Developing South Africa as a gateway for foreign investment in Africa: A critique of South Africa's headquarter company regime

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1 Introduction

Multinational enterprises which seek to invest in a geographical region often choose certain countries as a base from which they can expand their investments to the other countries in the region. When it comes to the African continent, South Africa is considered 'the economic powerhouse of Africa'.[1] Its 'sizable economy, political stability and overall strength in financial services'[2] makes the country a potential location from which foreign investors can extend their investments into the rest of Africa. Foreign investors would also be able to make use of South Africa's network of double taxation treaties to trade with other African countries.[3]

Despite the above assertions, South Africa's high tax costs and the uncertainties in applying certain of its tax laws that deal with international transactions have been a hindrance to basing foreign investments in the country. However, in 2010, the legislators came up with a fiscal regime to encourage the location of headquarter companies in the country.[4] Consequently, certain provisions in the country's Income Tax Act were amended to ensure that they will not hinder the headquarter company regime. The question, though, is whether the headquarter company regime is the correct regime for South Africa to develop considering competition posed by other low

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[1]Explanatory Memorandum on the Taxation Laws Amendment Bill of 2010 par 5.4 in part II.
[2]*Ibid*.
[3]*Ibid*.
[4]Taxation Laws Amendment Act 7 of 2010.

tax countries that have historically had similar regimes to encourage foreign investment. On the African continent, South Africa faces competition from countries such as Mauritius and Botswana (in the Southern African region), which have for years now developed legislation to ensure that they become ideal bases for foreign investment into Africa.

The purpose of this article is to analyse whether South Africa's headquarter company regime is conducive for basing headquarter companies in the country and whether this regime is the right one that the country should develop if it is to become a base for foreign investment in Africa. The article commences by providing some background information about South Africa's economic and fiscal climate. It then describes the fiscal features of jurisdictions that are ideal for locating base companies. The international fiscal climate in which South Africa is competing is then covered, with specific reference to equivalent fiscal regimes in Mauritius and Botswana. In light of the above, where the headquarter company regime is found wanting, recommendations are made to ensure that South Africa sets up a fiscal regime which is more conducive to its becoming a gateway for foreign investment into Africa.

2 South Africa's economy in relation to the rest of Africa

Unlike most African countries whose economies are generally underdeveloped, South Africa is unique in that its economy displays a mixture of aspects of both a developed and a developing economy.[5] Internationally, South Africa is recognised as one of the emerging economies,[6] making up the so-called BRIKCS nations: Brazil (B), Russia (R), India (I), China (C), Korea (K) and South Africa (S),[7] 'which are considered the world's six most influential economies outside of the G8'.[8] South Africa's economic and infrastructural development, which is comparable to that of many developed nations,[9] can make it easier for investors from developed countries to make use of the country as a gateway for further investment into Africa. It is common knowledge that before making investments in any given country, foreign investors often take a number of commercial, infrastructural and legal factors into consideration.[10] Much as they may be attracted by potential markets in

[5]Law Administration SARS 'Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962)' (2005) at 7.

[6]Holland and Vann 'Income tax incentives for investment' in Thuronyi *Tax law design and drafting* vol 2 (1989) at 1013.

[7]De Silva 'BRICKS: Reshaping the new global economy' *Daily News* 24 June 2009 available at http://www.dailynews.lk/2009/06/24/bus20.asp (accessed 20 September 2011).

[8]Oguttu 'The challenges of tax sparing: A call to reconsider the policy in South Africa' (2011) 65/1 *Bulletin for International Taxation* par 6.2.

[9]'Explanatory Memorandum on the Taxation Laws Amendment Bill of 2010' part II par 5.4.

[10]Oliver and Honiball *International tax: A South African perspective* (2011) at 697.

developing countries and the relatively low cost of labour, they often first consider a country's economic and infrastructural framework as well as its political stability before large scale investment can be made.[11]

Most African countries are lacking in many of these aspects. At the 2008 Africa Infrastructure Conference,[12] it was stated that Africa's shortage of energy and infrastructure poses major difficulties to doing business in the continent. It was however acknowledged that progress is being made on a country-by-country basis, with governments creating an environment which would encourage investors to enter their markets. Over the last decade this has been achieved to the extent that foreign investors have begun to recognise that 'Africa is the new frontier of the global economy'.[13] There are, for instance, ever-increasing Chinese entrepreneurs and companies investing billions of dollars across the continent.[14] The Organization for Economic Cooperation and Development (OECD) has also noted that 'Africa is the new emerging markets investment frontier'.[15] The OECD has noted that enthusiasm for investors to move into Africa can be witnessed from the growing foreign investments not only in South Africa, but also in countries such as Kenya, Ghana, Botswana and Mauritius, which keep receiving capital for investment flowing from cities such as London and New York.[16]

With this growing international interest in Africa, it is important for South Africa to take advantage of its regional economic and infrastructural superiority so that it positions itself as a base for foreign investment into the rest of Africa. In 1987, the Margo Commission[17] noted that 'transnational corporations make valuable contributions to the growth of developing countries through their inputs of expertise and capital, and they should be encouraged'.[18] This sentiment was reiterated by the 1997 Katz Commission Report[19] which pointed

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[11]Oguttu n 8 above par 5.2; OECD '*Taxation and foreign direct investment: The experiences of the economies in transition'* (1995) at 19; Rohatgi *Basic international taxation* (2002) at 238; Holland and Vann n 6 above at 998.
[12]Corey *Africa is the new frontier of global economy* (8 October 2008), quoting Simon, the US ambassador to the African Union. Available at http://www.america.gov/st/econenglish/2008/October/20081010111004WCyeroC0.1286432.html (accessed 7 June 2011).
[13]*Ibid*.
[14]Swain 'Africa, China's new frontier' *The Sunday Times* 10 February 2008 at 2.
[15]OECD Development Centre 'Africa: A new frontier for emerging markets' (2007) 55/December *Policy Insight* . Available at http://www.oecd.org/dataoecd/58/22/39733178.pdf (accessed 7 June 2011).
[16]*Ibid*.
[17]Margo 'Report of the Commission of Inquiry into the tax structure of the Republic of South Africa' RP 34/1987 par 26-30 (Margo Commission Report).
[18]*Id* at par 26.2.
[19]Katz 'Fifth Interim Report of the Commission of Inquiry into certain aspects of the tax structure of South Africa'(1997) par 2.2.2 (Katz Commission Report).

out that the location of multinational corporations in South Africa is a vital strategy for the country's economic growth. As South Africa becomes a channel through which foreign investments can expand into Africa, the country would benefit from the inward flow of technology and the income derived from such investment.[20] These investments would also lead to the retention and importation of skills, which would subsequently increase economic development in the country.[21]

Although South Africa may have the economic and infrastructural advantages that are considered ideal for basing foreign investments, it is common knowledge that investors do not consider such economic advantages only – they also consider foreign taxes as part of their investment appraisals. Indeed, in all business transactions, taxes are like any other expense, which should not be too high if businesses are to remain competitive.[22] To multinational companies 'the possibility of reducing tax costs by basing a business in a favourable tax jurisdiction is an inherent aspect of international tax planning'.[23] Thus, potential investors often consider the general features of a countries tax system (eg the tax base and tax rates),[24] the stability of a country's tax laws, and ease of compliance with those laws as important factors in determining an investment location.[25] Historically, South Africa has not had a favourable tax environment which would have encouraged foreign investment.[26] In 1987 the Margo Commission[27] recommended that as South Africa seeks to create an environment that will attract foreign investment and facilitate international trade, a 'hospitable fiscal environment should be seen as an integral part of such endeavors'.

3 Examples of base companies used to expand investments in a given region

Multinational companies can setup base companies in a given country to carry out functions as: headquarter companies; intermediary holding companies; finance companies; service companies; trading companies; or as intangible property holding companies.[28] The decision to locate any of these base

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[20] *Id* at par 3.1.2.7.
[21] *Id* at par 7.1.1.
[22] Grundy *The world of international tax planning* (1984) at 1-2; Ginsberg *International Tax* (1997) at 5. Arnold *The taxation of controlled foreign corporations: An international comparison* (1986) at 62.
[23] Grundy n 22 above at 1-2.
[24] Holland and Vann n 6 above at 998.
[25] Rohatgi n 11 above at 239.
[26] Mazansky 'The new South African headquarter regime' (2011) 65/3 *Bulletin for International Taxation* at 1.
[27] Margo Commission Report n 17 above par 26.2.
[28] Rapakko *Base company taxation* (1989) at 19-30.

companies in a given country often depends on whether that country has the ideal fiscal attributes that encourage the performance of the relevant functions.[29] In 1997, the Katz Commission recommended that South Africa should come up with a fiscal regime that would encourage the establishment of 'headquarter companies' and 'holding companies'.[30] Therefore, only the fiscal attributes of jurisdictions ideal for the setting up of these two types of base company are discussed below.

