

https://dspace.org/

The proposed global minimum tax: implications for South Africa

Moticoe, Lucky Calvin

2022

University of the Witwatersrand, Johannesburg

https://hdl.handle.net/10539/38625

Moticoe, Lucky Calvin. (2022). The proposed global minimum tax: implications for South Africa [Master's dissertatio , University of the Witwatersrand, Johannesburg]. WireDSpace. https://hdl.handle.net/10539/38625

Downloaded from a DSpace repository. https://dspace.org/

SCHOOL OF ACCOUNTANCY

University of the Witwatersrand. Johannesburg

A research report submitted to the Faculty of Commerce, Law and Management in fulfilment of the requirements for the degree of Masters of Commerce

The proposed global minimum tax: implications for South Africa

Applicant: Lucky Calvin Moticoe

Student number: 1303144

Degree: Masters of Commerce (specialising in Taxation)

Date 30 June 2022

ABSTRACT

Digitalisation and globalisation have resulted in the free movement of capital and trade between countries and has had a profound impact on the global economy. These global business reforms have brought with them challenges to the international tax laws that have existed more than 100 years without any reforms, therefore, creating an opportunity for base erosion profit shifting (BEPS). These challenges resulted in a need for a co-ordinated effort by the global communities to ensure that business income is taxed where economic activities take place, and international tax laws keep up with the accelerated rate of development in international business.

To bring reforms to the international tax laws and level the playing field in international corporate taxation, the OECD and the G20 countries joined forces and developed an Action Plan to address BEPS in September 2013; an action plan that came with 15 recommendations to tackle BEPS to be implemented by interested jurisdictions. Much progress had been made during the years, but one key issue remained outstanding on the BEPS issues; taxing the digital economy. On 08 October 2021, over 135 Inclusive Framework members joined forces and agreed to a two-pillar solution to reform the international tax rules. The two-pillar solution proposed a global minimum tax of 15% to ensure that multinational enterprises pay their fair share of tax where economic activities are conducted.

South Africa is one of the jurisdictions that expressed interest in the proposal and is a signatory to the proposal. It is, however, not clear how the global minimum tax will impact South Africa should it decide to adopt this. This report aims to evaluate the impact the global minimum tax will have on South Africa should it decide to adopt, with focus on policy implications, its ability to use tax incentives to attract investment (specific focus on the SEZ programme), and infringement on its tax sovereignty.

The results of the report revealed that South Africa might be faced with some tough policy implications that will need careful consideration before the decision to adopt can be made. It was further found that the ability to use tax incentives as a policy instrument to attract investment (under the SEZ programme) may be under a serious threat, considering all the other challenges with which the country is currently faced. The adoption of the proposal will not infringe on the tax sovereignty of the country as it is a voluntary process that countries may chose not to adopt if they so wish.

Keywords:

Base Erosion and Profit Shifting

Tax Haven

Multi-National Enterprise

Pillar two

Special Economic Zone

Global Minimum Tax

National Sovereignty

TABLE OF CONTENTS

ABSTRACT i
LIST OF FIGURES v
CHAPTER 1: INTRODUCTION 1
1.1 Introduction 1
1.2 Problem statement 5
1.2.1 Statement of the problem 5
1.2.2 Sub-problems 6
1.3 Significance of the study 6
1.4 Delimitations of the research 7
1.5 Research method 7
1.6 Chapter outline 8
CHAPTER 2: OVERVIEW AND HISTORICAL BACKGROUND OF TAX HAVENS 10
2.1 Introduction 10
2.2 What is a tax haven? 11
2.3 Historical background of tax havens 13
2.3.1 The development of corporations and laws regulating corporations 14
2.3.2 The use of tax havens to avoid tax 14
2.4 Tax planning strategies utilised by MNEs to reduce tax through tax havens 15
2.4.1 Transfer pricing (invoice value) 16
2.4.2 Thin capitalisation 18
2.4.3 Intellectual Property 19
2.5 Effects of tax haven jurisdictions on high tax jurisdictions and the risks they pose to South Africa 20
2.6 Conclusion 22
CHAPTER 3: INTERNATIONAL INITIATIVE TAKEN TO STIFLE THE DEVELOPMENT OF TAX HAVENS AND THE CAMPAIGN AGAINST HARMFUL TAX PRACTICES 24
3.1 European Union (EU) initiative against tax havens 24
3.2 The G7 Initiative against harmful tax practice 27
3.3 The OECD initiatives against harmful tax practice 29
3.4 Conclusion 35
CHAPTER 4: ANTI-AVOIDANCE MEASURES CONTAINED IN THE SOUTH AFRICAN TAX LEGISLATION TO FIGHT AGAINST MULTINATIONAL TAX AVOIDANCE 37
4.1 Section 31 of the income tax act 37
4.1.1 Relevance of transfer pricing to BEPS 38

4.1.2 Conclusion 39
4.2 General anti-avoidance rules (GAAR) 39
4.2.1 General Anti-Avoidance Rules 40
4.2.2 Arrangement 41
4.2.3 Tax Benefit 42
4.2.4 Sole or main purpose 43
4.2.5 Tainted elements 44
4.2.6 Conclusion 49
4.3 The extent to which South Africa has adopted the international strategies developed by the OECD in combating Base Erosion and Profit Shifting (BEPS) 50
4.3.1 Davis Tax Committee on the OECD BEPS report in the context of South Africa 50
4.3.2 Implementation of the BEPS instruments in South Africa 53
4.3.3 Conclusion 58
CHAPTER 5: 60
5.1 INTRODUCTION 60
5.2 Steps in determining tax liability for MNEs under the GLoBE model rules 62
5.3 Entities within the scope (step 1) 62
5.3.1 Scope of GloBE rules 63
5.4 GLoBE income calculations (step 2) 64
5.4.1 Determining financial accounting net income or loss for GLoBE purposes 64
5.4.2 Adjusting financial accounting net income and loss to GLoBE base 65
5.5 Calculation of covered taxes (step 3) 68
5.5.1 Identification of covered taxes 68
5.5.2 Adjusted covered taxes 69
5.6 Effective tax rate and top-up tax calculation (step 4) 72
5.7 Imposition of top-up tax (step 5) 74
5.7.1 Overview 74
5.7.2 Parent Entity Liable for the Top-up Tax under the IIR 74
5.7.3 Top-up tax calculations under the IIR 75
5.7.4 Identification of the remaining amount allocated under the UTPR 75
5.7.5 Liability for residual Top-up tax in the UTPR jurisdiction through a UTPR adjustment 76
5.8 Administration 76
5.9 Conclusion 77
CHAPTER 6: 79
6.1 Introduction 79
6.2 Possible policy implications 79

6.2.1 Compatibility of the GloBE model rules with the tax treaty law. 79
6.2.2 Tax treaty (double tax agreements) and tax sparing clause 80
6.2.3 Application of the IIR rule in cases wherein the sparing clause also applies 82
6.2.4 Legal standing of tax treaty and the GloBE rules (with focus on the IIR) 83
6.3 Future of tax incentives under the GloBE rules 85
6.3.1 Tax Incentives and their use in South Africa 86
6.3.2 Special Economic Zones 86
6.3.3 Special Economic Zone tax incentive under the GloBE rules 87
6.4 South africa's tax sovereignty under the GloBE rules 90
6.4.1 Tax Sovereignty 90
6.4.2 Tax sovereignty and the GloBe Rules 91
CHAPTER 7: SUMMARY AND RECOMMENDATIONS 93
7.1 Overall summary of findings 93
7.2 RECOMMENDATIONS 95
7.3 Further research opportunities arising 96
7.4 Conclusion 96
REFERENCES 97

LIST OF FIGURES

Figure 1: Overview of key operating provisions of the GLoBE Rules 62
Figure 2: Computation of the Jurisdictional Top-up tax 72

ABBREVIATIONS AND ACRONYMS

APA	Advanced Pricing Agreement
BEPS	Base Erosion and Profit Shifting
CFC	Controlled Foreign Company
DTA	Double Tax Agreement
DTC	Davis Tax committee
ETR	Effective Tax Rate
EU	European Union
FDI	Foreign Direct Investment
GAAR	General Anti-Avoidance Rules
GDP	Gross Domestic Product
GloBE	Global Anti-base Erosion Proposal
IDZ	Industrial Development Zone
IF	Inclusive Framework
IIR	Income Inclusive Rule

IMF	The International Monetary Fund
IP	Interllectual Property
MAP	Mutual Agreement Procedure
MNE	Multi-National Enterprise
The "MTC"	The "Model Convention on Income and on Capital"
OECD	Economic Co-operation and Development
PE	Permanent Establishment
SARS	South African Revenue Service
SEZ	Special Economic Zone
TIEA	Tax Information Exchange agreements
UPE	Ultimate Parent Company
UTPR	Under Taxed Payment Rule

CHAPTER 1: INTRODUCTION

1.1 Introduction

In circumstances where governments must deal with reduced tax collection and increased public expenditure, raising much-needed revenues remains the most important function of taxes (Organisation for Economic Co-operation and Development 2014:30). According to Akitoby (2018), a government's ability to collect taxes is central to a country's capacity to bring public value and finance social services. This ability to collect taxes is referred to as a government's "fiscal capacity". Developing countries typically collect only approximately 15% of their Gross Domestic Product (GDP) in tax revenue, as compared to 40% collected by their more developed counterparts (Akitoby 2018). Such low levels of revenue collection put economic development in developing countries at risk, exacerbating levels of poverty and inequality in these countries (Akitoby 2018). These low levels of tax collection persist despite the integration of national economies and markets due to globalisation (Rudra & Bastiaens 2018).

In the *Action Plan on Base Erosion and Profit Shifting* report of the Organisation for Economic Co-operation and Development (OECD), it is stated that the concept of globalisation is not new, however the pace at which globalisation has influenced national economies and markets has accelerated at an alarming speed in recent years (OECD 2013:7). According to Erixon (2018:3), globalisation has impacted the way that cross-border business activities are conducted and has facilitated growth and improved direct investments in many countries. Technological and telecommunication developments, the lifting of trade barriers, the free movement of capital and the simplicity of shifting manufacturing bases from high to low-cost locations, amongst others, have had an important impact on global trade and have integrated the world economy (OECD 2013:7).

Global integration has led corporations to extend their structures beyond domestic borders and to invest capital and assets in countries other than their home country. This corporate structure is known as a "Multi-National Enterprise" (hereafter referred to as MNE), representing a large portion of the global GDP (Palmisano 2006:127).

Supported by international laws, globalisation has brought about a paradigm shift in business operations, wherein corporations can trade in more than one jurisdiction or

have multiple subsidiaries across the world. The increased operations of MNEs have attracted the practice of aggressive tax planning by these global players, in terms of which profits are shifted from jurisdictions with high tax rates to those with very low or no tax rates, known as tax havens (OECD 2016:6).

Tax havens attract MNEs, as the secrecy provided by these jurisdictions enables MNEs to keep their financial information relatively private, while the protection offered by tax havens enables the exploitation of intellectual property and an opportunity to minimise taxes. The impact tax havens have on high-tax jurisdictions has attracted much attention and debate from policymakers in recent years (Chu 2014:304; Chu, Lai & Cheng 2014:803).

According to Shaxson (2019:6), the practice of profit shifting to tax havens is far more prevalent in and central to the global economy than any country has ever imagined. In their research, Chu et al. (2014:803) state that empirical research revealed that in 2006, 5% of the United States of America's (U.S.) GDP was invested in tax havens in the form of foreign direct investments.

In 2020, a 100 billion dollars a year in revenue losses had been estimated to occur in many European countries due to tax avoidance and evasion (OECD 2010:2). It has also been estimated that tax havens collectively cost governments between 500 and 600 billion dollars a year in lost company tax revenues (Crivelli, De Mooij & Keen 2015). Developing economies account for 200 billion dollars of these lost revenues, bearing the biggest impact as a percentage of GDP compared to developed economies (Shaxon 2019:6).

With billions of dollars per year in lost revenues through tax avoidance enabled by tax havens, the tax authorities and governments of many nations are faced with a massive challenge (Kemme, Parikh & Steigner 2017:520). International tax competition undermines their capacity for redistributive taxation and robs many nations of their taxing rights (Cassee 2019:242). The OECD (2010:2) also concedes that "Tax avoidance and evasion threaten government revenues throughout the world", and tax havens weaken the tax base of high-tax jurisdictions by providing opportunities for tax avoidance.

Over the years, various international organisations have initiated a global campaign against tax havens. Campaigns by the European Union, the Edward Report, the G7

and KPMG have been notable in the fight against tax havens (Oguttu 2010:172). In all these initiatives, the OECD has been at the forefront to improve international tax co-operation between nations to help fight against international tax avoidance and evasion (OECD 2021a).

The initiative against tax havens began in May 1996 in a meeting of the G-7 nations in Lyon, France, when heads of states called on the OECD to develop measures to "counter the distorting effects of harmful tax competition" (Sullivan 2007:327). A call by the G-7 members for measures against harmful tax practices was addressed by the OECD in 1998 after two years of deliberations, by issuing a report "*Harmful Tax Competition: An Emerging Global Issue*" (OECD 1998) (Kemme et al. 2017:520). The report made recommendations for tax treaties, legislative amendments and intensified the focus on the activities of global corporations (OECD 1998).

The OECD subsequently developed a standard for Tax Information Exchange Agreements (TIEAs) for tax authorities to obtain information from their financial institutions and automatically exchange such information with other jurisdictions annually (OECD 2017c). More than 800 TIEAs were signed by 2013 (Kemme et al. 2017:520).

In 2013, the OECD published the *Action Plan on Base Erosion and Profit Shifting* (BEPS), following a call by the G-20 finance ministers on the OECD to develop an action plan to address BEPS issues in a comprehensive and co-ordinated manner (OECD 2013:11). This action plan provides jurisdictions with domestic and international instruments to align taxing rights with economic activities (OECD 2013:11). The action plan identified 15 actions needed to address BEPS issues, provided timelines for the application of identified actions, and identified resources and methodologies for implementation of the action plans.

Taxing the digital economy was first on the list of 15 BEPS action items issued by the OECD, but due to its complexities, it was put aside and addressed last (Eden 2020:1). The issue was finally given attention in January 2019 with a policy note, opening an opportunity for a high level of policy proposals for tax and transfer pricing. The policy note was approved on January 30, 2019, focusing on two main proposals, also referred to as the "pillars" for handling the taxation of the digital economy (OECD 2019b).

The first proposal by the OECD Secretariat is “Pillar One” aimed at addressing challenges of allocation of taxing rights of business profits at an international level (Navarro 2021:2). The dramatic change presented by the digital revolution has placed immense pressure on the international tax regime due to incompatibility between the regime and the digital economy (Moreno & Brauner 2019:3). “Pillar One” aims to produce consensus-based solutions to this problem (Navarro 2021:2).

The most recent of these proposals was announced in November 2019 by the OECD, namely the *Global Anti-base Erosion Proposal* (GloBE), also known as “Pillar Two” (OECD 2019d). The GloBE recommended that two new taxes be adopted by the 139 member countries / jurisdictions of the OECD/G20 Inclusive Framework on BEPS (OECD 2019e) in taxing MNEs. The first tax is a global minimum tax on corporate profits, and the second is a tax on base eroding payments. The most talked about and debated is the first GloBE proposed tax, the global minimum tax on MNE profits, thus the emphasis on its implications in this paper.

On 20 December 2021, the OECD published detailed rules to assist countries in the implementation of a landmark reform to the international tax system on its report *“Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar two)”*. The rules will ensure that MNEs are subject to a global minimum tax rate of 15% from 2023. The rules provide countries with a precise template for the application of the two-pillar solution to tackle problems presented by the digitalisation and globalisation of the economy, as agreed by 137 countries and jurisdictions under the OECD/G20 Inclusive Framework on BEPS in October 2021 (OECD 2021d).)

According to the Department of International Relations and Co-operation (DIRCO) (2004), South Africa is not a member of the OECD but interacts with some functions of the organisation as a key partner. South Africa is, however, a member of the G20 forum (South African Government 2021). South Africa has also adopted most of the instruments proposed by the OECD in the fight against BEPS and is a signatory of various bilateral treaties developed by the OECD (Deloitte 2017). South Africa is likely to adopt the proposed global minimum tax on MNE should the OECD and members of the G20 Inclusive Framework decide to proceed with introducing this tax (SAIIA

2021). At present, the impact, effects, and implications of the proposed global minimum tax on South Africa is still unknown.

1.2 Problem statement

1.2.1 Statement of the problem

At the G7 meeting held in the UK in June 2021, the G7 Ministers of Finance agreed that a 15% global minimum corporate tax should be introduced. This was a landmark decision to end tax avoidance by MNEs and is an aid in raising funds to fight the Covid-19 pandemic by all countries (Financial Transparency Coalition 2021). The OECD (2020:10) emphasises that the proposed global minimum tax on corporations will not only play an important role in ensuring fairness and equity in the global tax system and provide a defensive tool for the international tax framework but can also assist in ensuring that governments attain financial stability.

The global Covid-19 pandemic has put pressure on governments to raise much needed revenues to finance initiatives put in place to fight against the pandemic and ensure that sufficient revenues are available to revitalise their economies following the devastating effects of the pandemic. The pressure on governments has intensified the need to ensure that large corporations and MNEs pay their fair share of tax and that a fair allocation of taxing rights is attained without discouraging businesses, whilst avoiding an environment of tax uncertainty that could be detrimental to global economic recovery (OECD 2021e).

Reaching a fair and acceptable global tax deal to put multilaterally agreed limitation on tax competition will not only ensure that the loopholes in the international tax arena are eliminated but will also ensure that developing countries reduce excessive and unfair tax incentives on foreign investors (Readhead, Lassourd & Mann 2021).

In their online article titled "*South Africa joins other countries in pushing for a global tax"* published on 5 July 2021, Business tech (2021) mentioned that the South African Minister of Finance, Tito Mboweni, joined a group of prominent global leaders in a call for a global minimum tax to be introduced. In their letter published in *The Washington Post* (2021), the group stated that they stand together to fight against tax evasion and to correct the issue with a collective solution, in the form of a global minimum tax. This

indicates South Africa's interest in the proposed tax and its willingness to implement it, should members of the Inclusive Framework decide to proceed with its introduction.

This research seeks to determine the effects of tax evasion and avoidance through the use of tax havens on South Africa and the efforts taken by the South African government and the international community against tax evasion and avoidance. The research further analyses the proposed global minimum tax and determines what potential consequences the global minimum tax will have on the South African tax system and its ability to collect taxes from MNEs.

1.2.2 Sub-problems

The first sub-problem investigates the impact tax avoidance through the use of tax havens by MNEs has on the South African tax base and its ability to collect taxes in an attempt to determine if tax havens pose a risk to South Africa by answering the following questions:

1. What is a tax haven and how are tax havens utilised by MNEs to avoid tax?
2. Do tax havens pose a risk to South Africa?
3. What efforts have been made by the South African government and the international community to fight tax avoidance?

The second sub-problem analyses the proposed global minimum tax and seeks to determine its potential consequences on the South African tax system and its ability to collect taxes from MNEs by answering the following questions:

1. What is the global minimum tax and how will it be implemented?
2. What are the possible policy implications for South Africa should the global minimum tax be adopted?
3. What is the possible impact of the global minimum tax on the use of tax incentives to attract investments in South Africa, with specific focus on Special Economic Zone (SEZs)?
4. Will the global minimum tax infringe on South Africa's national sovereignty?

1.3 Significance of the study

The findings of this study will assist in determining what the possible policy implications will be for South Africa should the members of the inclusive framework decide to

proceed with the introduction of the global minimum tax. The study will further determine the future of tax incentives, such as the Special Economic Zones (SEZs) to attract investments in South Africa and the possible impact on its sovereignty.

1.4 Delimitations of the research

This study is limited in that it uses as a basis of its analysis model rules which have not been implemented as yet in South Africa. Some of the rules may not be applicable in the context of South Africa and, therefore, not form part of the analysis for the purposes of this report. Furthermore, even though some of the policy implications are identified, not all are covered due to the limited scope of this study. The following documents are analysed to gather some of the important information for this study:

1) *'Action Plan on Base Erosion and Profit Shifting (BEPS)'* report of the OECD published in 2013 provides the action plans developed to address BEPS issues in a co-ordinated and comprehensive manner.
2) A report on *Harmful Tax Competition* published by the OECD in 1998 addresses harmful tax practices in the form of tax havens and harmful preferential tax regimes in the OECD member countries and non-member countries. This report establishes an international framework to counter harmful tax competition.
3) '*Towards Global Tax Co-operation'* report published by the OECD in 2000 outlines the progress made since the publication of the 1998 report on harmful tax competition.
4) Pillar two is found in a report *'Tax Challenges Arising from Digitalisation-Report on Pillar Two Blueprint'* published by the OECD in 2020.
5) The rules to assist countries in the implementation of the GLoBE are found on a report '*Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar two)'* published by the OECD on 20 December 2021.

1.5 Research method

This study is qualitative in nature and is carried out by way of a literature review. The literature review is performed on reports from the OECD, journals, income tax

legislation and articles published by tax professionals and experts as well as other global organisations on the topic.

1.6 Chapter outline

Chapter 1: Introduction

The introductory chapter establishes the background and significance of this study, the problem to be researched, the research questions and the research method to be used.

Chapter 2: Overview and historical background of tax havens

The purpose of this chapter is to provide a definition of tax havens and to provide an overview of the historical development of tax haven jurisdictions. Some tax avoidance strategies commonly employed by MNEs to shift profits to tax havens are discussed and explored in this chapter.

Chapter 3: International efforts to fight against tax avoidance

The international community has joined in the fight against tax avoidance and tax havens. This chapter reports on the global efforts made so far by various international organisations to fight tax avoidance and the effectiveness of these efforts against tax avoidance.

Chapter 4: South African efforts against tax avoidance

South Africa has joined in the fight against tax avoidance and has adopted some of the international strategies developed by the OECD in combating base erosion profit shifting. This chapter evaluates and reports on such strategies employed by South Africa and their effectiveness in combating profit shifting.

Chapter 5: The proposed global minimum tax

The OECD has recently proposed the *Global Anti-Avoidance Erosion* (“GLoBE”), also known as “Pillar Two”. This proposal recommends two new taxes on the profits of MNEs that should be adopted by the 135 member countries of the OECD/G20 Inclusive Framework of BEPS. The first is a global minimum tax, and the second is a tax on base eroding profits. The first “GLoBE” proposal is reviewed in this chapter. An analysis and report is made on its design, policy rationale and calculation based on the rules to assist countries in the implementation of a landmark reform to the international tax system on a report named ‘*Tax Challenges Arising from the*

Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar two)' published by the OECD on 20 December 2021.

Chapter 6: Analysis and findings

This chapter analyses chapter 5 and makes findings, also drawing from findings made in chapters 2, 3, and 4 with regards to the BEPS project globally and in South Africa, and what the potential consequences of the proposed global minimum tax will be on South Africa and its ability to collect taxes from MNEs.

Chapter 7: Summary of findings, recommendations, and conclusion

A summary of findings is made on possible consequences with a focus on policy implications, the use of incentives and national sovereignty. Finally, recommendations are made on how South Africa can better prepare for the implementation of the global minimum tax once it has been adopted. The chapter also makes recommendations on opportunities for future studies and provides a final conclusion.

CHAPTER 2: OVERVIEW AND HISTORICAL BACKGROUND OF TAX HAVENS

2.1 Introduction

According to Hampton (1996:1), the growing international mobility of capital in the last 30 years has been one of the main features of the international economy. Globalisation and the digital economy have also substantially increased the integration of international economies in recent years, straining international laws that were developed more than a hundred years ago (OECD 2020:3). Globalisation has resulted in a rise in the development of MNEs, as corporations extend their structures and operations beyond domestic borders and invest capital and assets in foreign jurisdictions (Zekos 2003:5).

This paradigm shift in the business arena has had far-reaching implications. Owing to the efforts of many MNEs that attempt to avoid paying taxes in high tax jurisdictions, offshore tax planning has become an increasingly popular phenomenon (Hadnum 2009:1). With over forty jurisdictions offering various facilities for favourable tax planning and offshore finance, many corporations have moved their investments to these jurisdictions where low or no tax rates on foreign investments are charged (Hampton & Abbort 1999:1; Oguttu 2010:172). Such jurisdictions are derogatively known as “tax havens” (Webb 2004:787).

Tax havens have flourished and have seen continuous growth despite negative publicity and international efforts to discourage their use (Ginsberg 1997:3). The combined growth of tax haven jurisdictions has been proven to accelerate at a rate higher than the growth of the global economy itself (Ginsberg 1997:3).

In this chapter, the concept of a tax haven is explored by first determining its definition, examining the historical development of tax haven jurisdictions, and by providing a brief analysis of a few selected tax haven jurisdictions. Lastly, an analysis of the tax planning strategies utilised by MNEs to reduce tax through tax havens and their effects on other jurisdictions is provided.

2.2 What is a tax haven?

There is no universally accepted definition or exact meaning of what a ‘tax haven’ jurisdiction is; however, the term is mostly associated with jurisdictions that levy nil or low taxes. Depending on the context in which the term is used, it can be described in a broad sense, or more narrowly. Almost every country in the world has a lower tax on certain activities than its counterparts or provides certain tax incentives which are not provided by other jurisdictions. Assigning this broader definition will result in almost all jurisdictions being included. Some jurisdictions levy no or minimal taxes on all of its income or on specific income categories, and some offer some form of incentives to lower the effective tax rate paid by companies. Basing the meaning and definition of a ‘tax haven jurisdiction’ solely on a tax rate comparison poses a challenge in that almost all countries in the world would be considered as tax havens. It is for this reason that no universally accepted definition of a ‘tax haven’ jurisdiction exists (Oguttu 2010:173).)

