IS UGANDA'S TAX REGIME EQUIPED TO FACE TAX AVOIDANCE BY MULTINATIONALS IN THE OIL AND GAS SECTOR?

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APPROVAL

COPY RIGHT DECLARATION

I **Nassali Maria,** declare that this is my original work and that it has under no circumstances ever been submitted for the award of any degree in any University or Institution.

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Date: ………………………………

ABSTRACT.

Multi - nationals often use legal means to organize their financial affairs in order to pay less tax leading to tax avoidance or planning. Some of the forms of tax avoidance discussed herein include: Transfer pricing, capital flight and tax havens, treaty shopping, tax incentives, tax credits and tax deductions. The study is done to legally analyse the tax regime in the face of tax avoidance practices by multi- nationals in Uganda's oil and gas sector. This research paper contains; the introduction in chapter one, the literature review in chapter two, the methodology used in data collection is found in chapter three, Chapter four contains the difference between tax avoidance and tax evasion, Uganda's fiscal and tax regime, Chapter five contains the country comparisons, Chapter six contains the findings from the field, the legal frame work, the structural frame work, the recommendations and conclusion. Lastly is the bibliography. In this study, it is recommended that tax avoidance can be reduced by governments ending tax havens and general tax reform. Further governments should consider placing a tax auditor in each multi- national company that is set up in the country. This will ensure that the tax due is payable and therefore prevent tax avoidance. Lastly the government must improve funding in the research on tax systems in order to equip the tax organs with the desirable skills and knowledge to counter tax avoidance.

DEDICATION

This work is dedicated to my parents: Mr. Nicholas. K. Ssali, Mrs. Deborah Ssali and my elder sister, Diana Nalukwago. My children: Marina, Israel and Shadrach and my husband, Mr. Masereka Martin. I thank you for your sacrifices that have enabled me to go this far. Other include my siblings; David, Charles, Christopher, John, Nelly and Roy. I thank you all for your support, love, patience and good will.

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CHAPTER ONE

1.1 INTRODUCTION

Experts on taxation in developing countries strongly agree that there is considerable potential to increase tax revenue in low income countries.[1]

Findings of the World Bank confirm that most low income countries have both low tax collection and low tax effort, indicating that most are below potential level and the main reason certainly being tax avoidance.[2] The shortage in funding of developmental projects persists and countries struggle to meet the financial requirements needed to achieve Sustainable Development Goals.

Tax professionals worldwide highlight that the tax losses are unjustifiable. Developing countries such as such Ghana, Botswana, Nigeria, Tanzania, Kenya, Malawi, Rwanda, Zambia and Uganda are faced with this complex and often challenging problem of tax avoidance.

This research is undertaken to find out the ways in which governments in the above developing countries can reduce the threat of tax avoidance by multi- national corporations involved in Uganda's oil and gas sector. Most of the available research surrounding the

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[1] Giulia Mascagni and Mick Moore, Tax Revenue Mobilization in developing countries; Issues and Challenges, © European Parliament, Directorate-General for External Policies, Policy department, 2014, https://www.europarl.europa.eu/meetdocs/2009_2014/documents/deve/dv/tax_evasion_study_/tax_evasion_study_en.pdf accessed on 5th March, 2020 P. 13.

[2]Torres, J., 'Revenue and Expenditure Gaps and Fiscal Consolidation: a Cross-Country Analysis', IMF Working Paper, WP/05/13 Fiscal Affairs Department, 2013.

topic of tax avoidance by multi- nationals in developing countries and Uganda in particular is centred on the methods of tax avoidance by multi-nationals in the oil and gas sector.

Therefore, this research focuses on finding out the ways in which the Ugandan government can curb the practice of tax avoidance by multi-national corporations in the oil and gas sector.

1.2 STATEMENT OF THE RESEARCH PROBLEM

Ironically, countries that are well endowed with natural resources consider that incomes ensuing from extraction thereof will be utilized to develop their economy. However the opposite is often true. Managing the proceeds of the resources for sustainable economic development is not as easy as projected.

The discovery of commercial quantities of oil in Uganda estimated at 6.6 billion barrels[3] has led to a number of multi-national oil companies investing in Uganda and these companies will be required to remit some revenues back to the government of Uganda. Nevertheless, as will be shown in the study, these companies try as much as possible to remit back less revenue through tax avoidance.

1.3 Motivation of the study

I was motivated to study the above topic because multi- national corporations are involved in tax avoidance thereby leading to loss of revenue not only in Uganda but in sub Saharan Africa. This has motivated me to find out how multi - national corporations are carrying

[3] http://www.reuters.com/article/us-uganda-oil-idUSKBN0NV0BB20150511 accessed on 17th/3/2020

out tax avoidance, the magnitude of the problem and also suggest ways in which to mitigate this challenge.

