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# Anti-Avoidance and Tax Laws: A Case of Fiji


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## ABSTRACT

The pervasiveness of tax avoidance is undoubtedly linked to the tax policies of any country. In Fiji, residents for tax purpose have to disclose income from all sources within and outside Fiji whereas non-resident has to disclose income derived from sources in Fiji. Fiji has a comprehensive tax system put in place with tax laws continued to be amended to curb any loopholes in the system so that everyone pays their fair share of tax. Thus, this research paper applied document analysis methodology. The objective of this research was to highlight Fiji's position on tax avoidance and how has Fiji addressed such issues identified in Base Erosion Profit Shifting (BEPS). Furthermore, the paper has discussed, Fiji's tax laws relating to anti-avoidance and provide recommendations to further strengthen and protect Fiji's tax base from being eroded away through various schemes or arrangements that taxpayer's might indulge into for the purpose of paying less tax or avoiding tax. The findings indicated that Fiji's position on tax avoidance issues has remained firm, pro-active and have made substantial progress in regulatory framework and in tax compliance culture.



Keywords: Tax, Tax Avoidance, Tax Evasion, Anti-Avoidance, BEPS and Fiji Income Tax Act.



## 1. Introduction

Tax is the principle means by which a government is funded (Fulcher, 1999). Tax collection enables financial funding for government expenditures (Jaidi et al, 2013). Indeed, funding is required by government to provide public goods such as education, health services, social welfare, public safety, and infrastructure developments. However, tax avoidance has turned into an all-pervading phenomenon. Non- compliance of tax imposed openly disrupts the chain of income distribution through loss of revenues anticipated by taxes, reduction in public services and leads to other imbalances in the general flow of the economy and public welfare (Kang, 2016). Moreover, supporting an aggressive approach to avoiding taxes via artifice skews the distribution of the society's total tax burden (Raiborn et al, 2015).

During the year 2016, the Fiji Financial Intelligence Unit (FIU) identified $128 million of possible tax evasion and $81 million as funds available for possible laundering in and through the Fijian financial


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system (Bolanavanua, 2017). This signifies that taxpayers in Fiji are highly practicing tax evasion and avoidance. Fiji has a progressive tax system, which means that the more a person earns, the more income tax the person pays on that extra dollar. It is important that everyone pays a fair share of their taxes to the government so that various functions and services can be provided to the people of Fiji.

However, there are people who want to take another path so that they are able to be better off by not paying taxes or are involved into some scheme in which they are able to defeat the tax system and pay less tax to the government. Tax evasion is a term which means that a person does not pay tax to the government or is simply dodging the tax system to avoid paying tax. Defrauding government revenue promotes corruption which thwarts economic development in a country. Nations are not able to progress because the activities which are targeted to the people do not reach that certain group of people which the government is targeting. Therefore, economic development does not take place as it does not increase the standard of living for the group which is targeted by the state.

Moreover, defrauding state revenue through tax evasion or excessive artifice is not ethically and morally right. To have a balance in the economy, the government has to redistribute income by taxing high earners and distributing to low earners in form of social welfare payments. Tax avoidance through proper tax planning may be legally right because no taxpayer would want to pay tax which is higher than what they are required to pay. However, it is essential that our tax laws are as stringent as possible so that tax evasion and excessive avoidance can be minimized so that everyone pays their fair share of taxes and the government is able to carry out its functions with due diligence in advancing the country. In Fiji, tax avoidance scheme is captured under the Fiji Income Tax Act 2015 (ITA) and the Tax Administration Act 2009 (TAA). The Fiji ITA and TAA discourage taxpayers to enter into tax avoidance scheme and strongly penalize taxpayers on noncompliance.

However, successful tax avoidance scheme erodes away a country's tax revenue base. Tax issues such as Base Erosion and Profit Shifting (BEPS) has been highlighted as one of the tax agenda that is facing many countries. There are 15 action points in BEPS. Every nation would try to protect their tax revenue base from being eroded away to other nations. The tax revenue being eroded away is a form of tax avoidance. Firms or multinationals might try to shift profits to tax jurisdictions that would attract the lowest tax or to tax heaven countries where there is low or no tax at all. Some of the BEPS action points which needs to be addressed that encourage tax avoidance schemes or arrangements are income splitting, thin capitalization and transfer pricing.

Thus, this research paper aims to highlight Fiji's position on tax avoidance and how has Fiji addressed such issues identified in BEPS. Furthermore, the paper will discuss Fiji's tax laws relating to anti-avoidance and provide recommendations to further strengthen and protect Fiji's tax base from being eroded away through various schemes or arrangements that taxpayer's might indulge into for the purpose of paying less tax or avoiding tax.

## 1.1 Problem statement

Globalization is one of the causes of international tax issues. International trade is vital since all nations face scarcity of resources. Thus, international trade fosters trade and investment with Fiji and other countries as nations may not entirely be self-sufficient. Through international trade and different nations having different tax regimes, this leads to international tax challenges. As tax forms the major revenue for any government, it is vital for tax authorities to ensure that their nation's tax revenue base is not eroded away and that everyone pays their fair share of tax. The international tax issue known as Base Erosion Profit Shifting (BEPS) is a global tax issue. Fiji has addressed a number of tax issues in its domestic laws. However, Rahman (2018) stated that "recent audit showing increasing trends towards tax avoidance and evasion". Furthermore, he added that tax avoidance issues such as transfer pricing, profit-shifting and customs valuation issues are on the rise. The problem lies with tax avoidance and evasion; this is a global issue as per BEPS. How can Fiji reduce tax avoidance issues highlighted above is the basis for this research. This research aims to analyze and provide recommendations to curb tax avoidance and evasion.

## 1.2 Aim and research questions

The aim of this research paper is to analyze Fiji's stance on tax avoidance issues and provide ways to mitigate this issue. The following are research questions for this research paper:

- What is the meaning of "Anti-Avoidance or Tax Avoidance" as per the existing literatures.
- Analyzing the sections of the Fiji Income Tax Act 2015 on Anti-Avoidance.
- Analyzing the differences between the Fiji Income Tax Act 2015 and the old Income Tax Act.
- Examination of the Standard Interpretation Guidelines (SIGS) on Anti-Avoidance issued by Fiji Revenue and Customs Service.
- Tax compliance reforms in Fiji such as Tax Treaties in particular to Anti-Avoidance.
- Analyzing other tax laws such as Tax Administration Act of 2009 and the Customs Laws.
- Analyzing some local and international cases on Anti-Avoidance.
- Anti-Avoidance using business structures such as sole trader, partnerships, companies and trusts.

## 2. Literature review

Tax avoidance and evasion is not new in the discipline of tax. There has been many international research done on this topic, however, the global trend and recent tax audits show that this practice continues to occur diluting a country's tax base (Source: Fiji Revenue and Customs Service). Crivelli et al. (2016) stated that the company tax issues have grown of importance all over the world. The researcher used panel data for 173 nations over a 33 year period to study the nature, size of spillover effect through tax avoidance and its impact on revenue. The researcher found that erosion of tax base is also a great concern for developing nations apart from the advanced nations.

Jun (2017) researched on how tax incentives can be used to increase tax base of developing nations. The prevalence of tax evasion in developing nations can be reduced through the use of tax incentives to protect the revenue base of developing countries. Jun (2017) stated that nations with strong investment climates do not need tax incentives as it will be a waste, however in weak investment climates, the use of tax incentives can be advantageous. The case studies conducted in Asia confirm the effectiveness of the use of tax.

Przygoda (2018) discussed about the three major world tax scandals which happened in 2014 (Lux Leaks), 2016 (Panama Papers) and in 2017 (Paradise Papers). The tax scandals involved billions of dollars of tax revenue lost by many countries due to tax haven countries. Tax Haven countries are jurisdictions where there is very low tax or no tax at all such as Vanuatu for instance. Przygoda (2018) stated that tax haven countries were used to avoid tax and this brought public outrage since tax were avoided by renown actors and sports people who were influential. The irony here is that these influential people should be paying the greatest amount of tax and bearing the full burden of tax. However, it is these influential people who have schemed out to avoid paying huge taxes through transferring profits to low tax jurisdiction nations. Przygoda (2018) found in her research that influential companies and people took advantage of tax haven countries to avoid paying huge taxes. There is not much difference between tax evasion and tax avoidance. Przygoda (2018) used Prebisch's theory to discuss issues using real life economic examples.

