of the Financial Services Act.

³¹² Financial Services Commission of Mauritius (2012:46).

³¹³ Ibid at 47.

failing to maintain these records. Training is expected to be conducted annually, except where staff handle business transactions and relationships, in which case the training should be undertaken more often.³¹⁴

3.4.6.2.3 Resources employed by management companies

The reputation of Mauritius as an international financial services centre is largely dependent on the quality of the services on offer. Therefore it is essential that management companies employ sufficient resources to meet the requirements of clients and the FSC.

As at 31 December 2011, there were 158 licensed management companies, which included management companies providing only corporate trustee services. These management companies employed 2 629 staff.³¹⁵ At this time, management companies administered 9 758 GBL1 corporations and acted as registered agents for 14 166 GBL2 corporations.³¹⁶ That translates on average to each management company servicing 152 GBL corporations. Furthermore by the end of 2011, each employee of a management company serviced approximately 9 GBL corporations.

By the end of August 2013, 10 772 GBL1 corporations and 15 324 GBL2 corporations are being serviced by 169 management companies or on average 154 corporations are serviced per management company.³¹⁷

3.4.6.2.4 Conclusion as to whether management companies possess suitable skills, experience and capacity

Details provided in Personal Questionnaires completed by individuals in control of management companies seeking licences should greatly assist the FSC in granting management licences to persons with the requisite skills, competence and experience and honesty. Credibility is reinforced by the applicants implicit understanding that the questionnaires will be verified thoroughly and there is a very real threat of severe punitive action for false declarations and deliberate omissions of detail.

³¹⁴ Ibid at 47 - 48.

³¹⁵ Financial Services Commission, Mauritius. 2012. *Annual Statistical Bulletin 2012*. Available: <http://www.fscmauritius.org/media/81458/fscstatsbulletin2012.pdf> - at 17 [15 November 2013]

³¹⁶ Financial Services Commission, Mauritius. *Global Business Data Sheet – Monthly Evolution - 2011*. Available: http://www.fscmauritius.org/media/67043/final_gb_2011.xlsx [16 November 2013]

³¹⁷ Financial Services Commission, Mauritius. *Global Business Data Sheet – Monthly Evolution - 2013*. Available: http://www.fscmauritius.org/media/102126/monthly_data_on_global_business_licences_for_2013.xlsx [16 November 2013]

The day-to-day due diligence procedures of management companies are conducted by staff who are adequately screened for competence and integrity. Furthermore, management companies must provide training to ensure that their staff remain up to speed in customer due diligence procedures.

By reasoning, the average number of GBL corporations serviced by each staff member of management companies is sufficiently low to indicate that adequate resources are available to service GBL corporations. Furthermore, the ratio of management companies to GBL corporations consistently indicates that there are sufficient management companies to service GBL corporations. The official statistics of the number GBL corporations and the number of management companies reflects a sufficiently low ratio both of management companies and staff for the efficient servicing of the corporations.

3.4.6.3 Important elements that must be present to ensure that management companies can collect beneficial owners' details

Important elements must exist to allow beneficial ownership information to be collected by management companies.³¹⁸ The advised elements are evaluated further.

3.4.6.3.1 Documentation collected and maintained by management companies

Management companies must collect and maintain information on the persons in control of and who ultimately benefit from the activities of a GBL corporation.

In determining the ultimate beneficial owner of these corporations and in determining the persons in control of these corporations, the management company must identify the individuals behind any legal persons or legal arrangements who are the registered owners of GBL corporations.³¹⁹

The individuals who have provided funds to a trust or to a foundation must be identified. Furthermore, the beneficiaries, trustees, protectors and members of the Council of a trust or foundation must also be identified by the management company.³²⁰

The identities of both general and limited partners must be obtained in the case of a GBL1 partnership. Where a partner of a GBL1 partnership is a legal person, the ultimate beneficial owner of that corporate person must be identified.³²¹

³¹⁸ Organisation for Economic Co-operation and Development (2001:82).

³¹⁹ Organisation for Economic Co-operation and Development (2001:79).

³²⁰ Ibid at 79 - 80.