1.4 General Objective

The general objective of the study is to legally analyse the tax regime in the face of tax avoidance by multi- nationals in Uganda's oil and gas sector.

1.5 Specific Objectives

i. To show the state of tax avoidance in Uganda's oil and gas sector.
ii. To conclusively distinguish between tax evasion and tax avoidance by multi – national companies.
iii. To find out the structure and organisation of Uganda's tax and fiscal regime in the oil and gas sector.
iv. To find out about the case laws applicable on tax avoidance in Uganda.
v. To make country comparisons on the situation of tax avoidance in Sub – Saharan Africa.
vi. To recommend ways of dealing with the problem of tax avoidance in the oil and gas sector of Uganda.

1.6 RESEARCH QUESTIONS.

a. How is tax avoidance carried out in Uganda's oil and gas sector?
b. What is the difference between tax evasion and tax avoidance by multi – national companies?
c. How is Uganda's tax and fiscal regime organised and structured?
d. Which case laws on tax avoidance are applicable in Uganda?

e. How are different countries dealing with the concept of tax avoidance by multi- national companies in Uganda?
f. What measures can be put in place to curb the problem of tax avoidance in Uganda's oil and gas sector?

1.7. SCOPE OF THE STUDY

1.7.1. GEOGRAPHICAL STUDY

The study is exclusive on tax avoidance in the oil and gas sector of Uganda but it shall not be limited as it also focuses on a comparative analysis of Uganda's oil and gas sector with the sectors of other countries in the sub Saharan region and the world at large, borrowing leaf from the developed countries around the globe.

1.7.2. TIME SCOPE

According to the Uganda Petroleum Authority[4], oil was earlier suggested to exist in Uganda as early as 1925. And the first shallow stratigraphic wells were drilled in 1938 but modern exploration and production began in around 2002 and 2004 when **HERITAGE** and **ENERGY AFRICA** were licensed to carry out the exploration.

Since then the country has gone ahead to structure laws, regulations and models to regulate the exploration and production of the oil and gas.

Therefore, this paper focuses from the time modern exploration commenced in Uganda i.e. from 2002 up to now.

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[4] https://www.pau.ug/about-us/profile/petroleum-exploration-history/<accessed on 10th January 2020.>

1.8 SIGNIFICANCE OF THE STUDY.

This paper gives insightful knowledge to the reader about how tax avoidance by multi - nationals in Uganda's oil and gas sector has severely obstructed development and injured the economy of the state.

Further the reader shall get a deeper meaning and understanding of how to control the fast developing vice of tax avoidance by multinational companies in the country and be able to comprehend this problem as and when it arises.

Additionally, the paper reaches out to the stakeholders in the government on how to take action and save Uganda's economy from shrinking because of tax avoidance in the oil and gas sector of Uganda.

As earlier observed, there is limited published literature available concerning Uganda's oil and gas sector. This paper will richly add to the oil and gas content available to the academic world.

1.9 HYPOTHESIS TO BE TESTED

1. The oil industry in sub Saharan Africa is dominated by multi-national corporations and these multi nationals are major tax contributors in these countries.
2. The multinational corporations try as much as possible to reduce their tax burden and obligations by avoiding taxes.
3. These multinational corporations are wealthy and powerful so they can influence state policies and leaders to create favourable taxation laws.

1.10 THEORATICAL FRAMEWORK

There are two main ways of formulating a research problem in academic research and these are conceptual and theoretical frameworks.[5]

The conceptual frame work is the researcher's idea on how the research problem was explored while the theoretical framework dwells on time tested theories that embody the findings of numerous investigations on how phenomena occur.[6]

The theoretical framework provides a general representation of relationships between things in a given phenomenon. It describes a broader relationship between things whereas the conceptual framework specifies the variables that were explored in the investigation.[7]

In the course of the study the theoretical framework was used over the conceptual framework.

The paper is guided by the **resource curse theory** as the theoretical framework. The resource curse theory represents a conflicting relationship between extraction of natural resources and socio-economic development.[8] Auty,[9] who coined the phrase "resource

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[5]Sitwala Imenda, Is There a Conceptual difference between Theoretical and conceptual Framework? University of Zululand, Kamia-Raj 2014, P.188.

[6]Ibid, p.189.

[7]Ibid, p. 189 & 190.

[8] Boniphace Luhende, Towards a Framework for Preventing Tax Revenue Leakage in the Upstream Oil and Gas Industry in Tanzania; An Analysis of the Concepts, Methods and Options Available in a Public Trusteeship Model of Natural Resource Holding, DST/NRF SARCHI Research Chair: Mineral Law in Africa at the Faculty of Law, University of Cape Town, August 2017, https://www.semanticscholar.org/paper/Towards-a-legal-framework-for-preventing-tax-in-the-Luhende/777291902935e5b98fb669d32b4795fd274e97f5?p2df p.2.