Furthermore, it is these tax scandals that have prompted countries to prevent their tax revenue base from being eroded away as the main agenda for the BEPS Action points. International cooperation is necessary to curb these issues since it is a global issue and a global action is required to stop this, otherwise a country will be deprived off its tax revenue which would have been utilized to provide essential services and public goods to its people.

Cobham and Jansky (2017) stated that for developing countries, international company tax is a vital revenue source for the government. The researchers found that lower and middle income economies suffer global tax revenue losses around 500 billion US dollars as a result of tax avoidance. The research of Crivelli et al. (2016), confirmed the researcher's findings. Multinational companies contribute to global tax losses as a result of tax avoidance through profit shifting in tax haven countries.

Wagener and Watrin (2013) carried out a study to investigate whether multinational firms use complex legal structures to shift profit to avoid paying huge taxes. The researchers used a sample of European multinational companies to find a correlation between tax avoidance and the firm's value. The findings suggest that investors to avoid tax may price discount the firm's shares, if they do not understand the company's tax strategies. The study also finds that "structural complexities weakens the positive association between tax avoidance and firm value" (Wagener and Watrin, 2013). The researchers also gave a prominent example of a firm that used complex structures in shifting income to jurisdictions where there are very low tax rates. The prominent company is Google which has used the income shifting strategy better known as "Double Irish and Dutch Sandwich". There are many ways in which companies can use complex structures to shift income to other jurisdictions to avoid paying high tax. The organizational structure, tax and legal structures could be used as a basis to shift income and achieve the objectives of multinationals.

Moreover, tax authorities need to understand the relationship, the organization and links of the multinational corporations in order to detect tax strategy implemented by the corporation in the view of paying less tax. This is a complex area and understanding the mechanics of how firms are able to meet its objective requires experience and understanding of the organization which may be very difficult to achieve.

Holland and Vann (1998) stated that "tax planning can lead to considerable revenue leakage". Though tax planning is legal to some extent however, excessive tax planning is avoiding paying tax. A tax dollar not collected means that that dollar cannot be used to provide essential government services to its people. A country should prevent double taxation from happening; however, policies must be put in place to ensure that double non-taxation does not happen.

Cobham (2005) stated that the flow of money within the nation is vital for long term development financing. "Tax evasion and avoidance are important as they affect both the volume and nature of government finances. The researcher finds that approximately 385 billion US dollars are lost in tax revenue due to tax avoidance schemes. Cobham (2005) stated that tax avoidance and evasion has become a hot issue in the taxation discipline as billions of dollars are lost because multinationals use tax havens to avoid paying higher taxes. Corporations such as Enron and WorldCom's tax practices have gained public interest as a result of corporate collapses.

Cox (2003) explained that corporations and individuals try to avoid or minimize their tax burden. The article by Cox (2003) assessed alternatives to traditional tax and tax havens. Freedman (2006) examined tax avoidance and corporate governance. Specific anti-avoidance rules are of more importance than general anti-avoidance rules. The anti-avoidance rules captured in the regulations can provide some means of tackling tax avoidance. Prebble (2017) discusses about general anti-avoidance rules in his paper which is also known as 'GAARs'. The purpose of GAARs is to prevent or stop tax avoidance schemes or arrangements to minimize tax. The paper discusses many examples from different perspectives and provides a base to improve the nation's GAARs.

Johnston (2017) stated that the New Zealand Herald published an article, discussing the tax base erosion problem known as BEPS. High tax nations are deprived of their tax revenue and profits are shifted to lower or no tax nations. The researcher gave the example of Google which took advantage of tax haven to avoid paying huge amounts in tax. Many countries formed part of the BEPS Action Project which led to the development of multilateral instruments to implement the tax treaties to prevent erosion of any nations' tax revenue base.In Fiji's case, some of the BEPS action points were put in the domestic laws to prevent profit shifting without being taxed. Krever and Mellor (2016) stated that "Australian tax laws have contained GAARs for more than 100 years". GAARs have been amended to incorporate specific BEPS action points. Principle-based design is a better option to GAAR. Alm (1988) analyzed people's choice for tax evasion or tax avoidance. Findings of Alm (1988) show that if policies of government are directed at reducing tax evasion to boost tax revenue may not hold since tax avoidance may increase. Decrease in tax rates may make tax evasion and avoidance unappealing. Alm (1988) also found out that "greater tax complexity generates more tax revenues".

Kirchler, Maciejovsky and Schneider (2003) stated that viewing from the point of economics; tax evasion, avoidance and capital flight have similar consequences as all try to reduce the burden of tax. From legal point of view they are different. The results for the researchers showed that tax evasion is seen to be negative, tax capital flight as being neutral and tax avoidance seen as positive based on a sample size of 252 people selected on a random basis evaluating the three terms.

Kwame, Tchao and Poku (2013) stated that government efforts are affected due to tax evasive practices which depends on a number of factors. One of the examples that makes tax evasion difficult to curb is corrupt tax officials. Some of the lapses in Ghana's tax administration were under declaration of income, under invoicing and failure to keep proper records. Tax is a very useful tool in developing the nation and in improving the welfare of its people and growing the economy (Kwame, Tchao and Poku, 2013).

Kwame, Poku and Anarfi (2014) found out how tax authorities in Ghana dealt with transit and warehousing regimes when goods are coming to and from overseas markets. Tax revenue are lost as a result of loopholes in the system and collusion of tax officials.

There were major tax scandals that have occurred such as Panama papers and Paradise papers and all were related to tax avoidance. The 'Paradise Papers' was a tax scandal revealed in 2017 which showed massive leaked documents of people who were politicians, celebrities, influential and corporations indulging in tax avoidance practices using complex structures to protect their cash from high tax jurisdictions. The paper also revealed institutions and accountants working on jurisdictions with low tax rates or better known as tax haven countries. One example of a corporation is Apple. The paradise papers revealed that Apple engaged in a new structure that enabled the company to avoid billions of dollars in tax due to the Apple and Ireland arrangement (Source: Wikipedia).

Furthermore, 'Panama Papers' was another major tax scandal that was revealed in 2016 through leaked documents showing entities and influential people engaging in off-shore businesses as tax avoidance schemes. The name Panama Papers was used because it is the country from which the information was leaked. Panama was seen as a tax haven country, along with Vanuatu, Bermuda, Bahamas and Lebanon to name a few. (Source: Wikipedia).

Thus, Tax Avoidance is seen as an arrangement or scheme working through complex structures that could be legal or organizational or offshore business as mentioned in the two common tax scandals. Tax Avoidance can take place in many forms, either through income splitting, thin capitalization or through transfer pricing to shift profit to low tax jurisdictions. The ultimate goal is to pay less tax and erode the tax revenue base of the country form where the profit was made. There are so many international literatures on tax avoidance and evasion, however, in the case of Fiji; there is very limited literature on this emerging global tax issue. There is not much literature on Fiji with regards to Tax Avoidance. This research paper aims to contribute to Fiji's literature on tax avoidance.

## 3. Research methodology

The paper applied document analysis methodology where documents were interpreted by the researchers. This qualitative method requires data to be examined and interpreted in order to elicit meaning, gain understanding, and develop empirical knowledge (Bowen, 2009). O'Leary (2014) stated that there are three primary types of documents. This includes public records such as company's annual reports, personal documents such as journals and newspaper articles, and physical evidence like handbooks and training materials.

Thus, the researchers examined archival data such as scholarly articles, newspaper articles, income tax legislations related to Fiji's taxation law in order to evaluate Fiji's position on tax avoidance, and how has Fiji addressed such issues identified in BEPS. The data used is reliable as the legislations are issued by the tax office of Fiji and scholarly and newspaper articles represent the views of academics, professionals, tax officials and the Government of Fiji.

## 4. Discussion and analysis on Anti-Avoidance (Tax Avoidance)

### 4.1 Anti-Avoidance versus Tax Evasion

Prosser and Murray (2012) stated that tax avoidance is not evasion. In comparison to criminal activity, tax avoidance is simply taking advantage of the loopholes in the tax legislations by proper tax planning in order to obtain a tax advantage or tax benefit.

Tax evasion simply means deceiving the tax system and not paying tax to the tax authorities. Deceiving the tax system may involve a taxpayer undertaking fraudulent ways to escape from paying tax. According to the literatures, it was found that there was not much difference between the two tax terminologies.