The beneficial ownership of these GBL corporations must be updated on a timely basis.³²²

It is submitted that the customer due diligence procedures performed by management companies for global business licensed companies, trusts, foundations and partnerships ensures that management companies collect and maintain the identities of the beneficial owners of these entities.³²³

3.4.6.3.2 *Licensing regime for management companies*

A licensing regime for service providers is essential when information on beneficial owners is to be gathered from service providers. Under a licencing regime only competent service providers may be able to offer the services of corporation formations and the provision of management services. Under this regime, authorities are able to establish appropriate standards, codes of best practice and are able to supervise compliance.³²⁴

Persons performing administrative, management, nominee, corporate trustee and other services to global business corporations must be licenced by the FSC.³²⁵ All applications for a global business licence from the FSC must be submitted via a management company.³²⁶ Every GBL1 corporation must be administered by a management company³²⁷ and every GBL2 corporation must appoint a management company to act as its registered agent.³²⁸ Therefore the Mauritian global business licencing regime is administered by persons considered competent by the FSC.

As management companies must be licenced, the FSC has the power to regulate all activities of the management companies through, *inter alia*, setting rules, issuing guidelines, setting standards, issuing instructions to comply with relevant acts or guidelines and instituting punitive measures against non-compliant management companies.³²⁹ In particular, management companies are required to comply with the Code in respect of keeping prescribed customer due diligence documentation.

³²¹ Ibid.

³²² Ibid.

³²³ For further discussion on the information collected for these GBL corporations refer to chapters 3.4.1.1, 3.4.2.1, 3.4.3.1, 3.4.4.1 and 3.4.5.

³²⁴ Organisation for Economic Co-operation and Development (2001:83).

³²⁵ Subsec 77(1) of the Financial Services Act.

³²⁶ Subsec 72(1)(a) of the Financial Services Act.

³²⁷ Subsec 71(5) of the Financial Services Act.

³²⁸ Subsec 76(1) of the Financial Services Act.

³²⁹ S 7(1) of the Financial Services Act.

For the aforementioned reasons, a robust licensing regime for management companies is in place.

3.4.6.3.3 Sanctions must be imposed on service providers in cases of non-compliance

To discourage service providers from not fulfilling their obligations, sufficient sanctions for non-compliance must be imposed.³³⁰

As discussed in chapter 3.4.1.3, the FSC may take disciplinary action against management companies and officers of management companies for failing to comply with the Financial Services Act and therefore this element is present.

3.4.6.3.4 Access to ownership information kept by service providers

Regardless of which authority requests information kept by service providers, this information must be provided.³³¹

As a general rule management companies cannot divulge information or provide documentation in its possession relating to a corporation holding a global business licence.³³² However, this information and documentation must be provided to the FSC³³³ and to the Financial Intelligence Unit.³³⁴ Furthermore where the MRA requires information from a management company for the purposes of enabling the MRA to respond to a request for information under a double tax agreement, this information must be provided by the management company.³³⁵

Whilst it has not been tested by Mauritian courts, indications are that officers of management companies would be compelled to supply the information requested by the FSC, the Financial Intelligence Unit and the MRA, despite any potential client secrecy privileges.³³⁶

In conclusion information regarding the identities of beneficial owners of GBL corporations must be provided by a management company to Mauritian authorities.

³³⁰ Organisation for Economic Co-operation and Development (2001: 83).

³³¹ Ibid.

³³² Subsec 44(6) of the Financial Services Act.

³³³ Subsec 42(1) of the Financial Services Act.

³³⁴ Subsec 44(6) of the Financial Services Act.

³³⁵ Subsec 44(6) of the Financial Services Act read with subsec 124(1)(b) of the Mauritian Income Tax Act.

³³⁶ Organisation for Economic Co-operation and Development (2011: 52).

3.4.6.4 Conclusion as to whether the use of management companies enables the effective collection of beneficial ownership information for GBL corporations

The collection of beneficial ownership information for GBL corporations through management companies is suitable as management companies are subject to compulsory monitoring by the FSC, which appears to have the capacity to perform this function. Management companies are required by the FSC to be suitably skilled, experienced and must have sufficient capacity to efficiently record and maintain the beneficial ownership information of these corporations.

The recommended key elements for management companies to effectively provide a basis for the collection of this information are also in place.

It is therefore submitted, that the collection of beneficial ownership information for GBL1 and GBL2 corporations is efficient and appropriate.