Even though there is no generally accepted specific definition of what a ‘tax haven’ jurisdiction is, various organisation, authors and accounting firms have attempted to provide a definition for tax purposes. The OECD (2021c) states that in its ‘classical’ sense, a tax haven jurisdiction refers to a country that levies low or no tax and is used by MNEs to escape tax which otherwise would be payable elsewhere. The International Monetary Fund (IMF), in the absence of a generally accepted definition, uses two words to describe what a tax haven is: ‘escape’ and ‘elsewhere’. A tax haven jurisdiction is therefore described as a jurisdiction one uses to escape the rules one does not plan to obey and moving one’s money from a resident tax jurisdiction to a foreign jurisdiction with much more favourable rules (Shaxson 2019:7).

An OECD report on *Harmful Tax Competition: An Emerging Global Issue*, published in 1998, recognised the difficulties in providing a precise technical meaning for the concept of a ‘tax haven’. The report makes a useful distinction between, on the one hand, jurisdictions that are in a position to finance their public goods and services with no or minimum income tax and make their tax system available to corporations that wants to escape tax in their domestic jurisdictions and, on the other hand, jurisdictions which are able to raise very high amounts of local income taxes but have features in their tax system that constitute harmful tax competition (OECD 1998:20).

These types of jurisdictions are not faced with the problem of having to fight against harmful tax reduction strategies with respect to local income tax but contribute significantly to the erosion of income tax revenues in other jurisdictions. For this reason, such countries may not have any interest in being part of an initiative to stop harmful global tax competition, therefore, qualifying them as tax havens. This determination, however, must be based on a complete assessment of all relevant factors. The levying of nil or extremely low tax rates provides a starting point for this evaluation and combined with the fact that a jurisdiction offers its tax system as a place for corporations to escape tax in their country of residence is enough for a jurisdiction to be classified as a tax haven (OECD 1998:21).

Additional factors that assist in identifying tax havens were also outlined in the report. The first factor is a lack of effective exchange of information because of laws and administrative practices. Lack of information exchange provides businesses and individuals the benefit of strict banking secrecy and protection from scrutiny by other tax authorities making the effective exchange of information difficult. Secondly, the existence of legislative, legal, or administrative provisions that lack transparency. Lastly, most companies registered in tax haven jurisdictions do not conduct any substantial business activities in such jurisdictions, suggesting that the main aim is to attract investments or transactions driven by tax advantages (OECD 1998:23).

Other methods used to identify tax havens include the following four categories of jurisdictions: jurisdictions with a nil tax rate, where corporations only pay licence fees; jurisdiction with an extremely low tax rate; jurisdictions that allow the practice of “ring fencing”, by levying tax on domestic income and not foreign income; and jurisdictions with special tax privileges and incentives for certain types of business activities or corporations (Eden & Kudrle 2005:101).

Tax havens can also be defined as jurisdictions that serve as the legal domain for the registration of contractual relations and activities that are actually performed elsewhere and are aimed at enabling the avoidance of taxing provisions and regulations in jurisdictions where these recorded contractual activities take place or have a real impact (Palan *et al.* 2013:13).

2.3 Historical background of tax havens

The history and evolution of tax havens is one that is mostly surrounded by myths, but the practice of offering foreign nationals with nil or low taxation on investments is an old practice. Even though there are some myths about the origins of tax havens, most of the information regarding their origins can be backed by real evidence (Palan *et al*. 2013:107; Oguttu 2010:175). The available hard evidence dismisses some of the myths surrounding the origins of tax havens.

Some of the best-known myths surrounding tax havens are that the development of secret bank accounts by Swiss bankers were developed to offer protection to the Jewish assets from the Nazis, when in reality, these accounts were meant to protect Swiss bankers from prosecution by other states. The second common myth held by the OECD, IMF and liberal economists is that the rising tax burdens in the 1960s resulted in a rise of tax haven jurisdictions. These claims cannot be true as some of the states were well-known as tax havens before the 1960s: Switzerland in the 1920s, Liechtenstein introducing the Anstalt in 1926, Luxembourg with its holding company rules introduced in 1929, and Bermuda, known as a tax haven since around 1935. The third myth is the claims by tax havens that they were non-participants in the global economy who got exploited by mobile foreign capital and have been innocent from the beginning. This statement could not be true given the amount of effort displayed by tax havens over the years to attract the same capital from foreign jurisdictions (Palan *et al.* 2013:107).

Tracing back to ancient times, the acts of avoidance, concealment and tax evasion have been long practiced by humanity. Concealment of capital may have had a long path in the history of humanity, but tax havens are a recent phenomenon (Palan *et al.* 2013:108). The earlier use of tax havens was not solely for tax avoidance purposes, but these jurisdictions had always been the preferred investment location for most capitalists seeking to protect and hide their capital (Ogguttu 2010:175).

The development of tax havens in their early stages were mainly as a reaction to the development of corporations and laws regulating corporates rather than for tax benefits, hence the use of easy incorporation rules and loose regulations as a competitive strategy (Palan *et al.* 2013:110).)

2.3.1 The development of corporations and laws regulating corporations

The evolution of tax havens began with the development of corporations which some historians date their beginning to 1553 in England, while others claim the beginning of modern corporations to have been in 1601 with the East Indian Company created by Queen Elizabeth I (Palan *et al.* 2013:109).

Palan (2013:108) states that corporations were subject to stringent rules and regulations imposed by the British government. The United States later inherited this attitude towards corporations. Corporations in those times were few and scarce as they required a Royal Charter, Act of Congress, or Act of Parliament to be incorporated (Palan *et al*. 2013:108).

With the lead by the United States, corporation law was slowly developed, and it evolved with much hesitancy, leading to the principle of taxing corporations as separate persona from their owners by the Unites States Revenue Act of 1894. In 1899, when New Jersey passed an act allowing corporations to own shares in other companies, this liberal attitude attracted and lured wealthier foreign corporations. Delaware soon followed by emulating New Jersey, seeing how successful their strategy was setting a standard to be followed by tax havens through their laws, which a group of lawyers in New York assisted with drafting (Palan *et al*. 2013:110).

But it was only in 1909 that the Constitutional way of taxing corporates was enacted in the United States and ever since, the principle has prevailed. The separation of corporate tax from income tax in Britain took place in 1965, and the revolution in France established the ‘patente’ as a tax to be paid by corporations in proportion to their turnover (Palman *et al.* 2013:109).)

2.3.2 The use of tax havens to avoid tax

There are various phases that distinguish the development of tax havens from its early stages in the late nineteenth century to the late 1960s when a number of United States banks set up branches in the Caribbean to act as Euro-currency booking offices (Palan *et al*. 2013:109). However, the use of tax havens for the purposes of tax avoidance only became a widely used practice in the international business sphere after World War I (Ogguttu 2010:175). Palan *et al.* (2013:108) concede that even though the first stages of tax havens were roughly from the late nineteenth century, it was during its

second stage of development through the early 1970s when a number of states led by Switzerland began to be developed into tax havens as the international development strategy after World War I.

Soon after, various states enacted laws that allowed them to operate as tax havens with most of these jurisdictions being in islands off Europe and the Caribbean located on the outskirts of the mainland continents. The scale at which corporations moved their investments in search of more favourable tax rates increased tremendously, encouraged by the development of telecommunication and automation (Ogguttu 2010:176). This need for international tax planning led to many corporations adopting the practice of aggressive tax planning through the use of tax havens, eroding the tax bases of many governments (Deloitte 2022). It is because of such harmful tax practices that tax havens are a recent hot political agenda and various states are joining hands in fighting against the harmful tax practices of these jurisdictions (Ogguttu 2010:176).

2.4 Tax planning strategies utilised by MNEs to reduce tax through tax havens

The single largest bill many companies pay each year is tax and it affects every form of business, including MNEs. Decisions on investment location, what is invested and how much is invested, including the funding strategies of such investments, depends on the tax system and tax rates to which the MNE is subjected. Understanding the motivations, behaviours, and strategies of MNEs in tax planning is incomplete without understanding how taxes influence corporate behaviour (Cooper & Nguyen 2020: 1).

Dharmapala (2008:666) emphasises that to gain an understanding of how and why tax havens are utilised by MNEs to minimise or delay their tax liabilities requires much more consideration of other factors other than how such jurisdictions tax foreign income of their resident corporations. The OECD (1998:23) states that other factors such as banking secrecy and protection of information making it difficult for corporations to be scrutinised by other tax authorities must be considered, then a full understanding of the benefits provided by havens will be understood. Taxpayers often take advantage of the tax variation across foreign borders and international tax systems presented by the differences in the tax systems, laws and rules from one country to another (Oguttu 2011:30). Taxpayers would, therefore, invest in the tax

jurisdiction that offers benefits such as lack of transparency and no exchange of tax information with other jurisdictions in order to minimise or defer their tax liability (Fourati 2019:2).

Many MNEs are able to plan their tax affairs using a variety of strategies, ranging from simple to extremely complex, to legally reduce or delay their taxes. This concept is called tax planning. Even though tax planning is legal, using these strategies to push the limits of what is allowable can be considered aggressive tax planning employed to avoid tax. Many MNEs have utilised aggressive tax avoidance planning strategies in their operations, resulting in the legality of various corporate tax planning strategies being a central research question in international business, law, tax, economics, and accounting literature (Cooper & Nguyen 2020: 1).

The aggressive tax avoidance strategies used by MNEs have spread throughout the globe and are varied and include transfer pricing (invoice value), royalty payments, intercorporate loans and intellectual property profit shifting (Contractor 2016: 29), all of which are enabled by various tax haven jurisdictions in which income is shifted from countries where business activities are normally conducted, to countries where little or no activities are conducted.

2.4.1 Transfer pricing (invoice value)

Transfer pricing is one of the most popular tax avoidance strategies. It involves the levying of artificial prices on the international supply chain process between a multinational group, wherein prices are determined by the multinational itself (Contractor 2016:29). The charging of artificial prices is often biased by tax considerations and its purpose is solely to transfer income from a high tax jurisdiction to a low tax jurisdiction (Wier 2020:1).

Dogan, Deran and Koksal (2013:734) define transfer pricing as:

> "the price charged for transferring a corporation's tangible assets, goods or services, raw material, know-how and technology to its subsidiaries or branches".

For example, if a company manufactures goods in country A and sells them to its affiliate in a foreign country B, the price at which the sale takes place is referred to as the transfer price. This transaction must be priced with reference to market

considerations and legitimate commercial considerations. In terms of the South African income tax legislation, transactions between related, or connected parties which forms part of an 'international agreement' should be conducted at arm's length prices. Parties to the transaction must levy prices that would have been charged if the transaction had been carried out between unrelated parties in an open market (SAICA 1999).

From the above statement, one can conclude that the so-called arm's length principle is central to the idea of transfer pricing. Paragraph 1 of Article 9 of the OECD Model Tax Convention provides the authoritative statement on the arm's length principle which forms the basis of bilateral tax treaties involving OECD member countries and an increasing number of non-member countries. Article 9 provides that:

> "[Where] conditions are made or imposed between the two [associated] enterprises in their commercial or financial relation which differ from those which would be made between independent enterprises, then any profit which would, but for those conditions, have accrued to one of the enterprises, but by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly" (OECD 2014:29).

The overruling precedent in the arm's length principle is that connected parties entering into a transaction must do so under the same conditions (and pricing) that would have applied between unrelated parties in an open market. "[T]ransactions between associated enterprises should not be distorted by the special relationship that exists between the parties" (OECD 2011:3). High levels of neutrality are reflected by the arm's length principle, and it is a simple principle used for customs evaluations to which connected parties must adhere when it comes to cross-border transactions.

The fact that MNEs operate in various jurisdictions across the globe and have subsidiaries in foreign jurisdictions opens up an opportunity for MNEs to exploit the international transactions between subsidiaries. The practice of artificial pricing in transfer pricing is widely practised in the international business space but its actual frequency is not known, and might amount to billions of lost taxes for all jurisdictions combined (Contractor 2016:30).

2.4.2 Thin capitalisation

Companies are mostly funded and financed through debt financing and equity. These two financing structures are not treated the same for income tax purposes. In South Africa, for instance, foreign dividends received by residents from foreign companies are taxes at a maximum effective rate of 20% through the normal tax system and no deductions are allowed in respect of the expenditure incurred to produce these foreign dividends (South African Revenue Service (SARS) 2021). Interest paid by South African companies to a foreign multinational parent or fellow subsidiary of a multinational company are, on the other hand, tax deductible.

Tax deductibility of interest payments, therefore, provides companies with the incentive to prefer financing their operation through debt rather than equity (Blouin, Huizinga, Laeven & Nicodeme 2014:3). It is, therefore, clear that the manner in which a company is capitalised has an impact on the calculation of taxable income. A company is considered to be thinly capitalised, for tax purposes, if its debt capital is significant in comparison to its equity capital (SAICA 2011).

De Koker and Williams (2021:2104) state that as a transfer pricing mechanism, thin capitalisation relates to the capitalisation method wherein a business is funded through an unequal amount of debt in relation to its equity for purposes of providing a benefit of exempt interest income to a foreign company in a low or no tax jurisdiction, while enjoying the benefit of tax-deductible interest on debt in South Africa. In cases where tax avoidance is a primary objective, tax deductibility of interest can, therefore, influence the finance decision of a company and lead to this capitalisation method being employed (National Treasury: Republic of South Africa 2020:3).

In the context of utilising a tax haven jurisdiction for profit shifting, thin capitalisation typically involves the extending of debt financing by a non-resident connected affiliate to a resident taxpayer company at conditions and terms which are prejudicial to the high tax jurisdiction tax base and are not at arm’s length.

The characteristics of a debt financing structure utilised to shift income from a high tax jurisdiction to a low tax jurisdiction are as follows:

- A foreign multinational parent company or its fellow subsidiary in a tax haven jurisdiction advances a loan to a company in a high tax jurisdiction.

- The lender in a tax haven jurisdiction is not subject to income tax in the high tax jurisdiction, but enjoys the benefit of tax-deductible interest in the same high tax jurisdiction; and
- The loan advanced is excessively high in value in comparison to the company's equity in the high jurisdiction subsidiary, therefore, utilising a thin capitalisation structure to finance the company in a high tax jurisdiction (Jatmiko & Huson 2018:87).

2.4.3 Intellectual Property

Intellectual property (IP) rights have, in recent years, been one of the most used strategies for tax-avoidance in the international tax space (Blair-Stanek 2015:4). IP refers to intangible assets utilised by companies in their trade to produce income. According to the OECD (2002a), intellectual property rights refer to the holding of sole property rights through patents, copyrights, and trademarks. These rights then allow the holder to exercise monopoly in the production of certain goods or services in a specific industry for a certain period of time.

In the context of profit shifting and tax avoidance, in an MNE group that has a parent company and subsidiaries across the world, IP rights can be used as a vehicle to shift income from high tax jurisdictions to low tax jurisdictions. According to Blair-Stanek (2015:5), there are two characteristics of IP rights that make the strategy attractive for tax avoidance. Firstly, unlike tangible assets, IP rights can be moved to tax havens with great ease, by mere paperwork. Secondly, as IP right are unique in nature, it makes it extremely difficult for their market value to be precisely determined, allowing undervaluing of IP by MNEs to be justified for the benefit of low taxation (Blair-Stanek 2015:5).

Fueste, Spengel, Finke, Heckemeyer and Nusser (2013:2) also share the same sentiments that the characteristic of IP plays an important role in the international profit shifting. Most companies accused of profit shifting and tax avoidance have highly IP intensive and profitable business models, making it no surprise that profit shifting is normally at the top of their agenda (Fueste *et al.* 2013:2). They further state that according to them, these characteristics are that, firstly, IP right are drivers of value creation in big corporations and, secondly, IP rights are highly mobile.

Profit shifting and tax avoidance through the use of IP takes place in two ways. Firstly, an invention can be developed in a high tax jurisdiction by a subsidiary of an MNE. The subsidiary then immediately transfers the patent rights to its parent multinational company in a low tax jurisdiction for an artificially low price. The tax levied by a high tax jurisdiction on the transfer will generally be low due to the undervalued price of the patent (Blair-Stanek 2015:5).

The invention then later becomes one of the services that generates immense value for the group, and the multinational parent in a low tax jurisdiction rents out the patent right back to the subsidiary in the high tax jurisdiction at a highly inflated premium. The transfer of the IP right to a multinational parent was not for business purposes but for the purpose of obtaining a tax advantage and the premiums levied for the use of the patent by subsidiaries are normally not at arm's length (Blair-Stanek 2015:5).

It is clear from the above analysis that at the centre of the IP-based tax-avoidance scheme is the assignment of an artificial price at some point in time for purposes of obtaining a tax benefit (Blair-Stanek 2015:5).

2.5 Effects of tax haven jurisdictions on high tax jurisdictions and the risks they pose to South Africa

The effects tax havens have on high-tax jurisdictions has caused concerns to various governments in recent years and have become a highly debated and researched topic globally (Chu 2014:2014). The effects of tax havens have also been a subject at the top of the agenda for policy makers globally (Chu, Lai & Cheng 2014:803). The main debate and concern is that the existence of tax havens erodes the tax base of high–tax jurisdictions, as it opens the doors for tax avoidance and promotes harmful tax competition (OECD 2008; Dhamapala 2008:662). Owing to the ongoing harmful tax practice by MNEs, the concept of tax justice has been the modern-day currency in the social and political spheres.

With increased and continued globalisation, the practices of tax avoidance, profit shifting, and aggressive tax planning have significantly increased, creating significant challenges in the implementation of tax systems that aim to be simple, broad-based and fair (Agbo 2020:49). Radu (2012:398) states that the existence of tax havens represents a continued global crisis and problem that negatively affects the budgetary revenues of high-tax jurisdictions. The existence of tax havens further leads to the

growing evasion of taxes in both lawful and unlawful diversion of capital, causing financial instability and crises in non-haven jurisdictions (Radu 2012:398).

The governments of many countries, especially developing countries, are faced with a crisis of increased costs of maintaining public goods and services, as well, as an increased number of people who depend on the state due to rising numbers of unemployment and poverty (Jansky & Prats 2015:273). The tax avoidance activities enabled by tax havens erode the tax base of many countries, therefore, reducing government spending in key infrastructural development, social services, and service delivery which in turn, depresses the economic growth rate (Chu, Lai & Cheng 2014:805).

A well-known conclusion is that tax competition will lead to low quality or inability to provide public goods by most states (Chu 2014:305). Governments cannot turn a blind eye while their tax bases are eroded through harmful tax practices allowed by countries enabling corporations to use havens to reduce and avoid tax that would otherwise be payable to them (OECD 1998).

The negative perceptions, viewpoints and attitudes on tax havens are modelled in a study conducted by Slemrod and Wilson in 2009 which labels tax havens as ‘parasites’ on tax bases of non-haven jurisdictions, therefore, decreasing their ability to finance and provide public goods. However, whether the existence of tax havens is actually harmful to non-haven jurisdiction has become a question that is debatable and controversial due to a number of opinions expressed by various researchers in support of tax havens (Chu, Lai & Cheng: 803).

In a study to determine the purpose tax haven serves, Desai, Foley and Hines (2006:523) empirically show that the presence of tax havens can stimulate investment in non-haven countries by reducing the cost of investment in such countries. According to Hong and Smart (2009:95), the opportunities for tax planning provided by tax havens enhances the willingness of corporations to invest in home countries, therefore, benefiting workers in those countries. They further argue that an increased international tax planning as a result of the existence of tax havens is associated with high levels of social welfare.

Even though it is a country rich in minerals and considered to be one of the thriving economies in Africa, South Africa is still faced with many socio-economic challenges

that threaten its sustainable development goals and the quality of life for its people (Development Bank of Southern Africa (DBSA) 2022). South Africa is under fiscal constraints in the same way as most developing countries (Wier & Reynolds 2018:5), and much needed revenues are lost each year through illicit financial flows enabled by tax havens (Robb 2020:26).

According to Robb (2020:27), it is estimated that US$327 billion in capital was shifted from South Africa between 1970 to 2017. The shift was made possible by trading with some of the high-ranking secrecy jurisdictions through artificial pricing and invoicing between 1998 and 2017 (Robb 2020:27). In their study of profit shifting by foreign-owned firms in South Africa, Weir and Reynold (2015:) noted discrepancies between profit-to-wage ratios of companies with headquarters in tax havens as compared to those with their headquarters in non-haven jurisdictions. They found that companies owned by parents situated in tax havens report significantly lower levels of profit as compared to their wage ratio even though there is a clear indication of high economic activity reflected by their wage bill each year.

In 2014, it was found that billions in profits were shifted from South Africa to five tax haven jurisdictions, namely, Switzerland, Ireland, Bermuda, Jersey, Guernsey, and the Isle of Man (Robb 2020:27). The value of these profits combined represented the biggest shift in 2014, indicating that South Africa, like other developing countries, suffers the same abuse enabled by tax havens (Robb 2020:27).

According to Weir and Raymond (2018:5), South Africa is mostly at risk of losing revenues to tax havens due to its over-reliance on corporate taxes, continuing fiscal constraints and growing exposure to foreign-owned firms. The high corporate tax rate of 28% also fuels these problems as it is 4% above the world average and much higher than that of most tax haven jurisdictions. The high corporate tax rate is on its own an indication that there is a high incentive for firms to shift their profit outs of South Africa to jurisdictions with much more favourable tax rates (Weir & Raymond 2018:6).

2.6 Conclusion

As can be deduced from the discussions above, central to a tax haven is aggressive international tax planning, tax avoidance and profit shifting. In practice, tax havens enable a multinational corporation to utilise various strategies to aggressively plan

their tax affairs, eroding the tax bases of non-haven countries and, therefore, denying non-haven countries a chance to collect much-needed revenue through taxes that would otherwise be payable to them. Radu (2012:400) emphasises the need for control and action against aggressive tax planning enabled by tax havens as governments are deprived of much-needed tax revenues to provide for public goods. He further states that the tax revenues evaded by multinationals can be estimated to be between 100 and 150 billion dollars annually in the United States only, a situation which is predicted to be much worse in developing countries, given the problems with which they are faced.

As with many developing countries, South Africa is not immune to the abuse and loss of revenue as a result of tax havens. The risk of continued profit shifting to tax havens is exacerbated by, amongst other things, over-reliance on corporate taxes, the increasing exposure to foreign-owned firms, and continuing budgetary and fiscal constraints (Weier & Raymond 2015:6).

The next chapter examines the global fight against tax havens and unfair tax competition by various organisations with the OECD at the forefront, and how effective these efforts have been to reduce tax havens' effects on non-haven countries and the world economy.

CHAPTER 3: INTERNATIONAL INITIATIVE TAKEN TO STIFLE THE DEVELOPMENT OF TAX HAVENS AND THE CAMPAIGN AGAINST HARMFUL TAX PRACTICES

As tax haven jurisdictions continue to thrive and grow, their use for tax planning purposes continues to be a major cause of the depletion of other jurisdictions' tax bases. The international community has taken some measures to try to suppress their development and limit harmful tax practices enabled by tax havens. This section provides an analysis of some of the international initiatives against the growth of tax havens and their effectiveness in curbing harmful tax practices.

3.1 European Union (EU) initiative against tax havens

The focus on the fight against harmful tax practices and tax havens by the European Union came as a result of the efforts by the European Commission ('the Commission') to create a fair environment in which corporate taxes are fairly distributed within the Union (Eden & Kurdle 2005:116). These attempts by the European Commission, dating back to 1960, failed to obtain buy-in and support from the national tax authorities for the harmonisation of the UN-intra corporate tax rates (Radaeli 1999:667). According to Eden and Kurdle (2005:117), the first successful policy amendments to curb the effects of harmful tax practices were related to the "EC 1992" single common market initiative.

The European Union (EU) issued a report in 1992, following a study by the Commission and conducted by independent experts to analyse the capital tax requirements in the EU (Commission of the European Communities 1992:09). The conclusion made on the report was that differences in tax rates between member states could have an impact on the investment location, which in turn, could exacerbate the problem of unfair competition amongst member states (Bai 2008:118). The report contained recommendations on company taxation in Europe, which, if implemented, would see the discouraging of resident members from transferring investments to other low tax jurisdictions (Commission of the European Communities (1992:346).

One of the proposals on the report was the adoption of a common tax system as a long-term strategy, while pushing for a short-term solution of an adoption of a minimum and maximum corporate tax rate of 30% and 40% respectively (Bai 2008:118). Even though the importance of this report was recognised, the Commission adopted only an insignificant number of recommendations from it, and it was not very successful (Bai 2008:118).

Years after publishing the report by the Commission of the European Communities, the situation was still the same and far from changing (Eden & Kudrle 2005:117). The unchanged situation was made evident through the survey of the national tax systems of member countries conducted in 1996 by the European Commission, called *"Verona Paper"* (Eden & Kudrle 2005:117). The report stated the following in respect of the fiscal erosion through tax switching:

> "In comparison with many other areas of European integration, tax policy is clearly lagging behind. In tax policy terms Europe is a patchwork. As a result of erosion of fiscal bases, especially the more mobile ones, professed attempts to defend tax sovereignty have in fact had the opposite effect, a gradual real loss of tax sovereignty for all Member States. More and more Member States are poaching other Member States' taxpayers, particularly in the field of business" (Commission of the European Communities 1996).