Braithwaite (2003) stated that "the integrity of tax systems as we know them is being challenged throughout the world. Tax avoidance schemes of various kinds are proving increasingly attractive and lucrative to wealthy individuals and large corporations. As governments fear the erosion of their tax revenue base amongst those who are most able to contribute, the public is looking on as one of its most public institution attempts to re-invent itself through changing laws and administrative procedures".

In Braithwaite's statement, tax avoidance is mostly done by elite people or high income earners because, if you look from Fiji's perspective, Fiji has a progressive tax system whereby the more a person earns the more income tax the taxpayers pays on that additional dollar. If you look at the structure of Fiji's income tax, majority of the taxpayers fall below the threshold, therefore attracting no income tax. It is utter common sense that these taxpayers who fall below the tax threshold will not engage in tax avoidance scheme because they are not paying tax. It is the wealthy or the high income earners who could be prone to engage in tax avoidance schemes to minimize their payment of tax. Tax avoidance is not illegal unlike tax evasion, however if you analyze Braithwaite's statement, governments are scared that their tax revenue base may get eroded away. It is the high income earners who are the major contributors of tax and if they start avoiding tax, then the tax revenue base of the government will be eroded away. The question will come as to how the government operations will be funded, how the government will provide public goods to the people and look after the welfare of the people who are at a disadvantage. It is because of these reasons, it is necessary for the government to legislate tax avoidance issues so that people go through the proper channels and pay their fair amount of taxes so that the government functions are smoothly operated.

Furthermore, taking debts to finance government operations is not an option. If tax avoidance is continuing at a large scale and the tax revenue of the government is being eroded away, to fund for government operations by taking debts is not justified. If the government does not have money to pay its debts because the tax base is eroded away, it will create disaster for the government and the taxpayers. In one of the literatures, Cobham (2005) stated that money needs to flow within the nation for financing developments. Thus, the only solution to mitigate tax avoidance issues is through legislating anti-avoidance rules and if any taxpayer is caught avoiding tax, the legislations should state and impose the fines and penalties as a deterrent to other taxpayers who are avoiding paying tax.

Fiji's tax system including its tax laws are considered to be comprehensive, modern and in line with international best practices. The tax avoidance issue is currently a hot topic in the tax discipline. Tax avoidance issue is an international tax issue as highlighted in the BEPS Action points. Every nation wants to protect its tax revenue base from being eroded away through various tax avoidance schemes. The tax avoidance schemes can take place in many ways and that is why nations are discussing ways to counter this international issue of tax revenue from being eroded away. The main BEPS action points highlighted are 'Thin Capitalization', 'Transfer Pricing' and how to tax digital economies and preventing double taxation and double non-taxation. Most of the actions points of BEPS have been internalized in Fiji's tax laws to address the international tax issues.

### 4.2 Fiji's income tax act on anti-avoidance

Fiji have legislated the anti-avoidance rules in the Income Tax Act 2015 (ITA). This is to prevent tax avoidance schemes and arrangements from happening. The Anti-Avoidance rules are stated in Part 8 of the ITA and captured in sections 101 and 102. Fulcher (1999) stated that for specific Anti-Avoidance provisions, "the second strategy is to legislate directly and specifically to foreclose a tax advantage that may be gained from a particular identifiable action of the taxpayer".

Section 101 is a specific anti-avoidance rule on income splitting.

Section 101 – Income Splitting reads as:

"101.—(1) If a person attempts to split income with another person, the CEO may adjust the chargeable income and tax credits of both persons to prevent any reduction in tax payable as a result of the splitting of income.

(2) A person is treated as having attempted to split income when—

(a) The person transfers income or the right to income, directly or indirectly, to another person; or

(b) The person transfers property, including money, directly or indirectly, to another person with the result that the other person receives or enjoys the income from that property, and the reason or one of the reasons for the transfer is to lower the total tax payable upon the income of the transferor and the transferee.

(3) In determining whether a person attempts to split income, the CEO must consider the value, if any, given for the transfer" (ITA 2015).

In section 101 of the ITA, the Chief Executive Officer (CEO) of Fiji Revenue and Customs Service (FRCS) has the powers to adjust the chargeable income of persons who have divided the income to avoid paying higher tax. A lower tax payable could arise as a result of transferring income or property simply to avoid paying tax or to lower the tax to be paid. The CEO of FRCS, if finds that the income has been split to reduce the tax payable, may adjust or withdraw tax credits and send an amended assessment. Moreover, if taxpayers have been caught for splitting income, further penalties may apply with respect to section 46 of the Tax Administration Act of 2009 (TAA 2009).

Section 46 of TAA states the penalties for making false or misleading statements. Section 46 states that:

"46.— (1) This section applies to a person -

(a) who makes a statement to a tax officer that is false or misleading in a material particular or omits from a statement made to a tax officer any matter or thing without which the statement is false or misleading in a material particular; and

(b) the tax liability of the person or of another person computed on the basis of the statement is less than it would have been if the statement had not been false or misleading (the difference being referred to as the —tax shortfall)" (TAA 2009).

In Section 46 of TAA 2009, if the false statement or omission was made knowingly or recklessly, the penalty is 75% of the tax shortfall. The tax shortfall is the difference between the tax liabilities filed by the taxpayer and the amended assessment of tax liability given by the CEO of FRCS. If it is a second offence, then the percent increases by 10% and if it is a third offence, then the penalty increases by 25%. If the taxpayer voluntarily discloses the offence before the offence is found out by the tax office, then the penalty decreases by 10%.

Other specific anti-avoidance provisions captured under the ITA are Transfer Pricing and Thin Capitalization. Moreover, another specific anti-avoidance provision captured under the ITA is Transfer Pricing. Division 10 of ITA relates to International. Division 10 contains 4 sections which are sections 60 Foreign Tax Credits, sections 61 foreign losses, section 62 Thin Capitalization and section 63 is on Transfer Pricing.

Section 62 of the 2015 ITA describes Thin Capitalization. The sections states:

"62.—(1) Subject to subsection (2), if a foreign-controlled resident company, other than a financial institution, has a debt-to-equity ratio in excess of 2 to 1 at any time during a tax year, a deduction is disallowed for the interest paid by the company during that year on that part of the debt that exceeds the 2 to 1 ratio for the period the ratio was exceeded.

(2) If the debt-to-equity ratio of a foreign-controlled resident company exceeds 2 to 1 for a tax year, subsection (1) does not apply if, at all times, during the year, the amount of the debt of the company does not exceed the arm's length debt amount" ( ITA 2015).

The purpose of Thin Capitalization is to prevent tax revenue from being diluted due to massive allowable deductions on interest payments. Heavy interest payments could be analyzed as a scheme of arrangement to pay less tax in the operating jurisdiction because interest payment is a business expense which is allowable for tax deduction. This means that if a foreign owned company operates in Fiji, its interest paid to the parent company in another country will be disallowed as a deduction if the debts are more than twice its equity portion. Otherwise the amount should not exceed the market loan amount. Section 62 is an important section because firms can use interest payments as a means to reduce the amount of tax to be paid by showing huge operating expenses which is not true. The interest payments can be used as vehicle to shift profits out of the country without paying its fair amount of tax in the jurisdiction where the firm is operating.

Section 62, Thin Capitalization applies to foreign controlled resident companies, companies which also have a Permanent Establishment (PE) in Fiji. Thin Capitalization is about the payment of interest made outside of Fiji and companies using this to show expenses to lower their taxable profits. It is another tax avoidance scheme which now can be stopped due to anti-avoidance ruling made that if the debt is more than twice as your equity (that is, debt to equity is more than 2:1), then interest payment expenses will not be allowed as a deduction. This prevents profits which are not taxed from shifting to other countries. Thus, the tax revenue base of the country is protected.

Furthermore, another specific anti-avoidance rule which is covered in section 63 of the ITA 2015 is Transfer Pricing. Transfer pricing is another tax avoidance strategy which can also be used to shift profits to another jurisdiction by dealing at non-arm's length transactions with the sole motive to pay less tax. For example, there are two companies, Company A and Company B, Company B is a subsidiary to the Parent Company A. Company B is located in Fiji and Company A is located in a tax haven country. Transfer pricing occurs when Company B takes loan from the parent company at non-market interest rate. If the market interest rate is 10%, a non arm's length transaction could mean the interest rate is set at 50% (any rate more than 10%). The difference of 40% is a non-market rate on which interest expense would be deductible in calculating tax liability which at the end means that 40% interest expense on the loan would not be taxed. Since it is an inflated, unrealistic rate which simply means to avoid tax and shift profits out of the tax regime of that country.