[9] R M. Auty, *Sustaining Development in Mineral Economies: The Resource Curse Study* (London and New York, Routledge, 1993) p.1.

curse", argued that most resource rich countries performed worse in terms of socio-economic development and good governance than their counter parts with less endowment. Karl describes it as oil's "paradox of plenty" and asserts as follows.

> "Countries that are dependent on petroleum revenues for their livelihood (with the notable exception of Norway) are among the most economically troubled, the most authoritarian or conflict-ridden in the world. This is true across regions-in the Middle East, Asia, Africa and Latin America. This is the oil's "paradox of plenty."[10]

However there are countries that have avoided the oil curse. These include inter alia: Chile, Botswana, Malaysia and Indonesia, and also the industrialized countries Norway, the USA, Australia and Canada. We frequently look to these countries for institutions that distinguish them from the many others. [11] It should be noted that oil is not necessarily a curse to Africans or any group of people. Instead, the major curse bedeviling African oil exporters is the curse of leadership. A crop of leaders, who through corrupt tendencies have misgoverned and mismanaged the continent's resources. Further the leadership has not

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[10] Emeka Duruigbo, The World Bank, Multi National Oil Corporations, and the Resource Curse in Africa, Published by Penn Law: Legal Scholarship Repository, 2014, [Online], https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1207&context=jil P 34. (Accessed on 1/10/202)

[11] Paul Stevens and Evelyn Dietsche, Resource curse: An analysis of causes, experiences and possible ways forward, 2008, Energy Policy, Centre for Energy No.36, Issue 1 Petroleum and Mineral and Policy (CEPMLP), University of Dundee, Scotland, UK, Page 56

made any effort to set up the right policies and structures in safeguarding their natural resource endowments.[12]

The resource curse theory troubles most underdeveloped countries that are producing oil and gas especially for the first time like Uganda as shown above. The biggest cause of the “resource curse” issue is the leadership. Therefore in this paper, the researcher suggests ways of avoiding the resource curse theory by putting in Uganda’s tax regime; proper policies, systems and arrangements. This will prevent tax avoidance by multi-nationals in the oil and gas sector.

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[12] Emeka Duruigbo, The World Bank, Multi National Oil Corporations, and the Resource Curse in Africa, Published by Penn Law: Legal Scholarship Repository, 2014, [Online], https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1207&context=jil p. 34(Accessed on 1/10/202)

CHAPTER TWO

2.0 LITERATURE REVIEW

2.1 INTRODUCTION.

The literature review in this paper focuses on the history and methods of tax avoidance by multinational companies in the oil and gas sector. The researcher starts with the history of tax avoidance and then goes on to the different methods in the practice of tax avoidance by multi – nationals in the oil and gas sector. This section as such points out the available literature on tax avoidance by multi- nationals in the oil and gas sector in accordance with the above stated objectives of this paper.

According to Cobham and Jansky[13]international corporate tax is an important source of government finance in all regions in the world and responsible for a larger share of total tax revenues in lower-average income countries.

However approximately $500 billion is lost annually through tax revenue losses due to tax avoidance and those greatly affected are low-income countries like Uganda and countries in Sub-Saharan Africa, Latin America, the Caribbean and South Asia.[14]

Hence Crivelli[15] estimates that out of the total revenue losses globally due to tax avoidance under international corporate tax, one third is from the law developed countries.

[13]Alex Cobham and Petr Jansky, Global Distribution of Revenue loss from Tax Avoidance; Re estimation and country results. WIDER Working Paper 2017/55, March 2017

[14] (ibid)

[15] E Crivelli, Ruud De Mooji and Michael Keen, Base Erosion, Profit Shifting and Developing countries, IMF Working paper, (2016), [online]

The literature directly shows what tax avoidance is but the same does not specify the means or the alternatives to be adopted by the oil and gas producing states especially the developing countries who are the most affected by tax avoidance that is the current literature is more definitive than descriptive. It tends to classify tax avoidance as a lesser evil over tax evasion merely because the former is legal and the latter is illegal. The researcher as such shows that tax avoidance is harmful though not illegal and should be eliminated.

This paper therefore provides a legal analysis of how tax avoidance greatly affects the economies of the developing countries. This is because multinational companies shift their profits or apply other legal methods of dodging taxes owed to developing countries where they pay little taxes than what they ought to have paid. Hence making these countries lose a lot of revenue.