According to Eden and Kudrle (2005:117), another survey conducted by the commission in 1999 revealed that the offshore dependencies of the Netherlands and the United Kingdom had infringed on the "*Monti Package*", a voluntary code of conduct designed to eliminate unfair tax competition amongst the EU member states. Half of the infringements were reported in these offshore dependencies.

In late 2002, Luxembourg, Belgium and Austria were obliged, through an agreement concluded by the European Union, to introduce a withholding tax of 15% to 20%, with other EU member states obliged to exchange information on intra-EU portfolio investments. Switzerland refused to co-operate with the terms of the agreement, while Luxembourg and Austria agreed on the condition that the United States and Switzerland would also co-operate (Eden & Kudrle 2005:117).

The commission later addressed issues relating to tax fraud and evasion in its communication issued in June 2012, wherein matters relating to developing countries were also included. Matters, such as the need for transparency on tax information amongst tax authorities and co-operation were identified, including the possibilities of a European Tax Identification number. The commission committed to developing a strategy to combat aggressive tax planning and foster good relations between tax administrations and authorities in different jurisdictions. The strategy would also enable dialogue on various tax issues countries face, both locally and internationally (European Parliament 2013:58).

On 31 July 2012, the European Economic and Social Committee issued an opinion paper on *"Tax and Financial Havens: A Threat to the EU's Internal Market"* (Own initiative opinion). The Committee concluded and made recommendations on measures the EU could take to eradicate secrecy jurisdictions and encourage member states to fight against financial crimes committed from these states to protect and preserve the internal market, including tax crimes (European Economic and Social Committee 2012).

Amongst 15 recommendations made in the opinion paper is the encouragement of the EU to take all efforts and make use of all resources it has access to through the G-20, the OECD and the FATF to ensure the eradication of tax haven jurisdictions. The paper also made recommendations that the EU should not only be limited by efforts made by the G-20 and the OECD in fighting against tax havens. Stricter rules should be developed internally to protect the EU market against many financial crimes committed through such jurisdictions (European Economic and Social Committee 2012).

The European Economic and Social Committee still recognises continuing challenges of tax fraud, tax evasion and avoidance, despite efforts by the EU, other governments, and organisations, such as the OECD. The Committee calls for the European Commission to launch a European pact that involves a variety of stakeholders, including member states, to effectively deal with the problem of tax fraud evasion and avoidance (European Economic and Social Committee 2020).)

Its latest opinion paper on "*Effective and coordinated EU measures to combat tax fraud, tax avoidance, money laundering and tax havens*" (Own-initiative opinion) was published on 11 December 2020. The opinion expressed its continued concern of the scale of tax fraud, tax evasion, tax avoidance and money laundering in Europe and globally and the role tax havens play in exacerbating this problem (European Union 2020). The paper also reflected on BEPS initiatives the EU has implemented to prevent tax avoidance and the account it has taken on its legislative initiative on digital taxation (European Union 2020).

Due to the high volume of tax fraud, evasion, avoidance, and money laundering, despite many efforts being put in place to fight these acts, the European Economic and Social Committee recommended, amongst other things:

- The launch of the European pact to assist in effectively dealing with all the financial crimes identified as well as the encouragement of political initiatives to assist in fighting these crimes;
- Improved provision of financial and human resources by European institutions and Member States to effectively implement existing legislation and the adoption of new legislation to deal harshly with all acts of financial crimes enabled by tax havens; and
- Emphasised the importance of civil society in creating public feeling against tax crimes and encouraged improved involvement of civil society in the implementation of the pact (European Union 2020).

3.2 The G7 Initiative against harmful tax practice

During the 1998 summit held in London (the Birmingham Summit) at the meeting G7 Finance Minister, the Ministers agreed on a new initiative to tackle harmful tax competition. The agreement encouraged improved exchange of international tax information to help curb the surge of international tax evasion and avoidance using tax havens and preferential tax regimes (University of Toronto (G8 Information Centre) 1998). It reaffirmed the recommendations made by the OECD in its 1998 report on curbing harmful tax competition and complemented the EU code of conduct on business taxation. The group further committed to leading the international effort and action on tax crime by increasing the availability of intelligence information regarding

issues on money laundering and making available a system that will make it possible for information to be shared with greater ease amongst international tax authorities (University of Toronto (G8 Information Centre) 1998).

As part of its initiative to tackle harmful tax practices, the G7 agreed to:

- Reinforce the report issued by the OECD providing a platform for dealing with harmful tax competition, and obtaining more information from tax havens and preferential tax regimes on tax-related transactions;
- Ensure that potential weaknesses in the anti-money laundering system are addressed through a reporting system of suspicious transaction, regardless of whether they are tax related or not; and
- Provide a new system of tax intelligent to tax authorities to ensure the effective sharing of suspicious transactions for investigation at a national and local level (University of Toronto (G8 Information Centre) 1998).

The G7 reaffirmed its support for the initiative against harmful tax practices in a statement issued during its 1999 Koln summit in Germany (University of Toronto (G8 Information Centre) 1999). The group emphasised the need for continued prioritisation of the fight against financial crimes by its member states during national and international policymaking. The OECD's forum on harmful tax competition was widely welcomed and commended by the group, and the work conducted by the forum was strongly endorsed, particularly its efforts to identify tax haven jurisdictions (University of Toronto (G8 Information Centre) 1999). The group further encouraged the OECD to continue to work on the fight against harmful tax practices and expressed its support in future dialogues regarding the issue.

In an effort to join in the fight against harmful tax competition, the G7 committed to continue supporting the work done by the OECD and the FATF in fighting harmful tax competition. It offered reassurance of its commitment in continuing to extend resources to ensure effective exchange of information between tax authorities globally and removal of barriers limiting this process (University of Toronto (G8 Information Centre) 1999).

To reaffirm its commitment and support for the need to prevent harmful tax competition, the G7 in its Summit in 2000, welcomed the *Report on Progress on Identification and Eliminating Harmful Tax Practice,* presented to the Council of the OECD in June 2000. The report included a list of jurisdictions meeting tax haven criteria and potentially harmful regimes within the OECD member countries. The report on improving access to bank information for tax purposes was welcomed in the same manner by the G7. The group encouraged the OECD to continue fighting against harmful tax practices and welcomed the efforts already made by some member states to eliminate policies and practices that could potentially be harmful to other jurisdictions (University of Toronto 2000).

3.3 The OECD initiatives against harmful tax practice

On the one hand, globalisation of the economy resulted in opportunities for the development for enterprises through the free movement of capital and assets across borders. On the other hand, it has crippled many governments' ability to collect taxes to achieve state objectives utilising traditional policy instruments (Webb 2004:788). Over the years, the governments of many countries have expressed great concern over the continuous growth of certain jurisdictions, especially those that take advantage of the opportunities presented by globalisation to distort economic behaviour and enable aggressive tax planning by MNEs defying the tax laws of their home countries (Hammer & Owens 2001:1). For this reason, the G7 countries called for the OECD in 1996 to act against harmful tax competition and its effect on investment and financing decisions, resulting in dire consequences on the tax base of many nations (Hammer & Owens 2001:1).

In May 1996, the G7 Ministers urged the OECD to develop measures to mitigate the distorting effects of harmful tax competition on investment and financing decision and the consequences for national bases and provide a progress report (OECD 1998:3). As a result, a report titled *"Harmful Tax Competition: An Emerging Global Issue"* was published in 1998 as a response to the G7 Ministers by the OECD's Committee on Fiscal Affairs through its project on harmful tax practice (OECD 1998).

The report intended to provide a better understanding of how harmful tax practices enabled by tax havens and harmful preferential tax jurisdictions impacted the investment decision by MNEs and negatively impacted the tax bases of other

countries. According to the report, the distortion of financial and investment flow amongst countries created an environment that encouraged unfair international tax competition and undermined taxpayers' confidence and acceptance of tax systems (OEDC 1998:8).

The report detailed a strategy to identify harmful tax competition (Gilmore 2001:550) and further recommended measures countries may adopt to counter harmful tax practices and enhance the effectiveness of their local legislation to curb the effect of tax avoidance (Oguttu 2010:116). The report further established a global framework to curb the spread of harmful tax competition (OECD 2000:5).

The OECD 1998 report in its strategy addressed harmful tax competition firstly by making a distinction between tax havens and harmful preferential tax regimes in the OECD member countries and non-members (OECD 1998:3). Then they developed and explained criteria and factors to consider in identifying tax havens and harmful preferential tax regimes, as well as questions to pose about their economic effect on other states (OECD 1998:19).

The report further provided an analysis of how various counteracting measures adopted by different countries can be re-enforced and how a co-ordinated approach may be adopted to develop new measures, taking into consideration the uniqueness of each jurisdiction’s tax system (OECD 1998:38). The report closed off by emphasising the effect of counteracting measures if they are in line with practices adopted at an international level (OECD 1998:39). Recommendations were then made following an approach of dividing them into three different categories. Recommendations regarding domestic legislation, tax treaties and intensification of international co-operation were developed (OECD 1998:39).

Even though widely accepted and supported by most of the OECD and the G7 member states, the initiative on harmful tax practices and the report published faced some criticism. The OECD was accused of having considered the interests of only its members when drafting the report and did not consult widely with other jurisdictions. Most haven states accused the OECD of undermining their right to fiscal sovereignty and displayed elements of discrimination against them. The 1998 OECD report was

not well-received by some tax haven jurisdictions whose prospects of future growth seemed be threatened by the recommendations of the report (Oguttu 2010:117).

In 2000, the OECD issued a report entitled *"Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices*". The report outlined progress made by the forum on the mandate given by G7 Ministers in 1998 to counter the spread of harmful tax competition (OECD 2000:8). The report committed to assisting member states in assessing whether they display features that could be potentially harmful and decide on how these members could remove such harmful features in order to meet the commitments made in the 1998 report by April of 2003 (OECD 2000:15).

In line with paragraphs 59 and 60 of the 1998 report, identification of preferential tax regimes that are potentially harmful was made. Jurisdictions meeting the tax haven criteria were also listed in the report, excluding a small number of jurisdictions that, prior to the publication of the report, made a public political commitment to eliminate their harmful tax practices and comply with the principles of the 1998 report. The council encouraged the committee to continue its efforts to ensure that these jurisdictions commit to eliminating harmful tax practices and adopt recommendations made in the 1998 report (OECD 2000).

On 18 April 2002, the chairperson of the OECD's Committee on Fiscal Affairs, Gabriel Makhlouf, issued a statement on the *"OECD List of Unco-operative Tax Havens"* (OECD 2002b). The committee chair announced that the project had managed to receive commitments from 31 jurisdictions to the OECD's principles of transparency and effective exchange of information. However, a small number of jurisdictions identified as tax havens in June 2000 were still unco-operative and had not made the same commitments. A few jurisdictions were identified by the OECD's Committee on Fiscal Affairs as unco-operative tax havens, and efforts were made to dialogue with these jurisdictions on the prospects of future commitment to transparency and effective exchange of information (OECD 2002b).

Progress made since the 2002 report was reported in *"The OECD's Project on Harmful Tax Practices: The 2004 Progress Report"*, published in 2004. The report stated that

out of the 47 preferential tax regimes listed in the 2002 report, eighteen regimes abolished their preferential tax systems, fourteen had made amendments to remove any potential harmful features and, after further analysis, thirteen regimes were found not to be harmful (OECD 2004:9). The report further reflected an increase of non-member states committed to the principle of effective exchange of information and transparency, with the number increasing from 11 to 33. Collaborated efforts were made under the direction of the OECD's Global Forum to develop the global standards regarding transparency and effective exchange of information in the form of a *Model Agreement on Exchange of Information on Tax Matters* ("the Model Agreement") (OECD 2004:12).

Following the 2004 report, further progress in the fight against preferential tax regimes and harmful tax practices has been published in various reports. This includes the 2006 report, wherein the OECD reiterated the importance of countries retaining sovereignty over national tax matters and the effective application of its tax laws. The OECD further reiterated that the objective of its project on harmful tax practice by promoting the implementation of transparency and effective exchange of information is to enable each jurisdiction to retain its national tax sovereignty and effectively apply its tax laws. The project is not aimed at dictating how countries should structure their tax systems but rather seeks to create an environment wherein countries can compete free and fairly, allowing for an equal share of the international economy (OECD 2006:3).

A publication issued by the OECD Global Forum on Tax titled *"Tax Co-operation: Towards a Level Playing Field"* published in 2007, reported an increased number of tax haven countries making commitments to implementing the OECD's standard of transparency and exchange of information for tax purposes (OECD 2007). Thereafter, most of the tax haven countries entered into agreements for the exchange of tax information with other jurisdictions. Furthermore, some tax haven jurisdictions also incorporated the OECD's standards on transparency and exchange of information into their own Model Tax Convention (Oguttu 2010:181).

In 2013, the OECD published the *Action Plan on Base Erosion and Profit Shifting* (BEPS), following a call by the G-20 finance ministers for the development of an action

plan to address BEPS issues in a comprehensive and co-ordinated manner (OECD 2013:11). This action plan provides jurisdictions with domestic and international instruments to align taxing rights with economic activities (OECD 2013:11). The action plan identified 15 actions needed to address BEPS issues, provided timelines for the application of identified actions, and identified resources and methodologies for implementation of the action plans.

The report recognised the elevation globalisation has brough to the international market through the free movement of international investments and enhanced free movement of labour and capital (Davis Tax Committee (DTC) 2017:8), at the same time, it emphasised the fact that manufacturing bases have been moved from high-cost to low-cost locations due to the same globalisation impacting on how cross-border transactions are conducted (OECD 2013: 7). These developments have resulted in an increased effort by MNEs in reducing their global tax burden by exploiting the weaknesses presented by the incompatibilities of the international tax laws to the rapid changing global market environment (DTC 2017:8).

The need for aggressive tax planning by MNEs has resulted in profits being shifted from jurisdictions with high tax rates to those with lower tax rates and expenses shifted to jurisdictions where higher benefits can be derived to reduce the amount of tax payable (OECD 2013:39). This practice is known as Base Erosion Profit Shifting (BEPS). Due to the size of business conducted by MNEs and the amount of their contribution to the global Gross Domestic Products (GDP), BEPS impact on many countries' ability to collect corporate tax from MNEs and, therefore, erodes their tax bases (OECD 2013:5).

The report further emphasised the need for urgent implementation of interventions to reduce the impact of BEPS on the global economy resulting from the weaknesses in the global tax laws (OECD 2013:13). The interventions must result in a uniform approach to corporate income tax laws at a global level with specific focus on the global economy (OECD 2017a:14).

In addressing the BEPS problem, the OECD recommended 15 action points to be implemented by its member and non-member states. The action plans are summarised as follows:

- Action 1: Address the Tax Challenges of the Digital Economy
- Action 2: Neutralise the Effects of Hybrid Mismatch Arrangements
- Action 3: Strengthen Controlled Foreign Companies Rules
- Action 4: Limit Base Erosion via Interest Deductions and Other Financial Payments
- Action 5: Counter Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance
- Action 6: Prevent Treaty Abuse
- Action 7: Prevent the Artificial Avoidance of PE Status
- Action 8: Assure that Transfer Pricing Outcomes are in Line With Value Creation / Intangibles
- Action 9: Assure that Transfer Pricing Outcomes are in Line With Value Creation / Risks and Capital
- Action 10: Assure that Transfer Pricing Outcomes are in Line With Value Creation / Other High-Risk Transactions
- Action 11: Establish Methodologies to Collect and Analyse Data on BEPS and the Actions to Address It
- Action 12: Require Taxpayers to Disclose Their Aggressive Tax Planning Arrangements
- Action 13: Re-examine Transfer Pricing Documentation
- Action 14: Make Dispute Resolution Mechanisms More Effective
- Action 15: Develop a Multilateral Instrument (DTC 2017: 19).

Taxing the digital economy was first on the list of 15 BEPS action items issued by the OECD, but due to its complexities, it was put aside and addressed last (Eden 2020:1). The issue was finally given attention in January 2019 with a policy note, opening an opportunity for a high level of policy proposals for tax and transfer pricing. The policy note was approved on January 30, 2019 and focused on two main proposals. These two proposals are also referred to as the “two pillars” for handling the taxation of the digital economy (OECD 2019b).

The first proposal by the OECD Secretariat is “Pillar One”, aimed at addressing the challenges of the allocation of taxing rights of business profits at an international level (Navarro 2021:2). The dramatic change presented by the digital revolution has placed

immense pressure on the international tax regime due to incompatibility between the regime and the digital economy (Moreno & Brauner 2019:3). “Pillar One” aims to produce a consensus-based solution to this problem (Navarro 2021:2).

The most recent of these proposals was announced in November 2019 by the OECD, namely the *Global Anti-base Erosion Proposal* (‘GloBE”), also known as “Pillar Two” (OECD 2019d). The GloBE recommended that two new taxes be adopted by the 139 member countries of the OECD/G20 Inclusive Framework on BEPS (OECD 2019e) in taxing MNEs. The first tax is a global minimum tax on corporate profits, and the second is a tax on base eroding payments. These pillars are discussed in more detail in chapter 5 of this report.

3.4 Conclusion

It is evident from the analysis presented above that the international community has taken initiatives over the years in combating harmful tax practices and providing greater tax certainty. The OECD has been at the forefront of these efforts to improve tax co-ordination between jurisdictions to fight against international tax avoidance and evasion (OECD 2015).

It remains to be seen how the latest proposals on Base Erosion and Profit Shifting will shape the existing international framework and create a levelled playing field for all jurisdictions, large and small, OECD and non-OECD members, those with an income tax system and those without, in taxing the digital economy and protect their tax bases against harmful tax practices.

Harmful tax practices continue to afflict nations, not only because of the resourcefulness of MNEs but also because of incompatibility between the international tax laws and the digital economy, local regulatory weaknesses, and government policies. Even though it is unknown what the level of impact will be of the latest proposals by the OECD on Base Erosion and Profit Shifting, the initiative sends a strong message to the international community that harmful tax practices will not be tolerated.

The next chapter evaluates the South African General Anti-Avoidance Rules (GAAR) and the extent to which South Africa has adopted the international strategies developed by the OECD in combating base erosion and profit shifting and their effectiveness in combating harmful tax practices.

CHAPTER 4: ANTI-AVOIDANCE MEASURES CONTAINED IN THE SOUTH AFRICAN TAX LEGISLATION TO FIGHT AGAINST MULTINATIONAL TAX AVOIDANCE

4.1 Section 31 of the Income Tax Act

Section 31 was introduced into the Act in 1995 as one of the measures that enables the Commissioner to adjust prices relating to goods and services supplied in terms of an international agreement between connected parties on the tax return (SARS 1999:6). This process of setting cross-border prices of goods and service by related parties is referred to as transfer pricing (Oguttu 2002:139). Transfer pricing is one of the channels used by taxpayers to avoid tax (Oguttu 2002:139).

According to SAICA (2013), Section 31 previously stated that the Commissioner could make an adjustment to consideration relating to any transaction to reflect the arm's length conditions of prices of goods and service. The taxpayer was not obliged in any way to amend their income tax returns even if transactions were not at arm's length. Excessive declarations were simply made, and taxpayers would hope that the Commissioner would not pick them up (SAICA 2013).

This meant that the onus was on the Commissioner to prove that transactions were not at arm's length, and this had huge cost implications for the Revenue Services (SAICA 2013). The cost was mainly due to the complexity of the transfer pricing transaction that would often require services of specialists to prepare transfer pricing related cases and deliver evidence in court (SAICA 2013).

Section 31 was subsequently amended in 2011 and the amendments applied to years of assessment commencing on or after 01 April 2012 (SAICA 2013). The amended Section 31 places a responsibility on the taxpayer to make a determination whether the terms of a cross-border transaction they enter into meet the defining of "affected transaction" (as defined) or any part thereof. If so, do they differ from any condition that would have existed if the contract had been entered into by unrelated parties at arm's-length (SAICA 2013). Should any difference be determined or a tax benefit result to one of the parties to the transaction, the affected party must recalculate their taxable income based on arm's-length conditions of the affected transaction (SAICA 2013).

4.1.1 Relevance of transfer pricing to BEPS

Transfer pricing is a cross-border transaction concluded between two or more connected parties (Ogottu 2006:139), and the price set by either of the parties to the transaction for the selling, buying, or sharing of goods or services is referred to as a transfer price (Ogottu 2006:139). Transfer pricing is also referred to as a mechanism used to intentionally create artificial prices for the purposes of obtaining a tax benefit either through reduced profits or increased losses (Ogottu 2006:139).

The focus on transfer pricing became prevalent in South Africa and globally due to digitalisation and technological advancement that enabled MNEs to easily transfer capital between jurisdictions (Ogottu 2006:139). The increased concerns are also due to the potential effects it has on the tax bases of many nations (Ogottu 2006:139).

Central to transfer pricing is the arm's-length principle, which is accepted globally and used by both OECD member and non-member countries (Oguttu 2006:142). Another important concept underlying transfer pricing is the notion of "related" or "connected" parties to the same cross-border transaction (OECD 2017b:32).

Article 9 of the OECD *Model Convention on Income and on Capital* (the "MTC") outlines the component parts of a parent company and its subsidiaries that are under the same line of control of a Group and refers to them as an associate enterprise (OECD 2017b:32). Article 9 of the MTC lays out rules on taxation of associated enterprises and approved the arm's-length principle as an acceptable tool to determine the validity of their transactions (OECD 2017b:32).

According to Article 9, authority is granted to adjust the profits of one company as per the principles of domestic laws, wherein companies of two contracting states that are contracting for the avoidance of double taxation by way of a DTA modelled on the MTC entered into a transaction, but the two companies happen to be connected as per the definition of an associated enterprise as laid out in Article 9, and conditions entered into under an associated enterprise are different from those that could have been if both parties were independent which would have resulted in one party having higher profits than what is projected under the current transaction (OECD 2017b:32; SAICA 2016).

Ogottu (2006:142) points out that the acceptance and use of the arm's-length principle internationally is due to its ability to bring equality between MNEs and independent companies for the purposes of tax. This inequality removed the possibility of economic differences between companies that may result from different tax treatment, therefore, promoting growth of international investment and trade (Ogottu 2006:143). It is evident that these provisions were devised specifically for targeting BEPS by eliminating the possibility of deviation of profits from high to low tax jurisdictions (SAICA 2016).

4.1.2 Conclusion

As can be seen from the above analysis, Section 31 was introduced in the South African Income Tax Act as a measure to fight against BEPS, especially in the context of cross-border transactions involving connected persons (transfer pricing). The definitions of "connected persons" and the inclusion of "affected transaction," as defined under Section 31(1) of the Act, are particularly important as the powers accorded the Commissioner are only triggered in respect of an affected transaction.

It was also noted that central to Section 31 was a principle of "arm's-length". The arm's-length principle remains an internationally accepted means of curbing tax avoidance through transfer pricing (Oguttu 2006:138), and is a standard against which cross-border transactions between connected persons are assessed.

The revised Section 31 places an obligation on the taxpayer to determine if a transaction falls within the ambit of a definition of "affected transaction" to make a determination whether the transaction entered into was done so at arm's-length. The section effectively places an obligation to the taxpayer to effect the transfer pricing adjustments on their return. However, the effectiveness of Section 31 in fighting BEPS was not tested as it is not within the scope of this report.

4.2 General anti-avoidance rules (GAAR)

South Africa, together with many other countries, including the UK, Australia, France, Germany, the Netherlands, Belgium, Canada, and numerous others, had adopted a general anti-avoidance rule (GAAR) as one of the measures to address unacceptable tax avoidance practices by taxpayers.

GAAR is legislation that changes the way the tax system deals with particular transactions or arrangements and was originally enacted in terms of section 103(1) of

the Income Tax Act 58 of 1962, as amended (the Act). Section 103(1) was repealed by section 36(1)(a) of the Revenue Laws Amendment Act 2006 and replaced by a new general anti-avoidance rule enacted in Part IIA of the Income Tax Act. Part IIA contains section 80A to 80L, which target impermissible tax avoidance arrangements, and applies to any arrangement (or any steps therein or parts thereof) entered into on or after 2 November 2006.

GAAR, as one of the risk management strategies, is a provision that the tax authority can invoke to strike down unacceptable tax avoidance practices that would circumvent the application of the applicable legislation. GAAR are rules intended to reduce the extent of, and impose a restriction on, impermissible tax avoidance. It also serves to inform taxpayers of permissible tax avoidance limits.

In additional to the GAAR, the international community with the OECD in the lead has also taken specific interest in tax avoidance by MNEs, and thus have made various recommendations against tax avoidance.

4.2.1 General Anti-Avoidance Rules

The provisions dealing with the GAAR, as encapsulated in Section 80A of the Act, reads as follows:

> "An avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit and—
> (a) in the context of business—
>
> i) it was entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than obtaining a tax benefit; or
>
> ii) it lacks commercial substance, in whole or in part, taking into account the provisions of Section 80C;
>
> (b) in a context other than business, it was entered into or carried out by means or in a manner which would not normally be employed for a bona fide purpose, other than obtaining a tax benefit; or
> (c) in any context—
>
> i) it has created rights or obligations that would not normally be created between persons dealing at arm s length; or
>
> ii) it would result directly or indirectly in the misuse or abuse of the provisions of this Act (including the provisions of this Part)."