3.1 Holding companies

A 'holding company' is defined as a company that holds the controlling shares in one or more other company so that they form part of the same group of companies.[31] If a holding company is incorporated outside the investor's country of residence it is often referred to as an intermediary holding company. Thus, intermediary holding companies are generally interposed between the ultimate holding company and the operating subsidiaries of a multinational group of companies.[32] Generally intermediary holding companies do not engage in commercial trade or businesses.[33] They are often used to expand investments in new regions.[34] Their functions are normally to acquire, manage, hold or sell investments in group companies.[35] Intermediary holding companies may be established for both tax and non-tax reasons. Some of the non-tax reasons could be: to avoid exchange controls in the investor's country of residence; to raise finance for the other subsidiaries on the strength of the intermediary holding company's balance sheet;[36] or for asset protection purposes where this could reduce the risk of expropriation in the investor's country.[37] Intermediary holding companies could also be set up to ensure the structural consolidation of the companies in the group so as to achieve centralised legal control in a geographical region or consolidation under one legal entity on a foreign stock exchange.[38]

The above non-tax reasons for setting up intermediary holding companies are often considered in conjunction with the fiscal advantages offered by the relevant country in order to maximise profits. This is especially so where the investor's country of residence is a high tax country. Thus, intermediary holding companies are often set up in low tax countries where capital gains and

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[29]Oliver and Honiball n 10 above at 697.
[30]Katz Commission Report n 19 above par 9.32.
[31]Olivier and Honiball n 10 above at 689.
[32]Mazansky n 26 above at 3; Legwaila 'Intermediary holding companies and group taxation' (2010) 43 *De Jure* at 309.
[33]Olivier and Honiball n 10 above at 690; Mazansky n 26 above at 3.
[34]Legwaila n 31 above at 314.
[35]Olivier and Honiball n 10 above at 690; Mazansky n 26 above at 3.
[36]Olivier and Honiball n 10 above at 690.
[37]Rapakko n 28 above at 19-20; Olivier and Honiball n10 above at 690.
[38]Olivier and Honiball n10 above at 691.

dividends can be accumulated and reinvested rather than being repatriated to the country of parent company where they would be taxed.[39] Generally, the key fiscal attributes of jurisdictions considered ideal for setting up intermediary holding companies are:

- The absence of tax or low tax on dividend income and other income received by the intermediary holding company from the foreign subsidiaries.[40]
- The absence of controlled foreign company legislation (discussed below).
- The absence of exchange controls.
- An efficient local tax rulings system
- The presence of tax treaties that offer favourable withholding tax reductions on dividends, royalties or interest from foreign subsidiaries.
- The absence of capital gains taxes on the disposal or deemed disposal of investments.[41]

3.2 Headquarter companies

A headquarter company is a type of intermediary holding company with special management functions that are not necessarily carried out by intermediary holding companies. Thus, whereas headquarter companies are intermediary holding companies, intermediary holding companies are not necessarily headquarter companies. In certain multinational group structures, sometimes a headquarter company 'may or may not be the same company as the intermediary holding company of the group'.[42] The main purpose of a headquarter company within a multinational group of companies is to oversee, supervise and co-ordinate the administrative and management activities of the group's subsidiaries in a particular region.[43] This could cover the full range of administrative and management functions associated with a head office, such as tax management, internal auditing, treasury, public relations, market research, insurance and accounting.[44]

Many countries have special headquarter tax regimes aimed at attracting multinational companies to set up administrative and management centres for the business activities of the group in a given region.[45] Since the activities or

[39] Rapakko n 28 above at 19-20; Olivier and Honiball n 10 above at 690; Mazansky n 26 above at 3.
[40] Rapakko n 28 above at 20-21.
[41] Oliver and Honiball n 10 above at 697; Katz Commission Report n 19 above par 7.1.4.
[42] Oliver and Honiball n 10 above at 844.
[43] *Ibid*
[44] Legwaila 'The tax treatment of holding companies in Mauritius: Lesson for South Africa' (2011) 23 *SA Merc LJ* at 2.
[45] Spitz *International tax haven guide* (1999) at 45.

functions of headquarter companies are typically labour intensive, headquarter companies are often located in jurisdictions with low tax rates so that the multinational company can achieve economies of scale and other commercial benefits.[46] Thus, apart from the fiscal attributes discussed above that are conducive to the setting up of intermediary holding companies in general, the key fiscal attributes of a jurisdiction which can be a suitable location for headquarter companies are:

- The absence of tax on head office management services rendered to the multi-national group; and
- The absence of tax on the remuneration of employees in other jurisdictions who work exclusively in those jurisdictions for a certain minimum period.[47]

4 The international fiscal environment in which South Africa is competing

From the above it is clear that for South Africa to develop a fiscal regime which is favourable towards foreign investments, it must relax its tax laws governing international transactions. However, a balance has to be maintained to ensure that the country does not engage in harmful tax practices which have been criticised by organisations such as the OECD.[48] Often these are practices carried out by low tax and tax haven jurisdictions.[49] In 2000 the OECD noted in its progress report on the identification and elimination of harmful tax practices, that holding company regimes and similar preferential tax regimes[50] do not constitute harmful tax practices. However, it observed that such regimes may constitute harmful tax competition.[51] The OECD examined holding company regimes in countries such as Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Luxemburg, Netherlands, Portugal, Spain and Switzerland,[52] but has not yet released a report on its investigations into whether any of these holding company regimes are potential preferential tax

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[46]Olivier and Honiball n 10 above at 690.

[47]Katz Commission Report n 19 above par 7.1.5.

[48]OECD *Harmful tax competition: An emerging global issue* (1998) at 13.

[49]A tax haven is described as a jurisdiction actively making itself available for the avoidance of tax that would have been paid in high tax countries. OECD *Issues in international taxation No 1: International tax avoidance and evasion* (1987) at 20; Ginsberg n 22 above at 5-6; Roper and Ware *Offshore pitfalls* (2000) at 5; Mazansky n 24 above at 1.

[50]These regimes are characterised by having no or low effective tax rates on income; the regimes are ring-fenced and there is a general lack of transparency and effective exchange of information with other countries. See OECD *Harmful tax competition report* n 48 para 75; see also Spitz and Clarke *Offshore service* (2002) at OECD/3.

[51]OECD *Towards global tax co-operation – Report on the 2000 Ministerial Council Meeting and recommendations by the Committee on Fiscal Affairs: Progress in identifying and eliminating harmful tax practices* par 12.

[52]Olivier and Honiball n 10 above at 703.

regimes that constitute harmful tax competition.[53] It can thus be concluded that since the OECD has not yet reached a decision on this matter, South Africa's endeavours in creating such a regime would not be in conflict with international expectations.

Nevertheless, given the advantages that countries derive from foreign investments, it would be presumptuous to think that South Africa is the only country desiring to position itself as a base for further investment in Africa. As pointed out above, South Africa faces competition from countries like Mauritius and Botswana (also located in the Southern African region) that have for years developed fiscal policies which would enable them to be bases for foreign investment into Africa. The focus will now shift to a description of the fiscal policies of these two countries and their success story, if indeed they have been successful, in order to determine whether South Africa's fiscal policies (discussed below) are effective in attracting base companies in light of the competition it faces.

4.1 Mauritius

Mauritius is a low tax country located in the Southern African region which has for decades aggressively advertised itself as a favourable jurisdiction through which investments in Africa can be channelled.[54] Since the 1970s, Mauritius has advertised itself as a tax-free zone which offers attractive fiscal incentives for foreign investors and thus encourages industrial development.[55] Companies based in Mauritius are generally subject to nil or low taxes and they benefit from the 'duty-free access to the European Union under the Lomé Convention, and the preferential trade agreements with several African countries'.[56] Indeed Mauritius is considered an established treaty haven for various offshore activities, especially from India, China and South Africa.[57]

In 1992, Mauritius formed the Offshore Business Activities Authority (MOBAA) that regulated a favourable fiscal environment for the establishment of foreign companies in Mauritius, with permission to access the Mauritius treaty network.[58] In 2001, MOBAA was phased out and the Financial Services Development Act 2001 was enacted in terms of which, the Financial Services Commission and an Advisory Council were established to monitor the country's offshore business

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[53] *Ibid*.
[54] Legwaila n 44 above at 1.
[55] Schulze 'The free-trade programmes of Namibia and Mauritius and the latest developments in Europe: Lessons for South Africa" (1999) 32 *CILSA* at 45.
[56] *Ibid*.
[57] Rohatgi n 11 above at 284.
[58] Hampton and Abbot *Offshore finance centres and tax havens: The rise of global capital* (1999) at 232; Rohatgi n 11 above at 282.

activities.[59] Under the 2007 Financial Services Act, foreign investors can set up Global Business corporations which can be licensed as Global Business Licences (GBL1 or GBL2 companies).[60] Corporate income tax on any of these companies is currently levied at 15% (reduced from 25% in 2007).[61] Unlike the GBL2 companies which are not resident in Mauritius, the GBL1 companies are resident in Mauritius and for are very popular for setting up headquarter companies, which can also make use of Mauritius's tax treaty network. GBL1 Companies are exempt from tax on dividends distributed. Interest income that a GBL1 company pays to non-residents out of its foreign source income is also exempt from tax.[62] The Mauritian legislation grants generous tax credits to GBL1 companies so as to encourage foreign investment. These include a generous foreign tax credit (to relieve the double taxation of income), which is the lower of the Mauritian tax and the foreign tax.[63] The foreign tax credit is presumed to be 80% of the Mauritian tax that is chargeable on foreign source income. This tax treatment essentially reduces the effective foreign tax credit rate to 3% of the chargeable income.[64] Mauritius also grants tax sparing credits to encourage foreign investment. Basically, the tax sparing credit presumes that 20% of the foreign taxes are not taxed.[65] Companies incorporated in Mauritius are also not subject to dividend withholding taxes or capital gains taxes.[66]

Mauritius has been a successful base for foreign investment into the African and Asian continents because it regularly reviews its tax system to make it an even more attractive destination for foreign investors. Its membership of regional bodies, such as the South African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA), and its extensive tax treaty network, particularly with African and Asian countries, has encouraged foreign investors from those regions to set up holding companies there.[67]

4.2 Botswana

Botswana is another country in the Southern African region which is steadily becoming a destination for a number of foreign investors who would like to expand