HISTORY OF TAX AVOIDANCE

Stevens[16] argued that in the first decade of the 20th century, the British government introduced progressive income taxation which was pro-taxpayer. The House of Lords decided cases in a way as to enable the wealthy to avoid taxation, and it can be attributed

https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Base-Erosion-Profit-Shifting-and-Developing-Countries-42973 accessed 28th February, 2020

[16] Robert Stevens, Law And Politics: The House Of Lords As A Judicial Body, 1800-1976 (1978) p. 17

to the fact that the Law Lords sought to serve their interests and to protect the wealth of the rich sections of society[17]

Thus in *Helvering v. Gregory,*[18] which decision was affirmed by the Supreme Court in *Gregory v. Helvering,*[19] Judge Learned Hand observed:

> "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."[20]

This research paper is in stark contrast to the above decision of the Supreme Court of America. Multi – nationals have for long gotten away with tax avoidance and consider it as an ordinary way of doing business. The research paper illustrates that the practice hurts the economies of developing oil rich nations like Uganda. It should therefore be discouraged.

Tiley[21] further discussed the case of *Ramsay v IRC*[22] where a tax avoidance scheme was considered as a whole and it was held that it should be treated as a nullity for tax purposes. The House of Lords held that:

[17] Assaf Likhovski, The Duke and The Lady: *Helvering v. Gregory* and the History of Tax Avoidance Adjudication, Forthcoming, Cardozo Law Review, vol. 25, Spring 2004, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=430080 accessed on 19th October, 2020

[18] *69 F.2d 809, 810 (2d Cir. 1934)*

[19] *293 U.S. 465 (1935)*

[20] Henry Ordower, The culture of tax avoidance, 2010, Volume 55, St. Louis U.L.J Available at: https://ssrn.com/abstract=1596684/ accessed on 15th /October/2020

[21] John Tiley and Ann O' Connell, Managing Tax Avoidance, 2007, Volume 12 No.1, e- Journal of Tax research, p. 11….. https://www.business.unsw.edu.au/research-site/publications-site/ejournaloftaxresearch-site/Documents/eJTR_Vol12-No1_2014-Tribute-to-the-late-Professor-John-Tiley.pdf accessed on 14th October, 2020

[22] *[1982] AC 300*

> "It has always been, a general principle of tax law that every man is entitled, if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be."

Professor Tiley outlined some of the other ways in which tax avoidance was being dealt with in the UK. This included the use of targeted anti-avoidance rules, the possibility of retrospective legislation, imposition of penalties for tax advisers, as well as improved relationships with large business.

The article explores the concept of tax avoidance in the UK, US, Australia among other plus the historical developments of taxation in Malaysia.

However the article is a general tax article and lacks the concepts of taxation in the oil and gas industry or the extractives sector at that in the developed world. Therefore the researcher will find out more about taxation in Uganda's oil industry and tax avoidance by multi- nationals.

Ordower [23] also discussed the history of tax sheltering or avoidance in the United States. He explains that the GAAR (General Anti Avoidance Rules) have been formulated in Canada, German and Sweden in order to tackle aggressive tax planning which results into avoidance. He further opined that tax planning is so prevalent in the countries with developed national economies that it has always has been or has become an acceptable behavior. The writer suggested that there is a culture of tax avoidance leading to tax evasion

[23] Henry Ordower, The culture of tax avoidance, 2010, Volume 55, St. Louis U.L.J Available at: https://ssrn.com/abstract=1596684/ accessed on 15th /October/2020

but that there is a lack of political will by the executive to eliminate the problem. He recommended that there should be massive education of the public about the benefits of taxation and consequences of non – compliance. There should also be funding of tax administration so that the auditors can do a better job among other recommendations.

Nevertheless the article is a general tax article and lacks the concepts of taxation in the oil and gas industry or the extractives sector at that in the developed world. Therefore the researcher will find out more about taxation in Uganda's oil industry and tax avoidance by multi- nationals.

2.3 METHODS OF TAX AVOIDANCE.

There are many methods of tax avoidance in the world of business and taxation. These include; transfer pricing, capital flight and tax havens, treaty shopping, tax incentives, tax credits and tax deductions.

All these forms of tax avoidance have been used in sub Saharan Africa especially by multinationals/transnationals[24]in the mining sector.

[24] For a general discussion of Multinationals as well as their influence and clout see, U.N Transnational Corporations in World Development: Third Survey, (New York): UN 1983, PP. 357 -364; Spero, The Politics of International Economic Relations, London, George Allen and Unwin Ltd., Third Edition, p.132, Steven Hymer (1972)Multinational Corporations and the Law of Uneven Development, in J. Bhagwati (ed), Economics and World Order from the 1970 to the 1990's Collier MacMilan, pp.130-40; See also George W.K.L.Kasozi, *Transnational Corporations and their role in the Transfer of Technology to Developing Countries: Consideration of some Legal Issues*, (1989), Vol. 5, No. 1, pp. 97-125 Lesotho Law Journal.