Section 80A defines an “impermissible avoidance arrangement” and once a transaction is considered to fall within the ambit of this definition, the power of the Commissioner, as sets out in Section 80B, is immediately activated to prevent the tax benefit that would result from such a transaction (De Koker & Williams 2021: par 19.33). The elements that must exists before the GAAR may be applied can be summarised as follows:

- There must be an arrangement.
- A tax benefit must be derived because of the arrangement.
- It must be the sole or main purpose of the arrangement to obtain a tax benefit.
- There must exist one of the following tainted elements: the transaction must be carried out in a manner that is not considered normal for business purposes; it must lack commercial substance; rights and obligations which are not at arm’s length are created by the transaction; or there is an indirect or direct misuse or abuse of the provisions of the Act enabled by the transaction.

Impermissible avoidance arrangements targeted by GAAR are, therefore, transactions or schemes specifically formulated to avoid tax.

What follows is a discussion of the individual requirements of Section 80A of the Act and their interpretation by the judiciary.

4.2.2 Arrangement

The presence of an arrangement is the first element required by the GAAR. The term “arrangement” is defined in Section 80L of the Act as:

> “any transaction, operation, scheme, agreement or understanding (whether enforceable or not), including all steps or parts thereof, and including any of the foregoing involving the alienation of property.”

The income tax does not define the words “transaction”, “operation”, “scheme”, “agreement” or “understanding” posing a risk of misinterpretation and difficulties in the application of these words. The word “arrangement” has, however been interpreted as requiring a deliberate involvement of two or more participants who reach a certain understanding. This understanding involves, as its major component, an expectation by one party for the other party to perform a certain act (De Koker & Williams 2021: par 19.36).)

A landmark case which laid down an authority for the requirement of the meeting of minds in respect of “arrangement” is the Newton v FCT, where Lord Denning shared a sentiment that

> “[T]he word “arrangement” is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons- a plan arranged between them which may not be enforceable in law.”

An “arrangement”, therefore, includes all forms of conscious decision wherein two or more people enter into an agreement to arrange their affairs to achieve a certain outcome. The agreement or understanding entered must have features which implicitly or explicitly amount to tax avoidance for the Commissioner to take interest in the transaction, and enforceability of such understanding or agreement is not relevant for purposes of an “arrangement” (De Koker & Williams 2021: par 19.36).

4.2.3 Tax Benefit

In terms of Section 80A of the Income Tax Act No. 58 of 1962 (The Act), it is a requirement that for an “arrangement” to be regarded as impermissible, it must result in a tax benefit. A “Tax Benefit” is defined in Section 1 of the Act as:

> “Including any avoidance, postponement or reduction of any liability for tax”

The word “Tax “is defined in Section 1 of the Act as including any Act administered by the Commissioner, including duties and levies imposed under the Income Tax Act (De Koker & Williams 2021: par 19.37). The postponement, avoidance, or reduction of any liability for any tax administered by the Commissioner will, therefore, constitute a tax benefit and can invoke the GAAR in regard to the income tax for as long as a tax benefit exists (De Koker & Williams 2021: par 19.37).

The courts have over the years interpreted the term “tax benefit” as follows:

- Commissioner for Inland Revenue v King (1947) 14 SATC 182: When an anticipated tax liability is delayed by the taxpayer through a transaction that reduces his income from what it will be in the future, a tax benefit arises.

- Smith v Commissioner for Inland Revenue (1964) 26 SATC 1: “avoid an anticipated liability” was interpreted to mean a case wherein a taxpayer made all possible efforts to prevent or escape an anticipated liability.
- Income Tax Case No. 1625 (1996) 59 SATC 383: A test to determine the existence of a tax benefit was confirmed. The test probe a question: Would a taxpayer have incurred a tax liability in the absence of this transaction?

To prove that a tax benefit has indeed arisen, the onus is on the Commissioner. The Commissioner must prove on a balance of probabilities that other transactions exist which would have achieved different commercial results and subjected the taxpayer to a tax consequence. It is not enough to simply conclude that a tax benefit has arisen as the Commissioner would have used some form of measurement to quantify the amount of such tax benefit. The measurement used to quantify the amount of tax benefit should reflect the existence of alternative transactions or arrangements that would have achieved different commercial results if entered into (De Koker & Williams 2021: par 19.37).

4.2.4 Sole or main purpose

Once the Commissioner is satisfied that an arrangement exists in respect of a certain transaction, and that it results in a tax benefit, it must be determined if the main or sole purpose was indeed to obtain tax benefit. In the context of Section 80A, the word ‘purpose’ stipulates that at the center of “impermissible avoidance arrangement” is a requirement that the “sole or main purpose” is to obtain a tax benefit. It is thus clear that the prerequisite for “impermissible avoidance arrangement” is the “sole or main purpose”, and even though an arrangement has resulted in a tax benefit, the absence of “sole and main purpose” fails to trigger the provision of the GAAR (De Koker & Williams 2021: par 19.38).)

A test to determine the purpose is one that is objective and not subjective, wherein the purpose of the arrangement entered is looked at rather than that of the parties who entered into such agreement. The current GAAR presumably only applies the objective test in determining the purpose of the arrangement (De Koker & Williams 2021: par 19.38).

The objective effect of an arrangement plays an important role in determining "impermissible arrangements". If the objective effect of an arrangement results in a tax benefit, and the only purpose of this effect was to obtain a tax benefit, it can be said that the creation of a tax benefit is the sole and only purpose of the arrangement. Then the objective effect of an arrangement will be sufficient and effective in determining the "sole and main purpose" as this objective purpose cannot in any way be different from that of the parties who entered the agreement (De Koker & William 2021: par 19.38).)

4.2.5 Tainted elements

The last step in determining whether the GAAR is applicable is establishing whether one of the tainted elements is present. Section 80A of the Act clearly arranges the forms of avoidance arrangement into three parts, namely, an arrangement in the context of a business, in a context other than a business and in any other context. In each of the contexts, there are criteria used to determine avoidance arrangements. Some of these criteria may be present in more than one of the three contexts. However, these criteria are not an indication that the "sole and main purpose" is to obtain a tax benefit but serves as very critical elements which, if they exist in addition to the requisite of "sole and main purpose," an arrangement may be classified as "impermissible avoidance arrangement", therefore, immediately invoking the powers of the Commissioner under Section 80B of the Act (De Koker & Williams 2021: par 19.39).

Only avoidance in the context of a business will be considered for the purposes of this report. The tainted elements in the context of a business are briefly discussed below.

As per Section 80A of the Act, an "avoidance arrangement" is an "impermissible avoidance arrangement" if its sole or main purpose was to obtain a tax benefit and

> "(*a*) in the context of business
>
> (i) it was entered into or carried out by means or in a manner which would not normally be employed for *bona fide* business purposes, other than obtaining a tax benefit; or
>
> (ii) it lacks commercial substance, in whole or in part, taking into account the provisions of section 80C."

Individual tainted elements, as contained in Section 80A(a) of the Act, are briefly discussed below.

4.2.5.1 Abnormality

The first of the tainted elements in (Section 80A(a)(i)) is argued based on "abnormality". In determining whether an arrangement was carried out in a manner that would commonly be used in commercial transactions and in good faith, other than obtaining a tax benefit, an objective test must be applied. Both the "means" and "manner" in which the arrangement was entered into are used to determine and argue "not normally employed for *bona fide* business purpose". If the arrangement is successfully argued to have been one that would normally be employed for *bona fide* business purposes, then GAAR is not triggered and the fact that the tax benefit is obtained carries less weight, unless if other tainted elements exist (De Koker & Williams 2021: par 19.39).

4.2.5.2 Lack of commercial substance

The second tainted element is dealt with in Section 80A(a)(ii) of the Act. This section deals with avoidance arrangements in the context of a business that "lacks commercial substance". An arrangement will be considered an "impermissible avoidance arrangement" if it lacks commercial substance in its entirety or certain parts of it. This is in addition to the requirement that the sole or main purpose is to obtain a tax benefit. Therefore, if parts of an arrangement lacks commercial substance and, in addition, the sole and main purpose is to obtain a tax benefit, the whole arrangement can be considered to be "impermissible avoidance arrangement" even though only parts of it lack commercial substance, and the powers of the Commissioner under Section 80B may be invoked (De Koker & Williams 2021: par 19.39).

For the purposes of GAAR, Section 80C (1) states that:

> "an arrangement lacks commercial substance if it would result in a significant tax benefit for a party . . . but does not have a significant effect upon either the business risks or net cash flows of that party apart from any effect attributable to the tax benefit . . ."

The above section put as an argument, a proposition that for a business to obtain a tax benefit, a business risk must have been taken or an activity resulting in an effect on the business cash flow (De Koker & Williams 2021: par 19.39). However, De Koker and William (2021: par 19.39) state that even though this proposition may be true when

generalised, it posed challenges to the court as measuring a business risk may be difficult. They further state that businesses normally put in place various strategies to protect themselves against financial loss or other adverse circumstances, therefore, limiting or completely mitigating their risk. The limitation or total mitigation of business risk through various business strategies poses another challenge in measuring business risk.

A list of indicators for lack of commercial substance is provided under Section 80C (2) of the Act, with further Guidance of these indicators provided under Section 80D and 80E of the Act. Section 80C (2) of the Act states that:

> "(*a*) the legal substance or effect of the avoidance arrangement as a whole is inconsistent with, or differs significantly from, the legal form of its individual steps; or
>
> (*b*) the inclusion or presence of—
>
> (i) round trip financing, as described in s 80D; or
>
> (ii) an accommodating or tax-indifferent party as described in s 80E; or
>
> (iii) elements that have the effect of offsetting or cancelling each other."

The list of indicators provided under Section 80C (2) provides the Commissioner with the basis for determining whether an arrangement lacks commercial substance. Each of these indicators are briefly discussed below.

Substance over form

The principle of legal substance of a transaction being significantly different from its legal form is a first indicator for a lack of commercial substance under Section 80C(2)(a) of the Act. Arrangements which are disguised or portrayed to reflect anything other than the true intentions of the parties are regarded as lacking commercial substance, therefore, effect will be given to their true intention and not the form they purport to be. The principle of substance over form has a strong foundation in common law in which the courts totally disregard the form of a transaction and only consider its substance (its true intention) when deciding on whether it lacks commercial substance or not (De Koker & Williams 2021: par 19:39).

The principle that the effect should be given to what the transaction really is and not its purported form was from a GAAR perspective laid down in Commissioner for South African Revenue Service v NWK Limited (2010) ZA SCA 168 (SCA).

4.2.5.3 Round trip financing

The second indicator for an arrangement that lacks commercial substance is contained in Section 80C(2)(b)(i), is the presence of round-trip financing. Section 80D further defines round-trip finance as including any avoidance arrangement which-

(1) (*a) funds are transferred between or among the parties (round tripped amounts);*

and

(b) the transfer of the funds would—

(i) result, directly or indirectly, in a tax benefit but for the provisions of this Part; and

(ii) significantly reduce, offset or eliminate any business risk incurred by any party in connection with the avoidance arrangement.

(2) *This section applies to any round tripped amounts without regard to—*

(a) whether or not the round tripped amounts can be traced to funds transferred

to or received by any party in connection with the avoidance arrangement;

(b) the timing or sequence in which round tripped amounts are transferred or received; or

(c) the means by or manner in which round tripped amounts are transferred or received.

(3) *For the purposes of this section, the term "**funds"** includes any cash, cash equivalents or any right or obligation to receive or pay the same".*

Cassidy (2019:771) explains that round-trip finance is a type of financing transaction devised to ensure that no money is actually paid but creates a deceptive transaction that results in a deductible expense. He further states that this form of finance transaction is a common feature of tax avoidance schemes. If all requirements of Section 80D (1) are met, an arrangement is considered to have the presence of a

round trip financing. The first requirement is that funds are transferred between or amongst parties. Section 80D (3) states that for the purposes of the round-trip test, funds includes cash, cash equivalent or any right or obligation to receive or pay the same. According to De Koker and Williams (2019: par 19:39), the definition provided in sub-section (3) is wide enough to include any granting of a right that has monetary value but does not seem to include any non-monetary commodities.

Round-trip financing creates a transaction that appears as if money is circulating between parties when, in fact, no money is circulating. The transaction is devised only for the purposes of obtaining a tax benefit but creates no financial value for any of the parties (De Koker & Williams 2021: par 19:39), nor does it reflect characteristics of a loan and an obligation for repayment (Cassidy 2019:772).

4.2.5.4 Accommodating or tax indifferent parties

One of the characteristics that indicates "lack of commercial substance" in terms of Section 80C(2)(b)(ii) in an avoidance arrangement is if there exists in a transaction an "accommodating or tax indifference party" as defined in Section 80E(1) (Haupt 2017:641). However, Section 80A explicitly states that no fiscal implication exists if the characteristic on its own is present without the presence of sole and main purpose of obtaining a tax benefit in an arrangement (De Koker & Williams 2021: par 19:39).

Section 80E(1) defines the characteristics of an accommodating or tax indifferent party as being that any amount accrued to such a party is not subject to normal tax or is being significantly reduced or offset by any expenditure or loss suffered by such a party as a result of an avoidance arrangement. It further requires that for a party to be an accommodated or tax indifferent party, such party should have some connection with other parties involved in such an avoidance arrangement (De Koker & Williams 2021: par 19:39).)

There are, however, circumstances wherein a party will not be considered an accommodated or tax indifferent party even though characteristics stated in Section 80E(1) exist. Provisions of Section 80E will, in this case, not be invoked as long as other tainted elements are not present or are the requirement of sole or main objective (De Koker & Williams 2021: par 19:39).

4.2.5.5 Offsetting or cancelling elements

Section 18C(2)(b)(iii) contains the fourth characteristic indicating that an arrangement lacks commercial substance. Section 80C(2)(b)(iii) says that an arrangement will lack commercial substance if there exists some elements in it that provides an offsetting right or obligation and results in a state of offsetting or cancelling each other if applied. These elements, it is stated, that do not necessarily need to have a monetary value and cannot on their own have any fiscal consequences unless if other tainted elements are present (De Koker & Williams 2021: par 19:39).

De Koker and Williams (2021: par 19:39) state that connected parties may be treated and deemed as one and the same person in determining the existence of a tax benefit or for the purposes of the application of the commercial substance test in Section 80C by the Commissioner. They further explain that any accommodating or tax indifferent party may be disregarded by the Commissioner or deemed any or all parties to an arrangement as one and the same person.

4.2.6 Conclusion

This section analysed the General Anti-avoidance Rules (GAAR) South Africa adopted in its legislation without necessarily analysing their effectiveness in combating tax evasion and avoidance. As with many other states, such as the UK, France, Germany, The Netherlands, Belgium and China, South Africa has introduced the GAAR as a tool to combat impermissible avoidance arrangements and to improve the collection of a much-needed revenue that is due to the South African Revenue Service (SARS) (Waerzeggers & Hillier 2016:1).

It has been noted from the above discussions that the main elements of the South African GAAR are avoidance arrangements and the sole or main purpose of obtaining a tax benefit. If an arrangement contains such elements, it would be rendered an impermissible avoidance arrangement in the context of South African GAAR.

GAAR, by its nature, grants the Commissioner the authority to re-arrange any steps in an impermissible avoidance arrangement in such a way that would eliminate the undue tax benefit and set the arrangement in an order that the Commissioner deems fit. The anti-avoidance provisions found in Section 80A to L of the Act are also intended to curb weaknesses and loopholes previously contained in the now repealed section

103(1) that rendered the GAAR ineffective against certain avoidance arrangements by the taxpayer.

However, GAAR, on its own, cannot curb the effect of BEPS and remedy the inadequacies of the international corporate tax laws in dealing with BEPS issues (DTC 2017:11). MNEs will always seek new and innovative ways of avoiding tax, and measures such as the GAAR remain a concern despite its rigorous tests.

4.3 The extent to which South Africa has adopted the international strategies developed by the OECD in combating Base Erosion and Profit Shifting (BEPS)

4.3.1 Davis Tax Committee on the OECD BEPS report in the context of South Africa

The Davis Tax Committee was formed by the Minister of Finance on 17 July 2013 in South Africa. As a requirement in its terms of reference was the need to address the concerns raised by the OECD on BEPS in the context of corporate income tax (DTC 2017:8). The committee, in its main introductory report on Base Erosion and Profit Shifting (BEBS) in South Africa published on 13 November 2017, recognised the importance of South Africa leading the fight against BEPS. It also stressed the ned for South Africa to represent Africa in the OECD BEPS committee to convey the view of the continent's economy (DTC 2017:18).

On the main introductory report, the committee made a determination if South Africa is obliged to apply the recommendation by the OECD on BEPS. This was made by reflecting on the extent the OECD principles are used by key institutions in the country when making decisions on various tax matters. The committee pointed out, amongst other things:

- the use of the OECD's commentary in ruling on a tax case by South Africa's courts.
- the South African Income Tax Act making reference to the OECD's definitions when defining some tax terms.
- the use of OECD's guidelines by the South African Revenue Service (SARS) in one of its practice notes (DTC 2017:25).

The need for collaboration by South Africa with the international community in developing an holistic approach to deal with BEPS issues in a decisive manner was stressed. This need was based on the fact that recommendations made by the OECD are globally acceptable and South Africa needed to be part of this initiative, given its membership status to the G20 (DTC 2017:25).

The report further pointed out the need for country-specific rules to be developed when addressing the BEPS issued, as it does not affect all countries in the same manner (DTC 2017:25).

In the context of South Africa, the committee made general recommendations regarding the development of BEPS rules in South Africa. The recommendations are summarised as follows:

- The supremacy of the Constitution must be recognised by legislators when drafting rules to address BEPS in South Africa, as any law inconstant with the constitution is invalid.
- South Africa has its unique challenges and any solution developed must take into consideration these challenges. Therefore, tailored solutions to address specific challenges faced by the country are of paramount importance. Facts pointing out the magnitude and relevance of the BEPS problem in South Africa should be determined before any legal remedies and responses can be developed.
- Measures developed must not be inconsistent with the constitutional and economic objectives of government. The National Development Plans must, therefore, be considered when developing BEPS rules in South Africa.
- A balance should be made between encouragement of Foreign Direct Investment (FDI) to the country and the preservation of South Africa's competitiveness in the global arena.
- Measures to address BEPS should not be issued in isolation without considering the international environment and other countries' responses to this problem (DTC 2017).

In addition, the DTC (2017) made recommendations on other factors that should be taken into considered to ensure that the comprehensive approach is taken to protect

South Africa against BEPS. The DTC recommended that for the protection against BEPS to be comprehensive and effective, it should occur on both the policy and administrative levels.

At policy level, the report touched on two aspects:

- The policy on incentive use: South Africa offers tax incentives, as opposed to tax holidays, as a preferred tool to attract investments. However, some tax incentives open an opportunity for the tax system to be abused and create an enabling environment for BEPS (DTC 2017: 49). South Africa provides several incentives to foreign investors. The DTC, therefore, recommended that advice by the IMF, OECD, UN, and the World Bank on options for developing countries on effective and efficient use of incentives be followed up closely. Then clear tax policies on the use of incentives be developed in line with recommendations made by these organisations. Clear tax policies on the use of incentives will be of importance in preventing any abuse and possibilities of BEPS (DTC 2017: 50).
- Treaty negotiation policy: South Africa has entered into double tax treaty agreements with several jurisdictions, some of which are low tax jurisdictions. Improper use of tax incentives can be detrimental and act as a main source of BEPS. Tax treaties are generally designed to reduce the risk of double taxation, wherein the source country gives up some or all its taxes to the other contracting state. Some of these treaties, however, pose a risk of tax not being payable in either one of the contracting states The DTC, therefore, recommended that South Africa take caution in renegotiating some of its riskier treaties with low-tax jurisdictions (DTC 2017:52).

At administrative level, it was recommended that the correct internal tools be used by SARS to clearly make a distinction between local and foreign companies to ensure proper detection of BEPS (DTC 2017: 52).

4.3.2 Implementation of the BEPS instruments in South Africa

BEPS Multilateral Instrument

According to Oguttu (2017:220), adopting the BEPS measures recommended by the OECD would require renegotiation of most of the Double-Tax-Treaties countries have entered into and this would have resulted in a huge burden for most jurisdictions, given a number of treaties countries have entered into already. The Multilateral instruments were, therefore, developed by the OECD under action 15 to simplify the implementation of tax treaty BEPS measures and still result in the same effect that countries would have achieved if thousands of tax treaties were renegotiated (Oguttu 2017:220).

On 24 November 2016, the OECD released the *Multilateral Convention to Implement Tax Treaty Measures to Prevent BEPS.* The Multilateral Instrument was subsequently signed by 67 Jurisdictions on 7 June 2017, of which South Africa is one. South Africa's reservation and notification statement to the Multilateral Instrument was also issued the same day (Werksmans 2017).

The Multilateral Instrument allowed for the modification of existing double tax treaties without requiring contracting parties to the tax treaty to engage and renegotiate with one another (Werksmans 2017).

Other BEPS measure relating to double tax agreements are set out in Action 2 which deals with hybrid mismatch, Action 6 dealing with the prevention of treaty abuse, Action 7 dealing with the prevention of artificial avoidance of permanent establishment status, and Action 14 dealing with the improvements in the dispute resolution process relating to treaty disputes (Oguttu 2017:221).)

Limit Base Erosion via Interest Deductions and Other Financial Payments (Action 4)

Action 4 of the BEPS plan is aimed at strengthening the South African tax regime in relation to the limitation of interest deductions. Due to the risk of BEPS posed by debt funding, the South African Government issued a discussion document detailing the proposed tax treatment of certain corporations in the country. The proposal focused on corporations which are excessively financed by way of debt. Due to continuing

borrowing by corporations to deal with the effects of Covid-19, the implementation of this action has had to be deferred (Du Toit & Hall 2021).

MNEs with subsidiaries in South Africa could avoid tax in South Africa and extract profits by extending loans to their South African subsidiaries which results in deductible interest payments, substantially reducing their tax in South Africa. The same interest income could then be subjected to lower or no tax in a jurisdiction which offers more favourable tax rates than South Africa (Du Toit & Hall 2021).

According to Du Toit and Hall (2021), the proposal, which is aligned to Action 4 of the BEPS plan, would have limited interest deductions by South African corporations to 30 percent of income before interest, tax, depreciation, and amortisation, for years of assessment commencing on or after 1 January 2021.

The proposal of the interest limitation rules was postponed by Government after realising the impact Covid-19 would have on businesses and the increased need to take debt financing to curb the effects of this pandemic on businesses. The postponement was announced by the South African National Treasury on 11 November 2021 in the draft documents on the 2021 draft tax bill ("the draft response documents") (Du Toit & Hall 2021).

Even though the proposal has been put on hold, Section 31 of the Act is addressing the issue of excessive debt financing by applying the arm's-length principle to such transactions. Section 31(2) of the Act requires a transfer pricing adjustment to be made by the taxpayer in calculating its taxable income if a cross-border transaction was entered into by two parties who are related to one another (SAIT 2017).

In the context of debt funding, an amount of interest considered to be excessive may trigger a transfer pricing adjustment in the hands of a borrowing South African company if the loan was extended by a foreign shareholder. This determination to adjust may be made, based on either the amount of debt (also referred to as thin capitalisation) or the level of interest rate (SAIT 2017). The effect of this excessive borrowing is an increased interest rate paid by a South African company to its counterpart in a low tax jurisdiction, substantially reducing the profits in South Africa. The reduced profits then lower the taxable income of a South African company to a lower amount than what it would have been if the transaction was entered into between independent companies (SAIT 2017). When triggered, Section 31(2) will result in part

of the interest amount being denied as a deduction in the hands of the borrower (SAIT 2017).

Standard on the exchange of information on certain tax ruling (Action 5)

The BEPS Action 5 minimum standard on the obligatory exchange of information on tax ruling (the "transparency framework") provides the tax administrator with real time information that may be used to conduct a risk assessment on a foreign related party of their resident taxpayer or permanent establishment (OECD 2021b:8).

This framework requires the voluntary provision of information of five categories of taxpayer-specific rulings: Ruling related to certain preferential regimes, Unilateral advance pricing arrangement (APAs) or other cross-border unilateral rulings in respect of transfer pricing, Ruling providing for a downward adjustment for taxable profits, Permanent establishment rulings, and Related party conduit ruling (OECD 2021b: 8).

A report on Harmful Tax Practice-2020, "*Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5*" was published in 2021. On this report, peer review is conducted on 131 Inclusive Framework member jurisdictions, of which South Africa is one. The review outlines the measures jurisdictions have taken to implement the transparency framework during the 2020 calendar year (OECD 2021b:9). The report has been used as it contains the most current review on South Africa.

To ensure an effective and consistent implementation of the agreed standard and to track progress made by jurisdictions, peer review is continuously conducted (OECD 2021b:19). Implementation of the standard is evaluated against the agreed set of criteria as set out in the terms of reference (OECD 2021b:19). Elements in the terms of reference which jurisdiction must demonstrate as proof of effective implementation of the standards are as follows:

- The information gathering,
- The exchange of information,
- Statistics,
- Exchange of information on IP regimes, and

- Response to the report (OECD 2021b:21)

Under its review, South Africa was considered to have met all aspects of the terms of reference for the 2020 calendar year, and no recommendation for improvements could be made (OECD 2021b:391). The following review was made under specific elements of the terms of reference:

The information gathering process:

From prior years reports, it was determined that South Africa's pledge to identify past and future rulings and all potential exchange jurisdictions were enough to meet the minimum standards. South Africa was also considered to have in place the review and supervision mechanisms to meet the minimum standards. It was, therefore found that South Africa complies with all the terms of the information gathering process and no recommendations were made. Its implementation would remain unchanged as it continues to comply with the minimum standards (OECD 2021b: 392).