3.5 The capability of Mauritian authorities to share ownership information with foreign jurisdictions

Management companies cannot divulge information to foreign authorities.³³⁷

No officer of the FSC may share beneficial ownership information relating to GBL corporations with any foreign authority³³⁸ unless this would prevent information being shared under an agreement with the government of that foreign authority.³³⁹

Officers of the Financial Intelligence Unit would also only be permitted to share beneficial ownership information of GBL corporations to foreign tax authorities where it is required to do so to fulfil obligations under an international agreement.³⁴⁰

To ensure that Mauritius is capable of exchanging ownership information for GBL1 and GBL2 corporations, it is necessary for Mauritius to have a sufficiently wide network of agreements specifically intended to provide a basis for sharing this information. Furthermore, Mauritian legislation should ensure that such agreements are effective and binding in law.³⁴¹

³³⁷ Refer to chapter 3.4.6.3.4.

³³⁸ Subsec 83(4) of the Financial Services Act.

³³⁹ Subsec 83(7)(a) of the Financial Services Act.

³⁴⁰ Subsec 30(2)(c) of the FIAL Act.

³⁴¹ Organisation for Economic Co-operation and Development (2011:59).

3.5.1 Effectiveness of Mauritian exchange of information agreements

3.5.1.1 Effect of international information sharing agreements in Mauritian law

The Finance Minister of Mauritius may conclude enforceable international agreements between Mauritius and foreign governments for the purpose of sharing information to assist with the administration of both Mauritian and foreign countries' tax laws.³⁴²

3.5.1.2 Agreements concluded permit the exchange of "foreseeably relevant" information

Only the double tax agreements concluded with China and the United Kingdom considers the exchange of information which is "foreseeably relevant". The remaining agreements require information which is necessary for carrying out the provisions of the agreement or of the domestic laws of the contracting states to be exchanged.³⁴³

Despite the express absence of the "foreseeably relevant" term in the majority of its double tax agreements, Mauritian authorities do not appear to interpret the words "foreseeably relevant" and "necessary" differently. Double tax agreements concluded by Mauritius would permit, therefore, for information to be shared, in line with the standard of "foreseeable relevance".³⁴⁴

Mauritian authorities are generous when considering requests for information. Ordinarily requested information would be supplied without inquiring further whether it is actually required for the purposes set out in the relevant agreement. The MRA has not denied a request for information, on the grounds that the information is not "foreseeably relevant".³⁴⁵

3.5.1.3 Mauritian authority's ability to share ownership information under international tax agreements

The laws of Mauritius must permit authorities to lift any confidentiality or secrecy provisions for the purpose of sharing "foreseeably relevant" information under the auspices of a double tax agreement. Confidentiality and secrecy considerations applicable to professionals, such as service providers, must also not prevent these persons from divulging information to Mauritian authorities or provide them a loophole for declining to do so.

³⁴² S 76 of the Mauritian Income Tax Act and Organisation for Economic Co-operation and Development (2011:70).

³⁴³ Organisation for Economic Co-operation and Development (2011:62).

³⁴⁴ Ibid.

³⁴⁵ Ibid at 63.

Management companies must provide revenue authorities with information required to answer requests stemming from a double tax agreement.³⁴⁶

The MRA is not prevented from disclosing information requested under a double tax agreement for secrecy reasons.³⁴⁷

Therefore, where a double tax agreement is in force, confidentiality and secrecy laws of Mauritius do not prevent ownership information of GBL corporations being gathered from management companies by the MRA and these laws also do not prevent that information from being provided to foreign authorities by the MRA.

3.5.1.4 No domestic tax interest requirement for exchange of information

Where a double tax agreement does not explicitly require a state to obtain and supply this information on the basis that the information is not required for the enforcement of its tax laws, there is a real concern that the ownership information of GBL corporations will not be shared.

Only the double tax agreements concluded with China and the United Kingdom obliges Mauritius to share information despite it not requiring that information for the purposes of enforcing its own tax laws.³⁴⁸ However, as all information requested of persons, in order to comply with a request from a treaty partner, must be provided,³⁴⁹ the absence of this express requirement in the other double tax agreements concluded by Mauritius is not detrimental to the sharing of information with treaty partners.³⁵⁰

3.5.2 Exchange of ownership information with all relevant partners

Ownership information of GBL corporations should be capable of being shared with all relevant partners.³⁵¹

Mauritius has concluded 46 double tax agreements.³⁵² These include agreements with a number of its main trading partners and in particular with significant trading partners contributing foreign direct investment. Mauritius has also concluded eight tax information

³⁴⁶ Refer to chapter 3.4.6.3.4.