In numerical sense, for example, Company B takes $1m loan from Company A at an interest rate of 50%, whereas the market corporate loan rate is 10%. In the first tax year, the interest expense is $500,000 which in fact should be $100,000. The difference of $400,000 would be used as a tax deduction on which tax will not be paid. Therefore, there is a shift of profit which is not taxed.

Section 63 states that:

"63.—(1) Subject to subsection (2), the CEO may, in respect of any transaction between persons who are associates, distribute, apportion, or allocate income, gain, deductions, or tax credits between the persons as is necessary to reflect the income that the persons would have realized in an arm's length transaction.

(2) If a party to a transaction between associates is located in and subject to tax in Fiji, and another party to the transaction is located outside Fiji, any distribution, apportionment, or allocation of income, gain, deductions, or tax credits under subsection (1) must be made in accordance with the Regulations.

(3) The allocation of income and deductions to—

(a) A permanent establishment in Fiji of a non-resident person; or

(b) A permanent establishment outside Fiji of a resident person, must be made in accordance with the Regulations" (ITA 2015).

Section 63 of the ITA explains about transfer pricing. If the CEO of FRCS finds any transaction which may be non-arm's length dealing between the two companies, the CEO can adjust the tax that will be payable by the firm operating in Fiji. This practice is in line with OECD standards and the corresponding country is required to make corresponding adjustments to the tax for that firm in another jurisdiction. Fiji's tax treaty (Double Tax Agreements) includes an article on corresponding tax adjustments. This section provides further border control with regards to shifting untaxed profits. Related party transactions now cannot shift profits without being taxed as the legislation provides the power to control such related party transactions so that the company pays their fair amount of tax and Fiji's tax base is not being eroded away.

### 4.2.1 A loop hole identified in Fiji's current tax system – Scenario Based

What if it is not a related party transaction?

If we analyze the same situation above, we have two companies A and B. Transfer pricing can occur if they are related parties since one is a subsidiary and the other one is a parent company.

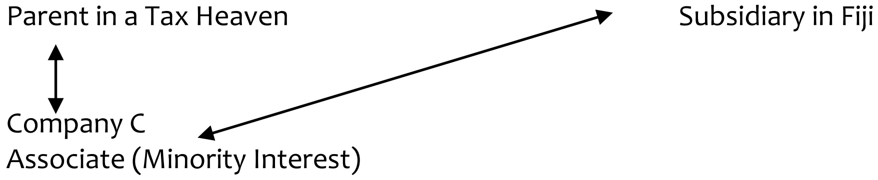
Company A Company B

Parent in a Tax Heaven Subsidiary in Fiji

Based on the above scenario, we can have a transfer pricing between these two companies if they deal at non-arm's length transactions.

What if Company A has an associate operating (Company C) in the same tax jurisdiction as the parent company.

Company A Company B




If Company B deals with Company C who is an associate of Company A and If company B borrows money from Company C and deals at non-arm's length transaction, there is nothing captured in Fiji's Income tax act to prevent the shifting of profits since Fiji's Income Tax only focuses on the parent-subsidiary relationship or better known as related party transactions. The issue here is that profit shifting can still occur without having related party transactions since company B and C do not have any relationship and both can be seen as independent entities. However, Company C has affiliations with Company A, who might have interest in profit shifting. If you look at the diagram carefully, profit has been shifted though indirectly. Now the question is how the Fiji's Income Tax Act will capture this in its tax laws to prevent shifting of profits without being taxed. Fiji's current Income Tax Act has not captured this in their act and is a loophole which companies might have been or is currently taking tax advantage of shifting profits to other jurisdictions indirectly.

This needs to be captured so that tax avoidance can be reduced and company profit border control can be maintained as no nation would want to erode its tax revenue base especially from companies who pay huge amount of taxes compared to other types of business structures.

## 4.3 Double taxation and double non-taxation

One of the aims of any tax system is to prevent double taxation from happening. This means that if an income has been taxed by a particular jurisdiction, then that same income should not be taxed in another jurisdiction. Jurisdiction must also be careful to ensure that there is no Double non-taxation, which means that the income has not been taxed by any jurisdiction. To prevent double taxation and double non-taxation, Fiji has signed tax treaties with many countries to ensure that such issues do not occur. Fiji has signed Double Tax Agreements with many countries such as Australia, New Zealand, Singapore and others, which determine the taxing rights of each country. However, to further solve this issue, Fiji has legislative foreign tax credits and losses in their income tax act to further strengthen or prevent double taxation with countries that Fiji does not have a Double Tax Agreement (DTA).

Section 60 discusses about Foreign Tax Credits. A resident person is given a tax credit in Fiji if the taxpayer has paid foreign income tax which is equal or lesser to Fiji's amount and remainder being payable. If the person has paid more tax in overseas, then no tax refund shall be given. Section 61 discusses about foreign losses. Foreign losses can be used as a deduction and losses can be carried forward for the next four years. Foreign losses are allowed as a deduction against that same income derived.

Tax avoidance issues can still occur, even though we have DTA's with many countries. Persons can take advantage of DTA's to channel funds from one jurisdiction to another. For example, Fiji and Australia have a DTA; however Fiji does not have a DTA with Samoa but Australia does. A firm from Samoa can channel funds from Fiji to Australia and then from Australia to Samoa but not directly from Fiji to Samoa because of no DTAs. Thus, DTA's could also be used as a vehicle to avoid tax. To prevent this, Fiji has signed a Multilateral Agreement with many countries to monitor series of transactions with regards to profit shifting. This is to ensure that the profit or income is fairly taxed in the rightful jurisdiction.

## 4.4 General Anti-Avoidance Rules (GAARs)

So far, we have discussed about specific anti-avoidance rules captured in Sections 101 (income splitting), Sections 60 and 61 on foreign tax credits and losses and section 62 (Thin Capitalization) and 63 (Transfer Pricing). Section 102 of the ITA covers General Anti-avoidance rules such as Tax Avoidance Schemes. Fulcher (1999) stated that "specific anti-avoidance rules suffer from two difficulties. First, parliament cannot always anticipate undesirable exploitation of rules by the taxpayer. Specific anti-avoidance rules are usually enacted after a taxpayer has exposed a loophole. Second, specific anti-avoidance rules are often technical and susceptible to technical avoidance". These limitations lead to GAARs legislated in the ITA.

Section 102 reads as:

"102.—(1) Notwithstanding this Act, if the CEO is satisfied that—

(a) A tax avoidance scheme has been entered into or carried out;

(b) A person has obtained a tax benefit in connection with the tax avoidance scheme; and

(c) having regard to the substance of the tax avoidance scheme, it would be concluded that a person or one of the persons, who entered into or carried out the scheme did so for the sole or dominant purpose of enabling the person referred to in paragraph (b) to obtain a tax benefit,

the CEO may determine the tax liability of the person who obtained the tax benefit as if the tax avoidance scheme had not been entered into or carried out and can make compensating adjustments to the tax liability of any other person affected by the tax avoidance scheme" (ITA 2015).

Section 102 was about GAARs which has been extended to include tax avoidance schemes. If the CEO of FRCS finds out that a scheme of arrangement has been entered into, the CEO has the right to send an amended assessment so that the correct tax is paid. The income tax has been modified to include scheme.

### 4.4.1 Comparison of New ITA 2015 versus Old Income Tax Act

In the old income tax act, section 106 covers prevention of or relief from double taxation where as in the new act it is covered as sections 60 and 61 (foreign tax credits and losses). In the old income tax act, anti-avoidance rules were captured in section 108 which states schemes to reduce income tax. In the new income tax act, anti-avoidance law is divided into two categories, specific avoidance rules such as income splitting, thin capitalization and transfer pricing and GAARs.