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[59]Lowtax Network (BVI) Ltd 'Mauritius: Offshore business sectors' available at http://www.lowtax.net/lowtax/html/jmuobs.html (accessed 2 June 2009).
[60]Oleynic *Mauritius tax guide* (2006) at 43-4.
[61]Legwaila n 44 above at 3.
[62]Legwaila n 44 above at 10.
[63]Section 77 of the Mauritius Income Tax Act of 1995; Ernest and Young *The 2011 worldwide corporate tax guide* (2011) at 715; Legwaila n 44 above at 10.
[64]Ernest and Young n 63 above at 715.
[65]Legwaila n 44 above at 10.
[66]Oliver and Honiball n10 above at 694.
[67]Mauritius Offshore Business Activities Authority (MOBAA) 'Mauritius: A sound base for the new millennium" (5 July 1999). Available at http://www.mondaq.com/article.asp?articleid=7371&searchresults=1 (accessed 2 June 2009). On MOOBA see also Schulze n 54 above at 185-186.

their investments into the rest of Africa. Botswana is one of the solid, growing economies in the Southern African region.[68] In 2003 the country formed the International Financial Services Centre (IFSC) with the aim of establishing and developing Botswana as 'a world class hub for cross border financial and business services into the rest Africa'.[69] It has succeeded in providing a base for companies, which have operated successfully in the Southern African region, as well as internationally.[70] The IFCS is 'one of the key strategies that the government of Botswana has put in place to reduce the country's reliance on mineral revenues'.[71] Unlike South Africa and Mauritius, however, Botswana is a land-locked country. According to the United Nations World Investment Report,[72] this factor is rather unfavourable for attracting tangible foreign direct investment because of geographical disadvantages such as long distances from seas and ports, which increase transport costs and are often compounded by infrastructural deficiencies. However, the United Nations World Investment Report[73] also points out that a land-locked country can deal with such geographical constraints by encouraging investments in intangible products (such as services and digital products which are transferred electronically). The Botswana IFSC targets such intangible products by granting various incentives (discussed below) to companies that deal in cross-border services such as banking, insurance and investment.

Generally companies incorporated in Botswana are taxed at a rate of 5% which includes the basic rate of 15% and the additional company tax of 10%. However, IFCS companies are taxed at a discounted rate of 15%.[74] Botswana generally levies withholding taxes on interest, royalties or dividends income at a rate of 15%.[75] However, IFCS companies are exempted from withholding taxes 'on interest, dividends, management fees and royalties paid to a non-resident'.[76] IFCS companies are also exempted from value added tax and capital gains tax, while gains made by IFSC companies on the disposal of shares are also exempt from tax.[77] Botswana also offers IFSC companies a 200% tax training rebate.[78]

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[68]Botswana International Financial Services Centre 'Annual Report 2009/10' available at http://www.ifsc.co.bw/docs/ifsc_annualreport_2010.pdf (accessed 1 December 2011); Low ax: Global Tax and Business Portal 'Botswana low-tax legal and tax regimes' available at http://www.lowtax.net/lowtax/html/botswana/jbolltr.html (accessed 11 January 2012).
[69]Botswana International Financial Services Centre n 68 above at 3.
[70]*Ibid*.
[71]*Ibid*.
[72]United Nations Conference on Trade and Development 'World investment report (2010)' at 64-65 available at http://www.unctad.org/en/docs/wir2010_en.pdf (accessed 2 December 2011).
[73]*Ibid*.
[74]Ernest and Young n 63 above at 129; Low Tax: Global Tax and Business Portal n 67 above.
[75]Ernest and Young n 63 above at 128.
[76]Botswana International Financial Services Centre n 68 above at 3.
[77]*Ibid*.
[78]*Ibid*.

Although Botswana does not have an extensive double taxation treaty network when compared to Mauritius and South Africa, IFSC companies have access to the tax treaties that Botswana has in place, and where Botswana has no treaty with a particular country, it offers IFSC companies credits for any withholding taxes (of up to 15%) levied by that country.[79] The Botswana government is also putting in place arrangements to advance the countries double taxation treaty network.[80] Botswana IFSC companies are permitted to denominate their capital in internationally recognised currencies. This prevents losses that could be incurred as a result of exchange rate fluctuations. In addition to the above fiscal advantages, Botswana does not have exchange controls which can hinder the transfer and repatriation of funds across borders.[81] Aware that South Africa has embarked on a headquarter company regime (described below), Botswana has become even more vigilant in establishing itself as an IFSC to stand the challenging competition that South Africa may pose.[82]

5 South Africa

In 1997 the Katz Commission pointed out that South Africa is well positioned as a head office, finance, or management company location for investment into Africa north of its borders due to the country's relatively developed financial structure and other infrastructural advantages.[83]

As historically the country's tax laws have not been conducive to setting up such companies, the Katz Commission recommended that there was need for legislation in South Africa to provide statutory commitment to the establishment of holding companies and that a favourable regime for corporate headquarter and holding companies should be enhanced through appropriate income tax exemptions to such companies.[84] Following up on this recommendation, South Africa created the headquarter company regime in 2010.[85] As discussed below, this was the second headquarter company regime adopted by South Africa. The first was established in 2003 and repealed in 2004 in terms of sections 12(1)(g) and (l) of the Revenue Laws Amendment Act 45 of 2003.

It should, however, be recalled that when the Katz Commission[86] recommended in 1997 that South Africa needed to create a fiscal regime which would attract

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[79]Botswana International Financial Services Centre n 68 above at 13.
[80]*Ibid*.
[81]Botswana International Financial Services Centre n 68 above at 3.
[82]*Id* at 13.
[83]Katz Commission Report n 19 above para 2.2.5.
[84]*Id* par 9.32.
[85]Taxation Laws Amendment Act 7 of 2010.
[86]Katz Commission Report n 19 above par 2.2.2.

regional investment, South Africa's income tax laws were based on the principle that taxes would be levied only on income sourced in South Africa.[87] The Katz Commission Report stated that:

> the source based system would make South Africa an ideal location from a tax viewpoint, for the location of headquarter companies, finance companies, or with minor concessions even management companies, for investment into Africa north of our borders which would not only benefit South Africa itself, but the entire region.[88]

However, the then predominant use of the source basis of taxation opened up numerous loopholes for offshore tax avoidance since income was taxed only when it was generated in South Africa.[89] It was thus necessary gradually[90] to introduce the residence basis of taxation.[91] The latter was adopted from the years of assessment commencing 1 January 2001.[92] Since then, South African residents have been taxed on their world-wide income,[93] while non-residents are taxed on a source basis.[94]

The Katz Commission, however, warned that the residence basis of taxation would not be suitable for foreign companies wishing to base themselves in South Africa.[95] This is because the application of the residence basis of taxation implied that South Africa also had to promulgate legislation to combat international tax avoidance. Examples include: controlled foreign company legislation, as well as transfer pricing and thin capitalisation measures. However, as discussed below, such legislation would hinder foreign investment. When the headquarter company regime was adopted in 2010, it became necessary for the law-makers to relax the way the international tax avoidance legislation applied to headquarter companies in order to encourage the basing of foreign investments in South Africa.

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[87] Under the source principle of taxation, persons are taxed on income that originates within the territorial jurisdiction or geographical confines of the country, irrespective of the taxpayer's country of residence. Meyerowitz *Meyerowitz on Income Tax* (2006-2007) par 7.3.

[88] Katz Commission Report n 19 above par 3.1.4.1.

[89] Ginsberg n 20 above at 594-595.

[90] Whereby the source basis of taxation was applied on active income, and deeming provisions (based on the residence principle) were applied on passive income. See Ginsberg n 20 above at 597.

[91] Under the residence principle of taxation, residents are taxed on their worldwide income regardless of its source. See Meyerowitz n 87 above par 7.1; Olivier 'Residence-based taxation' (2000) 1 *South African LJ* at 20.

[92] Ushered in by Revenue Laws Amendment Act 59 of 2000 (the Amendment Act) which amended the Income Tax Act.

[93] Section 1 of the Income Tax Act.

[94] Meyerowitz n 87 above par 7.3; Olivier and Honiball n 10 above at 52; Huxham and Haupt *Notes on South African income tax* (2007) at 294.

[95] Katz Commission Report n 19 above para 7.1.2.

5.1 The meaning of a headquarter company

The Taxation Laws Amendment Act 7 of 2010, introduced the definition of a 'headquarter company' in section 1 of the Income Tax Act.[96] Basically, a headquarter company must be resident in South Africa. Section 1 of the Income Tax Act, defines the term 'resident' with reference to persons other than natural persons (for instance companies) if they are incorporated, established or formed in South Africa,[97] or if they have a 'place of effective management'[98] in South Africa. If a company is deemed a resident of another country in terms of a double-taxation agreement which South Africa has signed with that country, the company is deemed not to be a resident of South Africa.[99] If a headquarter company is resident in South Africa, it is taxed on its worldwide income and it is entitled to make use of South Africa's treaty network for purposes of eliminating any double taxation of income.[100]

In terms of section 1 of the Income Tax Act, as amended by the Taxation Laws Amendment Act 24 of 2011, a 'headquarter company' is defined as any company which has made an election in terms of section 9I. This section provides that the headquarter company regime is voluntary and any company that is resident in South Africa and complies with the criteria set in the section, can elect to be a headquarter company for a year of assessment. In terms of section 9I(1), the election has to be made annually in the prescribed form and manner indicated by the commissioner. Further, in terms of section 9I(3) the election is only valid from the beginning of the year for which it is made. The criteria that have to be satisfied when the election is made are:

First, there has to be minimum participation by the shareholders. In effect, each shareholder of the holding company (whether alone or together with any other company forming part of the same group of companies as that shareholder) must hold 10% or more of the equity shares and voting rights in that company.