³⁴⁷ Subsec 76(5) of the Mauritian Income Tax Act.

³⁴⁸ Organisation for Economic Co-operation and Development (2011:67).

³⁴⁹ Subsec 124(1) of the Income Tax Act of Mauritius.

³⁵⁰ Organisation for Economic Co-operation and Development (2011:68)

³⁵¹ Ibid at 72.

³⁵² 8 of these agreements, namely with Bangladesh, Egypt, Gabon, Guernsey, Kenya, Nigeria, Republic of Congo and Russia are not yet in force – See Appendix C.

exchange agreements.³⁵³ It is also actively seeking to extend its double tax agreement network and continues to negotiate tax information exchange agreements.³⁵⁴

As at 2011, Mauritius had never refused an exchange of information agreement request.³⁵⁵

In conclusion Mauritius has a tax treaty network with most of its trading partners. This treaty network allows for exchange of information. However, development of this treaty network would further widen the sharing of beneficial owners' identities of GBL corporations to more countries.

3.5.3 Conclusion as to whether ownership information of GBL corporations may be effectively shared

Mauritius has and continues to conclude international agreements which provide for the exchange of information between states. These measures are incorporated into Mauritian law which permits information to be shared under these agreements.

Mauritius must pursue further international agreements allowing the exchange of information.

3.6 Conclusion – The Mauritian Global Business Licence regime as a transparent holding company regime

The Global Business Licence regime allows the licencing of vehicles with features which promote the concealment of its beneficial owners.

It is impossible for a corporation to be licenced and to maintain its licence if it does not obtain incorporation and management services from a management company which is licenced by the FSC. Management companies are obliged to keep and maintain customer due diligence documentation which will identify the beneficial owners of these corporations.

Punitive action deters management companies and licensees from not maintaining ownership information for these corporations.

Management companies must have the required skills, competence, experience and capacity to offer services to GBL corporations. Compliance to standards for maintaining customer due diligence documentation is codified and enforced by the FSC. Furthermore, the licencing and monitoring of the activities of management companies is performed by the FSC, which has

³⁵³ Refer to Appendix J for further details.

³⁵⁴ Ibid at 72-73 and refer to Appendix K for treaties which Mauritius is in the process of negotiating.

³⁵⁵ Ibid at 73.

the necessary capacity and enforcement powers. Therefore the integrity of this system for collecting and maintaining the identities of the beneficial owners of these corporations is fortified.

Beneficial ownership information must be provided to the MRA by management companies for the purpose of providing information under a double tax agreement. Mauritius is able to share ownership information with treaty partners. Mauritius has only concluded 46 double tax agreements and eight tax information exchange agreements, thus limiting the effective scope of sharing widely beneficial ownership information which is pertinent to the administration of the tax laws of other states. In mitigation, Mauritius has however concluded double tax agreements with its main trading partners and has concluded or is in the process of concluding tax information exchange agreements with other states where a double tax agreement is absent.

The Mauritian Government and the Mauritian authorities have made substantial efforts to ensure the transparency and credibility of the Global Business Licence regime. These efforts align with recommended international best practice so that these efforts should curb abusive concealment of the beneficial owners of GBL corporations. It is therefore submitted that the Global Business Licence regime does not undermine fiscal transparency.

4. Conclusion – the fiscal transparency of the South African and Mauritian preferential holding company regimes

Investors are seeking a gateway into Africa in order to benefit from this continent's largely untapped markets. The South African Headquarter Company and the Mauritian Global Business Licence regimes offer favourable holding company gateways into Africa. This dissertation set out to establish whether these two African holding company regimes have characteristics and installed measures to ensure the fiscal transparency so desired by the international community at large. The investigation evaluated the legal and administrative measures employed by South Africa and Mauritius to enforce the recording and maintenance of ownership information and the measures employed to collect and share this ownership information with foreign authorities.

South Africa offers a Headquarter Company regime which permits the use of corporate entities and enables the use of nominee shareholdings which may aid in concealing owners' identities.

Measures are in place to enforce the accurate recording of the ownership of headquarter companies. This ownership information can be accessed through effectively established upfront disclosures and investigative means. Almost all of the double tax agreements and tax information exchange agreements concluded by South Africa allows for effective exchange of ownership information of headquarter companies with its treaty partners. Furthermore, South Africa remains committed to concluding protocols to existing agreements and to entering tax information exchange agreements to enable further exchange of ownership information for its headquarter companies.