### 4.4.2 Transition of GAARs

The old income tax captured GAARs, in sections 108 of ITA. From 1974 to 2003, section 108 on GAAR's was a very short provision captured in the old ITA. The provisions of section 108 were specific as it applied only to contracts, agreement and arrangement. The provisions did not cover schemes. The provision was self activating and does not apply tax offices intervention. When the contracts get void, all the adjustments will be done through specific provisions. Any tax avoidance arrangement is void (no legal effect from the beginning) against the CEO for income tax purposes.

From 2004 to 2015, section 108 of the old income tax act was further modernised and provisions were more detailed than the earlier one. This time the provisions included schemes apart from agreements and arrangements. There was specific reference made to the following schemes such as stripping of company profits and withholding tax avoidance apart from the general provisions (GAARs).

From 2016 and onwards, the new income tax act came in to include provisions (Sections 102) which were fairly broad that covered any type of tax avoidance. The GAARs included a rule to counter tax havens used by Fiji residents to avoid tax. The sole or dominant purpose was amended to any purpose with reference to section 102 (c) of ITA. The definition of scheme and tax benefit was broadened to include all types of arrangements and transaction hence GAARs. Any form of scheme to avoid tax is captured under the new provision whether it is incidental or not and any tax benefit obtained from such schemes will be denied by the tax office. Finally, the CEO of FRCS has the powers to adjust the taxpayer's tax position and recover the tax money lost.

Thus, Fiji's anti-avoidance laws have taken several reforms and developments to further strengthen it. The provisions have been amended to curb the loopholes in the tax system and prevent taxpayers from avoiding tax through schemes and arrangements. The TAA administers the taxes in Fiji and any avoidance can lead to further penalties (reference to section 46 of TAA 2009). The purpose of TAA is "To revise and harmonize the rules relating to the administration of the tax laws of the Fiji islands and to ensure the efficient collection of taxes" (Tax Administration Act 2009). The income tax laws are jointly read together with TAA. Any income tax violations such as tax avoidance is captured in TAA which is also same for all other taxes apart from Customs which is a before event activity and has its separate Customs Act including the penalties and fines for violation of custom rules.

Fulcher (1999) stated that tax avoidance can be stopped due to legislation requirements, tax authority's discretion and using specific and general anti-avoidance rules.

## 4.5 Tax compliance reforms on Anti-Avoidance in Fiji

### 4.5.1 Restructuring of Fijian Tax System

"Fiji's tax reforms are in line with global practices which are seen to be the best. Fiji has implemented a tax regime in which the tax rate is low and has a broad base. There is fairness in the treatment of tax promoting an investment climate by providing tax incentives. Fiji's tax incentives have been reviewed to promote favorable investment climate" (Raj, 2018).

### 4.5.2 Clarity on New Tax Laws

"Fiji's Income Tax Act has taken recent reforms and they have been written in such a way that it is simple and easy to comprehend by various stakeholders and users. In the past, it provided great difficulty for people and practitioners of tax to understand due to its legal jargons" (Raj, 2018). The new tax laws have provided greater clarity in areas of Permanent Establishment Rule, Residency Rules, Source Rules, and International Tax provisions such as foreign tax credits and losses, thin capitalization and transfer pricing.

### 4.5.3 Recent Tax Compliance Initiatives

"The government's premier revenue collection body known as Fiji Revenue and Customs Service (FRCS) has legislative authority to collect and administer taxes on behalf of the government. One of the methods adopted by FRCS to increase its tax revenue is through tax compliance. Fiji's has been actively engaged in International Tax Agendas such as OECD, G20 Base Erosion and Profit Shifting (BEPS) initiatives. The important discussion currently taking place is how economies can prevent their tax revenue base from being eroded away by multi-nationals through various schemes. Fiji has incorporated most of the BEPS initiatives and other current international tax agendas in their current domestic laws such as Transfer Pricing which is captured in Section 63 of Fiji's Income Tax Act (ITA), Thin Capitalization (Section 62 of ITA), Foreign Tax Credits (Section 60 of ITA) to avoid double taxation for countries which Fiji does not have Double Tax Agreements. The division 10 of 2015 ITA states International; sections covered are from 60 to 63" (Raj, 2018).

"In addition, the domestic laws have very well captured most of the international tax agendas such as prevention of double taxing, taxing rights (Section 6 and 7), BEPS 15 actions points, most importantly, tax challenges in taxing digital economy, hybrid mismatches (transfer pricing and thin capitalization), prevent treaty abuse and multilateral instrument. With regards to treaty abuse, Fiji has signed a Tax Treaty document (Multilateral Tax Treaty Agreement) with many countries to prevent abuse of tax treaties such as Double Tax Agreements (DTA) and double non-tax system. Profits and financial resources have been diverted to countries within DTA's to avoid paying tax. The purpose of signing the Treaty Abuse by Fiji fosters trade and investment, exchange of information and prevents double taxation and double non-taxation. Fiji also has Anti-avoidance rules in ITA preventing tax avoidance with reference to Part 8 of ITA" (Raj, 2018).

"Another main reform that has taken place is tax compliance. The tax authority in Fiji is placing more emphasis on tax compliance and aims to increase government tax revenue through building a tax compliant culture in Fiji. There are harsh penalties for not paying taxes or not paying taxes on time. For example, failure to pay vat can lead to 300% vat penalty on the amount owing. People are even jailed for not paying taxes. The Fijian tax laws have become stringent for those who do not pay their fair share of taxes. Fiji Revenue & Customs Service also publishes name of Tax evaders under the "Name and Shame" concept to discourage other people or businesses from evading tax and builds a tax compliance culture in taxpayers (FRCS Amendment (no.2) Act 2017). Other initiatives include penalty regimes and time bar rules for prosecution as captured in the TAA of 2009" (Raj, 2018). Offshore asset declaration amnesty – time given to taxpayers to declare their foreign wealth (assets) if they have any, otherwise penalties will apply for failing to declare foreign assets. This is consistent with the worldwide tax regime. False declaration will attract penalties with reference to TAA of 2009 section 46.

### 4.5.4 Tax treaty articles on Anti-Avoidance

"To elaborate further, Fiji's tax laws have been modernized to address the tax challenges. Fiji has signed the multilateral conventions to address international tax issues such as treaty abuse (DTA), artificial PEs and BEPS action points. Thus, Fiji's tax system could be seen as up to date, modern and in line with best international practices. Fiji has adopted the OECD Model Tax Conventions for its DTA like many economies in comparison to the UN Model Tax Conventions. There are about 30 articles in which Fiji has adopted for its DTA. Fiji's tax authority are well aware of the tax issues around the world and fully participates in International Tax agendas and encourages international cooperation to tackle these global tax issues" (Raj, 2018).

There are two tax treaty articles on Anti-Avoidance which Fiji is part of, Double Tax Agreements and Multilateral Convention. Fiji has DTA's with many countries to prevent double taxation; however its aim should also be preventing double non-taxation. DTA provides a platform to exchange information amongst the countries with transactions relating to taxpayers and ensuring that income is taxed once. Double Tax Agreements can also lead to fiscal evasion or better known as tax evasion. This means that persons can use DTA's to channel money to other countries without paying taxes or a scheme to avoid tax. For example, there are three countries, A, B and C. Country C is seen to be a tax haven country. Country A and B have a DTA but country C does not have a DTA with country A, however Country C has a DTA with country B. A company who is operating in country A and the parent company is in C can use DTAs to channel funds and avoid paying taxes. The parent company whose vested interest is to avoid tax might use country B because A and B have a DTA rather than directly channeling funds from A to C since they do not have DTA, the parent company can indirectly channel the funds through the use of DTA from country A to B and then to country C. Therefore, international cooperation is important so that transactions are monitored by each nation's tax office to ensure that persons do not avoid tax and having multilateral instruments help achieve such objectives.

Moreover, there might be limitation of benefits in some of the DTAs. The limitation of benefits might occur if nations are not effectively trading with each other. For example, we have three countries, Fiji, Australia and USA. Fiji might be effectively trading with Australia and very rarely with USA, however, USA might be effectively dealing with Australia but not much with Fiji. It wise to have a DTA with Australia rather than USA due to the increase in the economic activity between the two countries and having a DTA can solve the problem of double taxation. If Fiji has a DTA with USA, then there are limited benefits of the DTA since there is not much issue with double taxing the same income of the person whereas Australia having a DTA with USA has potential advantages because of the increased level of activity, persons will not be double taxed.