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[96]The headquarter company definition was introduced in the Income Tax Act in terms of section 6(1)(o) of the Taxation Laws Amendment Act 7 of 2010. The definition was subsequently amended in terms of s 9I of the Taxation Laws Amendment Act 24 of 2011.

[97]Although the Income Tax Act does not define the terms 'incorporated', 'established', or 'formed'. In terms of section 13 of Companies Act 71 of 2008 a company comes into existence after the Commissioner of the Companies and Intellectual Property Commission has accepted a Memorandum of Incorporation and a Notice of Incorporation submitted by the company's founders.

[98]The concept 'place of effective management' is not defined in the South African Income Tax Act. It is, however, commonly used in double taxation agreements as a 'tie-breaker' criterion for dual resident entities. See art 4(3) of the OECD Model Tax Convention on Income and on Capital (2008 condensed version).

[99]Meyerowitz n 87 above par 5.19, Huxham and Haupt n 94 above at 349.

[100]Olivier and Honiball n 10 above at 711.

Secondly, there is the so-called 80-10 asset test. This test requires that at the end of the relevant year of assessment and of all previous years of assessment, 80% of the total costs of the assets of the headquarter company (in the form of debt, equity or licenced intellectual property) must be attributed to any foreign company in which that company (whether alone or together with any other company forming part of the same group of companies as that company) held at least 10% of the equity shares and voting rights. In determining the total assets of the company, any amount in cash or in the form of a bank deposit payable on demand must not be taken into account.

The third requirement is the gross income test. This test requires that, if the gross income of the company (excluding exchange differences determined in terms of section 24I) for the year of assessment exceeds R5 million, 50% or more of this gross income should consist of amounts in the form of one or both of the following:

- any rental, dividends, interest, royalties or service fees received from a foreign company in which the company holds at least 10% of the equity shares and voting rights or;
- any proceeds of any interest in equity shares in the foreign company or the disposal of any intellectual property as defined in section 23(i), which was licensed by the company to a foreign company, both in respect of which the company at least 10% of the equity shares and voting rights.

The gross income test must be met at the end of the year of assessment. However, section 9I provides that if a company's gross income is less than five million, it can still elect to be classified as a headquarter company even if its gross income does not consist 50% or more, or rentals, dividends, interest, management fees etc. Provided that it complies with the minimum participation shareholding and the 80% asset requirements as set out above.

Where a South African resident company elects to be a headquarter company and it satisfies the above criteria, it qualifies for some income tax relief with regard to controlled foreign company legislation, secondary tax on companies, and the transfer pricing and thin capitalisation provisions.[101]

We shall now consider the working of each of these provisions in order to determine whether the relevant tax relief creates a fiscal environment which would be suitable for basing headquarter companies in South Africa.

[101] Stinglingh, Koekemoer, Van Schalkwyk, Wilocks, De Swardt and Jordaan *Silke: South African income tax* (2011) at 546.

5.1.1 Relief from controlled foreign company legislation

As mentioned above, companies resident in South Africa are taxable on their worldwide income. If a resident company sets up a subsidiary in another jurisdiction, the subsidiary is a separate legal entity and South Africa cannot directly tax its income until it is distributed to South African shareholders as dividends. To prevent the resulting deferral of taxes, countries often enact 'controlled foreign company' (CFC) rules which ensure that 'the undistributed income of a controlled foreign company is not deferred, but it is taxed in the hands of its domestic shareholders on a current basis'.[102]

Unilateral or bilateral measures are applied to prevent double taxation of income. In South Africa, the CFC rules as set out in section 9D of the Income Tax Act, prevent the deferral of taxes by taxing the South African owners of foreign companies on the income earned by those foreign companies, as if they had repatriated their foreign income as soon as it was earned.[103] The income that is targeted by the CFC rules generally includes passive income and diversionary income (which may arise in circumstances likely to lead to transfer pricing). There are, however, certain exclusions to the CFC rules – for example, where a taxpayer is engaged in genuine business activities in the foreign country.[104]

Even with the exclusions to the CFC rules, foreign investors often avoid setting up base companies in jurisdictions that have CFC legislation. The South African National Treasury, for instance, noted that if the headquarter regime were to be adopted with no CFC relief, the application of the CFC rules would expose foreign shareholders of a South African headquarter company to a double administrative tax burden, if their home country also has CFC rules. National Treasury also noted that it does not make sense to apply CFC rules to foreign shareholders of a South African headquarter company if most of its funds originate from abroad.[105]

Amendments were thus made to the CFC rules in 2010.[106] Before then, section 9D(1) defined a CFC as one in which one or more South African residents, directly or indirectly, hold more than 50% of the total participation rights of the company; or more than 50% of the voting rights of that foreign company are

[102]Oguttu 'The challenges e-commerce poses to international tax laws: "Controlled foreign company legislation" from a South African perspective' Part 1 (2008) 20/3 *SA Merc LJ* at 348; Arnold *The taxation of foreign controlled corporations: An international comparison* (1986) at 131; Jooste 'The imputation of income of controlled foreign entities' (2001) 118 *The South African LJ* at 473-474; De Koker *Silke on South African income tax V*ol 1 (2011) par 8.10.2; Arnold and Mclntyre *International tax primer* (2002) at 91.

[103]Jooste n 102 above at 474.

[104]The exclusions to the CFC rules are set out in section 9D(9) of the Income Tax Act.

[105]'Explanatory Memorandum on the Taxation Laws Amendment Bill of 2010' par 5.4 in Part I.

[106]Ushered in by the Taxation Laws Amendment Act 7 of 2010.

held (or exercisable) directly or indirectly by one or more residents. With effect from years of assessment commencing on or after 1 January 2011, the definition of a CFC was amended[107] to exclude headquarter companies in the determination of the participation rights and voting rights of South African residents in a foreign company if, as a resident company, it meets the criteria of a headquarter company (discussed above). This amendment ensures that foreign subsidiaries of companies that qualify as headquarter companies are not treated as CFCs if the headquarter company has significant equity interests in those foreign subsidiaries.[108]

For purposes of determining whether a foreign company is a CFC in relation to a qualifying headquarter company, the qualifying headquarter company is deemed to be a resident. In effect, its interests in the participation rights and voting rights of a foreign company are taken into account in determining whether the foreign company is a CFC.[109] This means that the CFC status of a foreign subsidiary of a qualifying headquarter company is determined based on the indirect ownership of the qualifying headquarter company's shareholders. If more than 50% of the indirect owners are South African, then the foreign subsidiary will qualify as a CFC. The net income of the CFC attributable to the resident company will then be included in the income of the shareholders of the headquarter company and not in the income of the headquarter company itself.[110]

The above amendment, which basically exempts headquarter companies from CFC provisions, is a step in the right direction in ensuring South Africa's tax regime presents a suitable base for foreign investment into Africa. Indeed, jurisdictions that are ideal locations for basing headquarter companies do not have CFC provisions.[111] One serious disadvantage, however, is that the relief measures described above do not apply to South African shareholders. This is because as soon as South African residents collectively hold more than 50% of the headquarter company, its subsidiaries are considered CFCs, not in relation to the headquarter company, but in relation to the shareholders of the headquarter company.[112] This may, therefore, compel South African investors, who would like to expand into the rest of Africa, to base their investments in countries such as Mauritius and Botswana which do not have CFC provisions.

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[107] The definition of a 'controlled foreign company' as amended by s 16 of the Taxation Laws Amendment Act 7 of 2010 is as follows: 'any foreign company where more than 50% of the total participation rights in that foreign company are directly or indirectly held, or more than 50% of the voting rights in that foreign company are directly or indirectly exercisable, by one or more persons that are residents other than persons that are headquarter companies'.
[108] 'Explanatory Memorandum on the Taxation Laws Amendment Bill of 2010' par 5.4 in Part III.
[109] *Ibid*.
[110] Section 9D(2) of the Income Tax Act. See also the 'Explanatory Memorandum on the Taxation Laws Amendment Bill of 2010' par 5.4 in Part III (C).
[111] Olivier and Honiball n 10 above at 697.
[112] *Id* at 709.

5.1.2 Relief from secondary tax on companies now replaced by dividends tax

For years of assessment before 1 April 2012, South Africa levied secondary tax on companies (STC). Basically STC was a tax payable by companies separate from, and in addition to, normal tax on companies. In terms of the STC provisions in section 64(B) of the Income Tax Act, STC was charged when a company declared a dividend.[113] It was in effect a withholding tax applicable in the context of dividends even though STC was not formally considered a tax on dividends.[114] Section 64C(2) provided for certain transactions or distributions that were deemed as dividends declared for purposes of STC. It is, however, worth noting that with effect from 1 April 2012,[115] STC has been replaced by a dividend withholding tax at a rate of 15% levied in terms of section 64D to 64N of the Income Tax Act.[116] Dividends tax applies to both resident and non-resident companies and it is charged at the shareholder level (as opposed to STC which was charged at company level). Provisions in tax treaties have applied to grant some relief for the dividend withholding tax.[117] For headquarter companies incorporated before 1 April 2012, the Income Tax Act sets out provisions for the application of STC for a limited period until it is completely phased out.