The exchange of information:

Prior reports indicated that South Africa's processes of information exchange were sufficient to meet the minimum standards, and no further actions were required in respect of past rulings, as South Africa was found to have the necessary legal basis for voluntary exchange of information through its various international agreements. No recommendations were made as South Africa has complied with all minimum standards set in the terms of reference for exchange of information. As South Africa continues to meet the minimum standards, its implementation remained unchanged (OECD 2021b:392).

Advanced Pricing Agreements

Transfer pricing is one of the most popular tax avoidance strategies. It involves levying artificial prices on the international supply chain process between a multinational group, wherein prices are determined by the multinational itself (Contractor 2016:29). The charging of artificial prices is often biased by tax considerations and its purpose is solely to transfer income from a high tax jurisdiction to a low tax jurisdiction. It is for this reason that the G20 made a commitment to curtail this behaviour, an initiative followed by the OECD by publishing the 15 points BEPS Action Plan in 2013 (SARS 2020:1).

The BEPS actions dealing directly with transfer pricing are Actions 8, 9, 10 and 13, while the dispute resolution mechanisms, such as the mutual agreement procedure and advanced pricing agreements are dealt with under Action 14 (SARS 2020:1). Even though the most important reason for implementation of the BEPS Action Plans is to ensure that MNEs do not avoid tax in any country, it is also aimed at ensuring that there is fairness, and these companies are not taxed twice in two different jurisdictions (SARS 2022:1).

Global tax harmonisation is, therefore, necessary to ensure that disputes regarding taxing rights are reduced as much as possible and measures to decide on these rights are put in place. The issue of double-taxation or no taxation at all is addressed by the OECD Model Tax Convention on Income and Capital, wherein countries are provided with a tool to enter into tax treaties to assist in clarifying the issue of taxing rights through a Mutual Agreement Procedure (MAP) (SARS 2020:2).

South Africa has entered into tax treaties with many jurisdictions but lacks the tax treaties that include arbitration clauses should the MAP fail to produce the intended results or reach a deadlock (SARS 2022:2). Arbitration is provided for as an option in Article 5 of the OECD model, alternatively, countries are allowed to implement Advanced Pricing Agreements (APA) programmes on a bilateral basis to assist in eliminating disputes, limit the use of MAPs and create a favourable environment for investment (SARS 2020:2).

OECD (2022:19) defines an Advanced Pricing Agreement as:

> "arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time".

Implementation of the APA in South Africa would assist in enhancing the incentive for the country to maintain its lead in the Continent and remain a preferred location for foreign investments. However, structures such as the DTC have highlighted weaknesses in the tax administration in dealing with transfer pricing and APA and pointed out that the system would currently not work due to these weaknesses. Some of the weaknesses identified are lack of capacity and capabilities within SARS. These

are highly specialised areas and external parties have to be approached for assistance, the DTC recommended (SARS 2020:4).

Realising the challenges the country would face in implementing the APA at this stage, SARS committed to building internal capacity to effectively deal with transfer pricing that may possibly commence with planning and drafting laws that will regulate a bilateral APA system. This exercise may take several years to complete, and SARS has committed to starting the process as soon as it is reasonably ready to do so (SARS 2020:5).

4.3.3 Conclusion

This section further assessed the extent South Africa has implemented international initiatives on BEPS recommended by organisations such as the OECD and the G20. Tax avoidance by MNEs has attracted special attention and the interest of international organisations such as the OECD, which recommended measures against BEPS to its member and non-member states, most notably, the 15 Action Plans on BEPS.

As the only member of the G20 and although not a member of the OECD and only holding OECD observer status (DTC 201717), South Africa realised its position in the continent and ensured that a consistent African view on BEPS issues was maintained and influenced a general attitude of co-operation around the key OECD recommendations on the continent.

As a powerhouse of Africa and an aspiring gateway for investment in Africa, it can be deduced from the above analysis that South Africa has gone the extra mile in implementing the recommended Action Plans on BEPS by the OECD, even though the current state of its tax system and other economic factors renders it difficult for full implementation at this stage.

However, the ever-changing international business environment still renders domestic laws ineffective as they are unable to keep up with the pace of this change. Adopting a uniformed global tax system to better suit the modern business model has also proven to be a challenge, resulting in the OECD implementing more measures with a specific focus on the digital economy. Most recent of these measures is the “GLoBE” proposal.

The “GLoBE” proposal is reviewed in the next chapter. An analysis and report is made on its design, policy rationale and calculation based on the rules to assist countries in the implementation of a landmark reform to the international tax system in a report named *Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules* (Pillar two) published by the OECD on 20 December 2021.

CHAPTER 5:

5.1 INTRODUCTION

It is clear from the previous chapter how the impact of base erosion and profit shifting (BEPS) resulted in drastic measures being put in place by policy-makers throughout the world. These global efforts were initiated to ensure that profits are taxed where the economic activities generating such profits are performed. Even with these measures in place, globalisation and digitalisation have been accelerating at an overwhelming speed in recent years, resulting in a continued challenge in taxing the digital world and creating an enabling environment for aggressive tax planning (OECD 2021d:03). Harmful tax practices continue to afflict nations, not only because of the resourcefulness of MNEs but also because of incompatibility between the international tax laws and the digital economy, local regulatory weaknesses, and government policies (OECD 2019a).

In ensuring that the playing field is levelled in the global tax system, the OECD and G20 countries have continued working together in ensuring a consistent and co-ordinated implementation of the 15 Action Plans against base erosion and profit shifting through the OECD/G20 Inclusive Framework on BEPS. With its member states, the OECD works with other various stakeholders in monitoring and conducting peer review on the implementation of minimum standards and making recommendations where members are still lagging (OECD 2021d: 03).

Taxing the digital economy was first on the list of 15 BEPS action items issued by the OECD, but due to its complexities, it was put aside and addressed last (Eden 2020:1). The issue was finally given attention in January 2019 with a policy note, opening an opportunity for a high level of policy proposals for tax and transfer pricing. The policy note was approved on January 30, 2019, focusing on two main proposals, also referred to as the “pillars” for dealing with the taxation of the digital economy (OECD 2019b).

The first proposal by the OECD Secretariat is referred to as “Pillar One”. Pillar One is aimed at addressing the challenges of the allocation of taxing rights of business profits at an international level (Navarro 2021:2). The dramatic change presented by the

digital revolution has placed immense pressure on the international tax regime due to incompatibility between the regime and the digital economy (Moreno & Brauner 2019:3). “Pillar One” aims to produce a consensus-based solution to this problem (Navarro 2021:2).

The most recent of these two proposals was announced in November 2019 by the OECD, namely the *Global Anti-base Erosion Proposal* (‘GloBE”), also known as “Pillar Two” (OECD 2019d). The GloBE recommended that two new taxes be adopted by the 139 member countries of the OECD/G20 Inclusive Framework on BEPS (OECD 2019d) in taxing MNEs. The first tax is a global minimum tax on corporate profits, and the second is a tax on base eroding payments. The most talked-about and debated is the first GloBE proposed tax, the global minimum tax on MNE profits, thus the emphasis on its design and implementation rules in this chapter.

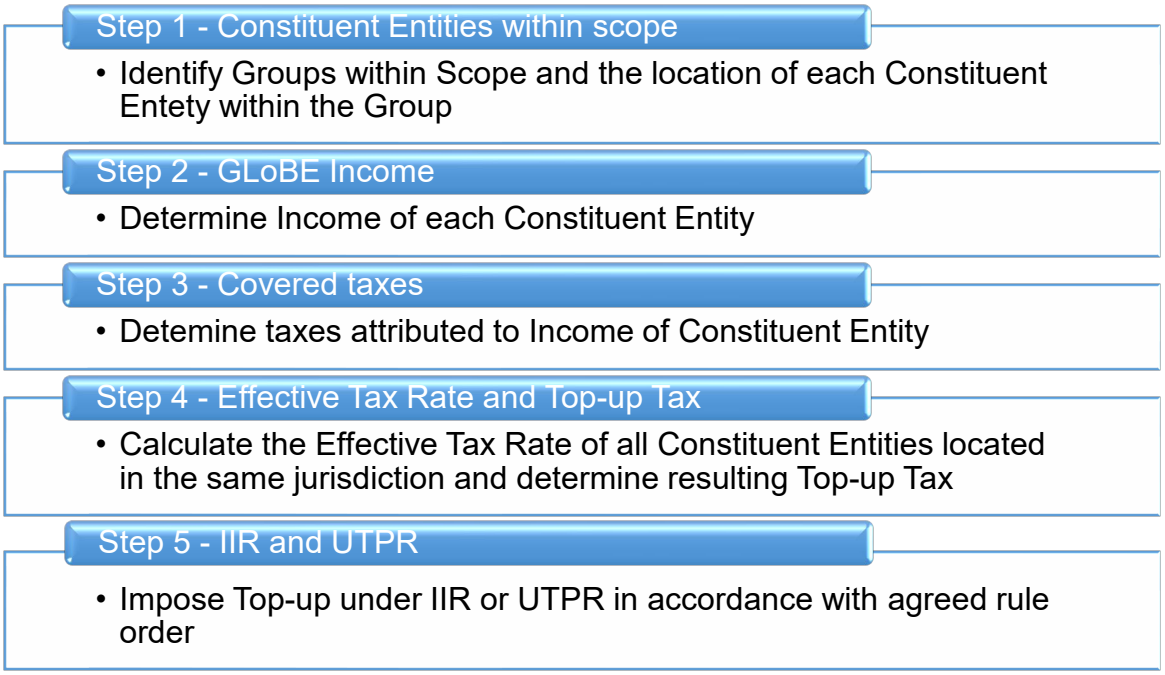
On 20 December 2021, the OECD published detailed Model GloBE Rules to assist countries in the implementation of a landmark reform to the international tax system on its report *“Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules* (Pillar two)”. The rules will ensure that MNEs are subject to a global minimum tax rate of 15% from 2023. The rules provide countries with a precise template for the application of the two-pillar (OECD 2021d).

The Model GloBE Rules calculates the Effective Tax Rate (ETR) of an MNE in the country in which it carries out its business operations, based on the tax base and taxes incurred on a jurisdictional basis. A comparison is then made between the ETR and the proposed global minimum tax of 15%. If the jurisdictional ETR on an MNE is below the global minimum tax of 15%, then the MNE will be liable for an additional top-up tax to bring the ETR to the agreed global minimum level of 15%. An “Income Inclusive Rule” (IIR) is used to collect the top-up tax, and where the IIR has not been applied the “Under Taxed Payment Rule” (UTPR) is applied. Standardised bases and definitions of taxes covered are provided for in the rules to assist in the identification by jurisdictions where an MNE is subject to an effective rate less than the targeted 15% global minimum tax. Jurisdictions, will then be based on the “GloBE Model Rules” impose a top-up tax to bring the MNE tax rate on that particular income to the maximum target of 15% (OECD 2022a:1).

This chapter is divided into different sections providing a brief analysis of the model rules designed to assist countries in implementing “Pillar Two” or “GloBE” in taxing the digital economy. The analysis is done firstly, by providing steps in determining tax liability for MNEs. Secondly, each step is discussed with examples provided where possible, and lastly, administration and implementation issues relating to “GloBE” are briefly explored.

5.2 Steps in determining tax liability for MNEs under the GLoBE model rules

The following figure adopted from the OECD *Overview of the Key Operating Provisions of the GLoBE Rules* (2022b) identifies the steps in determining the top-up tax liability of an MNE in terms of the GloBE model rule.



Source: OECD

Figure 1: Overview of key operating provisions of the GLoBE Rules

The design of the GloBe Rules in different steps to determine the top-up tax guides the application of these rules.

5.3 Entities within the scope (step 1)

5.3.1 Scope of GloBE rules

The first step in determining if an MNE will be impacted by the Pillar Two GloBE Model Rules is to determine whether it falls within the scope of the rules. An MNE group and its constituent entities falls within the scope of the rules if it has an annual gross revenue exceeding EUR 750 million in a consolidated financial statement of the Ultimate Parent Entity (UPE) in at least two of the four "Fiscal Years" prior to the year being tested (OECD 2021d:8).

An Ultimate Parent Entity is defined as any Entity that directly or indirectly holds a controlling interest in any other Entity, and its ownership is not held directly or indirectly by any other Entity with a controlling interest (OECD 2021d:3).

The "Fiscal Year" is generally the financial period in which consolidated financial statements are prepared by the UPE (Bloomberg 2022:3). If the fiscal year of one or more entities taken into account for the purposes of the rules consists of a period less than 12 months, an apportionment will be applied for each of the fiscal years to align the UER750 million threshold with that particular period (OECD 2021d:8). GLoBE rules will not be applied to Excluded Entities as defined (OECD 2021d:8).

Constituent Entities

A constituent entity is defined as any entity that forms part of an MNE group for the purposes of GLoBE Model Rules. A Permanent Establishment (PE) of an entity that is part of the group will also be included for the purposes of the rules, but will be treated as a separate constituent entity (OECD 2021d:9; Bloomberg 2022:03). In the context of the GLoBE rules, a group is considered to consist of any entities that are related through ownership or control, and have their assets, liabilities, income, and expenditure consolidated in the financial statements of the UPE. Exclusions from the consolidated financial statement is only permissible under exceptional circumstances, which are explained below. A single entity may be considered as a group if it has at least one PE in a foreign jurisdiction (OECD 2021d:8).

Excluded Entities

Several entities are excluded from the scope of the GLoBE Model Rules. These entities are (as defined in the GloBE Model Rules):

- Government entities.

- International Organisations.
- Non-Profit Organisations.
- Pension Funds.
- Investment Funds that are Ultimate Parent Entities; and
- Real Estate Investment Vehicles that are Ultimate Parent Entities (OECD 2021:9).

Any other entities which are owned by the above entities will also be excluded if 95% of its value is owned by any of the excluded entities or operates exclusively to hold funds for the benefit of any excluded entity, or its services are exclusively for providing supplementary support to the excluded entity. A company (other than a Pension Service Entity) will also be excluded if at least 85% of its value is owned (through shareholding) by any excluded entity provided that substantially the whole of its income is excluded dividends or equity gains or losses that are excluded from the calculation of the GLoBE income or loss (OECD 2021d:9).

A constituent entity may, for a period of five years, elect not to treat an entity as an excluded entity (OECD 2021d:10).

5.4 GLoBE income calculations (step 2)

An essential part of Pillar Two Globe rules is the determination of the Effective Tax Rate (ETR) of a jurisdiction by firstly calculating its GLoBE income. In calculating the GLoBE income, it is important to identify the net income from the consolidated financial statements (financial accounting net income). This is the net income for financial accounting purposes. The financial accounting net income is then adjusted to determine the GLoBE income (income for tax purposes). Lastly, the GLoBE income is allocated, where necessary, to PEs or owners of flow-through entities (Bloomberg 2022:4).

5.4.1 Determining financial accounting net income or loss for GLoBE purposes

Determining the financial accounting net income or loss of a constituent entity for GLoBE purposes is the first step for the ETR calculation. The financial accounting net income of a constituent entity is its net income or loss calculated before any consolidation adjustments eliminating intra-group transactions are done in compiling

the consolidated financial statements of a UPE. The consolidated financial statements must be prepared using an acceptable accounting standard and it is this same standard that will be used to determine the financial accounting net income and loss (OECD 2021d:15; Bloomberg 2022:4).

However, a different accounting standard may be used if it is not practically possible for the income and loss to be determined using the same standard utilised to compile consolidated financial statements. This is provided that:

- the same accounting standard is used to maintain the financial accounts of the constituent entity.
- its information contents are reliable; and
- permanent differences exceeding EUR 1 million resulting from the application of transactions of a particular standard that is different from the UPE's financial standard, complies with the requirements of the UPE's accounting standard (OECD 2021d:15).

5.4.2 Adjusting financial accounting net income and loss to GLoBE base

Each constituent entity's GLoBE income or loss is the financial accounting net income or loss calculated for the fiscal year adjusted for the items described by the GLoBE rules (OECD 2021d: 15).

To arrive at the GLoBE income, the accounting income is subject to a number of adjustments (for common differences between financial accounting and taxable income), including:

- total and final tax expenses;
- excluded dividends - generally most dividends excluding certain dividends from investment entities and short-term portfolio dividends, and;
- excluded equity gains or losses - generally gains or losses resulting from changes in the fair value or disposals of an ownership interest (except portfolio dividends) or when arising from ownership interests subject to the equity method of accounting;
- revaluation gains or losses;

- gains or losses from transfers of certain assets and liabilities;
- asymmetric foreign currency gains or losses - generally this is applied when there are differences between currencies used for accounting and tax purposes;
- policy disallowed expenses - this includes expenses incurred for illegal purposes, as well as fines and penalties that are at least EUR 50,000 (or an equivalent in the currency in which the constituent entity's financial accounts were prepared);
- prior period errors and changes in accounting principles; and
- accrued pension expenses (OECD 2021d:16; Bloomberg 2022:4).

Constituent entities in different jurisdictions must ensure that that their transactions are at arm's length if business is being conducted amongst them (OECD 2021d:16). Any transaction between constituent entities operating in different jurisdictions that is not recorded at the same amount and does not comply with the arm's length principle will be adjusted accordingly (OECD 2021d:16).

Qualified Refundable Tax Credits

To avoid distortion in the ETR, any qualified refundable tax credit will be treated as income in the computation of the GLoBE income and loss for a constituent entity (OECD 2021d:16). A qualified tax credit is any tax credit that is refundable to a constituent entity either in a form of cash or cash equivalent within four years from a period when the constituent entity becomes fully entitled to the credit (Bloomberg 2022:5).

Exclusions

Any expenses linked to intergroup financing and that can reasonably be estimated will be excluded when calculating the income or loss of a constituent entity's GLoBE income. These are expenses intended to increase an amount of expenditure taken into consideration in calculating the GLoBE income or loss of a low-tax jurisdiction but do not result in the same effect (increase) on the amount of taxable income of its counterpart in the high-tax jurisdiction (Bloomberg 2022:5).

Any amount charged to policy-holders by an insurance company for taxes paid by the company on the refunded amounts will be excluded from the computation of the

GLoBE income and loss of an insurance company (OECD 2021d:18). In respect of an MNE group that has International Shipping Income, certain income and auxiliary income will be excluded when computing the GloBE income or loss for each constituent entity (OECD 2021d:18).

Elections

When calculating the GLoBE income, an Ultimate Parent Entity has several elections available to them as per the rules. These elections include:

- A five-year election may be made by a constituent entity on a jurisdiction-to-jurisdiction basis to substitute the tax-deductible amount of stock-based compensation for the amount treated as an expense in its financial account;
- A further annual election may be made to carry back a gain on the disposal of local fixed assets in a jurisdiction (excluding gains or losses from intergroup transfers) for up to four years to adjust the GLoBE income and loss in the carry-back year. This will require that ETI and any top-up taxes to be recalculated for the relevant year; and
- A UPE can elect (on a jurisdiction-to-jurisdiction basis) to calculate on the basis of its consolidated accounting treatment the GLoBE income and loss of its constituent entities to eliminate income, expenses, gains, and losses from transactions between constituent entities that are located, and included in the tax consolidated group, in the same jurisdiction (Bloomberg 2022:5; OECD 2021d).

Allocation of GLoBE income or loss to Permanent Establishments or Flow-through Entities

A PE is treated as a separate entity for the purposes of the GLoBE rules, and it is, therefore, necessary to have a method for allocating income between an entity and any PE it might have (Bloomberg 2022:6). The net income or loss of a PE for the purposes of the GLoBE calculations, will be the net income or loss as reflected on the financial accounts of the PE. If no separate financial accounts exist, then the amount that would have been reflected on its financial statement if the PE had separate financial statements prepared in accordance with the UPE's accounting standards is reflected (OECD 2021d:19).

Flow-through entities or Tax-transparent entities have special rules applied to them for the calculation of the GLoBE income. An entity is a Flow-through Entity to the extent it is fiscally transparent with regards to its finances in the jurisdiction in which it was created, unless if it is a tax resident of another jurisdiction. A Flow-through Entity is a Transparent Entity to the extent that it is fiscally transparent in the jurisdiction in which its owner is located (OECD 2021d:67).

In terms of the GLoBE Model Rules, when a business is carried out through a PE, financial accounting net income or loss is allocated to the PE based on the terms applicable to PEs as per the GLoBE Model Rules. The remaining income will then be allocated to the owner in proportion to their ownership interests. However, if the remaining financial accounting net income or loss (after allocations to the PE) belongs to the UPE or a reverse hybrid entity, it will be allocated to the flow-through entity (OECD 2021d:20; Bloomberg 2022:6).

5.5 Calculation of covered taxes (step 3)

The second element in the calculation of the ETR is the determination of "covered taxes" as referred to in the rules. Covered taxes are amounts of tax paid by a constituent entity (Bloomberg 2022:06). The step in calculating covered taxes includes:

- The determination of covered taxes,
- Utilising the financial accounting expenses to adjust and determine adjusted covered taxes,
- Taking into consideration any timing differences and losses,
- Making an allocation of covered taxes to other constituent entities where necessary, and
- Adjusting for post-filing adjustments (Bloomberg 2022:06; OECD 2021d).

5.5.1 Identification of covered taxes

In determining covered taxes, financial accounts serve as a primary starting point in terms of the GLoBE rules. Subject to several adjustments, covered taxes are determined by using any current tax expense accrued in the financial accounts for the fiscal year relating to such covered taxes (Bloomberg 2022:6). Covered taxes are then

taken into account when calculating the ETR as per the GLoBE rules. Covered taxes include:

- any tax recorded in the financial account of a constituent entity that relates to a share of the income or profit that resulted from its share of the profits of another entity in which it has an ownership interest;
- taxes on distributed profits, deemed distribution (of profits) expenses not of a business nature imposed under an eligible distribution tax system;
- taxes imposed in lieu of general applicable company income taxes;
- taxes levied by reference to retained earnings and company equity (OECD 2021d:23; Bloomberg 2022:6).

Article 4.2.2 of the GLoBE rules details amounts that do not form part of covered taxes for the purposes of the ETR calculation.

5.5.2 Adjusted covered taxes

Current tax expenses relating to covered taxes in a constituent entity's financial accounts are the first step in calculating adjusted taxes for the purposes of the ETR calculations. However, these taxes are subject to a number of adjustments. These adjustments include any additions or deductions to covered taxes in a fiscal year, and deferred tax adjustments (OECD 2021d:22).

Adjustments to covered taxes include:

- any amount of covered taxes in the financial account accrued as an expense before tax;
- amounts of GLoBE loss deferred tax assets utilised under the GLoBE loss elections as per article 4.5.3 of the rules;
- any amount treated for the previous fiscal year as a reduction to covered taxes but paid in the current fiscal year; and
- any amount of credit or refund relating to a qualified refundable tax credit reducing the current tax expense.

Deductions from covered taxes include:

- any tax expense amount relating to income not taxed under the GLoBE rules;

- refundable amount relating to Non-Qualified Refundable Tax Credit not recorded as a reduction to the current tax expense;
- any covered tax refunded or credited, excluding any Qualified Refundable Tax Credits, not treated as an adjustment to the current tax expense in the financial accounts;
- any current tax expense relating to an uncertain tax position; and
- amounts of current tax expenses not expected to be paid within three years of the last day of the fiscal year (OECD 2021d:23).

Elections

When calculating the covered taxes, a UPE has several elections available to them on a jurisdiction-to-jurisdiction basis in terms of the rules. The elections are subject to an eligible distribution system. The distribution system is a tax system that that holds the entity liable for tax only when profits are distributed to shareholders or are deemed to have been distributed, or when the company has incurred certain non-business expenses, imposes a tax equal to or more than the 15% minimum rate and was in force on or before 1 July 2021 (Bloomberg 2022:7). When elected, this system allows for deemed distribution tax to be included in the adjusted covered taxes for the fiscal period.

The deemed distribution tax is equal to the lower of any amount of adjusted covered taxes that is necessary to increase the ETR for the jurisdiction to the targeted 15% minimum rate, or any tax that would have been due had all the income subject to the distribution tax regime been distributed by the company (Bloomberg 2022:7).

The extent to which the deemed distribution tax is paid is monitored through an annual deemed distribution recapture account if this type of election is made. A loss in this recapture account is carried over for a period of four years and set-off against future amounts in the account. If there are still unpaid amounts in the recapture account by the last day of the fourth fiscal year from the fiscal year the account was created, the balance is treated as a reduction to the adjusted covered taxes for that fourth year (Bloomberg 2022:7).

Adjust Covered Taxes for temporary differences and losses

The GLoBE rules include a deferred tax adjustment to address timing differences in the carrying amounts of assets and liabilities for accounting and tax purposes (Bloomberg 2022:7). The reason for this adjustment is to prevent an MNE from suffering a top-up liability when the lower ETR in a particular fiscal year is because of its income being taxed in the different accounting period (Bloomberg 2022:7).

The deferred tax expense accrued in the constituent entity's financial accounts is used as a basis for the deferred tax adjustment This amount is recalculated to the 15% minimum rate if the relevant tax rate is above this (OECD 2021d:25). Several other specific adjustments are also applied to the deferred tax adjustment and the final figure is included as an adjustment in the calculation of the adjusted covered tax (OECD 2021d:25; Bloomberg 2022:7).