Multilateral Convention(MC) is a tax treaty signed by many countries to prevent treaty abuse. Despite having DTA's, companies are able to divert funds and avoid paying tax through the use of DTAs, this leads to treaty abuse. With the multilateral convention, nations exchange information and monitor financial flows from one nation to another. This is to ensure that income is taxed once based on the taxing rights of that jurisdiction. Multilateral convention includes remedies on dealing with treaty abuse, which persons has permanent establishment (PE) through agency and PE in third jurisdictions. MC also focuses on splitting of contracts (where a long term contract is divided into small contracts for the purpose of avoiding tax, for example, less than 6 months contract) and principle purpose test (to determine the location of the place and taxing rights of that nation).

#### 4.5.5 Tax Avoidance in TAA 2009 and customs duties

The TAA was legislated in 2009 by an act of parliament. It harmonizes most of the types of taxes in Fiji. All the types of tax which is an after-event are captured in TAA of 2009. Section 46 of TAA is very clear; there are penalties levied for making false and misleading statements. But before that the collection, recovery mechanism by the tax office and repayment of tax is captured in TAA of 2009. There are harsh penalties for multiple offences. Avoiding tax is a serious offence as it is defrauding government revenue. Tax is an after event activity which is captured in the ITA and TAA, however, customs duty is a beforehand activity and a separate customs duty legislation was passed by the government apart from the normal one. Persons can avoid customs duties by undervaluing the goods imported however; the customs legislations also include the fines and penalties for avoiding tax. Section 137 of the Customs Act focuses on custom offences. Section 139 provides penalties for fraudulent evasion of customs duty. Section 159 gives powers to the custom officers to seize the goods and take custody of items which are prohibited or not allowed as per the Customs Act. People are able to avoid customs duties through undervaluation of their items, however if they are caught undertaking such arrangement, then they will be dealt as per the Customs Act and TAA 2009.

Moreover, tax avoidance in the area of customs can also occur through custom staff collusion where by customs staff clears the goods at a lower duty rate since they might receive something in cash or kind. It is very important for FRCS to hire competent and ethical personnel to avoid such issues and the outcome being increase in tax and duty collections. FRCS should also rotate staff on a regular basis so that fraud and mismanagement of money could be found out. These are important accounting internal control fundamental principlessince any firm would like to safe guard its assets and financial resources from being misused. Any staff of FRCS should be competent and ethical so that every dollar of tax money is recovered and utilised properly to deliver services to the citizens of Fiji by its Government.

Furthermore, use of 'pro-forma' invoices may also be used to avoid taxes. Such invoices can be used to send money to the suppliers in overseas but no goods enter Fiji and in Fiji, firms show it as expenses. This is an example of profit shifting as one of the BEPS issues that nations are facing. Finally, harsh penalties are levied if people or officers are found to be abusing the system. In customs, it is very difficult to monitor each and everything coming into the country, due to these administrative issues, it is based on self-assessment basis with regular checks done at intervals and at high risk areas. One of the recommendations to further strengthen the customs section of FRCS is to use more technology to capture and mitigate tax avoidance issues. One of the examples that FRCS currently uses is the custom x-ray machines to see what is actually in the containers and what is described in the documents to find out discrepancies and the laws capture the fines and penalties very well in TAA 2009 and in the customs act if such tax avoidance issues arise.

### 4.5.6 Standard Interpretation Guidelines (SIGS) on Anti-Avoidance

The standard interpretation guidelines which are also known as SIGS was issued by FRCS with the authority of the CEO of FRCS that covers practical aspects where the law is grey, unclear or ambiguous. SIGS 2018-3 is specifically for Income Tax Anti-Avoidance. SIGS were previously known as practice statements which included the practice side of law things and to clarify any ambiguities in the tax laws. One of the reasons to bring SIGS is to help practitioners to clarify practical aspects of the law since legislations do not capture everything. Section 102 of ITA 2015 is on GAARs. The legislation ensures that schemes to avoid tax and get tax benefits from such schemes will be nullified. The aim of tax schemes is to pay less tax than if the scheme was not done.

There is a difference between tax evasion and tax avoidance. Tax evasion is illegal (criminal activity) whereas tax avoidance is exploiting the loopholes in the tax system that is not intended by the parliament. Tax evasion is a criminal offence whereas tax avoidance is like civil matter whereas the breached is compensated through fines and penalties. The taxpayer has breached a contract with the Fijian parliament that everyone should pay a fair amount of tax.

"A "sham" is basically where parties have entered into arrangements without really intending to create legal relations. Hence, the arrangements they enter into are for "show" only to make third parties (including FRCS) believe that legal relations have been created. The objective of "shams" is, sometimes, to create an impression under which tax position for a taxpayer is more favourable. However, at no stage do any of the parties ever intend to pursue obligations under the arrangements. In simple terms, the arrangements are "fictitious" and have no legal effect" (Source: SIGS – Fiji Revenue and Customs Service, 2018). If a sham has happened, the CEO of FRCS has the powers to adjust the tax as if the legal arrangement was made, thus application of section 102 does not apply. Section 102 would be applied once facts and evidences are gathered and analysed. The next step is to ensure that a scheme has been entered into and tax benefit was obtained for the purpose of tax avoidance. A scheme could be a course of action, an arrangement, an agreement that could be written, spoken or implied by conduct.

A tax benefit could mean reduction in tax liability, a refund or an increase in tax credits. "Factors that FRCS will look for in identifying tax avoidance purpose in a scheme include: artificiality, contrivance, lack of commercial reality and lack of economic benefits obtained for prices supposedly paid" (Source: SIGS – Fiji Revenue and Customs Service, 2018). Section 102 will not be applied where tax avoidance was merely incidental which means there were no intention of the tax payer to avoid tax, it just happened. If the requirements are proven in applying Section 102 of ITA 2015 on GAARs, the CEO of FRCS will use the reconstruction provision to reassess the tax and make adjustments.

Section 102 is General Anti-avoidance rule; its purpose is to capture any scheme that leads to tax avoidance by finding loopholes in the tax system. This is a generic rule that captures any schemes to avoid tax. Tax avoidance is not good for the country as it is unfair to those who pay their fair share of taxes. With the tax money, essential public goods are provided to the public and to the less fortunate. Australia and New Zealand also have GAARs in their income tax laws.

Section 102 is a powerful tool vital for reaching outcomes for the taxpayers. It is only applied by the CEO based on facts collected and analysed. The application of section 102 is based on objective analysis, followed by analysis of the purpose and not the test on intention. Section 102 came into effect when the 2015 ITA was rewritten but was further modified as part of 2017 budget announcements. The relevant definitions such as scheme, tax avoidance scheme and tax benefit were captured in section 102 subsection 5. The new amendment was made in 2017 was due to structural inconsistency in the wordings such as 'sole or dominant purpose' that had contrasted with tax avoidance scheme as 'one of the main purposes'. Fiji had the 'two purpose test' which FRCS needed to satisfy to prove tax avoidance whereas internationally, Australia and New Zealand had one purpose test in their GAARs. Thus, the laws have incorporated that as long as the purpose is tax avoidance, section 102 will be applied, however, it will not be applied if the purpose was 'merely incidental'.

"The new section on 102 states:

102 (1) Notwithstanding this Act, if the CEO is satisfied that –

(a) a tax avoidance scheme has been entered into or carried out; and

(b) a person has obtained a tax benefit in connection with the tax avoidance scheme,

the CEO may determine the tax liability of the person who obtained the tax benefit as if the tax avoidance scheme had not been entered into or carried out and can make compensating adjustments to the tax liability of any other person affected by the tax avoidance scheme" (Source: SIGS – Fiji Revenue and Customs Service, 2018).

"The definition of "tax avoidance scheme" in section 102(5) will state:

Tax avoidance scheme" means any scheme, whether entered into by a person affected by the scheme or by another person, that directly or indirectly –

(a) Has tax avoidance as its purpose or effect; or

(b) Has tax avoidance as one of its purposes or effects, if the tax avoidance purpose or effect is not merely incidental" (Source: SIGS – Fiji Revenue and Customs Service, 2018).