The paper therefore discusses these methods extensively with strict emphasis on their application in the oil and gas sector and how multinational companies have taken advantage of the legal loop holes and exploited the profits made within developing countries.

Transfer pricing.

According to **Readhead**, transfer pricing is a mechanism by which prices are chosen to value transactions between related legal entities within the same multinational enterprise.[25]Transfer pricing may become illegal when related parties seek to distort the price as a means of reducing their overall tax bill and this is referred to as transfer mispricing.[26]

Dementia explains that this method of tax avoidance works when the price set does not match the "arm's length" price at which the transaction would have taken place between unrelated parties. A transaction is conducted at arm's length if the terms of the transaction do not differ from the terms of a comparable transaction between independent people.[27] For example, where a company incorporated in Nigeria transfers goods or services to a

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[25] Alexander Readhead, Transfer Pricing in the extractives sector in Ghana, published by National Resource Governance Institute, March 2016, [online] https://resourcegovernance.org/sites/default/files/documents/nrgi_ghana_transfer-pricing-study.pdf accessed 4th June, 2020, p.1.

[26] Ibid

[27]W K O Demitia, The Challenges of Transfer Pricing in Ghana, Transfer Pricing Summit, 9th September, 2015) https://www.researchgate.net/publication/294874261_Addressing_the_Challenges_of_Transfer_Pricing_in_Ghana accessed on 26th November, 2019

related company in Ghana the price charged by the Nigerian entity is called transfer pricing.[28]

It is estimated that developing countries lose about US$ 160 billion every year through this scheme of transfer pricing. He further observed that studies in the mining sector showed that Ghana loses about US$ 36 million a year through transfer pricing.[29]

By using the above of statistics, this paper seeks to find out how Uganda is affected by transfer pricing. Further the above pieces of literature do not show how transfer pricing affects Uganda's oil and gas sector. As such the researcher demonstrates how transfer pricing affects the economy of Uganda.

On the other hand, it should be noted that though it is suggested that transfer pricing occurs when there is valuation of similar transactions in a low taxing country and high taxing country, it is quite not certain why despite the problem being detected, is not cured or done away with.

Therefore, a case study on Uganda's oil and gas sector establishes within this paper that similar complications exist within the sector due to lack of well authored mechanisms to curb this vice and hence provide suggestions through which it could be stopped.

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[28] Emmanuel Buddo Addo, Hussein Sala and Abdala Ali-Nakeya, Transfer Pricing Abuse; The Ghana perspective and the role of the accountant In tax compliance, (December 2017) Page 84

[29] W K O Demitia, The Challenges of Transfer Pricing in Ghana, Transfer Pricing Summit, 9th September, 2015) https://www.researchgate.net/publication/294874261_Addressing_the_Challenges_of_Transfer_Pricing_in_Ghana accessed on 26th November, 2019

In order to appreciate the complex web of transfer pricing please refer to Annexure I appended at the end of the dissertation

Capital Flights and Tax havens

Fundira defines tax havens as jurisdictions that use secrecy and low tax rates as selling points to attract foreign investors in their country.[30] He goes further to describe capital flight as unrecorded and unregulated capital flows between a country and the rest of the world. These capital flows are not subject to tax as the cash flows are unknown and unregulated, therefore depriving the country of much needed revenue.[31]

It has been revealed that capital flight in the corporate world is responsible for the disappearance of an estimated $ 1.26 trillion to $ 1.44 trillion from developing countries on an annual basis.[32] In the sub-Saharan region tax havens are a major bottleneck to revenue collection and economic development in general.

The International Monetary Fund estimates that assets held in tax havens equal to about 50 percent of total cross-border assets.

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[30]Fundira Taku, The G-20 Tax Agenda and Africa's Taxation Needs, Occasional Paper 216, April 2015,p.9 https://media.africaportal.org/documents/saia_sop_216_fundira_20150729.pdf accessed on 14th October, 2019

[31] Ibid

[32]Africa Europe Faith and Justice Network, *Capital Flight and its Impact on Africa*, [online], http://www.aefjn.org/index.php/370/articles/capital-flight-and-its-impact-on-africa.html(accessed on 14th October 2019)

According to Merrill Lynch and BCG, assets held in tax havens, beyond the reach of effective taxation, would equal one-third of total global gross domestic product, the value of goods and services, which in 2003 was $36.2 trillion.[33]

Hubert[34] explains that Kenya is on the fast track to producing petroleum, however the country is concerned about tax avoidance practices by IOCs. There is a widespread use of tax havens and low tax jurisdictions in the corporate structures of companies holding petroleum rights in Kenya. Seventeen parent companies own petroleum rights in Kenya directly through a subsidiary in a tax haven or low tax jurisdiction. Ultimately, all but five of the parent companies make use of a tax haven or low-tax jurisdiction as part of their wide corporate structure.