Allocation of covered taxes to other constituent entities

To match covered taxes with the corresponding income, specific rules are applied to relevant situations. In general, the allocation of covered taxes is applied in respect of PEs, flow-through entities and controlled foreign companies in the following manner:

- Covered taxes included in the financial accounts of the constituent entity, but that relates to a PE, are allocated to a PE;
- Covered taxes of the constituent entity are allocated to its owners if they are related to income and losses that are allocated to such owners;
- Covered taxes recorded under financial accounts of the owner of a CFC are allocated to such CFC;
- Covered taxes of the owner of a hybrid entity are allocated to the hybrid entity if the constituent entity is a hybrid entity; and
- Covered taxes relating to distributions to the owner of a constituent entity are allocated to the allocating constituent entity (OECD 2021d:24).

Post-Filing Adjustments

An increase or decrease in covered taxes informs the type of adjustment to be made for the fiscal year following the submission of the GLoBE income tax return (Bloomberg 2022:8).

Previous fiscal year increases in covered taxes will be treated as an adjustment to covered taxes in the fiscal year in which the adjustments is made. A decrease will

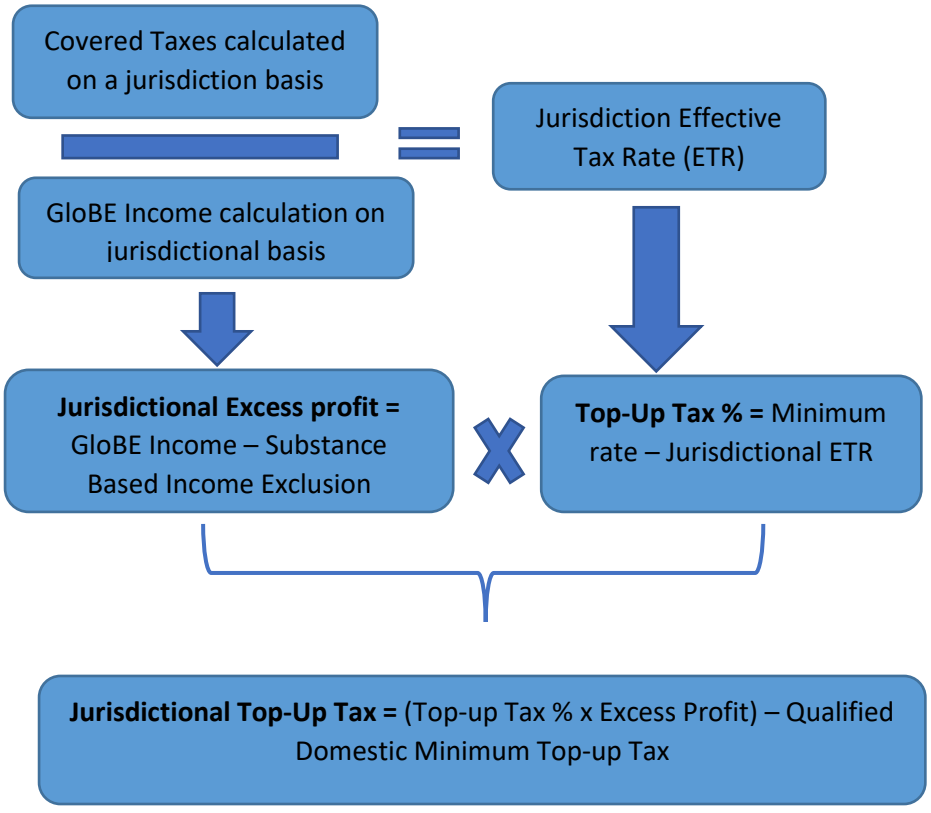
require the recalculation of the ETR and top-up tax for that fiscal year (OECD 2021d:27; Bloomberg 2022:8).

An election may, however, be made by a constituent entity annually to treat an immaterial decrease in covered taxes as an adjustment to covered taxes in the year the adjustment is made. Immaterial, in this case, is defined as a decrease of less than EUR1 million (Bloomberg 2022:8).

5.6 Effective tax rate and top-up tax calculation (step 4)

Following a calculation of covered taxes, actual top-up taxes payable are calculated. Elements of a top-up tax calculation include the calculation of:

- Jurisdictional ETR;
- Excess profit with the substance-based income exclusions taken into account;
- Identification of any additional top-up tax and domestic top-up tax;
- the applicability of the *de minimis* election; and
- actual calculation of the top-up tax (Bloomberg 2022:8).



Source: OECD

Figure 2: Computation of the Jurisdictional Top-up tax

ETR Calculation

It is relatively simple to calculate ETR once adjusted covered taxes and net GLoBE income or loss for each constituent entity has been determined. ETR for purposes of GLoBE is determined by dividing the amount of adjusted covered taxes by the net income determined under the Globe rules (OECD 2021d:28). The rules favour an approach that calculates the ETR on a jurisdiction basis and requires an MNE to calculate ETR for each constituent entity in a jurisdiction before an aggregate ETR is determined for such jurisdiction (Bloomberg 2022:8). The ETR calculation, therefore, is not calculated on a group level according to the rule.

ETR is calculated as follows:

$$\frac{\text{total adjusted covered taxes}}{\text{total net GLoBE income}}$$

As investment entities are required to calculate their ETR on a standalone basis, their adjusted covered taxes and the GLoBE income and loss are excluded from this calculation (Bloomberg 2022:9).

Calculation of top-up tax

Following the calculation of the ETR for the jurisdiction, a comparison is made between the calculated ETR and the proposed global minimum tax of 15%. A top-up tax will then be due if the ETR for the jurisdiction is less than the global minimum tax rate (Bloomberg 2022:9; OECD 2021d:29).

The calculation of a top-up tax for each jurisdiction is as follows:

$$(\text{top-up tax \% x excess profit}) + \text{additional top-up tax} - \text{domestic top-up tax}$$

The top-up tax is then allocated to constituent entities in the relevant jurisdiction as follows:

$$\text{Jurisdiction top-up tax x } \frac{\text{GLoBE income of the constituent entity}}{\text{total GLoBE income of all constituent entities}}$$

The difference in the jurisdiction ETR and global minimum tax rate is generally applied to the jurisdictional net GLoBE income, after subtracting the substance-based income exclusion (also referred to as “excess profit”). The “payroll carve-out” and the “tangible

asset carve-out" relating to each constituent entity in a jurisdiction forms part of the substance-based income exclusion amount. The two amounts are deducted based on an argument that they reasonably represent substantive economic activity. Guidance on the calculation of the two amounts is provided for in the rules and eligibility of the costs forming the two amounts (Bloomberg 2022:9).

An annual election may be made by an MNE group not to apply the substance-based income exclusion (OECD 2021d:30). Additional top-up taxes may also be imposed in specific circumstances provided for in the rules (OECD 2021d:31). Special rules and elections are also applied to Minority Owned Sub-Groups and investment Entities, and special provisions are provided for in the Model Rules to mergers, demergers, reorganisations, joint ventures, multi-parented MNEs and specific scenarios where an entity leaves or enters an MNE group (Bloomberg 2022:11; OECD 2021d:34).

5.7 Imposition of top-up tax (step 5)

5.7.1 Overview

The Income Inclusion Rule (IIR) and the Under Taxed Payments Rules (UTPR) are the two main top-up rules applied. Even though related, these rules cannot be applied simultaneously. An applicable rule for a jurisdiction in a particular tax year will take priority over the other (Bloomberg 2022:12).

The IIR requires that a payment of a top-up tax be made on the allocated share of income of any low-tax constituent entity by a UPE of an MNE group (or any part of such group) in which a direct or indirect ownership is held by the taxpayer. The IIR levies a parent company tax which is calculated in relation to the low-taxed profits of its subsidiaries. This is an approach similar to that of Controlled Foreign Company rules (Bloomberg 2022:12).

5.7.2 Parent Entity Liable for the Top-up Tax under the IIR

The liability for a top-up tax of all low-taxed constituent entities primarily lies with the UPE of an MNE group. In cases where it is not required for a UPE to apply the IIR, the top-up tax will be levied on the first intermediary parent entity in the ownership chain that is subject to the IIR. A top-down approach is applied in this regard (Bloomberg 2022:12).

A partially owned parent company, defined in the model rules as a constituent entity having more than 20% of its ownership held by a non-group member, will be subject to a top-up tax if it is subject to the IIR in line with the top-down approach (Bloomberg 2022:12).

The purpose of the top-down approach is to ensure co-ordination of the application of the IIR in each jurisdiction and to ensure that no duplicate tax is levied on the same low-tax income. If the IIR has been adopted, the approach ensures that priority is given to the IIR in the jurisdiction in which the highest constituent entity in the MNE group's ownership is ordinarily resident. The effect of this is that an intermediate parent company may be charged the IIR if the UPE does not implement a qualifying IIR (Bloomberg 2022:12).

5.7.3 Top-up tax calculations under the IIR

Distribution of a top-up tax is done to a parent entity in proportion to its allocable share. A parent entity's "inclusion ratio" is used as a basis to determine the allocable share of the top-up tax (Bloomberg 2022:12). This inclusion ratio is part of the profits of the Low Taxed Entity attributable to the parent entity on the basis of accounting standards used to prepare consolidated financial statements (OECD 2021d:12).

An offsetting mechanism is applied to prevent double taxation. The offsetting mechanism is applied in cases where several parent entities are liable for a top-up tax under the IIR in respect of the same low-tax constituent entity. A reduction may be done by the parent entity that is higher on the ownership chain on its top-up tax by an amount paid by lower-tier intermediate parent entity or partially owned parent entity (OECD 2021d:12; Bloomberg 2022:13).

5.7.4 Identification of the remaining amount allocated under the UTPR

UTPR will be applied to the low-tax income if its beneficial owner (UPE) is not charged under the IIR. UTPR is, therefore, applied as a backup mechanism to the IIR (OECD 2021d:13; Bloomberg 2022:13). A UTPR calculation starts from the same top-up tax as the IIR with specific adjustments made as prescribed by the model rules with a possibility of carry-overs to the next financial year where necessary (Bloomberg 2022:13).

UTPR is applied for the same purposes as the IIR, however, it may be reduced to zero in instances where the UPE's ownership (directly or indirectly) is held through a parent entity that applies an IIR. In a similar manner, there will be a reduction in a top-up tax of a constituent entity allocated under the UTPR of the same amount charged under the IIR (Bloomberg 2022:13).

5.7.5 Liability for residual Top-up tax in the UTPR jurisdiction through a UTPR adjustment

A two-factor allocation key is utilised to allocate the UTPR top-up tax amount to jurisdictions (OECD 2021d:13). The two-factor allocation key is applied by multiplying the total UTPR top-up tax amount by the jurisdiction UTPR percentage (OECD 2021d:13). The UTPR percentage on a jurisdiction is determined annually for each MNE as follows:

- 50 percent of number of employees in the UTPR jurisdiction over total employees for all UTPR jurisdiction;
- Plus 50 percent of the net book value of all tangible assets in the UTPR jurisdiction over the total net book value of tangible assets in all UTPR jurisdictions (OECD 2021d:13; Bloomberg 2022:13).

A constituent entity of an MNE group in a judication will be denied a deduction or any adjustment permissible under domestic laws of an amount that results in the generation of an additional cash tax expense for the constituent entities that is equal to the UTPR top-up tax amount for the fiscal year allocated to that jurisdiction (OECD 2021d:12).

5.8 Administration

It is the responsibility of each constituent entity located in a jurisdiction to submit a GloBE information return to the relevant tax administration within a period of 15 months following the end of the fiscal year (OECD 2021d:46). This period may be extended to 18 months after the last day of the first fiscal year in which an MNE group falls within the scope of the GloBE rules in a particular jurisdiction (Bloomberg 2022:14).

No obligation will be placed on a constituent entity to file a GloBE return if such return has been filed by:

- The UPE in a jurisdiction with a qualifying competent authority agreement in effect with a constituent entity's jurisdiction for the year; or
- The designated filing entity in a jurisdiction with a qualifying authority agreement in effect with a competent entity's jurisdiction for the year (OECD 2021d:47).

Violation of the GloBE rules will be subject to penalties as per the domestic laws of the implementing jurisdiction (Bloomberg 2022:15; OECD 2021d:47), and the tax administration of the implementing jurisdiction, shall apply the GloBE rules in line with any agreed administrative guidelines and subject to any requirements of any domestic laws (OECD 2021d:48). In cases wherein the ETR for entities in a jurisdiction is reasonably expected to be above the 15% minimum rate, the GloBE rules provides for a constituent entity to make a safe harbour election on a jurisdiction-to-jurisdiction basis. This will result in no top-up tax for a jurisdiction (Bloomberg 2022:15; OECD 2021d:47).

5.9 Conclusion

Considered one of the most ground-breaking developments in the international tax landscape, Pillar Two or "GloBE rules" aims to ensure that the global tax playing field is levelled. Pillar two will ensure that income is appropriately taxed where the economic activities generating it are conducted, and an appropriate rate is paid through several complicated mechanisms.

The OECD/G20 Inclusive Framework (IF) on Base Erosion and Profit Shifting (BEPS) published the Model Global Anti-Base Erosion (GloBE) rules (Model Rules) under pillar two on 20 December 2021. The Model rules set a common approach to subject a global minimum tax rate of 15% for MNEs with an annual turnover above the threshold as set in the Model Rules.

The OECD (2021d:48) indicated that tax administrations of each jurisdiction would, subject to any requirements of their domestic laws, put in practice the GloBE rules in line with any agreed administrative guidelines. More information on the administrative guidelines is expected to be issued in 2022. The Model Rules are complex and can pose a practical challenge during implementation. Therefore, more guidance is needed from the OECD to assist in implementation.

As the OECD does not have any powers to implement domestic legislation in any jurisdiction, each adopting country will have to make its own decisions as it develops its domestic policies and legislation surrounding the implementation of the rules.
It is, therefore, not clear what the implications will be for South Africa in implementing the GloBE Model Rules should it adopt the rules.

The next chapter assesses and recommends some of the possible policy implications for South Africa should the global minimum tax be adopted. The possible impact of the global minimum tax on the use of tax incentives to attract investments in South Africa, with a specific focus on Special Economic Zone (SEZs), and if the global minimum tax will infringe on South Africa's tax sovereignty are considered.

CHAPTER 6:

6.1 Introduction

The minimum tax rate that jurisdictions may levy on business profits is intended to discourage profit shifting and these reforms are expected to take effect in 2023. When enacted, these reforms may have policy implications for all adopting jurisdictions. South Africa, as one of the jurisdictions which expressed its interest in part of the agreement, must expect some policy implications from its side should the agreement be adopted.

The objective of this chapter is to assess some of the possible policy implications for South Africa should the global minimum tax be adopted. The possible impact of the global minimum tax on the use of tax incentives to attract investments in South Africa, with a specific focus on Special Economic Zone (SEZs), and if the global minimum tax will infringe on South Africa's tax sovereignty. The chapter draws its conclusions on all matters analysed.

6.2 Possible policy implications

This section outlines some of the possible policy implications South Africa might be faced with should the global minimum tax be adopted, and the GloBE model rules be implemented. It must be noted, however, that it is not within the scope of this paper to provide details on how the anticipated policies should be formulated or even adopted by the South African government. The paper also does not attempt to make recommendation on the implementation model of the global minimum tax in South Africa should it be adopted, as the OECD has not issued guidelines for implementation by jurisdictions. A general analysis is made solely based on the GloBE model rules issued.

6.2.1 Compatibility of the GloBE model rules with the tax treaty law.

The GloBE model rules have been designed to facilitate a top-up tax on foreign-source profits of MNEs whose ETR is below the agreed global minimum tax rate of 15%. The ruled provide for two basic mechanisms to collect the top-up tax:

- An income inclusion rate (IIR) wherein a parent company is liable for the top-up tax; and

- An undertaxed payment rule (UTPR), wherein the collection of tax is made from a company making an intra-group payment.

The two mechanisms are not applied simultaneously to avoid double taxation. The IRR is the priority mechanism which is applied as a top-down approach in case of several ties of parent companies. The UTPR serves as a backstop to the IRR in cases wherein the parent jurisdiction did not apply the IRR or is a low-tax jurisdiction. The IRR in its nature allows for a resident jurisdiction to impose a top-up tax on the parent company of an MNE group in which a tax of less than 15% is paid in a foreign jurisdiction by its subsidiary or permanent establishment (Titus 2021:4).

One of the questions that arises when one examines the rationale for the implementation of the IIR mechanism, as proposed in the GloBE model rules, is its compatibility with the existing tax treaties, especially treaties that contains tax sparing clauses.

6.2.2 Tax treaty (double tax agreements) and tax sparing clause

To make a clear connection between the IIR, and how it can possibly clash with tax treaty law and, therefore, create policy implications for South Africa, it is necessary to briefly define the tax treaty, tax sparing clause and explain their use and importance in the international tax arena.

According to SARS (2022), the purpose of a tax treaty is to form an agreement between two jurisdictions or tax administrations to ensure that the administration eliminates the possibilities of international juridical double taxation. Double Tax Agreements (DTAs) have, therefore, been entered into between South Africa and other jurisdictions. In the case of Commissioner of South African Revenue Service v Tradehold Ltd, it is stated that the principal objectives of DTAs are to avoid double taxation and prevent fiscal evasion, and the enabling provision for DTAs is Section 108 of the Income Tax Act (Prevention of or relief from, double taxation).

Section 108, therefore, effectively grants legal powers to the DTAs to modify domestic laws and take preference in any matter in which they are applicable. When entered into, the DTAs becomes legally binding instruments in line with the provisions of Section 108 of the Income Tax Act.

The OECD (2017d:9) defines international juridical double taxation as the comparable taxes imposed on two or more states on the same taxpayer in respect of the same profits or tax period. Double taxation threatens the effective and efficient exchange of goods and services and movement of capital, and it is of utmost importance that obstacles that double taxation presents are removed for the benefit of economic development between jurisdictions (OECD 2017d:9).

Corporate income tax incentives are extended to foreign corporations by developing countries such as South Africa to attract direct foreign investment that would aid in fostering economic development (Navarro 2020:4).

South Africa has entered into tax treaties with several contracting states in which these corporations are residents. Under these treaties, corporate residents of other contracting states (foreign jurisdictions) are taxed at a reduced rate on certain classes of income or exempt from tax on such income received from sources within South Africa (SARS 2020:4). This is for the purposes of ensuring that an entity is not unfairly taxed in South Africa and the other contracting state. The reduced rates and classes of income varies amongst countries according to treaty agreements entered into (Tax Consulting South Africa 2022).

According to Pickering (2013:4), jurisdictions enter into tax treaties for various reasons and benefits. One of these benefits is the protection and maintenance of tax incentives or tax holidays relating to inbound investments (Pickering 2013:5). Most developing countries offers these tax incentives and holidays as a policy mechanism to attract foreign investment (United Nations 2018: 3).

But the effectiveness and policy objectives of tax incentives becomes under threat in instances wherein one state (resident state) seeks to tax income for which an incentive was granted by another state (host state), resulting in the tax forgone by the source/host country being collected by the resident country. This is defeating the whole policy objective and effectiveness of the tax incentive in attractive investments from foreign corporations (Navarro 2020:4).

This problem is solved through the tax sparing mechanisms (included as a clause on tax treaties) wherein a notional credit at residence is granted (Navarro 2020:4). The notional credit is granting as a discount on taxes due in the country of residence if no or lower taxes were paid at the source or host country, therefore, placing an obligation

to the residence country to provide relief on the taxes spared by the host country. This clause ensures that the effectiveness of the incentive is maintained, and it achieves the policy objective for which it was designed.

6.2.3 Application of the IIR rule in cases wherein the sparing clause also applies

On one hand, the IIR rule imposes a top-up tax on the ultimate parent entity wherein a foreign tax subsidiary has an ETR which is less than the 15% global minimum rate. On the other hand, the tax treaty ensures that corporate residents of foreign jurisdictions are taxed at a reduced rate on certain classes of income or are exempt from tax on such income received from sources within South Africa as an incentive to attract investment. The question then arises that will the resident state, when applying the IRR rules, provide a relief to its resident company of the tax amount that has been forgone by South Africa wherein an incentive has been granted and a treaty exists, or will it enforce the provisions of the IIR as they are, regardless of the tax treaty in place, rendering the policy objective for providing tax treaties ineffective.

The IRR rule is similar to the CFC rule in the sense that it charges a parent company tax which is calculated in relation to the low-tax profits of its subsidiaries. Therefore, one would reasonably assume that the IRR will operate in a similar fashion as the CFC rule.

When related to the CFC rules, IIR may pose some policy challenges for South Africa with regards to cases wherein tax treaties with a tax sparing clause clash with the IIR rules. When discussing the interaction of the CFC rule with the sparing clause, the OECD in its 1997 report on tax sparing titled *"Tax Sparing: a Reconsideration*", mentioned in article 93 that fifteen member countries have enacted the CFC rules in response to regulatory reforms and the rapid growth in the use of tax havens for tax evasion. The report further states that even though foreign investment targeted by the CFC rules generally do not fall within the scope of tax sparing provisions, both tax sparing and CFC rules may in some instances apply at the same time. The two rules will then be in conflict with one another. The conflict could be removed by inserting in a treaty an interpretative provision stating that in such circumstances the CFC provision will take precedence (OECD 2017d:26).

In the context of IIR, this conflict may arise when a UPE is taxed based on the CEs income, and consideration is not given to the spared income when the ETR calculation of the CE is made. It may, therefore, be reasonably argued that the IIR rule may be in conflict with tax treaties that contain tax sparing clauses unless there is an interpretative provision that the national rule will take precedence in cases of such conflict. This is currently not the case as the GloBE Model Rules are silent on this matter and IIR may possibly take precedence over the tax sparing provisions resulting in a policy issue for South Africa.

6.2.4 Legal standing of tax treaty and the GloBE rules (with focus on the IIR)

Another matter that might possibly result in a conflicting situation between the GloBE rules and tax treaty is the legal standing of tax treaties in South Africa. For the legal status and domestic application of a tax treaty in the South African law to be determined, both the provisions of the Constitution of the Republic of South Africa and the Income Tax Act have to be considered (Oguttu 2009:105). The most supreme law of the country is the Constitution, as stated in Section 2 of the Constitution, and as such, all laws in the country must be consistent with the provisions of the Constitution, including the treaty law (Nabievna 2022:2).

The Constitution provides in Section 231 (4) that:

> *'Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'*

The implications of this section is that once a tax treaty or international agreement has been enacted into law by national legislation, it becomes part of the domestic law in South Africa.

Section 108(2) of the Income Tax Act provides that:

> *'(2) As soon as may be after the approval by Parliament of any such agreement, as contemplated in section 231 of the Constitution, the arrangements thereby made shall be notified by publication in the Gazette and the arrangements so notified shall thereupon have effect as if enacted in this Act.'*

Both sections read together provide, amongst other things, that an agreement may be entered into by the national executive of the Republic with governments in other jurisdictions to regulate a variety of taxes in both jurisdictions (Oguttu 2009:105). The same agreement, once ratified and published into the Government Gazette, will be effective as if it had been incorporated into the Income Tax Act and its provision will be enforceable (Oguttu 2009:105). These agreements will, therefore, be binding on South Africa, on an international level, once approved by both houses of Parliament.

Oguttu (2009:106) cautions that this effectively implies that provisions of any double tax agreement or any international tax treaty entered into by South Africa will have the same legal standing as any other provisions of the Income Tax Act.

Article 8.3 of the GloBE model rules states that a jurisdiction, subject to any requirements of its domestic law, if opting to adopt the GloBE rule shall apply them in accordance with any agreed administrative guidance (OECD 2021d:48). An implementation framework of the GloBE rules has not been published yet and it is not clear what the guidance from the document will be and its requirements for implementation. From article 8.3 of the Model rules, it is clear even though the implementation framework has not been approved, that a jurisdiction will have to, as one of the requirements, apply the rules within the scope and requirements of its domestic laws.

Should South Africa decide to adopt the agreement and implement the rules, the domestic taxation law may undergo an amendment process that will seek to integrate practical complexities of the new generation of tax laws (GloBE rules) targeting the digital economy. The same process prescribed by Section 231(4) of the Constitution and Section 108 of the Income Tax Act will have to be followed. Once enacted, the GloBE rules, as an international tax agreement, will have to be considered both within its international context and within the domestic legal framework of South Africa, granting it the same legal standing as the tax treaties.

This will pose another policy challenge in cases where both the GloBE rules and tax treaties with tax sparing clause apply simultaneously. A conflict might arise. It will have to be decided on which legislation takes precedence. The tax treaty law or the GloBE rules. This is a process that might possibly require some policy amendments to clarify

and avoid situations of conflict and possible treaty override, therefore, resulting in disputes amongst jurisdictions.

Based on the analysis above, it can be concluded that the Globe Model Rules, if adopted and implemented in South Africa, can arguably trigger conflicts with the provisions of tax treaties, especially treaties with a tax sparing clause. It has further been observed that another possible conflict could arise if both the treaty regulations and the GloBE rules are afforded the same legal standing through ratification and approval by both houses of parliament as required by Section 203(4) read with 108(2) of the Income Tax Act.

This conflict will be brought by a question that once the GloBE Model Rules forms part of the South African domestic law, will it be ranked higher, lower, or on par with the existing tax treaties that have a tax sparing clause? A further question will be that if the GloBE rules are incorporated into the South African tax law after the tax treaties have been entered into, do the GloBE rules override the existing treaty provisions?