Needless to say, STC was a hindrance to the basing of foreign companies in South Africa as it was an extra tax on resident companies (when dividends were distributed to foreign investors), in addition to the corporate tax on income. Most jurisdictions with ideal headquarter and intermediary holding company regimes do not levy extra taxes when dividends are distributed to shareholders.[118]

When the headquarter company regime was created in 2010, amendments were effected to provide some STC relief for headquarter companies incorporated before 1 April 2012. Section 64B was amended[119] to provide that if a company qualified as a headquarter company; the dividends it declared were exempt

[113]However STC is not deducible from the dividend declared and it is not payable by a shareholder. A company wishing to declare a dividend would therefore have to allow for STC in determining the amount to be paid as a dividend. See Huxham and Haupt n 94 above at 236.
[114]Olivier and Honiball n 10 above at 82.
[115]Gordon 'Budget Speech 2011' at 30. Available at http://www.info.gov.za/speeches/budget /speech2011.pdf (accessed 24 January 2012).
[116]National Treasury 'Budget Review 2012' at 50 available at http://www.treasury.gov.za /documents/national%20budget/2012/review/FullReview.pdf (accessed 23 March 2012).
[117]Olivier and Honiball n 10 at 102.
[118]Rapakko n 28 above at 20-21.
[119]Section 64B as amended by s 68(1)(b) of the Taxation Laws Amendment Act 7 of 2010 states: 'There shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the secondary tax on companies, which is calculated at the rate of 10% of the net amount, as determined in terms of subsection (3), of any dividend declared by any company, other than a headquarter company, which is a resident'.

from income tax in the hands of the shareholders. However, section 64B(3A)(e), provided that a shareholder who received a dividend from a headquarter company was not allowed a deduction of the dividend in the calculation of the net dividend for STC purposes.

An equivalent to the above STC tax relief exemption also applies in the case of dividends tax which replaced STC from 1 April 2012.[120] The extension of this relief to the new dividends tax is a step in the right direction as jurisdictions which are known to be ideal locations for headquarter or intermediary holding companies, normally levy no or only a minimum tax on dividends.[121] The new dividend tax at the rate of 15% rate may attract investors from countries such as the United States of America where dividends are taxed at a high rate of 30%.[122] Nevertheless, foreign investors may opt to base their headquarter companies in countries such as Mauritius which levies no tax on dividends.[123] Alternatively, they may turn to Botswana, where IFCS companies are exempted from dividend taxes, as discussed above[124]

5.1.3 Relief from transfer pricing and thin capitalisation provisions

The term 'transfer pricing' describes the process by which 'related entities set prices at which they transfer goods or services between each other'.[125] It entails 'the systematic manipulation of prices in order to reduce profits or increase profits artificially or cause losses and avoid taxes in a specific country'.[126]

If the subsidiaries of an enterprise are resident in one country, tax authorities often face minimum transfer pricing problems, because those subsidiaries are subject to the same national law. It is in the context of multinational companies trading in various jurisdictions, that transfer pricing is most problematic[127] as

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[120]Explanatory Memorandum n 1 above par 5.4 part III; Oliver and Honiball n 10 above at 708; Mazansky n 26 above at 2.
[121]Olivier and Honiball n 10 above at 697.
[122]Ernest and Young n 63 above at 1225.
[123]Oliver and Honiball n 10 above at 694.
[124]Botswana International Financial Services Centre n 68 above at 3.
[125]Oguttu 'Transfer pricing and tax avoidance: Is the arms length principle still relevant in the E-commerce era?' (2006) 18 *SA Merc LJ* at 139. See also SARS 'Practice Note No7: Section 31 of the Income Tax Act 1962 (the Act): Determination of taxable income of certain persons from international taxation: Transfer pricing' (6 August 1999) par 2.1.
[126]Oguttu 'Transfer pricing and tax avoidance' n 125 above at 139. See also Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa 'Second Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structures of South Africa' (1995) par 1.3b; Arnold and McIntyre n 102 above at 53; Ware and Roper *Offshore insight* (2001) at 178.
[127]OECD Report of the Committee on Fiscal Affairs 'Transfer pricing guidelines for multinational enterprises and tax administrators (1994) 172 *Intertax* 318 par 12; Tanzi *Globalization, tax competition and the future of tax systems* (1996) at 6; Oguttu 'Transfer pricing and tax avoidance' n 125 above at 139.

these companies are not subject to the same tax laws.[128] Therefore, they may resort to 'fictitious transfer pricing in order to manipulate profits so that they appear lower in a country with higher tax rates and yet higher in a country with lower tax rates'.[129]

Often such distortions have an impact on the tax revenues of the jurisdictions in which the multinational companies operate.[130] To counteract this, countries promulgate legislation which prevents transfer pricing schemes. It is therefore little wonder that multinational companies choose to base their intermediary holding companies in jurisdictions with no transfer pricing rules.

In South Africa transfer pricing is dealt with under section 31 of the Income Tax Act. From years of assessment commencing on or after 1 January 2011,[131] these provisions were amended to bring them in line with international practices. They now cover both 'transfer pricing' and 'thin capitalisation' as defined below.[132] These terms were previously dealt with under separate sub-sections of section 31.

The term 'thin capitalisation' refers to the funding of a business with a disproportionate degree of debt rather than equity, in order to gain tax advantages.[133] A company is said to be 'thinly capitalised' when its equity capital is small in comparison to its debt capital.[134] The tax treatment of a company and the contributors to its capital, differ, depending on whether the capital is loan or equity capital. Interest incurred on loaned capital is usually a deductible expense in most jurisdictions (unless there are special rules to the contrary).[135] Even where a withholding tax on the interest is levied,[136] it may be subject to reduced rates if there is an applicable tax treaty.[137] If, however, the parent company were to subscribe for shares in the subsidiary company, the dividend distributions would

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[128]Arnold and McIntyre n 102 above at 54; Bischel and Feinschreiber *Fundamentals of international taxation* (1985) (2nd ed) at 27.
[129]Oguttu 'Transfer pricing and tax avoidance' n 125 above at 140; Ginsberg n 22 above at 20; Tanzi n 127 above at 7.
[130]SARS *Practice Note No 7* n124 above par 2.2; Oguttu 'Transfer pricing and tax avoidance' n 125 above at 140.
[131]Taxation Laws Amendment Act 7 of 2010.
[132]Both the OECD and UN Model Tax Conventions deal with thin capitalisation as part of the transfer pricing rules. See art 9 of the OECD Model Tax Convention.
[133]The *Second Interim Report of the Commission of Inquiry into Certain Tax Structures of South Africa: Thin capitalisation rules* (1995) par 1.1.
[134]*Ibid*.
[135]Tomsett *Tax planning for multinational companies* (1989) at 140; The 'Second Interim Report of the Commission of Inquiry into Certain Tax Structures of South Africa' par 1.1; Ware and Roper n 126 above at 178.
[136]OECD *Issues in international taxation* No 1 n 49 above at 8-9.
[137]*Ibid*.

not be deductible in most jurisdictions. Accordingly, income earned by the subsidiary company and distributed to its shareholders (parent company) will be subject to two levels of tax: the corporation tax, when the income is earned by the corporation, and shareholder tax, when the income is distributed to the shareholders as a dividend. The dividend may even be subjected to a withholding tax depending on the applicable tax treaty.[138] It is thus clear that when a company is funded by debt capital, it can repay the loan without incurring tax. However, a company funded by equity capital may not be able to repay equity investments without incurring a taxable dividend. It is therefore more advantageous (from a tax point of view) for a company to be financed by loan capital than by equity capital.[139]

Often countries enact debt/equity or thin capitalisation provisions[140] in order to limit the deductibility of interest on the excessive debt funds[141] which could result in tax advantages as explained above.[142] The effect of the application of thin capitalisation rules is generally that excessive interest is not deductible. In some countries it is treated as a dividend.[143] The thin capitalisation provisions often extend to 'back-to-back loans' where taxpayers channel inter-company loans through international banks and other financial intermediaries into subsidiaries incorporated in tax haven jurisdictions as collateral for loans to other foreign subsidiaries.[144]

Needless to say, thin capitalisation rules can have a serious impact on foreign investors if the funding of its foreign operations is heavily taxed. As many foreign investors mainly fund their subsidiary companies with back-to-back loans, often the application of thin capitalisation rules to such loans could leave the subsidiary companies with non-deductible interest payments owed to their parent companies.[145]

It is thus no wonder that multinational companies will often choose to base their holding companies in jurisdictions with no thin capitalisation provisions.

In South Africa, the now combined transfer pricing and thin capitalisation[146] provisions in section 31 focus on cross-border transactions, operations, schemes, agreements or understandings between connected persons. If the

[138]Ware and Roper n 126 above at 178.
[139]Tomsett n 135 above at 141; Arnold and McIntyre n 102 above at 72-73.
[140]*Ibid*.
[141]De Koker n 102 above at 17.54
[142]Arnold and McIntyre n 102 above at 72-73.
[143]*Ibid*.
[144]Diamond and Diamond *Tax havens of the world* (2002) at glossary 1
[145]Explanatory Memorandum n 1 par 5.4 Part II.
[146]The section was amended by the Taxation Laws Amendment Act 7 of 2010

terms or conditions made or imposed by the connected persons differ from the terms and conditions that would have otherwise existed between independent persons acting at arm's length, and the difference confers a South African tax benefit on one of the parties, the taxable income of the parties that have benefited must be calculated as if the terms and conditions had been at arm's length. Generally, a headquarter company should be subject to the transfer pricing and thin capitalisation rules in the case of excessive financial assistance[147] or if it is granted at a non-arm's length rate. The headquarter company would thus not be granted a deduction for the portion of the interest that it incurs in respect of that foreign financial assistance.