Best practice in the extractive sector good governance calls for the government to publish details of all companies holding oil, gas and mineral rights. Kenya already provides some of this information through the online mining cadastrel portal. Comprehensive information on petroleum rights should also be published including the legal names of operators and their joint venture partners as well as their respective percentage stakes and the dates on which the relevant transaction were concluded. Furthermore, as Kenya has made a public commitment to joining the EITI, companies should be required to disclose full details of their corporate structures and their beneficial owners.

[33] Lucy Komisar, Profit Laundering and Tax Evasion, The Dirty Little Secret of Financial Globalization, 2005, [online], https://www.dissentmagazine.org, accessed on 27th November 2019

[34] Don Hubert, The Use of Tax Havens in the Ownership of Kenyan Petroleum Rights, Resources for Development Consulting, www.oxfam.org, May 2016, [Online], https://www-cdn.oxfam.org/s3fs-public/file_attachments/rr-tax-havens-kenyan-petroleum-rights-100516-en_0.pdf accessed on 14th October,2020

The article goes on to show the list of tax havens including: OECD Harmful Tax Competition (2000), IMF Offshore Financial Centers (2007), US Stop Tax Havens Abuse Act 2015, EU Blacklist 2015, and Financial Secrecy Index (2015). Note that FSI also includes many other jurisdictions including Delaware, Netherlands, Switzerland and the United Kingdom (City of London).

De Montclos [35] further analyses the leakage of the oil wealth in Nigeria at all levels of production and commercialization, from the well heads, with the bunkering of pipelines, up to the export of crude oil and the import of refined products, including capital flights to tax havens. The study proposes that the diversion of oil rent is a governance issue. The Nigerian state is involved in the mis - governance at both federal and local levels. The study suggests that there are illegal and legal means of diversion of the oil wealth. This has been done for instance by institutions halting production in order to obtain bribes.[36]The largest black hole in the industry is the national oil company. The NNPV is known for its lack of transparency, the NNPC is a kind of Bermuda triangle where public money disappears forever. It doesn't pay taxes and only transfers part of its revenue to the central bank.[37] De Montclos recommends that there is need to improve governance in Nigeria in order to tackle corruption. Further there is need to reform the judiciary and to support

[35] Marc-antoine Pérouse De Montclos, Oil rent and corruption : the case of Nigeria, E'tudes de I'ifri, Ifri, November 2018, [Online] https://www.ifri.org/sites/default/files/atoms/files/perouse-de-montclos_oil_rent_corruption_nigeria_2019.pdf accessed 12th October, 2020 Page 7

[36] A. Giles, Reforming Corruption out of Nigerian Oil? Bergen: CHR. Michelsen Institute, 2009

[37] A. Nwankwo, Nigeria; The Stolen Billions, Enugu; Fourth Dimension, 1999, p.P.112

“whistle blowers” without forgetting to work “from the bottom up” with people and communities right in the Niger Delta.

However, it should be noted that this study mainly deals with tax evasion through illegal means like corruption, embezzlement and bunkering, although it has some aspects of tax avoidance. Some aspects of capital flights and tax havens are shown as the NNPC does not pay taxes and its members usually transfer the proceeds of the black gold to tax havens. As such there is a lacuna in the study as it deals with tax evasion in Nigeria and not tax avoidance in Uganda.

From the above, it can be pointed out that capital flights are unregulated and continue to be applied by multinational companies at the detriment of developing countries who deal with oil and gas production with Uganda inclusive. But the above research does not focus on Uganda so the research attempts to find out the means of capital flight by MNEs in Uganda’s oil and gas sector.

These tax havens are known as pointed out by Christensen[38]. But it is not clear as to why such havens are the ‘chosen ones.’ Though in most cases it is because they are low taxing states and multinationals transfer their assets from high tax rate countries to these countries.

Review of the above literature by Komisar and Christensen shows that the problem of capital flight is eminent but regulation of the same is still lacking. And so there is a gap as far as enforcement by the regulators.

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[38]Christensen, John, Africa’s Bane; Tax Havens, Capital Flight and Corruption interface, Working Paper 1/2009, p.3

Therefore, this paper gives an elaborate explanation as to why there is capital flight and suggests that if there is proper regulation of the activities of these multinational corporations especially through treaty agreements, tax avoidance can be prevented.

Treaty Shopping:

According to **Akong,** treaty shopping refers to the use of double tax treaties by the residents of a non-treaty country in order to obtain benefits that are not supposed to be available to them.[39] It is often achieved by interposing a corporation in one of the contracting states to shift profits out of any of these states.[40]

Among the reasons why multinational corporations use treaty shopping as a mechanism of tax avoidance is because developing countries in the need to attract investment and avoiding double taxation and hence end up implementing or signing these treaties. As is established in this paper, Multi-National Companies take advantage of this vulnerability and end up exploiting the resources of the host country.