Both these questions are important in situations wherein a clear possibility of conflict can be predicted. Therefore, it can be concluded that should South Africa adopt and implement the Globe Model Rules, there will be policy implications relating to the tax treaties containing tax sparing clause.

6.3 Future of tax incentives under the GloBE rules

The purpose of this section, is very generally, to answer a question around the future of the use of tax incentives by South Africa in attracting investment should the GloBE rules be adopted. However, no recommendation will be made as to whether adopting the GloBE rules will be beneficial for South Africa or not. It is also not within the scope of this paper to make a judgement whether tax incentives have been successful in accelerating national growth in South Africa or not. The section only seeks to evaluate the future of tax incentives with a specific focus on Special Economic Zones and not all incentives or tax holiday options are evaluated. Any link of tax incentives to the economy is only for the purposes of attributing it to the investment decision making of foreign companies in South Africa and not necessarily its success in improving the economy.

6.3.1 Tax Incentives and their use in South Africa

Developing countries frequently adopt corporate tax incentives to attract foreign direct investment as one of the policy instruments designed to foster economic development (Navarro 2020:2). Even though the balance between the benefit achieved through the adoption of such policies and the loss of tax revenue is not clearly known, the continued popularity of these policies in developing countries is undisputable. South Africa is no exception (Navarro 2020:2).

According to Calitz, Wallace and Burrows (2013:4), tax incentives are preferential corporate tax treatments extended to particular types of taxpayers, especially large corporations. They vary in form and use and can be anything from complete relief from a tax liability, special tax rates, tax deductions or exemptions. Tax incentives may also be applied in one or more tax types (United Nations (UN) 2018:3). Developing countries adopt tax incentive policies to attract foreign investments and foster national industries (UN 2018:3), and South Africa is one of the countries that uses tax incentives widely in Sub-Saharan Africa (Calitz *et al.* 2013:4). One of the tax incentive policies South Africa uses is through the establishment of Special Economic Zones (SEZs), on which this section focuses.

6.3.2 Special Economic Zones

SEZs are specific geographic areas that operate under different economic rules than the rest of the economy (Mugobo & Mutize 2016:19). The type of establishments that have been highly promoted under SEZ includes industries such as agriculture, tourism, commerce, services, or any other business that promotes a Free Trade Area (Pakdeenurit, Suthikarnnarunai & Rattanawong 2014:1).

According to Pardeenurit *et al.* (2014), SEZs have been long utilised theoretically for reasons such as the promotion of exports of goods and services, investment from local and foreign sources, employment, infrastructure development and acceleration of additional economic activities. They further state that in certain cases, SEZ were used as a tool to test viability and worthiness of business-friendly policies before embarking on a large-scale roll-out, therefore, assisting in introducing economic reforms that might pose difficulties in implementation at a national level.

In South Africa, a review of the SEZ policy began in 2007 following the realisation that the previous Industrial Development Zone (IDZ) programme had some weaknesses that needed to be addressed (Department of Trade, Industry and Competition (DTIC) 2020). The introduction of the SEZ policy in South Africa was to provide a clear policy framework relating to the development, operations, and management of SEZs, including mitigation of the challenges presented by the previous IDZ programme (Department of Trade, Industry and Competition (DTIC) 2012:9).

The SEZ programme was implemented in conjunction with various stakeholders in the public and private sector, and the co-ordinated co-operation from various stakeholders rendered the programme as an effective strategic instrument for the achievement of the industrial development policy objective on both the national and regional level (DTIC 2012:8). SARS is one of the stakeholders involved thorough tax incentives for SEZs.

The introduction of the SEZ tax incentive scheme in the Income Tax Act was to promote investment, growth and job creation in the manufacturing sector and the development of designated regions in South Africa (SARS 2022). For a company to qualify for the tax incentive under the SEZ programme, it must meet the criteria of a "qualifying company" as defined under Section 12R of the Income Tax Act. Reduced income tax rates are then provided to all "qualifying companies" operating within the special economic zones as prescribed by Section 12R of the Income Tax Act.

The following preferential income tax rates are applied to "qualifying companies":

- A corporate tax rate of 15% instead of the current 28% for companies.
- Depreciation allowance of 10% on the cost of new and unused buildings and improvement under the ownership of qualifying companies (SARS 2022).

6.3.3 Special Economic Zone tax incentive under the GloBE rules

The GloBe concept calls for a top-up-tax on profits of large MNEs whose sources are from foreign jurisdictions with an effective tax rate below the proposed global minimum rate of 15% (Englisch 2021:4). This is the same rate offered by South Africa under the SEZ programme to qualifying companies operating in special economic zone as identified. The question now arises that will the tax incentive (under the SEZ

programme) survive as a tool to attract investments should South Africa decide to adopt and implement the GloBE rule?

According to Legwaila (2012:22), there has been an increased need by a lot of countries to make efforts in attracting foreign direct investments, and South Africa is one of them. He further states that the National Treasury has expressed its intention to promote South Africa as a gateway to investment into Africa by creating an enabling and business orientated environment. In ensuring that this goal is realised, South African corporate and business frameworks, exchange control and company tax legislations were reviewed to determine areas that could possibly pose a threat to the country's ability to being a gateway to investment in the continent (Legwaila 2012:12).

One of the policy strategies utilised by South Africa to attain this goal is the introduction of corporate tax incentives in its SEZ programme, even though favourable tax rates are one of the important features of the SEZ programme and attraction of foreign investments. Legwaila (2013:4), when commenting on the cost of setting a foreign company with specific reference to headquarter companies, mentions how expensive it is to set up a foreign company. He further states that due to ever changing tax laws, one would not ordinarily set up a company in a foreign jurisdiction just for the purposes of taking advantage of a certain tax regime.

When setting up a company in a foreign jurisdiction as an investment, various other non-tax determinants are considered. They include:

- Political environment and investment climate,
- The availability of credible and reputable laws (corporate, accounting and audit), and the rule of law,
- Monetary policy issues, foreign exchange controls and currency exposure,
- Infostructure availability and operational costs (labour) (Legwaila 2013:4).

Overreliance on tax incentives can, therefore, be said to be dangerous for the country. Calitz *et al*. 2013:8), in their research on tax incentives in South Africa, indicate that even though tax incentives can stimulate the economy, the overall characteristics of a country's economy is vital in determining the success or failure of industries rather than any other tax incentive package. They further emphasise that tax incentives are not cost effective, even though they can stimulate the economy.

Investors also put less emphasis on the importance of tax systems in investments decisions compared to other characteristics of the economy, resulting in the limited usefulness of tax incentives in investment decision making (Calitz *et al.* 2013:8). Evidence shows that investors are attracted to potential markets in developing countries with relatively low labour costs, and they firstly assess the basic economic and institutional situation of the country before deciding to invest (Calitz *et al*. 2013:8.). All these factors, they state, if negative, will hinder the performance of investment in a country and prevent the decision for large-scale investments, all of which cannot be compensated by tax incentives.

Policy decisions by government, the country's political situation, and favourability state of the legal framework of a market economy are all factors that, if not stable, can affect the general features of the tax system, all of which tax incentives, on their own, cannot overcome and what becomes more important are general features of the tax system rather than tax incentives themselves (Calitz *et al*. 2013:8).

Mongale and Baloi (2020:2) have observed the impact of the previous regime in South Africa which created political and policy uncertainty that negatively affected growth and, therefore, damaged the investment and business confidence in the country's economy. In addition, they point out the low gross domestic product (GDP) growth as a result of continued industrial action, uncertainty of policies relating to the mining industry and constant power outages all affect the economy and discourage investments in South Africa. All issues that again, tax incentives cannot, on their own, compensate.

Recent allegations of extreme corruption have also been argued to be one of the factors that contributed to the weak economic growth, leading the economy into a recession in 2017 (Mongale & Baloi 2020:3).

Legwaila (2012:24) argues that major considerations in investment decision making is social, economic, and political stability, and a country's risk profile, especially where the need to raise finance is a priority. Foreign investment decisions are influenced and determined by various factors, some of which are within or beyond the control of the host country.

The above analysis has proven that tax incentives, on their own, cannot serve as determinants for foreign direct investment as investors consider all other

characteristics of the economy, some which have far more damaging implications than tax incentives, if negative. Tax incentives or favourable tax rates cannot, on their own, compensate for all these other economic factors in investment decision making.

Key to the determination of a country's suitability as a location for investment are non-tax characteristics, however, tax characteristics also play an important role in this regard (Legwaila 2012:44). As has been seen in this analysis, even though concrete proof has not yet been determined as to what the future of tax incentives (under the SEZ programme) will be should South Africa adopt the GloBE rules, an analysis of all factors involved in foreign investment decision permits a cautious conclusion that tax incentives alone may not survive as a tool to attract investment under the SEZ programme if all other characteristics are not aligned to the needs of investors.

The proposed global minimum rate of 15%, is the same rate as the tax incentive under the SEZ programme. Given all the economic and political challenges South Africa is facing in recent times, the 15% tax rate may no longer compensate for all the other challenges, therefore, giving investors reasons to move their investments to other jurisdictions with more favourable economic and political environments.

South Africa has been under a dark cloud of allegations of extreme corruption in recent years, prolonged industrial action, high crime levels that include looting and damage to business property, high inflation and rising cost of employment. All these factors, if not corrected, will result in the effectiveness of tax incentives in SEZs as a policy tool being affected in a more fundamental manner as the SEZ programme is a multi-stakeholder programme that does not only depend on the favourable tax rate.

6.4 South Africa's tax sovereignty under the GloBE rules

This section seeks to answer a question around the infringement of South Africa's tax sovereignty should the country decide to adopt the GloBE rules. It will not necessarily make any analysis or comment on the Constitutionality of the GloBE rules and any reference to the Constitution of the Republic will be for purposes of indicating the authority on which South African tax sovereignty is founded.

6.4.1 Tax Sovereignty

According to the Management Study Guide (MSG) (2022), sovereignty refers to the independence and autonomy of modern nation states, the state of absolute

independence and autonomy that states have when faced with decision making on matters relating to its citizens. This is a different era from the one wherein a nation was ruled by kings and colonial powers in the 18th and 19th centuries.

A sovereign nation has one central government with a power to govern a specific geographic area. International law has set the definition of a sovereign nation as one with a defined territory and one government (World Population Review 2022).

In South Africa, Section 1 of the Constitution declares the Republic as one, sovereign, democratic state that is founded on values stated under each Section. Section 2 of the Constitution further declares the Constitution as the supreme law of the Republic and that each law or conduct must be consistent with the Constitution to be considered valid, and all obligations imposed under the Constitution must in a similar fashion be fulfilled.

One of the sovereign powers given to the South African Government is the levying of taxes. The Government has an implied power to impose taxes in terms of the provisions of the Constitution. The South African Revenue Service Act was enacted, resulting in the establishment of the South African Revenue Service (SARS) empowered to administer taxes in the Republic (South African Revenue Service Act 34 of 1997).

This, therefore, implies that tax sovereignty is an inherent and important component of a sovereign state (Christians 2008:6), as the country's ability to control its tax policies enables its tax collection efforts and fiscal policy design and supports its two main purposes (democratic accountability and democratic legitimacy) (Ring 2009:4).

6.4.2 Tax sovereignty and the GloBe Rules

It is not a requirement for members of the Inclusive Framework (IF) to adopt the GloBE rules, but if they do, they will have to implement and administer the rules in a manner that is consistent with the outcome, as provided for under Pillar Two (Bloomberg 2022:15). Article 8.3.1 of the Model Rules also states that even though the application of the rules will be subject to domestic laws, they will still need to be applied in accordance with any agreed administrative guidelines (OECD 2021d:49).

Furthermore, the GloBE rules were designed for the purposes of harmonising the global tax arena and level the playing field in taxing cross-border transactions.

Therefore, when adopting the GloBE rules, jurisdictions' limitation on the tax rate they may levy on certain transactions as a form of expression of tax sovereignty will be sacrificed in an effort to ensure fairness in taxing cross-border transactions to ensure that every state is able to get their fair share of taxes (Navarro 2020:32). For a country such as South Africa, adopting the GloBE rules poses a potential threat to its ability to use policy instruments such as tax incentives to attract investment, further sacrificing their tax sovereignty.

Further sacrifice of the countries tax sovereignty will be in cases wherein some of the tax policies have to be amended or phased out as they will clash with the GloBE rules or may not operate simultaneously with the rules in South Africa. An example is the analysis done earlier on the legal standing of tax incentives with sparing clause and the GloBE rules.

Tax sparing clauses are said to be an expression of the sovereignty of a jurisdiction seeking their implementation (Navarro 2020:32). A decision between the legal standing of tax sparing clauses and the GloBE rules will be another sacrifice of the country's tax sovereignty as a choice might have to be made for the GloBE rule to prevail over incentives with tax sparing clause. It should, however, be borne in mind that the process of implementation of the GloBE rules is still unfolding and much more in-depth analysis will only be possible as the process of implementation has been made clear.

As can be seen from the above analysis, it can be concluded that the GloBE rules, if adopted by South Africa, will not necessarily infringe on its tax sovereignty. As it is a voluntary process, jurisdictions are not forced to adopt the rules. Where jurisdictions do adopt the rules, however, they will have to willingly sacrifice and forgo some of their tax sovereignty or powers to levy certain rates of taxes on certain transaction.

South Africa, by deciding to adopt the GloBE rules, must expect some limitation on what they can levy in taxes, especially when it comes to cross border-transactions and its freedom in using tax incentives as an investment policy. They will have to adhere to the implementation rules and guidelines provided by the OECD and it is still unsure that some of their tax policies are aligned and not in conflict with the GloBE rules.

CHAPTER 7: SUMMARY AND RECOMMENDATIONS

This section provides an overall summary of findings, makes recommendations and suggestions for future studies. A brief conclusion of the paper is, thereafter, made.

7.1 Overall summary of findings

Chapter 6 of this study analysed some of the possible policy implications that will come with the adoption of the GloBE Model rules should South Africa decide on its adoption. The possible implication of the global minimum tax of 15% will have on the effectiveness of the use of tax incentives to attract foreign investments was also analysed with specific focus on the SEZ policy. Lastly, it was analysed if the adoption of the GloBE Model Rules will infringe on the tax sovereignty of the country should South Africa proceed in adopting them. The analysis revealed that there may be some policy implications South Africa might have to deal with should the GloBE rules be adopted, and a possible threat to the use of the tax incentive as a policy mechanism to attract investments under the SEZ programme. The GloBE Model Rules would not necessarily infringe on the country's sovereignty as it is a voluntary process. The findings under each section are summarised as follows:

- **Possible policy implications**: South Africa may have to face some policy implications that policy makers will have to consider before adopting the GloBE Model Rules. This is based on the analysis that GloBE Model Rules may conflict with other rules that have already been implemented in South Africa. With a focus on the tax treaties with tax sparing clause, the implementation of the GloBE Model Rules may possibly result in conflicts between jurisdictions, especially where preferential tax rates or tax holidays are involved. The IRR which imposes a minimum of 15% on the parent entity wherein a lower ETR applies, is utilised as one of the mechanisms under the GloBE Model Rules to levy a top-up-tax to bring the ETR to the agreed minimum of 15%. The IRR may clash with the tax treaty rules where there is a tax sparing clause, wherein a host country has provided a preferential tax rate or tax holiday to the foreign investor. This conflict may arise when a UPE is taxed based on the CEs income, and consideration is not given to the spared income when the ETR calculation of the CE is made**.** Another possible conflict could arise if both the treaty regulations and the GloBE rules are afforded the same legal standing through

ratification and approval by both houses of parliament as required by Section 203(4) read with 108(2) of the Income Tax Act.

Therefore, the GloBE Model Rules may clash with the tax treaty rules unless there is an interpretative provision that makes a ruling as to which rule take precedence in cases of such conflict. This is currently not the case as the GloBE Model rules are silent on this matter and IIR may possibly take precedence over the tax sparing provisions resulting in a policy issue for South Africa.

- **Future of Tax Incentives (SEZ programme) under the GloBE rules**: The 15% tax incentive granted to foreign investors under the SEZ programme is under serious threat and might not be as effective as it should be as a policy instrument to attract foreign investment should South Africa decides to adopt the GloBE Model rules. The basis of this conclusion is the premise that investors consider various factors before making investment decision, most of which are non-tax in nature. Characteristics such as the stability of the political environment, level of involvement of labour unions in employee matters and cost of employment, stability of the economy, crime levels and corruption are some of the factors investors consider when making investment decisions. The 15% provided under the SEZ programme might not be able to compensate for all the challenges South Africa is currently faced with and investors might choose other jurisdictions with much more favourable environments as their investment destinations, as they will still be subject to the same rate of 15% introduced under the Global Anti-base Erosion Proposal ('GloBE"), also known as "Pillar Two".
- **Infringement of South Africa's tax sovereignty:** The analysis has revealed that the adoption of the GloBE Model Rules will not necessarily infringe on South Africa's tax sovereignty, but South Africa will have to willingly sacrifice some of its tax sovereignty. This is due to the fact that the adoption of the GloBE Model Rules is purely voluntary, and nations may choose not to adopt. South Africa, by adopting the GloBE Model Rules, must expect some limitation on what they can levy in taxes as they will have to adhere to the GloBE Model Rules and its implementation framework.

7.2 RECOMMENDATIONS

- Implementation of the GLoBE rules may come with a lot of policy challenges for South Africa. It is, therefore, recommended that the country not rush into adopting the rules, but instead make a thorough analysis on what its implications will be, before a decision is made. This includes what policies the country will need to forgo, and which treaties may need to be renegotiated.
- The adoption of the GloBE rule may cause conflict between the rules and certain tax treaties, especially those with tax sparing clauses. It is recommended that South Africa consider coming up with safeguarding clauses that will authorise one of the rules (GloBE or tax sparing) to take precedence over the other in cases of conflicts.
- The possibility of equal status of the GloBE rules and other rules which are already operating in South Africa could exacerbate normative tension that could lead to legal disputes with other jurisdictions. An example is a possibility of treaty override. South Africa must start thinking of and devising possible dispute resolution processes that will assist in resolving possible disputes between jurisdictions.
- The use of tax incentive as a major policy tool under the SEZ programme might find itself under serious threat should the GloBE rules be adopted. This is due to all the other ills that the country is facing and the 15% incentive under SEZ might not be able to compensate for these any longer. South Africa must consider redesigning its other non-tax policies to increase its attractiveness as a preferred country of investment.
- The GloBE rules prove to be complicated and extremely difficult to understand. The country's tax administration must ensure that it capacitates its staff members dealing with international taxation to make it easy for them to understand and effectively apply the rules to avoid possible disputes, loss of revenue or unnecessary compliance burden for taxpayers.
- Policy makers must think carefully of the tax sovereignty powers that the country will have to sacrifice should it adopt the GloBe rules. An analysis should then be made if the GloBE rules will benefit the country in the long run versus the tax sovereignty sacrificed.

7.3 Further research opportunities arising

- Based on the above findings, it is proposed that a study be conducted on tax policy measures that can be adopted to resolve the possibility of potential conflict between the GloBE rules and other international tax rules that have been implemented already in South Africa, but only after the full implementation framework has been published by the OECD.
- Another area of study can be around the long-term benefits that the GloBE rules will bring to South Africa, given the possibility of some of its tax sovereignty having to be sacrificed should the rules be adopted.
- STTR as a treaty-based rule was not explored in this study. A further study can be conducted on how the STTR can assist in solving some of the conflicts that might arise as a result of the adoption of the GloBe rules in South Africa. This study may only be possible once a model provision to give effect to the STTR has been released, as well as multilateral instruments for its implementation.

7.4 Conclusion

The proposed Global Anti-Base Erosion ('GloBE'), also known as "Pillar Two" which seeks to introduce a global minimum tax of 15% on MNEs to put a floor on the rate of tax MNEs can pay is a cutting-edge reform in the international tax legislation. However, these reforms will not come without any challenges, policy implications and administrative burden, especially for developing countries due to an additional layer of complexity GloBE will add on international taxation.

It is important for South Africa, like any other developing country, to undertake a thorough review on its tax policy preferences before deciding on adopting the GloBE proposed by the OECD, and the implications that will come with the adoption of this proposal.

The proposal is aimed at levelling the playing field in the international tax space and ensuring that every country retains its right to tax activities conducted in it. Yet, it remains unclear whether the proposal is the best option available for every jurisdiction. For this reason, it is important for South Africa to avoid rushing in taking a decision but rather to undertake a thorough examination of whether these measures are convenient for its interests in the long run.

REFERENCES

Agbo, E. I., 2020. Aggressive Tax Planning in Africa. *International Research Journal of Human Resource and Social Sciences,* 7(8), 48-67.

Akitoby, B., 2018. *International Monetary Fund.*
Available at: https://protect-za.mimecast.com/s/eVWvC66MKjUGY1z9U6WHZ9?domain=imf.org
[Accessed 21 07 2021].

Bai, B., 2008. The Code of Conduct and the EU Corporate Tax Regime: Voluntary Coordination without Harmonization. *Journal of International and area studies,* 15(2),115-132.

Blair-Stanek, A., 2015. *University of California School of Law.*
Available at: https://protect-za.mimecast.com/s/X6G4C3l3VGUWvMLqfqbgHM?domain=uclalawreview.org
[Accessed 19 01 2022].

Blouin, J., Huizinga, H., Laeven, L. & Nicodeme, G., 2014. *Thin Capitalisation Rules and Multinatinal Firm Capital Structure,* Washington: International Monetary Fund.

Bunn, D, 2020. *Tax Foundation.*
Available at: https://protect-za.mimecast.com/s/3fn5Cr0pV6UDkM09CzmGuu?domain=taxfoundation.org
[Accessed 30 07 2021].

BusinessTech, 2021. *South Africa Joins other countries in pushing fo a global tax.*
Available at: https://protect-za.mimecast.com/s/Zn6bC58MKgCW7OkMtOi5FT?domain=businesstech.co.za
[Accessed 25 07 2021].

Cassee, A., 2019. International tax competition and justice: the case for global minimum tax rate. *Politics, philosophy & economics,* 18(3),242-263.

Cassidy, J., 2009. The Holly Grail: The search for the optimal GAAR. *South African Law Journal,* 126(4740),740-779.

Christians, A., 2008. Sovereignty, Taxation, and Social Contract. *Legal studies research paper series,* 1063, 1-45.

Chu, H., Lai, C. and Cheng, C., 2014. Tax havens, growth and welfare. *Journal of public economic theory,* 17(6), 802-823.

Chu, H., 2014. Tax enforcement policy and the provision of public goods with the presence of tax havens. *Scottish journal of political economy,* 61(3), 304-321.

Commission of the European Communities, 1992. *Report of the Committee of Independent Experts on Company Taxation.* Luxembourg: Office of the Official Publication of the European Communities.

Commission of the European Communities, 1996. *Taxation in the European Union: Discussion paper for the Informal Meeting of ECOFIN Ministers: Brussels.*
Available at: https://protect-za.mimecast.com/s/KAjkCy8z2nCK0ywzhMTAV6?domain=eur-

lex.europa.eu
[Accessed 12 02 2022].

Commissioner of Sputh African Revenue Service v Trade hold Ltd 74 SATC 263 at 269 (n.d.).

Contractor, F., 2016. Tax Avoidance by Multinational Companies: Methods, Policies, and Ethics. *Rutgers Business Review,* 1(1), 27-43.

Cooper, M. & Nguyen, Q. T. K., 2020. Multinational Entreprise and Corporate Tax Planning: A review of literature and suggestions for a future research agenda. *International Business Review,* 29,1-20.

Crivelli, E., De Mooji, R. and Keen, M., 2015. *Base erosion and profit shifting and developing countries. IMF working paper WP/15/118.*
Available at: https://protect-za.mimecast.com/s/B8VJCGZAWESL4KDoU7WSaG?domain=imf.org
[Accessed 22 07 2021].

Davis Tax Committee, 2017. *Second Interim report on base erosion and profit shifting (BEPS) in South Africa: Introdiuction.*
Available at: https://www.taxcom.org.za/docs/New_Folder3/2%20BEPS%20Final%20Report%20-%20Introductory%20Report.pdf
[Accessed 29 03 2022].

De Koker, A. & Williams, R. C., 2021. *Silke on South African Income Tax.* 70th ed. Durban: LexisNexis.

Deloitte, 2017. *BEPS Action implementation by country: South Africa.*
Available at: https://protect-za.mimecast.com/s/9WzjCoYmXPs6E1p6Cz7EDR?domain=www2.deloitte.com
[Accessed 24 01 2022].

Deloitte, 2022. *Perspective: Base Erosion and Profit Shifting.*
Available at: https://www2.deloitte.com/global/en/pages/tax/articles/beps-actions.html
[Accessed 22 02 2022].

Deloitte, 2022. *Tax Havens and the Game od Hide and Seek.*
Available at: https://protect-za.mimecast.com/s/ENLHCg5yMPT43Bm4So2kyo?domain=www2.deloitte.com
[Accessed 30 01 2022].

Department of Trade and Industry: Republic of South Africa, 2012. *Policy on the Development of Special Economic Zone in South Africa.*
Available at: http://www.thedtic.gov.za/wp-content/uploads/Policy_SEZ.pdf
[Accessed 28 05 2022].

Department of Trade, Industry and Competition, n.d. *Special Economic Zones.*
Available at: http://www.thedtic.gov.za/sectors-and-services-2/industrial-development/special-economic-zones/
[Accessed 27 05 2022].

Desai, M. A., Foley, C. F. & Hines Jr, J. R., 2006. The demand for tax haven operations. *Journal of Public Economics,* 90, 513-531.