The new provisions on Anti-avoidance are consistent with Australia and New Zealand where the 'dominant purpose' was removed and thus, the purpose of issuing SIGS by FRCS, to educate on the recent amendments made to section 102 of 2015 ITA. Tax haven is also captured in Section 102 subsection 5. Tax Havens are nations with lower tax rates or nations with financial secrecy laws. Subsection 5 of 102 also covers definitions for sham and schemes (course of action, agreement and arrangement to name a few). Fiji's ITA definition of scheme is similar to those of Australia and New Zealand and thus, case laws from these nations would provide good practical guidance on how a scheme is being carried out. The main point on schemes is that it can be formal (written), or spoken or through parties actions.

Some practical issues highlighted such as:

- Can a scheme be done by one person?
- Is there an agreement made to an arrangement.
- If you fail to do something, can it be a scheme.
- Extra ordinary restrictions

The ordinary meaning of these words indicates scheme invoking section 102. Section 102 includes scheme which can also be done by one person. A taxpayer is part of a scheme if steps were taken to minimise their tax whether the outcome was known or not. The definition of scheme is broad enough to capture failure to do something. Once it is proven that a scheme has been undertaken, the next step is to prove by FRCS whether the taxpayer obtained a tax benefit and the aim was to avoid tax. If tax benefit is not there, then section 102 cannot be applied because the purpose of section 102 is to recover lost tax due to tax avoidance.

'Alternative postulate or counter factual' is the terminology used for finding the difference in tax which was avoided (actual tax position versus schemed tax position). This applies to Fiji, Australia and New Zealand. Finding the difference can also lead to practical issues and hypotheses. There have been many court cases involving interpretations of wordings which were challenged in Australian and New Zealand jurisdictions. Artificial transactions may indicate tax avoidance but may not be true in every situation. If tax avoidance happens to be 'merely incidental' which means that it happened by chance (minor compared to other purpose) and the outcome was tax avoidance then section 102 will not be invoked since the sole purpose was not there. This means that the tax avoidance outcome was connected to a non-tax avoidance purpose, thus merely incidental.

Finally, once it is known that a scheme was made which has led to tax benefits due to tax avoidance; the CEO of FRCS will invoke section 102 and find the difference of tax that was benefited by the taxpayer and undertake the reconstruction provision. The reconstruction provision gives powers to the CEO of FRCS to reassess the return and make tax adjustments to recover the tax loss as a result of tax avoidance and the taxpayer is not allowed to argue. The CEO may calculate the tax loss based on estimation or hypothetical fact analysis plus any penalties applicable as well. In the SIGS, FRCS has highlighted that due to the complexities of the law, practical examples were not provided however, case laws from Australia and New Zealand on application of section 102 can be analysed to provide further insights to taxpayers and agents (Source: SIGS – Fiji Revenue and Customs Service, 2018).

## 4.6 Anti-Avoidance and Role of Business Structures: An Application of Case Laws

There are many types of business structures operating in Fiji. The most common business structure falls under the small and medium enterprises (SMEs) known as sole proprietorship business owned by one person. Partnership business comprises of two or more partners engaging in business to make profits. In Fiji, we have Private and Public Companies and Public Listed Companies. Another type of business structure is trusts in which the trustee runs the business on behalf of the beneficiaries. Tax implications can be affected by the way a business is structured.

Furthermore, the types of business structures can be used to avoid paying taxes. There are many cases where taxpayers have formed a particular type of business structure purely for the purpose of paying less tax or creating tax avoidance. Some of the ways a sole trader business can be used to avoid tax are having relatives employed in the business who are paid excessive salaries more than the market rate. This will lead to more business expenses, thus, lowering the profits and less tax would be paid. Most of the time, sole trader businesses do not disclose their actual income because of no proper record keeping and the reporting requirements for SMEs in Fiji is not compulsory since majority of businesses in Fiji are SMEs which has significant contribution to Fiji's economy in creating jobs. Small business also avoid paying VAT as a tax due to the claiming of personal expenses as business expense in their input claim resulting in vat refunds or lower vat payables. The tax office does not check each and every document for Vat purposes as it is self-assessed system, however regular audits are done to ensure accuracy. This could be seen as gambling because a taxpayer takes risk and if audits check catches it then the taxpayer is penalised otherwise, the taxpayer takes advantage of the system. Self-assessment is vital, due to huge administration cost; it may exceed tax revenue if self-assessment was not there. Otherwise the tax office will have to hire so many staff to administer the system. Tax compliance is one of the modern approaches that the tax office has used to increase tax revenue for the government.

Furthermore, in sole trader and partnership business, it is the owner and the individual partners who pay tax at personal income tax regime level on the profits, thus having unlimited liability. For companies, it is the companies that are taxed at corporate level and not the shareholders, thus giving the limited liability feature. Partnership business structure can also be used to avoid paying huge taxes when it comes to relatives. For example, the taxpayer used to operate a sole trader business and the profit on average used to be $50,000 per year. The taxpayer then decided to convert his business into a partnership business and the taxpayer's wife being one of the partners on a 50:50 profit sharing ratio. If you analyse this situation, if he was operating alone he would have paid personal income tax on that $50,000. However, due to his current business structure, that profit will be divided into 2 equal parts, thus, one partner getting $25,000 each. In this way both are exempted from paying income tax as both fall below the threshold since the income is taxed on individual partners and not on the partnership business unlike companies which pay tax at corporate level. It could generally be seen, that tax avoidance usually takes place where relatives or family members are involved in the operations of any type of business structures. The above example on partnership business could be seen as income splitting. Income spitting is a specific anti-avoidance rule covered in section 101 of the ITA and if found, the CEO FRCS may send a revised tax assessment with further penalties as captured in the TAA 2009. Another example to increase business expenses is paying excessive salaries to relatives or family members which are not a legitimate business expense. This may happen in both sole trader and partnership businesses. Assets could also be split or transferred to relatives for the purpose of avoiding tax. The above arrangement takes advantage of progressive income tax rates applied to individuals and results in less tax liability for the family as a whole (Fulcher, 1999).

Moreover, the future of businesses in Fiji is companies. Companies as a type of business structure can also be used as vehicle to avoid tax. A company is a type of business formed and registered under the 2015 Companies Act that is a legal person which is separate and distinct from its owners. This scenario might be applicable in private companies where the directors for the purpose of avoiding tax may ask for dividends rather than being paid salaries or director's fees since Fiji's tax laws exempt dividends from being taxed because of the double taxation issue. Thus, tax will be applicable at company level (profits) from which dividends will be paid out. The director will pay income tax if salaries are paid; however, if the directors receive dividends in lieu of salaries, then no income tax is paid. So in this scenario, the director would opt for dividends. This is a loophole in the current system and the legislation should only accommodate legitimate dividend payments only. This practice might be currently happening and huge amounts in tax revenue are lost. If for example, Fiji had dividend tax which was very high than the personal tax rates, then taking salary by the director would be an attractive option and this would result in excessive salaries being paid which is not legitimate (more than market rate paid). Therefore, there must be some rule to counter this issue. Off-shore entity investment can also be another way to avoid tax. This may be applicable to entities with parent subsidiary relationship. The current tax laws accommodate such issues such as thin capitalisation and transfer pricing. However, the current laws only deal with related party entities, what about if they are not related. This is an indirect way to shift profits to tax haven countries if subsidiaries deal with parent company's associates (a separate entity) which our current laws do not capture. This situation has been highlighted in detail with examples in the above section on specific anti-avoidance rules.

In addition, other business structures may form companies to take advantage of low corporate tax if personal income tax is more than the corporate rate to avoid paying higher taxes since forming company is more attractive. Also, profits can be converted to equities such as bonus share, retained earnings or general reserves to lower tax. However, such issues are solved since it is captured in the legislations on reduction of capital (attracting capital gains tax – Part 3 of ITA) and corporate reorganisations (section 88 of ITA) respectively. A trust is another type of business structure that can also be used to avoid tax. The 2015 Company Act also recognises trust as a company. A trustee is appointed by law to look after the business or better known as trusts on behalf of the beneficiaries. Fulcher (1999) stated that "trusts are used for both business and family purposes". Trusts may be discretionary and non-discretionary. A discretionary trust is where the trustee has the powers to distribute income to the beneficiaries based on the trustee's discretion. Dishonest trustees may abuse this system to their advantage however, if the trustee receives income, then a flat rate of 20% tax will apply otherwise the tax will be charged to the trust business and not to the beneficiaries. Trusts can be used as a vehicle to avoid tax such as income splitting among the number of taxpayers.