In order to bring the transfer pricing and thin capitalisation rules in line with the headquarter company regime, section 31(4) was added to the Income Tax Act by the Taxation Laws Amendment Act 7 of 2010. In summary, section 31(4)[148] provides that financial assistance, for example interest-free loans, to foreign companies (in which a headquarter company holds an interest of at least 20%) will not be subjected to the transfer pricing and thin capitalisation rules. Thus, the rules will not apply in instances of back-to-back, cross-border loans involving the headquarter company. In addition, the foreign creditors of the headquarter company will be exempt from withholding tax on interest in respect to the back-to-back loans.[149]

Although the exclusions from the transfer pricing and thin capitalisation provisions constitutes some tax relief for headquarter companies (a positive step in making South Africa a conducive base for foreign investment into Africa) this relief is limited by section 20C which was inserted in the Income Tax Act to ring-fence interest incurred by headquarter companies.[150] Section

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[147]Section 31(1) defines 'financial assistance' to include any loan, advance or debt; or security or guarantee.

[148]Where any transaction operation, scheme, agreement or understanding has been entered into between a headquarter company and (a) any other person that is not a resident, and that transaction, operation, scheme, agreement or understanding is in respect of the granting of financial assistance by that other person to that headquarter company, this section does not apply to so much of that financial assistance that is directly applied as financial assistance to any foreign company in which the headquarter company directly or indirectly (whether alone or together with any other company forming part of the same group of companies as that headquarter company) holds at least 10% of the equity shares and voting rights; or (b) any foreign company in which the headquarter company directly or indirectly (whether alone or together with any other company forming part of the same group of companies as that headquarter company) holds at least 10% of the equity shares and voting rights and that transaction, operation, scheme, agreement or understanding comprises the granting of financial assistance by that headquarter company to that foreign company, this section does not apply to that financial assistance.

[149]Explanatory Memorandum n 1above par 5.4 Part III.

[150]Section 20C of the Income Tax Act inserted by s 38(1) of the Taxation Laws Amendment Act 7 of 2010.

20C which came into operation from 1 October 2011,[151] provides that although interest paid by a headquarter company will be exempt, this exemption is limited to interest received or accrued from a loan that is part of a back-to-back arrangement with the headquarter company acting as a cross-border intermediary borrower and on-lender.[152] In effect, interest deductions will only be granted in respect of the foreign loans granted to the foreign subsidiaries in which the headquarter company holds at least 20% of the equity shares and voting rights.[153] It should be noted that section 20C at present still refers to 20% equity shares and votes. This section needs to be amended to reflect the 10% equity shares and votes introduced by section 9I of the Taxation Laws Amendment Act 24 of 2011 as discussed above. Nevertheless, the above limitation may compel investors to base their investments in countries such as Mauritius and Botswana, which do not have transfer pricing and thin capitalisation provisions.

5.1.4 Relief from some capital gains tax provisions

Many countries impose capital gains tax (CGT) on the disposal of investments and also on deemed disposals, such as where tax residence is terminated.[154] Foreign investors would thus prefer to locate their base companies in countries that do not levy CGT.[155]

In South Africa, paragraph 2 of the Eighth Schedule to the Income Tax Act provides that a South African resident is subject to CGT on the disposal[156] of

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[151] 20C (1) For the purposes of this section, 'financial assistance' means financial assistance contemplated in section 31(1).

(2) Where a headquarter company has during any year of assessment incurred any interest in respect of any financial assistance granted to that headquarter company by a person that is not a resident, the amount of the interest in respect of which a deduction is allowable to that headquarter company in that year of assessment is limited to so much of the amount of interest received by or accrued to the headquarter company as relates to any portion of that financial assistance that is directly applied as financial assistance to any foreign company in which the headquarter company directly or indirectly (whether alone or together with any other company forming part of the same group of companies as that headquarter company) holds at least 20% of the equity shares and voting rights.

(3) Any amount that is disallowed as a deduction in any year of assessment of a headquarter company in terms of subsection (2) must be –

(i) carried forward to the immediately succeeding year of assessment of the headquarter company; and

(ii) deemed to be an amount of interest actually incurred by the headquarter company during that succeeding year in respect of financial assistance granted to that headquarter company by a person that is not a resident.

[152] Explanatory Memorandum n 1 above par 5.1 Part III (C).

[153] *Id* par 5.4 Part III (E); Mazansky n 26 above at 1.

[154] Paragraph 12(2(a) of the Eighth Schedule to the Income Tax Act 58 of 1962.

[155] Oliver and Honiball 10 at 694.

[156] In terms of par 11(1) of the Eighth Schedule to the Income Tax Act, a 'disposal' is defined as 'any event, act, forbearance or operation of law, which results in the creation, variation, transfer, or extinction of an asset'. This would include a sale or a donation of an asset.

any asset[157] whether situated in or outside the Republic.[158] Since a headquarter company is considered a resident of Republic, it would be liable for CGT on the disposal or deemed disposal of its worldwide assets. Section 9H of the Income Tax Act provides that once a company becomes a headquarter company, it is deemed to have disposed of all its assets at their respective market values and to have immediately reacquired those assets at the respective market values. There are, however, certain exclusions to CGT.[159] The exclusion that is relevant to the discussion at hand relates to the disposal of equity shares in a foreign company, if a person (together with any other company in the same group of companies) immediately before that disposal:

- held at least 20% of the equity shares (and voting rights) in that foreign company[160] and
- that person held the shares for a period of at least eighteen months prior to that disposal, alone or as part of the same group of companies, and
- the shares have been disposed of to a non-resident, or
- the shares have been disposed of to a controlled foreign company in relation to that person or to any controlled foreign company in the same group of companies, or
- if there has been a deemed disposal in terms of paragraph 12(2)(a) where the foreign company ceases to be a controlled foreign company.[161]

In line with the headquarter company regime, this exclusion has been amended to provide that the term 'foreign company' (as used in the paragraph) refers to a 'foreign company', as defined in section 9D, or to a headquarter company.[162] This implies that since a headquarter company is deemed to be a foreign company, CGT will not be levied on the disposal of a shareholder's interest to a non-resident in terms of paragraph 64B.[163]

Apart from this relief measure, headquarter companies will still be liable to CGT in respect of all other disposals. For instance, CGT will still be payable when the headquarter company disposes of investments or on the termination of tax

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[157] For CGT purposes, an 'asset' is defined in par 1 of the Eighth Schedule to the Income Tax Act as including property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coins made mainly from gold or platinum, and any right or interest of whatever nature to or in such property.

[158] In contrast, a non-resident is subject to CGT on the disposal of any immovable property situated in the Republic, or any interest or right in immovable property situated in the Republic, as well as any asset of a permanent establishment of the non-resident in the Republic. See par 2(2) of the Eighth Schedule to the Income Tax Act 58 of 1962.

[159] CGT exclusions are set out in pars 52-64B of the Eighth Schedule to the Income Tax Act.

[160] This excludes a hybrid equity instrument in terms of section 8E of the Income Tax Act.

[161] Paragraph 64B(2) of Eighth Schedule to the Income Tax Act.

[162] Paragraph 64B of Income Tax Act as amended by s 108(1)(b) of the Taxation Laws Amendment Act 7 of 2010.

[163] Oliver and Honiball n 10 above at 708; Mazansky n 26 at 2.

residence.[164] From 1 March 2012, the effective rate of CGT levied on South Africa companies was increased from 14% to 18,6%.[165] Although this increase may discourage foreign investment in the country, the rate is still rather low and could attract investors from developed countries where CGT is levied on companies at the income tax rate. These countries include the United States at a rate of 38,5%[166] and the United Kingdom at a rate of 28%.[167] Nevertheless, as jurisdictions that are ideal locations for intermediary holding companies normally levy no tax or minimal tax on capital gains,[168] foreign investors may opt to base their headquarter companies in countries such as Mauritius (which does not levy CGT)[169] and also Botswana (where IFCS companies are exempted from CGT).[170]

6 Other limitations of South Africa's headquarter company regime

6.1 No favourable tax treaty provisions to limit withholding taxes

A withholding tax is a tax which the payer of interest, dividends or royalties must withhold from each such payment and pay over to the tax authorities.[171] The majority of countries in the world impose significant withholding taxes on interest, dividends and royalties paid to non-residents.[172] For multinational companies involved in cross-border investments, withholding taxes can cause a major loss of revenue.[173] High withholding taxes can, however, be reduced if there is a favourable double taxation agreement between the investor's country and the country of investment.[174]

Headquarter companies in South Africa are currently fully taxed on the interest, dividend and royalty income paid by their foreign subsidiaries.[175] A matter that would be of concern to foreign investors is whether such income, earned by foreign subsidiaries that is also taxable in the country where the foreign subsidiary is based, would be granted double tax relief in South Africa where there is an applicable tax treaty. The headquarter company regime does not seem to be advantageous in this regard.

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[164]Oliver and Honiball n10 above at 694.

[165]National Treasury 'Budget review 2012' at 51 available at http://www.treasury.gov.za /documents/national%20budget/2012/review/FullReview.pdf (accessed 29 March 2012)

[166]*Id* at 1236.

[167]*Id* at 1177.

[168]Olivier and Honiball n 10 above at 697.

[169]Ernest and Young n 63 above at 713.

[170]Botswana International Financial Services Centre n 68 above at 3.

[171]Spitz and Clarke (2002) 66/March *Offshore Service* at LEX/26.

[172]*Ibid*.

[173]Rohatgi n 11 above at 206.

[174]Spitz and Clarke n 171 above at LEX/26; Glautier and Bassinger *A reference guide to international taxation: Profiting from your international operations* (1987) at 263.

[175]Mazansky n 26 above at 3.