Ultimately, the South African Headquarter Company regime substantially prevents the concealment of owners' details and therefore bears the imprint of a fiscally transparent holding company regime.

The Mauritian Global Business Licence regime permits the licensing of entities which may aid in concealing owners' identities.

Customer due diligence measures performed by management companies are reinforced through prescribed best practices that are monitored and enforced by punitive measures employed by the FSC. These practices and measures meet standards of best practice and therefore it is submitted that the ownership information for GBL corporations is accurately maintained. Mauritian authorities are able to access and share ownership information

maintained by management companies. Mauritius has concluded double tax agreements with a number of its main trading partners, thereby largely facilitating the transfer of ownership information of these GBL corporations.

Mauritian authorities have installed measures and continually make substantial efforts to align with recommended international best practice in curbing abusive concealment of the beneficial owners of GBL corporations. In conclusion, the Global Business Licence regime does not fundamentally undermine fiscal transparency.

Appendix A: Table of African Preferential Holding Company Regimes

The below presents the preferential holding company regimes identified during the preparation of this dissertation. This table is prepared based on the Country Key Features for African states contained in the IBFD Tax Research Platform.

African state	Holding company regime offered?	Applicable holding company regime
Algeria	No	N/A
Angola	No	N/A
Benin	No	N/A
Botswana	Yes	International Financial Service Centre regime offered.
Burkina Faso	No	N/A
Burundi	No	N/A
Cameroon	No	N/A
Cape Verde	Yes	International Business Centre regime offered.
Central African Republic	No	N/A
Chad	No	N/A
Comoro Islands	No	N/A
Congo (Democratic Republic of)	No	N/A
Congo (Republic of)	Yes	General Tax Code Holding Company regime offered.
Djibouti	No	N/A
Egypt	No	N/A
Equatorial Guinea	No	N/A
Eritrea	No	N/A

African state	Holding company regime offered?	Applicable holding company regime
Ethiopia	No	N/A
Gabon	No	N/A
Gambia	No	N/A
Ghana	No	N/A
Guinea	No	N/A
Guinea-Bissau	No	N/A
Ivory Coast	No	N/A
Kenya	No	N/A
Lesotho	No	N/A
Liberia	No	N/A
Libya	No	N/A
Madagascar	No	N/A
Malawi	No	N/A
Mali	No	N/A
Mauritania	No	N/A
Mauritius	Yes	Global Business Licence regime offered.
Morocco	No	N/A
Mozambique	No	N/A
Namibia	No	N/A
Niger	No	N/A
Nigeria	No	N/A
Rwanda	No	N/A
São Tomé and Príncipe	No	N/A
Senegal	No	N/A
Seychelles	Yes	International Business

African state	Holding company regime offered?	Applicable holding company regime
		Companies regime offered
Sierra Leone	No	N/A
South Africa	Yes	Headquarter Company regime offered
South Sudan	No	N/A
Sudan	No	N/A
Swaziland	No	N/A
Tanzania	No	N/A
Togo	No	N/A
Tunisia	No	N/A
Uganda	No	N/A
Zambia	No	N/A
Zimbabwe	No	N/A

(Source: IBFD Tax Research Platform)

Appendix B: South Africa – double tax treaty network

State	African states	Other states	Not yet in force?
Algeria	YES		
Australia		YES	
Austria		YES	
Belarus		YES	
Belgium		YES	
Botswana	YES		
Brazil		YES	
Bulgaria		YES	
Canada		YES	
Chile		YES	Not yet in force
China (People's Republic of)		YES	
Croatia		YES	
Cyprus		YES	
Czech Republic		YES	
Democratic Republic of Congo (DRC)	YES		
Denmark		YES	
Egypt	YES		
Ethiopia	YES		
Finland		YES	
France		YES	
Gabon	YES		Not yet in force

An investigation into whether the South African and Mauritian preferential holding company regimes may undermine fiscal transparency

State	African states	Other states	Not yet in force?
Germany		YES	
Ghana	YES		
Greece		YES	
Grenada		YES	
Hungary		YES	
India		YES	
Indonesia		YES	
Iran		YES	
Ireland		YES	
Israel		YES	
Italy		YES	
Japan		YES	
Kenya	YES		Not yet in force
Korea (Republic of)		YES	
Kuwait		YES	
Lesotho	YES		
Luxembourg		YES	
Malawi	YES		
Malaysia		YES	
Malta		YES	
Mauritius	YES		
Mexico		YES	
Mozambique	YES		
Namibia	YES		