The paper therefore observes and argues that however much there is need to encourage investment, countries should ensure that preventive measures are put in place to protect their source of revenue from treaty shopping by MNEs.

[39]Akong, Charles, (2017) The Impact of Illicit Financial Outflows from the Mineral Sector in Africa, p.38
[40] Ibid

Tax Incentives:

Tax incentives in sub-Saharan Africa are now more widely used, as more than two-thirds of African countries offer tax holidays to attract investment.[41]Tax incentives are another major factor that has been shown to prevent African governments from maximising tax revenues. Governments have invested a lot of money in tax incentives on the premise that such incentives promote economic development.

The problem is evident in the mining sector, especially in mining in sub-Saharan Africa, where there are several investment incentives offered mainly to large Multinational Enterprises (MNEs) without assessing the cost of these incentives and the benefits of these incentives to the economic growth of the nation.[42] There is enough evidence in Africa to suggest that significant revenue is lost through tax incentives. A study conducted by Tax Justice Network Africa and Christian Aid in 2012 estimates that up to $2.8 billion is lost annually in countries such as Kenya, Uganda, Tanzania and Rwanda from tax incentives and exemptions. These losses deprive African countries of critical revenue.

Tax Credits

This is used when the government is interested in promoting a particular type of qualifying activity, such as research and may allow related costs to be credited against a taxpayer's

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[41]P -fister, Michael (2009), Taxation for Investment and Development; An Overview of Policy Challenges in Africa, p. 11

[42] Ibid

income tax liability instead of being deducted for calculating income tax.[43] A Tax credit enables a taxpayer to reduce the amount of tax payable by a portion of its investment expenditure in the first year, rather than reduce its taxable income.[44] Tax credits reduce the cost one incurs in carrying out their business hence reducing the amount of tax paid.[45] This is one of the ways in which the wealthy and the wealthy individuals and rich companies in the extractives sector avoid paying taxes. However a review of the literature did not show how multi – nationals are using tax credits to avoid paying tax to Uganda Revenue Authority.

Tax deductions:

The Centre on Budget Policy and Priorities has described a tax deduction as a specific expense that a taxpayer has incurred and can subtract from his or her taxable income.[46] Most nations accord the oil and gas sector special treatment by allowing various deductions, allowances, credits, and so forth that are used to calculate the 'tax basis.'(Tax Justice Network Africa, 2012).[47] This reduces the amount of tax that would be collectable

[43] James M. Otto, The Taxation of the Extractives Industries, WIDER Working Paper 2017/75, March 2017, p. 17

[44] Alexandra Readhead, Tax Incentives in mining: Minimising Risks to revenue, published by International Institute for sustainable development and OECD, 2018, [online], https://www.oecd.org/tax/beps/tax-incentives-in-mining-minimising-risks-to-revenue-oecd-igf.pdf accessed 4th June, 2020, p. 28

[45] Ibid

[46] Centre on Budget and Policy Priorities, Tax Exemptions, Deductions and Credits, (2018), p.2

[47] Tax Justice Network Africa and Christian Aid, *Tax Competition in East Africa: A Race to the Bottom?*, 2012,p.8

by the countries in the sub Saharan region from wealthy individuals and companies thereby affecting revenue collected from the extractive sector.

The above literature does not show the deductions available to Uganda's oil and gas industry and how to counteract the problem. Thus the research demonstrates the ways how the issue of tax deductions to multi-nationals in the Uganda's oil and gas sector can be handled.

ILLICIT FINANCIAL FLOWS

Le Billon suggests that countries highly dependent on natural resources are among the most severely affected by the problem of illicit financial flows.[48]In this paper, the main sources of illicit financial flows and beneficiaries are described as Corruption, illegal exploitation and tax avoidance and evasion. Some of the recommendations made by Philippe include interalia the following:

That a Stolen Asset Recovery (STAR) initiative be instituted. Restrict contracts to companies incorporated in fair-tax and high-disclosure Jurisdictions, Extend and enforce anti-corruption legislation, Promote the ethics of tax payment maximization in the poorest resource producing Countries. The paper complements the objectives of this research and the suggestions therein should be incorporated by the relevant tax bodies. However the gap is that the study is not tailored specifically to Uganda.