Development Bank of Southern Africa (DBSA), 2022. *Socio-Economic Factors that Challenges SA's Education System.*

Available at: https://protect-za.mimecast.com/s/KYltCzmAYoiODAryFXUig8?domain=dbsa.org
[Accessed 31 01 2022].

Dharmaoala, D., 2008. What problems and Opportunities are Created by Tax Havens?. *Oxford Review of Economic Policy,* 24(4), 661-679.

Dharmapala, D., 2008. What problems and oportunities are created by tax havens?. *Oxford Review of Economic Policy,* 24(4), 661-679.

DIRCO, 2004. *Organisation for Economic Cooperation and Development (OECD): History and Present status.*
Available at: https://protect-za.mimecast.com/s/nPDiCP1GW8cJWmxAF0aoWg?domain=dirco.gov.za
[Accessed 24 01 2022].

Dogan, Z., Deran, A. & Koksal, A. G., 2013. Factors Infliencing the Selection of Methords and Determinants of Tranfer Pricing in Multinational Companies: A Case Study of United Kingdom. *International Journal of Economic and Financial Issues,* 3(3), 734-742.

Du Toit, M. & Hall, C., 2021. *Mazars: South African Approach to BEPS and trafer pricing in light of Covid-19.*
Available at: https://blogs.mazars.com/globaltax/2021/12/02/south-african-approach-to-beps-and-transfer-pricing-in-light-of-covid-19/
[Accessed 04 04 2022].

Eden, L. & Kudrle, R. T., 2005. Tax havens: renegade state in the international tax regime?. *Journal of Law and Policy, (*27),100-127.

Eden, L., 2020. Taxing multinationals: The Globe poposal for a global minimum tax. *Tax management international journal,* 46(1), 1-10.

Englisch, J, 2021. *International Effective Minimum Taxation-analysis of GloBE (Pillar Two).*
Available at: http://ssrn.com/abstract=3829104
[Accessed 28 05 2022].

Erixon, F., 2018. *European Centre For International Political Economy (ECIPE).*
Available at: https://protect-za.mimecast.com/s/rO46CpgnLPIp1yrrHDwk2T?domain=ecipe.org
[Accessed 22 01 2022].

European Economic and Social Committee, 2012. *Opinion of the European Economic and Social Committee on 'Tax and finalcial havens: a threat to the EU's internal market' (own-initiative opinion).*
Available at: https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:52012IE1289
[Accessed 13 02 2022].

European Economic and Social Committee, 2020. *Effective and coordinated EU measures to combat tax fraud, tax avoidance, money laundering and tax havens (own-initiative opinion).*
Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020IE0997&from=EN
[Accessed 13 02 2022].

European Parliament, 2013. *European Initiative on Eliminating Tax Havens and Offshore Financial Transactions and the Impact of these Constructions on the Union's own Resources and Budget.*
Available at: https://protect-za.mimecast.com/s/T-

05CMjXW6HDRzO1uwSPDI?domain=europarl.europa.eu
[Accessed 13 02 2022].

Financial Transparency Coalition, 2021. *G7 aggress to a global corporate minimum tax-but developing countries don't appears to have much to gain.*
Available at: https://protect-za.mimecast.com/s/937dCLgGWRIYgzQwfqSIDq?domain=financialtransparency.org
[Accessed 24 07 2021].

Fourati, Y. M., 2019. What Drives Emerging Economies Firms to Invest in Tax Havens?. *Academy of Accounting and Financial Studies Journal,* 23(06), 1-20.

Fuest, C., Spengel, C., Finkel, K., Heckemeyer, J. H. & Nusser, H., 2013. *Centre for European Economic Research.*
Available at: https://protect-za.mimecast.com/s/4CuvC58MKgCw17zOiOiYhk?domain=ftp.zew.de
[Accessed 19 01 2022].

Gilmore, W., 2001. The OECD, Harmful Tax Competition and Tax Havens: Towards an Understanding of the International Legal Context. *Law and Society Trust,* 27(01), 548-571.

Ginsberg, A., 1997. *International tax havens: your guide to offshore investments.* Second edition ed. Cape Town: Butterworth Publishers (PTY) LTD.

Gravelle, J. G., 2022. *Congressional Research Services.*
Available at: https://protect-za.mimecast.com/s/_obqCKOG9RsZY4kxCvIWOO?domain=sgp.fas.org
[Accessed 27 01 2022].

Hadnum, L., 2009. *The world's best tax havens.* Fifth ed. Kirkcaldy: Taxcafe UK Limited.

Hammer, R. M. & Owens, J., 2001. *OECD: Promoting Tax Competition.*
Available at: https://protect-za.mimecast.com/s/-DiKCAnrKxiBjOqZt83Bxj?domain=oecd.org
[Accessed 16 02 2022].

Hampton, M. P. & Abbort, J. P., 1999. *Offshore finance centres and tax havens: the rise of global capital.* First edition ed. Hampshire: MacMillan Press LTD.

Hampton, M., 1996. *The offshore interface.* London: MacMillan Press LTD.

Hong, Q. & Smart, M., 2010. In praise of tax havens: International tax planning and foreign direct investment. *European Economic Journal,* 54, 82-95.

Jahannesen, N., 2022. *The Global Minimum Tax: CESIFO Working paper No. 9527.*
Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4014925
[Accessed 18 05 2022].

Jansky, P. & Prats, A., 2015. International Profit-Shifting out of Developing Countries and the Role of Tax Havens. *Development Policy Review,* 33(3),271-292.

Jatmiko, V. B. & Husodo, Z. A., 2018. The impact of thin capitalisation rule on capital structure. *Advances in Economics, Business and Management Research,* 72, 87-92.

Kemme, D. M., Parikh, B. and Steigner, T., 2017. Tax havens, tax evasion and tax information exchange agreements in the OECD. *European financial management,* 23(3), 519-542.

Legwaila, T., 2012. Tax Characteristics of an iseal holding company location. *De Jure Law Article,* 22-45.

Legwaila, T., 2013. Commercial -law reasons (other than tax) for setting up a headquarter company: a South African observation. *Sabinet African journals,* 31(1), 1-16.

Management Study Guide, 2022. *What is Sovereignty.*
Available at: https://www.managementstudyguide.com/what-is-sovereignty.htm
[Accessed 30 05 2022].

Mara, E. R., 2015. Determinants of tax havens. *Procedia Economics and Finance,* 32, 1638-1646.

Mongale, I. P. & Baloyi, L., 2020. An analysis of drivers of international investment decisions in South Africa. In: R. M. Y. a. V. Bbobek, ed. *Perspectives on economic development-Public policy, culture, and economic development.* London: IntechOpen, 1-145.

Moreno, A. B. & Brauner, Y., 2019. 'Taxing the Digital Economy Post BEBS...Seriously'. *Colombia Journal of Transnational Law,*157-161.

Mugobo, V. & Mutize, M., 2016. Special Economic Zone (SEZs) in Southern African Develoment Community (SADC).*Risk governance & control: financial markets & institutions,* 6(4), 19-23.

Nabievna, N. D., 2022. The importance of the constituion in the life of our society. *Journal of innovations in social sciences,* 2(2), 1-3.

National Treasury: Republic of South Africa., 2020. *South African Revenue Service Legal Discussion Paper.*
Available at: https://protect-za.mimecast.com/s/DS1cCqjoL9HJ2DRRSXqp0U?domain=sars.gov.za
[Accessed 18 01 2022].

Navarro, A., 2020. *Jurisdiction not to tax, tax sparing clause and the Income Inclusion Rule of the OECD Pillar 2 (GloBE) Proposal. The demice of a policy instrument of developing countries?.*
Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678169
[Accessed 05 05 2022].

Navarro, A., 2021. *Social Science Research Network (SSRN).*
Available at: https://protect-za.mimecast.com/s/BRxOC98jYmCrL8BjhEhTnJ?domain=papers.ssrn.com
[Accessed 22 01 2022].

OECD, 1998. *Harmful Tax Competition: an emerging global issue,* Paris: OECD.

OECD, 2000. *Towards Global Tax Co-operation: Report to the 2000 ministerial council meeting and recommendations by the committee on fiscal affairs: Progress in identifying and eliminating harmful tax practices.*
Available at: https://www.oecd.org/tax/harmful/2090192.pdf
[Accessed 17 02 2022].

OECD, 2002a. *Intellectual Property Rights (IPRS).*
Available at: https://protect-za.mimecast.com/s/rNLiCVmWn9iz86qrczM_F5?domain=stats.oecd.org
[Accessed 19 01 2022].

OECD, 2002b. *The OECD List of Unco-operative Tax Havens- A Statement by the Chair of the OECD's Committee on Fiscal Affairs, Gabriel Markhlouf.*

Available at: https://www.oecd.org/corruption/theoecdlistofunco-operativetaxhavens-astatementbythechairoftheoecdscommitteeonfiscalaffairsgabrielmakhlouf.htm
[Accessed 17 02 2022].

OECD, 2004. *The OECD's Project on Harmful Tax Practice: The 2004 Progress Report.*
Available at: https://www.oecd.org/ctp/harmful/oecd-harmful-tax-practices-project-2004-progress-report.pdf
[Accessed 18 02 2022].

OECD, 2006. *The OECD's Project on Harmful Tax Practices: 2006 Update on Progress in Member Counries.*
Available at: https://www.oecd.org/tax/harmful/37446434.pdf
[Accessed 22 02 2022].

OECD, 2007. *Tax Co-operation: Towards a Level Playing Field-2007 Assessment by the Global Forum on Taxation.*
Available at: https://www.oecd.org/ctp/harmful/taxco-operationtowardsalevelplayingfield-2007assessmentbytheglobalforumontaxation.htm <https://protect-za.mimecast.com/s/EW2gCX6PpRUjJ3RASVk07p?domain=oecd.org
[Accessed 22 02 2022].

OECD, 2010. *Promoting transparency and exchange of information for tax purposes. OECD.*
Available at: https://protect-za.mimecast.com/s/WRjUCoYmXPsKY4vMhz9wOa?domain=oecd.org
[Accessed 22 07 2021].

OECD, 2011. *Tranfer Pricing Legislation-A Suggested Approach.*
Available at: https://protect-za.mimecast.com/s/kvQLCLgGWRIl4KzrSBSENR?domain=oecd.org
[Accessed 13 01 2022].

OECD, 2012. *Model Tax Cobvention on Income and on Capital.*
Available at: https://www.oecd-ilibrary.org/docserver/mtc_cond-2017-en.pdf?expires=1653476632&id=id&accname=oid011488&checksum=8337768D92EF463FBC8857B00643D947
[Accessed 05 05 2022].

OECD, 2013. *Action plan on base erotion and profit shifting, OECD publication.*
Available at: http://dx.doi.org/10.1787/9789264202719-en
[Accessed 21 07 2021].

OECD, 2014. *Model Tax Convention on Income and on Capital.*
Available at: https://protect-za.mimecast.com/s/fIR6CAnrKxiG24WNf8qqEF?domain=read.oecd-ilibrary.org
[Accessed 13 01 2022].

OECD, 2015. *Aggressive Tax Planning.*
Available at: https://www.oecd.org/tax/aggressive/
[Accessed 2022 02 2022].

OECD, 2016. *Tax Planning by Multinational Firms: Firm-Level Evidence From A Cross-Country Database.*
Available at: https://protect-za.mimecast.com/s/SHRBCQ1XgRcJMJRnSP182y?domain=oecd.org
[Accessed 22 01 2022].

OECD, 2017a. *BEPS Action 5 on harmful tax practices: Transparency framework.*
Available at: https://www.oecd.org/tax/beps/beps-action-5-harmful-tax-practices-peer-review-transparency-framework-2017-2020.pdf
[Accessed 04 04 2022].

OECD, 2017b. *Model Tax Convention on Income and on Capital : Volum I and II.*
Available at: https://www.oecd-ilibrary.org/docserver/g2g972ee-en.pdf?expires=1654624064&id=id&accname=oid011488&checksum=A4AA1F1C09AB707B52ADE7BCDB4527D0
[Accessed 07 06 2022].

OECD, 2017c. *Standard for automatic exchange of financial information in tax matters, Second edition.,* Paris: OECD publishers.

OECD, 2017d. *Tax Sparing: a reconsideration.*
Available at: https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_54682700-en#page26
[Accessed 26 05 2022].

OECD, 2019a. *"South Africa", in Harmful Tax Practice-2018 Peer Review on the exchange of In formation on Tax Ruling: Inclusive framework on BEPS: Action 5.*
Available at: https://doi.org/10.1787/9399d568-en
[Accessed 04 04 2022].

OECD, 2019b. *Addressing the tax challenges of the digitalisation of the economy- Policy note.*
Available at: https://protect-za.mimecast.com/s/D5esCQ1XgRcNKy7pFP84hA?domain=oecd.org
[Accessed 07 07 2021].

OECD, 2019c. *Harmful Tax Practices- 2018 Progress report on Preferencial Regimes: Inclusive Framework on BEPS : Action 5.*
Available at: https://www.oecd-ilibrary.org/docserver/9789264311480-en.pdf?expires=1654697646&id=id&accname=guest&checksum=98F3A9176E9E8796EFE754CDF022D03F
[Accessed 08 06 2022].

OECD, 2019d. *Members of the OECD/G20 Inclusive Framework on BEPS,* Paris: OECD Publishers.

OECD, 2019e. *Public consultation document, Global Anti-Base Erosion Proposal ("GloBE')- Pillar two,* Paris: OECD Pulishers.

OECD, 2020. *Tax challenges arising from digitalisation-Report on pillar two blueprint; Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project.,* Paris: OECD Publishers.

OECD, 2021a. *Aggressive Tax Planning.*
Available at: https://protect-za.mimecast.com/s/JBkfCKOG9RsZzZWXtv_j5W?domain=oecd.org
[Accessed 22 01 2022].

OECD, 2021b. *Harmful Tax Practices – 2020 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5 , OECD/G20 Base Erosion and Profit Shifting Project.*
Available at: https://doi.org/10.1787/f376127b-en.
[Accessed 04 04 2022].

OECD, 2021c. *OECD Glossary of tax terms.*
Available at: https://protect-za.mimecast.com/s/EisTCWn1oRiXAlqEUxV6fu?domain=oecd.org
[Accessed 20 09 2021].

OECD, 2021d. *OECD releases Pillar Two model rules for domestic impelementation of 15% global minimum tax.*
Available at: https://protect-za.mimecast.com/s/uUAMCpgnLPIpmLgxTDoowS?domain=oecd.org
[Accessed 24 01 2022].

OECD, 2021e. *Tax and Fiscal Policies after the COVID-19 Crisis.*
Available at: https://protect-za.mimecast.com/s/U74FCg5yMPT4ZM4BCoUBNW?domain=oecd.org
[Accessed 26 01 2022].

OECD, 2022. *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.*
Available at: https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2022_0e655865-en#page20
[Accessed 08 06 2022].

Oggutu, A. W., 2009. Resolving the conflict between "controlled foreign company" legislation and tax treaties: a South African perspective. *The comparative and international law journal of Southern Africa,* 42(1),73-114.

Oguttu, A. W., 2006. Transfer pricing and tax avoidance: Is the Arm's-length principle still relevant in the e-commerce era?. *South African Mercantile journal,* 18, 138-158.

Oguttu, A. W., 2010. A Critique on the OECD Campaign Against Tax Havens: Has it Been Successful? A South African Perspective. *Stellenbosch Law Review,* 21(01), 172-200.

Oguttu, A. W., 2011. Exposing and curtailing secret offshore tax shelters: the tools and enablers. A call for vigilance in South Africa.. *The Comparative and International Law Journal of Southern Africa,* 44(1), 30-58.

Oguttu, A. W., 2017. OECD Multilateral instrument on treaty-related BEPS measures: Benefits, Challenges and recommended options for South Africa and other developing countries. *South African Yearbook of International Law,* 42(1), 220-265.

Organisation for Economic Co-operation and Development , 2014. *OECD-ilibrary.*
Available at: https://protect-za.mimecast.com/s/6cFFCWn1oRiymD3xfxDtHW?domain=oecd-ilibrary.org
[Accessed 21 07 2021].

Oxfam, 2000. *Oxfam Policy and Practice.*
Available at: https://protect-za.mimecast.com/s/QkTOCNxGWRHPmW3mh42kDC?domain=policy-practice.oxfam.org
[Accessed 29 09 2021].

Pakdeenurit, P., Suthikarnnarinai, & Rattanawong, W., 2014. Special Economic Zone: Fact, Roles, and Opportunities of Investment.. *Proceedings of the International MultiConference of Engineering and Computer Scientists,* 2, 1-5.

Palan, R., Murphy, R. & Chavagneux, C., 2013. *'Tax havens: how globalisation really works'.* London: Cornell University Press.

Palmisano, S. F., 2006. The Global Integrated Enterprise. *Foreign Affairs,* 85(3), 127-136.

Pickering, A., 2013. *United Nations: Why negotiate tax treaties.*
Available at: https://www.un.org/esa/ffd/wp-content/uploads/2013/05/20130530_Paper1N_Pickering.pdf
[Accessed 02 05 2022].

PriceWaterHouseCooper, 2021. *Worldwide Tax Summaries.*
Available at: https://protect-za.mimecast.com/s/EOZMClO0EPsA3NAEs9HRR2?domain=taxsummaries.pwc.com
[Accessed 08 11 2021].

Radaelli, C. M., 1999. "Harmful Tax Competition in the EU: Policy Narratives and Advocacy Coalition". *Journal of Common Market Studies,* 37, 661-682.

Radu, D. I., 2012. Tax Haven Impact on the World Economy. *Procedia-Social and Behavioural Science,* 62, 398-402.

Readhead, A., Lassourd, T. & Mann, H., 2021. *IISD: Investment Treaty News.*
Available at: https://protect-za.mimecast.com/s/WA5HC482GJCRgO4BtxRpmm?domain=iisd.org
[Accessed 24 01 2022].

Ring, D. M., 2009. Democracy, Sovereighty and Tax Competition: The role of tax sovereighty in Shaping tax cooperation. *Boston College Law School Faculty Papers,* 9, 1-41.

Robb, N., 2020. *Trade and Industrial Policy Strategies. Illict Financial Flows, Tax Havens and Industrial Deveelopment in South Africa.*
Available at: https://protect-za.mimecast.com/s/I_nvCvgwLkIr1p8LSQ_VQ6?domain=tips.org.za
[Accessed 31 01 2022].

Rudra, N. & Bastiaens, I., 2018. *United Nations.org.*
Available at: https://protect-za.mimecast.com/s/qur1CX6PpRUkVGlrhV7kmd?domain=un.org
[Accessed 22 01 2022].

SAICA, 2013. *Transfer Pricing: Section 31- Further analysis.*
Available at: https://www.saica.co.za/integritax/2013/2256._Section_31_û_Further_analysis.htm
[Accessed 07 06 2022].

SAIIA, 2021. *Strengthening Tax Cooperation with Africa for Sustainable Revenue Mobilisation.*
Available at: https://protect-za.mimecast.com/s/KfV1CElyWBUkLzrGSwyHRJ?domain=saiia.org.za
[Accessed 24 01 2022].

SARS, 2020. *Discussion paper: Advance Pricing Agreements.*
Available at: https://www.sars.gov.za/wp-content/uploads/Legal/DiscPapers/LPrep-DP-2020-02-Discussion-Paper-on-Advance-Pricing-Agreements.pdf
[Accessed 07 04 2022].

Shaxson, N., 2019. Tackling tax havens. *Finance & development,* 56(3), 6-10.

South African Government, 2021. *President Cyril Ramaphosa participates in G20 Compact with Africa meeting in Germany. 26-27.*
Available at: https://protect-za.mimecast.com/s/si4qCBgv9yIzjk92c6I8WB?domain=gov.za
[Accessed 24 01 2022].

South African Institute of Chartered Accountants (SAICA), 1999. *Tranfer pricing: impact on international trade for South African Business.*

Available at: https://protect-za.mimecast.com/s/jLZwC8qgKlHBL11ri1Yv20?domain=saica.co.za
[Accessed 13 01 2022].

South African Institute of Chartered Accountants, 2011. *International tax: New Thin Capitalisation Rules.*
Available at: https://protect-za.mimecast.com/s/u7ZDCzmAYoiOr3nPfXihhv?domain=saica.co.za
[Accessed 18 01 2022].

South African Institute of Taxation (SAIT), 2017. *Transfer pricing adjustment: too many layers of tax?.*
Available at: https://www.thesait.org.za/news/326196/Transfer-Pricing-Adjustments-Too-Many-Layers-of-Tax.htm
[Accessed 08 06 2022].

South African Revenue Service (SARS), 1999. *Practice note no. 7: Determination of the taxble income of certain persons from international transactions: Transfer Pricing.*
Available at: https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-PrN-2012-11-Income-Tax-Practice-Note-7-of-1999.pdf
[Accessed 06 06 2022].

South African Revenue Service (SARS), 2022. *Double Taxation Agreement & Protocols.*
Available at: https://protect-za.mimecast.com/s/YIc0CpgnLPIPkkD9fD0DA5?domain=sars.gov.za
[Accessed 25 05 2022].

South African Revenue Service, 2020. *Interpretation note 18 (issue 4).*
Available at: https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-18-Rebate-Deduction-Foreign-Taxes-Income.pdf
[Accessed 02 06 2022].

South African Revenue Service, 2021. *Interest and Dividends.*
Available at: https://protect-za.mimecast.com/s/fjavCKOG9RsZ1l8gIv6f1y?domain=sars.gov.za
[Accessed 18 01 2022].

South African Revenue Service, 2022. *Legal Counsel Income Tax: Brochure on the Special Economic Zone Tax Incentive.*
Available at: https://www.sars.gov.za/wp-content/uploads/Ops/Brochure/LAPD-IT-G28a-Brochure-on-the-Special-Economic-Zone-Tax-Incentive.pdf
[Accessed 28 05 2022].

South African Revenue Service, *Act 34 of 1997.* Pretoria: Government Printer.

Sullivan, M. A., 2007. *Tax justice.*
Available at: https://protect-za.mimecast.com/s/C_yJCxGyLmtQgl05FvjMHS?domain=taxjustice.net
[Accessed 24 07 2021].

Tax Consulting South Africa, 2022. *What is double tax agreement?.*
Available at: https://www.taxconsulting.co.za/double-taxation-agreements/
[Accessed 02 06 2022].

The Washington Post, 2021. *Five finance ministers: why we need a global corporate minimum tax.*
Available at: https://protect-za.mimecast.com/s/lUl_CP1GW8c5Rq8vT0G6zr?domain=washingtonpost.com
[Accessed 25 07 2021].

Titus, A., 2021. *Global Minimum Corporate Tax: A death Knell for African Coutry Tax Policy?.*
Available at: http://ssrn.com./abstract=3975311
[Accessed 25 05 25].

United Nations, 2018. *Design and Assessment of Tax Insentives in Developing County: Selected issues and a country experience.*
Available at: https://www.un.org/esa/ffd/wp-content/uploads/2018/02/tax-incentives_eng.pdf
[Accessed 27 05 2022].

University of Toronto, 1998. *G7 Initiative on Harmful Tax Competition.*
Available at: http://www.g8.utoronto.ca/summit/1998birmingham/harmfultax.html
[Accessed 13 02 2022].

University of Toronto, 1999. *G7 Statement, Koln, Germany.*
Available at: https://protect-za.mimecast.com/s/y4L7C66MKjU7184mu6vKww?domain=g7.utoronto.ca
[Accessed 13 02 2022].

University of Toronto, 2000. *Action Against Abuse of the Global Financial System: Report from the G7 Finance Ministers to the Heads of State and Government, Okinawa.*
Available at: http://www.g7.utoronto.ca/summit/2000okinawa/abuse.htm
[Accessed 13 02 2022].

Waerzegger, C. & Hillier, C., 2016. *IMF Technical Note: Introduction to a General Anti-Avoidance Rule (GAAR).*
Available at: https://www.imf.org/external/pubs/ft/tltn/2016/tltn1601.pdf
[Accessed 08 04 2022].

Webb, M. C., 2004. Defining the Boundaries of Legitimate State Practice: Norms, Transactional Actors and the OECD's Project on Harmful Tax Competition. *Review of International Political Economy,* 11(04), 787-827.

Werksmans Attorneys, 2017. *The implementation of the BEPS multilateral instrument in South Africa.*
Available at: https://www.werksmans.com/legal-updates-and-opinions/the-implementation-of-the-beps-multilateral-instrument-in-south-africa/
[Accessed 31 03 2022].

Wier, L. & Reynold, H., 2018. *United Nationa University (UNI-WIDER).*
Available at: https://protect-za.mimecast.com/s/vS6WCNxGWRHwLDJ8U4vM0b?domain=wider.unu.edu
[Accessed 31 01 2022].

Wier, L., 2020. Tax-motivated trafer mispricing in South Africa: direct evidance using transaction data. *Journal of Public Economics,* 184, 1-16.

World Population Review, 2021. *World Population Review.*
Available at: https://protect-za.mimecast.com/s/2w7kCmwkNPcPYAjAHOCGGi?domain=worldpopulationreview.com
[Accessed 30 09 2021].

Worldpopulation review 2020, 2022. *Sovereign Nation 2022.*
Available at: https://worldpopulationreview.com/country-rankings/sovereign-nation
[Accessed 30 05 2022].

Zekos, G. I., 2003. MNEs, Globalisation and Digital Economy: Legal abd Economic Aspects. *Managerial Law,* 15(1), 1-230.