An investigation into whether the South African and Mauritian preferential holding company regimes may undermine fiscal transparency

State	African states	Other states	Not yet in force?
Netherlands		YES	
New Zealand		YES	
Nigeria	YES		
Norway		YES	
Oman		YES	
Pakistan		YES	
Poland		YES	
Portugal		YES	
Romania		YES	
Russia		YES	
Rwanda	YES		
Saudi Arabia		YES	
Seychelles	YES		
Sierra Leone	YES		
Singapore		YES	
Slovakia		YES	
Spain		YES	
Sudan	YES		Not yet in force
Swaziland	YES		
Sweden		YES	
Switzerland		YES	
Taiwan (Republic of China)		YES	
Tanzania	YES		
Thailand		YES	
Tunisia	YES		

An investigation into whether the South African and Mauritian preferential holding company regimes may undermine fiscal transparency

State	African states	Other states	Not yet in force?
Turkey		YES	
Uganda	YES		
Ukraine		YES	
United Kingdom		YES	
United States of America		YES	
Zambia	YES		
Zimbabwe	YES		
Total	24	53	4

(Source: SARS. 2013. *Summary of all Treaties for the Avoidance of Double Taxation*. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2013-01%20-%20Status%20Overview%20of%20All%20DTAs%20and%20Protocols.pdf> [16 January 2014])

Appendix C: Mauritius – double tax treaty network

State	African states	Other states	Not yet in force?
Australia		YES	
Bangladesh		YES	Not yet in force
Barbados		YES	
Belgium		YES	
Botswana	YES		
China (People's Republic of)		YES	
Croatia		YES	
Cyprus		YES	
Egypt	YES		Not yet in force
France		YES	
Gabon	YES		Not yet in force
Germany		YES	
Guernsey		YES	Not yet in force
India		YES	
Italy		YES	
Kenya	YES		Not yet in force
Kuwait		YES	
Lesotho	YES		
Luxembourg		YES	
Madagascar	YES		
Malaysia		YES	

An investigation into whether the South African and Mauritian preferential holding company regimes may undermine fiscal transparency

State	African states	Other states	Not yet in force?
Monaco		YES	
Mozambique	YES		
Namibia	YES		
Nepal		YES	
Nigeria	YES		Not yet in force
Oman		YES	
Pakistan		YES	
Republic of Congo	YES		Not yet in force
Russia		YES	Not yet in force
Rwanda	YES		
Senegal	YES		
Seychelles	YES		
Singapore		YES	
South Africa	YES		
Sri Lanka		YES	
State of Qatar		YES	
Swaziland	YES		
Sweden		YES	
Thailand		YES	
Tunisia	YES		
Uganda	YES		
United Arab Emirates		YES	
United Kingdom		YES	

An investigation into whether the South African and Mauritian preferential holding company regimes may undermine fiscal transparency

State	African states	Other states	Not yet in force?
Zambia	YES		
Zimbabwe	YES		
Total	19	27	8

(Source: IBFD Tax Research Platform – last accessed 20 January 2014)

Appendix D: Botswana – double tax treaty network

State	African states	Other states	Not yet in force?
Barbados		YES	
France		YES	
India		YES	
Mauritius	YES		
Russia		YES	
Seychelles	YES		
South Africa	YES		
Sweden		YES	
United Kingdom		YES	
Zambia	YES		Not yet in force
Zimbabwe	YES		Not yet in force
Total	5	6	2

(Source: IBFD Tax Research Platform – last accessed 20 January 2014)

Appendix E: Cape Verde – double tax treaty network

State	African states	Other states	Not yet in force?
Macau		YES	
Portugal		YES	
Total	0	2	0

(Source: IBFD Tax Research Platform – last accessed 20 January 2014)

Appendix F: Republic of Congo – double tax treaty network

State	African states	Other states	Not yet in force?
France		YES	
Italy		YES	Not yet in force
Mauritius	YES		Not yet in force
Tunisia	YES		Not yet in force
Total	2	2	3

(Source: IBFD Tax Research Platform – last accessed 20 January 2014)