Finally, business structures can be used to achieve tax benefits; however, legislations are put in place to prevent such issues. Though there might be laws in place, however, if the administration is not effective from the tax office side such as unethical and incompetent staff then tax avoidance issue may come up, however the administration side could be further strengthened through using more technology in their day to day operations. The question is, are they ready to spend that much? Does it increase administration costs versus the tax revenue collected?

With reference to case-laws:

With reference to Commissioner of Taxation versus Hart (2004) – Australian Case:

This case is about avoidance of tax whereby the respondent obtained a tax benefit. The question arose whether the respondent entered into a scheme to obtain tax benefit. A split loan facility was used by the respondents to buy a principal place of residence and another part of the loan was used for an investment facility generating taxable income. Any expense incurred to produce taxable income is deductible. The respondent claimed all the interest expense as deductible expense which lowered the tax liability. The court held that the respondent had entered into a scheme which they obtained a tax benefit. Therefore, the court ruled in favour of the commissioner of taxation. However, an appeal was made by the commissioner on the question of allowing deductions on interest on interest but the appeal was dismissed and the appellant was to pay the respondent, the costs.

**Fiji Cases on Tax Avoidance:**

With reference to Deo Narayan Sahay versus CIR (21 FLR 171):

This case is about a husband and a wife jointly owned land in Lami. The couple were directors of the family company. The land was leased to the company as trustee for the couple's children as benefits. The lease was for two years and was renewal for further two years. The annual rent was $50. The trustee sub-leased the property for $3,000 as annual rent lowering the tax liability for the family as a whole. The court found that the transaction was a tax avoidance and thus inescapable from the section.

A similar case to the above is Mangin versus CIR (1971) AC739. In this case, Mangin leased a farmland for one year to trustees for his family members and was renewed for a further one year period. The court held that the dominant purpose was to avoid tax and ruled in favour of the tax office.

With reference to JethalalNaranji vs CIR (1968):

"The taxpayer was a partner in a family firm doing business in developing land. The partners could not work and a person was appointed to liquidate the firm. Considering the nature of the business, it took a lot of time. During this time, the taxpayer and a brother entered into negotiations to purchase land for development purposes, however, the partners objected contravening their partnership agreement. A partnership was formed between the wives of the two brothers. Capital was contributed from their wife's savings and some were given by their husband. The wives of the two brothers had no business experience and they hired the taxpayer to conduct and manage the business operations. At the beginning, all profits made were returned as part of the taxpayer's income. In the third year of business, the wife files her separate tax return. The commissioner challenged the arrangement as tax avoidance since it constituted income splitting to avoid paying higher taxes. It is clear that the new arrangement was not motivated by tax returns and the parties did not know the advantages of such arrangements. The court held that GAAR's cannot be invoked since it could be said that it is merely incidental and the commissioner did not appeal" (Fulcher, 1999).

These were some of the old cases relating to Fiji. However, recent cases on tax avoidance in Fiji are very limited since most of them are internally fixed rather than going to courts to settle the disputes. The question is how effective is the administration side of things? If the tax office is effective in catching tax perpetrators and fining them or resolve the matter internally. Then the outcome is very good. It is necessary for the tax office to hire, competent, ethically responsible and moral staff for effective service delivery and mitigating tax avoidance issues. The regularity laws are effective for Fiji in combating tax avoidance issues and BEPS action points. Case laws help people better understand the issuesaffecting the taxpayers.

## 5. Conclusion, findings and recommendations

Fiji is seen to have a comprehensive tax system that is in line with international best practices. Tax avoidance is one of the main international tax issues highlighted in the BEPS actions points. Fiji has taken a pro-active approach in combating tax avoidance issues by internalizing the issues in its domestic laws. Fiji's income tax act contains specific and general anti-avoidance provisions to prevent any taxpayer from undertaking a scheme to avoid paying tax. Whether it be specific with regards to income splitting, thin capitalisation or transfer pricing or any type of scheme undertaken to obtain a tax benefit will be caught under the GAARs.

Thus, Fiji's position on tax avoidance is seen to be effective in terms of its regulations and self-assessment tax compliance approach. The provision on anti-avoidance has continued to change, mitigating the loop holes in the system based on the case decisions. The definitions in the legislations are clearer and easily understandable. Despite having the provisions legislated, there will be certain taxpayers who would still opt for reducing their tax liability by any possible means. Fiji still needs to go further in advocating to the taxpayers, the need to pay fair share of their taxes. Fiji's approach has been modern and the laws have been continuously updated to reflect current situations and provide means of resolving issues in a fair and harmonious way.

Tax compliance through self-assessment and risk management approaches help eradicate tax avoidance issues however, with increased globalisation and business structure complexities, Fiji still needs to go further. A loophole was found in the ITA with regards to related party transactions. The tax avoidance on specific anti-avoidance scheme only recognises related party transactions in shifting profits. However, associates or minority interest are not taken into account. Though they might to be related, but still profit shifting can occur. The question is how Fiji is going to legislate this.

Thus, this research paper contributed to the limited literature on tax avoidance in Fiji and noted that Fiji's position remains positive in tackling tax avoidance. Continuous effort and development are made by the government and the tax office to prevent its tax revenue base from being eroded away. Complexities in the business environment make it difficult to track transactions that involve schemes to avoid or reduce tax. However, Fiji has adopted unilateral measures, bilateral and multilateral measures to curb tax avoidance. Unilateral measures through internalising the issues in Fiji's domestic laws. The specific and general anti-avoidance provisions are seen as effective unilateral measures. Bilateral measures through double tax agreements and multilateral measures through international cooperation and participation. Fiji has signed multilateral instrument to prevent treaty abuse with many nations to prevent tax revenue base from being eroded away. Thus, Fiji's position on tax avoidance issues has remained firm, pro-active and made substantial progress in regulatory framework and in tax compliance culture.

## 5.1 Recommendations

Tax avoidance should not be taken lightly, though Fiji might have the best legislations covering all the aspects of anti-avoidance provisions but if their administration is not tight then such issues will continue to occur. Legislating and administration are two important concepts that go hand in hand. From legal point of view, Fiji's stance on tax avoidance is seen to be effective however, if it is not administered properly by the responsible authorities, the issue will still be prevalent. Any nation's tax office needs to be very vigilant and diligent when it comes to performance. It is very important to ensure that the tax office hires the right kind of people (ethical and competent) to ensure the effectiveness of the system. If not, then the tax revenue base of the nation will not be sustainable since the system is defeated as correct tax will not be collected. One of the ways to mitigate human resource issues such as greasing the palm for reduction of duty is technology. Using technologies help improve the administration and is effective in detecting errors and fraud. Applying internal control principles also helps to maintain effectiveness of the system such as separation of duties and rotation of staff. Creating more awareness helps educate taxpayers to be tax compliant and consequences faced if not.

## 5.2 Scope of research, limitation and further research

The scope of this research paper is based on Anti-Avoidance in Fiji. The research questions basically answered Fiji's stance on Anti-Avoidance issues. The questions were answered based on the secondary published resources. Anti-Avoidance is one of the international tax issues based on the Base Erosion Profit Shifting agenda. Tax avoidance is an issue that affects all the nations who have implemented tax as a major source of revenue for the government. However, this research paper only analyzed Fiji's situation on Anti-Avoidance despite it being a global tax issue and what Fiji has done to alleviate this issue.

Moreover, the limitation of this research paper was as follows:

- Time Limitations – the research paper on Anti-Avoidance is an international tax issue. Carrying out this particular research within a semester as part of one of the postgraduate accounting course's major assignment is very limited. Tax avoidance issue is a global issue which nations are combatting. Doing the research in just 14 weeks makes it very difficult to do a thorough analysis of the underlying problems which nations (Fiji) are facing.
- Difficulties in accessing publications as some of the sites did not allow downloading papers or reading the papers since they require subscriptions. However, the university librarian was very helpful in getting the paper access.
- Lack of literature – there were very few literatures on tax avoidance written on Fiji's case, therefore most of the literature review were based on other nations.
- Tax avoidance is a complicated issue in the tax discipline and a qualitative study based on secondary published resources may not be sufficient to derive findings to completely solve the issue and this gives scope for future or further research.

The scope for further research is analyzing tax avoidance issues in Fiji based on quantitative analysis or using a mix methods approach. There could be a research based on correlations of tax avoidance variables using questionnaires and run through statistical software packages to analyze the relationships and state key findings.

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