Generally, in order to prevent double taxation of income, countries have bilateral[176] and unilateral tax relief measures. In South Africa, a unilateral tax relief measure is found under section 6*quat*(1) of the Income Tax Act, which grants a special rebate, or unilateral tax credit, to resident taxpayers for foreign taxes paid by residents in respect of income from sources outside of the Republic. Section 6*quat*(1) does not, however, allow a tax credit for foreign taxes levied on South African source income. Consequently interest, royalties or dividends, which may be subject to foreign withholding taxes but which are sourced in South Africa, will not qualify for the section 6*quat*(1) credit. It is, however, notable that where a section 6*quat*(1) credit cannot be claimed, section 6*quat*(1C) provides for a deduction for foreign tax payable in respect of foreign income received by, or accrued to, a South African resident in the course of carrying on a trade. Normally, however, foreign investors prefer the credit method of relieving double taxation. Under the 'credit method', foreign taxes paid by a resident taxpayer on foreign-source income generally reduce domestic taxes payable by the amount of the foreign tax.[177] Under the deduction method, taxpayers are allowed to take a deduction for foreign taxes paid in the computation of their taxable income.[178] In effect, foreign taxes are treated as current expenses of doing businesses or earning income in the foreign jurisdiction. For this reason, the deduction method is considered internationally as the least generous method of granting relief from international double taxation.[179] Thus, despite the availability of relief under the section 6*quat*(1C) deduction, the restriction to claim double tax relief under what is considered the most favourable 'credit method' is a major hindrance for headquarter companies. As mentioned above, jurisdictions that are ideal for basing intermediary holding companies and headquarter companies have favourable withholding taxes. Investors may thus opt to base their headquarter companies in countries such as Botswana, which (as mentioned above) offers IFSC companies credits for any withholding taxes (of up to 15%) levied by any country.[180] Mauritius also grants generous tax credits to GBL1 companies (presumed to be 80% of the Mauritian tax chargeable on foreign source income, which reduces the effective rate to 3% of the chargeable income).[181]

6.2 Currently, no tax relief for management fees

As explained above, the main function of headquarter companies is the

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[176]See art 23A and art 23B of the OECD Model Tax Convention (2008 condensed version); Arnold and McIntyre n 102 above at 30.
[177]Arnold and McIntyre n 102 above at 33.
[178]*Id* at 32.
[179]*Ibid*.
[180]Botswana International Financial Services Centre n 68 above at 13.
[181]Ernest and Young n 63 above at 715; s 77 of the Mauritius Income Tax Act of 1995;
[181]Legwaila n 44 above at 10.

performance of administrative and management functions to the group of affiliated companies in a geographical region.[182] Most of the income derived by a headquarter company during the performance of these functions would be in the form of management fees, technical fees, and interest paid by its foreign subsidiaries.[183] This explains why internationally one of the key fiscal attributes of a regime conducive to the establishment of headquarter companies is the lack of taxation, or the imposition of minimal taxes, on head office management services which have been rendered to the multi-national group.[184] Currently in South Africa headquarter companies are fully taxed on the management fees paid by their foreign subsidiaries.[185]

A matter that would be of concern to foreign investors is whether the management fees earned by foreign subsidies and taxable in the countries where they are based, would be granted some double tax relief in South Africa where there is an applicable tax treaty. Basically, if a headquarter company based in South Africa has subsidiaries in other countries, the source of management fees or technical fees is considered to be from a source in the Republic and they would be fully taxed, unless there is a specific provision in a double taxation treaty which South Africa has signed with another country, which states that those fees would be taxed in that other country.[186]

In terms of the Taxation laws Amendment Act 24 of 2011, section 6*quin* has been introduced into the Income Tax Act to provide a rebate for fees on services rendered (particularly management services) from years of assessment commencing 1 January 2012. The gist of this provision is that where tax is levied on a resident on income received by, or accrued in respect of, services rendered in the Republic, and tax is also levied or withheld by another country in respect of those services, a rebate is deducted from the normal tax payable by that resident. The rebate is the lesser of the South African tax and the foreign tax payable. The rebate is not granted where the amount is deductible from the income of the resident in terms of section 6*quart*(1C) (dealt with above). In addition, no rebate is granted if the taxpayer does not submit a declaration to the Commissioner that the amount was taxed by a foreign country. Such a declaration must be submitted within sixty days. Although section 6*quin* provides some tax relief for headquarter companies, the condition that taxpayers have to submit the declaration to the Commissioner within the period above may pose an administrative burden for investors and this could be a hindrance to setting up such companies. It has been stated above that

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[182]Oliver and Honiball n 10 above at 844.
[183]Mazansky n 26 above at 4.
[184]Katz Commission Report n 19 above in par 7.1.5.
[185]Mazansky n 26 above at 3.
[186]*Id* at 4.

jurisdictions which are ideal for setting up headquarter companies generally levy no tax (or they levy only minimal taxes) on head office management services rendered to the multi-national group. Clearly, the section 6*quin* rebate does not relieve headquarter companies of tax on management fees completely. This is because the rebate amounts to the lesser of the South African tax and the foreign tax payable. Therefore, despite this rebate, foreign investors may opt to set up headquarter companies in countries such as Mauritius (where no taxes on management fees are levied)[187] and Botswana (where ITCS companies are exempted from tax on management fees paid to a non-resident). [188]

6.3 Other taxes for which headquarter companies are liable

It has to be recognised that income taxes are levied by almost all countries, so seeking a jurisdiction that does not levy income taxes would not be the main concern of foreign investors. Rather, their concern would be the rate of the tax levied and whether the effective rate of payable tax can be reduced. In South Africa, headquarter companies are liable to pay tax on their trading income, as well as on the sale of investments and other assets held on revenue account, at the corporate rate of 28% for resident companies. This rate may attract investors from countries such as the United Kingdom, where the rate is also 28%,[189] and the United States, where the corporate rate is at a much higher rate of 38,5%.[190] However, South Africa's rate is still high compared to Mauritius where the corporate income tax is currently levied at 15% (reduced from 25% in 2007).[191] Botswana also offers a competitive rate, since the corporate rate for IFCS companies is discounted to 15%[192] (other companies pay the normal 25% corporate rate which includes the basic rate of 15% and additional company tax of 10%).[193]

It should also be noted that South Africa does not have a tax on share capital. However, South Africa has a Securities Transfer Tax which applies to the transfer of any security as defined in the Securities Transfer Act[194] at a rate of 0.25% of the taxable amount determined in accordance with the provisions of the Act.[195] Therefore, headquarter companies are liable to pay tax on the transfer of securities.

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[187]Ernest and Young n 63 above at 713.
[188]Botswana International Financial Services Centre n 68 above at 3.
[189]Ernest and Young n 63 above at 1177.
[190]*Id* at 1236.
[191]Legwaila n 44 above at 3.
[192]Ernest andYoung n 63 above at 129.
[193]*Ibid*.
[194]Act 25 of 2007.
[195]Mazansky n 26 above at 4.

6.4 *Headquarter companies do not qualify for corporate group taxation relief*

Headquarter companies do not qualify for the corporate group taxation relief which applies to company formations in terms of sections 42 to 47 of the Income Tax Act.[196] The rules in these sections allow company group restructurings and the transfer of assets between group companies with neutral tax effect.[197] These rules provide for the so called 'roll-over' relief from income tax and capital gains tax for South African resident companies when they acquire assets. The company disposing of the asset need not be a resident.[198]

For the rules to apply, the South African company must be part of a group of companies as defined in section 1 of the Income Tax Act.[199] Although headquarter companies can generally be considered as part of a group of companies, the corporate group taxation relief does not apply to headquarter companies since they are not deemed to be resident for purposes of the corporate group taxation.[200]

7 The impact of exchange controls on the headquarter companies

The discussion at hand would not be complete without reference to exchange control provisions. This is because, as mentioned above, the absence of exchange controls is one of the key attributes of an ideal location for a headquarter company. South Africa has exchange control regulations to limit and control the in- and outflow of capital[201] thereby protecting the country's foreign exchange reserves.[202] The regulations aim to control capital movements in and out of the Common Monetary Area (CMA) which consists of South Africa, Lesotho, Namibia and Swaziland.[203] The exchange control system has

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[196]Olivier and Honiball n10 above at 709.
[197]*Id* at 93.
[198]*Ibid*.
[199]The term 'group of companies' in s 1 of the Income Tax Act refers to:

> two or more companies in which one company (hereinafter referred to as the 'controlling group company') directly or indirectly holds shares in at least one other company (hereinafter referred to as the 'controlling group company') to the extent that –
> (a) at least 70 percent of the equity shares of each controlled group company are directly held by the controlling group company, one or more other controlling group companies or any combination thereof; and
> (b) the controlling group company directly holds at least 70 percent of the equity shares in at least one of the controlling group company'.

[200]Olivier and Honiball n10 above at 709.
[201]Johnson *Export/import procedures and documentation* (2002) at 22.
[202]Gidlow *The South African Reserve Bank monetary policies under Dr TW De Jongh: 1967-1980* (1995) at 180.
[203]The Common Monetary Area is a single exchange control territory so there are no exchange control restrictions among the members. See South African Reserve Bank 'Exchange control

been gradually liberalised over the past few years.[204] Currently, the exchange control regulations permit South African residents to make direct investments out of the CMA of up to R2 million.[205]

Exchange Control Circular No 37/2010[206] provides that although headquarter companies are residents for exchange control purposes, they are allowed to raise and disburse capital offshore without exchange control approval. This concession is advantageous to setting up headquarter companies in South Africa. It should, however, be noted that since headquarter companies are exchange control residents, other exchange control restrictive measures still apply to them. For example, there are restrictions against 'loop structures' whereby South African residents export capital by investing it in non-CMA jurisdictions and then re-investing it back into the CMA.[207] Exchange Control Circulars D417 and D405 provide that loop structures are a contravention of the Exchange Control Regulations.[208] These restrictions could hinder setting up headquarter companies in South Africa, which may compel foreign investors to base such companies in jurisdictions that have no exchange controls, such as Botswana[209] and Mauritius.