Appendix G: Seychelles – double tax treaty network

State	African states	Other states	Not yet in force?
Bahrain		YES	
Barbados		YES	
Belgium		YES	Not yet in force
Botswana	YES		
China (People's Republic of)		YES	
Cyprus		YES	
Ethiopia	YES		Not yet in force
Indonesia		YES	
Isle of Man		YES	
Kuwait		YES	Not yet in force
Luxembourg		YES	
Malawi	YES		Not yet in force
Malaysia		YES	
Mauritius	YES		
Monaco		YES	
Oman		YES	
San Marino		YES	
South Africa	YES		
Sri Lanka		YES	Not yet in force
State of Qatar		YES	
Swaziland	YES		Not yet in force
Thailand		YES	

An investigation into whether the South African and Mauritian preferential holding company regimes may undermine fiscal transparency

State	African states	Other states	Not yet in force?
United Arab Emirates		YES	
Vietnam		YES	
Zambia	YES		
Zimbabwe	YES		Not yet in force
Total	8	18	7

(Source: IBFD Tax Research Platform – last accessed 20 January 2014)

Appendix H: Tax information exchange agreements concluded by South Africa

Jurisdiction	Date signed	Date entered force
Argentina	2 August 2013	not yet in force
The Bahamas	14 September 2011	25 May 2012
Barbados	17 September 2013	not yet in force
Bermuda	6 September 2011	8 February 2012
Cayman Islands	10 May 2011	23 February 2012
Cook Islands	25 October 2013	not yet in force
Costa Rica	27 October 2012	not yet in force
Dominica	7 February 2012	not yet in force
Gibraltar	2 February 2012	21 July 2013
Guernsey	21 February 2011	26 February 2012
Jersey	12 July 2011	29 February 2012
Liberia	7 February 2012	not yet in force
Liechtenstein	6 December 2013	not yet in force
Monaco	23 September 2013	not yet in force

Jurisdiction	Date signed	Date entered force
Samoa	26 July 2012	not yet in force
San Marino	10 March 2011	28 January 2012

*(Source: Global Forum on Transparency and Exchange of Information for Tax Purposes
Exchange of Tax Information Portal – Available: <http://www.eoi-portal.org/jurisdictions/ZA#agreements> [14 January 2014])*

Appendix I: Tax information exchange agreements in the process of negotiation by South Africa

Jurisdiction

1. Andorra
2. Belize
3. British Virgin Islands
4. Brunei Darussalam
5. Isle of Man
6. Jamaica
7. Lichtenstein
8. Macao SAR
9. Marshall Islands
10. St. Kitts and Nevis
11. Sint Maarten
12. Turks and Caicos Islands
13. Uruguay

(Source: Summary of all Tax Information Exchange Agreements and Mutual Administrative Assistance Agreements – Available:

<http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-EIA-2013-01%20-%20Status%20Summary%20of%20all%20Tax%20Information%20Exchange%20Agreements.pdf> [14 January 2014])

Appendix J: Tax information exchange agreements concluded by Mauritius

Jurisdiction	Date signed	Date entered force
Australia	8 December 2010	1 January 2011
Denmark	1 December 2011	1 June 2012
Faroe Islands	1 December 2011	not yet in force
Finland	1 December 2011	6 July 2012
Greenland	1 December 2011	not yet in force
Guernsey	6 February 2013	5 July 2013
Iceland	1 December 2011	not yet in force
Norway	1 December 2011	18 May 2012

(Source: Global Forum on Transparency and Exchange of Information for Tax Purposes Exchange of Tax Information Portal – Available: <http://www.eoi-portal.org/jurisdictions/MU#agreements> [14 January 2014])

Appendix K: Tax information exchange and double tax agreements in the process of negotiation by Mauritius

Jurisdiction

1. Algeria
2. Burkina Faso
3. Canada
4. Czech Republic
5. Greece
6. Hong Kong
7. Lesotho
8. Portugal
9. Republic of Iran
10. Malawi
11. Saudi Arabia
12. St. Kitts and Nevis
13. Vietnam
14. Yemen
15. Tanzania
16. Morocco
17. Montenegro

*(Source: MRA: Double Taxation Agreements – Available: [http://
http://mra.gov.mu/index.php/taxation/double-taxation-agreements](http://http://mra.gov.mu/index.php/taxation/double-taxation-agreements) [14 January 2014])*

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