8 Is the headquarter company regime the right regime that South Africa should develop?

In 1997 the Katz Commission recommended that South Africa should come up with a tax regime that is a conducive base for further investment into Africa[210] and it stated that there was need for legislation in South Africa that would provide statutory commitment to the establishment of holding companies. It also affirmed that a favourable regime for corporate headquarter and holding companies should be enhanced through appropriate income tax exemptions to such companies.[211] Considering the above discussion[212] on the specific functions of headquarter companies as opposed to holding companies in general, there is no clarity in the Katz Commission Report as to whether the regime to be adopted ought to be a holding company regime or a headquarter company regime. The Explanatory Memorandum on the Taxation Laws

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manual' par D7 available at http://www.reservebank.co.za (accessed on 11 September 2011).

[204]South African Reserve Bank 'Exchange Control Manual' n 203 above par C.

[205]*Id* at par 6.1.1.

[206]Issued 27 October 2010.

[207]Olivier and Honiball n 10 above at 536; Mazansky n 26 above at 2; Khuzwayo 'FirstRand's loop legal – Dippenaar' (9 September 2007) *Business Report* available at http://www.busrep .co.za/index.php?fArticleld=4023192 (accessed on 20 December 2011).

[208]Exchange Control Regulation 10(1)(c).

[209]Ernest and Young n 63 above at 131.

[210]Katz Commission Report n 18 above par 2.2.5.

[211]*Id* at par 9.32.

[212]Paragraph 3 above.

Amendment Bill of 2011, refers to the regime as a 'regional headquarter company regime'.[213] The relevant provisions in the Taxation Laws Amendment Act 24 of 2011 also refer to 'headquarter companies'.[214] However as discussed above,[215] although headquarter companies are intermediary holding companies, not all intermediary holding companies are headquarter companies. Headquarter companies, are specifically established to carry out administrative and management functions and these companies are often set up in jurisdictions that levy nil or minimum taxes on management fees.[216] The discussion above has clearly shown that although the Taxation Laws Amendment Act 24 of 2011 provides for a section 6*quin* rebate for fees on services, this rebate is inadequate considering that countries like Mauritius and Botswana provide for no tax on management fees.

Mazansky[217] is correct in noting that South Africa's headquarter regime was wrongly named. It is submitted that the regime should rather be named an 'intermediary holding company regime', which can also be used as a gateway for expanding business operations in new markets and regions,[218] but whose functions are broad enough to cover the acquisition, management, holding or selling of investments in group companies.[219] It has been mentioned above[220] that the ideal fiscal features of a regime conducive to the formation of international holding companies include: the absence of capital gains taxes; absence of CFC legislation; absence of exchange controls; absence of tax or low tax on dividend income; and the presence of double tax agreements which limit withholding taxes on dividends.[221] Olivier and Honiball[222] are of the view that the tax relief provisions that are currently granted to headquarter companies conform more to the attributes of an ideal intermediary company regime, but they are insufficient for a headquarter company regime. I support this view.

As indicated above,[223] it has to be noted that this is not the first time that South Africa has enacted headquarter company legislation. In 2002, South Africa had provisions that dealt with international headquarter companies but these were

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[213]Explanatory Memorandum on the Taxation Laws Amendment Bill of 2011 par 4.1 in part I.
[214]See the definition of 'headquarter company' in 9I of the Taxation Laws Amendment Act 24 of 2011.
[215]Paragraph 3.2 above.
[216]Mazansky n 25 above at 4.
[217]*Ibid*.
[218]Legwaila 'Intermediary holding companies and group taxation' n 32 above at 314.
[219]Olivier and Honiball n 10 above at 690; Mazansky n 26 above at 3.
[220]Paragraph 3.1 above.
[221]Oliver and Honiball n 10 above at 697; see also Katz Commission Report n19 above at par 7.14.
[222]Olivier and Honiball n 10 above at 711; Mazansky n 26 above at 5.
[223]Paragraph 5 above.

abolished in 2004.[224] Basically, the aforementioned provisions excluded a headquarter company (as then defined[225]) from the definition of the term 'resident' in section 1 of the Income Tax Act. There were no other provisions in the Act that applied to headquarter companies. CFC and STC provisions (discussed above) which apply to residents, did not apply to the then headquarter companies as non-residents. Transfer Pricing provisions could only apply if a permanent establishment of the non-resident headquarter company was connected to a resident.[226] Since the then headquarter companies were considered non-residents they were taxable on a source basis,[227] which implied that they were taxed on certain capital gains that arose from the disposal of immovable property or any interest in such property in South Africa, and any disposal of assets attributed to their permanent establishment in South Africa.[228] And, as non-residents, the headquarter companies did not qualify for any benefits in South Africa's tax treaties which apply only to residents. In general, the old headquarter company regime was more of an intermediary holding company regime, albeit inadequate, and it did not have any tax relief measures that would have attracted the establishment of headquarter companies.[229] In 2003, due to these shortcomings, section 1 of the Income Tax Act was amended to exclude headquarter companies from the definition of 'resident' and the definition of a 'headquarter company' was deleted from the Income Tax Act.[230]

In my view, when the headquarter company regime was re-instated in 2010,[231] the legislators attempted to rectify the weaknesses of the old headquarter company regime by ensuring that headquarter companies are now considered residents as discussed above. They also promulgated measures to relieve headquarter companies from CFC, STC, transfer pricing, and some CGT provisions (as discussed above). Nevertheless, these measures are still not conducive to the establishment of headquarter companies in South Africa. Therefore, it would be better for South Africa to name its regime an 'intermediary holding company regime' which is a more general term, rather than a 'headquarter company regime', the requirements for which are more specific.

However, South Africa faces another setback. Unlike Mauritius and Botswana, which have developed and advertised fiscal policies that have enabled them to become established bases for foreign investment into Africa, South Africa's fiscal initiatives in this regard are rather overwrought. This strain has been

[224]Section 12(1)(g) and (l) of the Revenue laws Amendment Act 45 of 2003.
[225]See the old definition of 'headquarter company' in Olivier and Honiball n 10 at 704.
[226]See s 31(1) as it applied before the Taxation Laws Amendment Act 7 of 2010.
[227]See the definition of 'gross income' in s1 of the Income Tax Act.
[228]Paragraph 2 of the Eighth Schedule to the Income Tax Act.
[229]Olivier and Honiball n 10 above at 704.
[230]Section 12(1)(g) and (l) of the Revenue Laws Amendment Act 45 of 2003.
[231]Taxation Laws Amendment Act 7 of 2010.

caused by South Africa's other fiscal policies, more specifically the need to develop a robust tax policy in order to broaden the tax base and thus ensure the country's financial recovery in the aftermath of the global financial crisis.[232] In this regard, SARS has embarked on various initiatives to improve tax compliance and its ability to collect more taxes.[233] The latter include the tightening of anti-tax avoidance legislation to close up sophisticated offshore tax avoidance schemes, which cause substantial loss of revenue.[234] These initiatives are an indication of the divided focus in South Africa's fiscal policies which makes one wonder whether the country will fully realise its objective of establishing an ideal fiscal location for foreign investment in Africa.

9 Conclusions and recommendations

As has been shown above, South Africa's headquarter company regime does not adequately meet the requirements for an ideal headquarter company location. Even if certain provisions in the Income Tax Act have been amended to provide some tax relief for headquarter companies, full South African tax at the applicable rates is still payable in a number of circumstances. Internationally, headquarter companies are established to carry out administrative and managerial functions, so jurisdictions that are ideal locations for headquarter companies should levy nil or minimum taxes on management fees.[235] This is despite the rebate granted for management fees levied by other countries, as this rebate is the lesser of the South African tax payable or the foreign tax.

Therefore, one can conclude that South Africa's current fiscal environment does not compete favourably on the international scene as an attractive location for headquarter companies. It is thus recommended that the Income Tax Act should be amended and the headquarter company regime be re-named an 'intermediary company regime' rather than a 'headquarter company regime'. The tax relief provisions discussed above conform to the criteria for an intermediary company regime in many respects, but they are insufficient and inefficient for a headquarter company regime.[236]

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[232] National Treasury 'National budget – 2010 – national budget review' in chap 5 on Revenue trends and tax proposals. Available at http://www.treasury.gov.za/documents/national%20 budget/2010/review/chapter5.pdf (accessed 13 May 2011); see also Williams 'The economic downturn and the regulation of tax practitioners' (15 Feb 2010) Issue 30 *Time Newsletter* at 2.

[233] Such as the Voluntary Disclosure Programme in terms of the Voluntary Disclosure Programme and Taxation Laws Second Amendment Act 8 of 2010. The programme ran from November 2010 to 31 October 2011.

[234] National Treasury 'National budget – 2010 – National budget review' n 232 above.

[235] Mazansky n 26 above at 4.

[236] Olivier and Honiball n 10 above at 711; Mazansky n 26 above at 5.

Although South Africa's taxes may still be high compared to other low tax jurisdictions that have had intermediary holding company regimes for decades, as SARS gradually finds a balance between the need to collect more taxes by curtailing offshore tax avoidance schemes, and the need to come up with a favourable fiscal regime for base companies, more tax relief measures can be created to ensure that the country gradually becomes an ideal location for intermediary holding companies.