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[48] Philippe Le Billon, Extractive sectors and illicit financial flows: What role for revenue governance initiatives? Bergen: Chr.Michelsen Institute (U4 Issue 13), 2011, [Online] https://www.imf.org/external/np/seminars/eng/2014/eac/pdf/031514.pdf accessed 14th October, 2020 page

The United Nations Economic Commission for Africa (UNECA)[49] indicated that a lot of money is lost through illicit Financial Flows (IFFs) from Africa that is in excess of $1 trillion. This is a problem for Africa given that it is highly underdeveloped and poor. Information on IFFs was gathered from several African countries and it was discovered that IFFs were high. These countries include: Algeria, Democratic Republic of Congo, Kenya, Liberia, Mozabique, Nigeria etc. The UNECA recommended that African states should adopt the "arms - length principle" to counter transfer pricing. African countries should support the OECD – led response to base erosion and profit shifting. There should be transparency of ownership and control of companies, partnerships, trusts and other legal entities that can hold assets and open bank accounts is critical to the ability to determine where illicit funds are moving and who is moving them.

African countries should review their current and prospective double taxation conventions, particularly those in place with jurisdictions that are destinations of IFFs to ensure that they do not provide opportunities for abuse. Automatic exchange of tax information by tax and law enforcement officials. The report is relevant in as far as tax avoidance by multi – nationals is concerned; however the researcher's paper is tailored to Uganda. Further the report is on IFFs generally and covers issues of tax evasion, tax avoidance and money laundering in generally. However this paper covers tax avoidance specifically.

[49] United Nations Economic Commission for Africa, Illicit Financial Flows; "Why Africa needs to track it, stop it, get it", Report of the High level Panel on Illicit Financial Flows, 2015, [online] >https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf< accessed on 1st /10/2020 p 13 & 78

In conclusion, a review of the above pieces of literature reveals that the common methods of tax avoidance by multinational corporations in the oil and gas sector of Sub Saharan countries include the following: transfer pricing, capital flight, tax havens, treaty shopping, tax incentives, tax credits and tax deductions. That literature goes on to show a few of the methods of reducing the practice of tax avoidance.

However, there is a gap in the literature that the researcher intends to fill. The literature does not show the ways in which the government of Uganda is stepping up to control the practice of tax avoidance by multinational corporations in the oil and gas sector. My understanding is that as far as the gaps are concerned it is not what Uganda has not done, but rather to highlight the gaps/ weakness in the literature, which the study addresses.

It is based on this that the researcher may wish to advise; Uganda to take certain steps in order to control tax avoidance.

CHAPTER THREE

3.1 METHODOLOGY

INTRODUCTION

The research methodology is the general principle that directs the research. There are two research methodologies; the qualitative and the quantitative research methodology. In this research paper, the researcher focuses on the qualitative research methodology. Qualitative research explores attitudes, behavior and experiences through such methods as interviews or focus groups. It attempts to get an in-depth opinion from participant[50]

3.2 SCOPE OF THE STUDY

3.2.1 Study design

A research design is the logic or master plan of a research that throws light on how the study is to be conducted[51]. Accordingly the research design serves to plan, structure and execute the research to maximise the validity of the findings. It gives directions from the underlying philosophical assumptions to research design and data collection[52].There are four types of research designs that is: Exploratory or formative, descriptive or statistical, explanatory and experimental plus analytical research design[53]. In this study the research

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[50] Catherine Dawson, *Practical research methods, a user- friendly guide to mastering research*, 3 Newtec Place, Magdalen Road, Oxford OX4 1RE. United Kingdom.Tel: (01865) 793806. Fax: (01865) 248780. email: info@howtobooks.co.uk, http://www.howtobooks.co.uk, ©2002 Page 14

[51] Unisa Research methodology, p. 308.

[52] J Mouton, Understanding social research, Pretoria, Van Schaik Publishers, 1996

[53] Khtar, Inaam, Research design. Published in 2016.
www.researchgate.net/publication/308915548_Research_Design accessed on 18th/March/2020

will mainly focus on the descriptive or statistical research design for conducting the research. The study design or research design for this study is a descriptive and interpretive case study that is analysed through mainly qualitative methods with a small qualitative component. Face to face interviews were used as the data collection method[54]. The main aim of a descriptive research is to provide an accurate and valid representation of the factors or variables that pertain/ are relevant to the research question. Such research is more structured than exploratory research[55]. Therefore through a descriptive study design the researcher was able to analyse and make a vivid representation of the actual situation on the ground in regard to tax avoidance by multi- nationals in Uganda's oil and gas sector.

3.3.1 Area of study

The study is exclusive on tax avoidance in the oil and gas sector especially in the oil and gas section within Uganda but it shall not be limited as it also focuses on a comparative analysis of Uganda's oil and gas sector with the sectors of the sub Saharan region and the world at large, borrowing leaf from the developed countries around the globe.

3.2.2 Population Size

Accordingly the participants chosen will be a few people within the research population this is due to the limited budget and timescale available for completion of the project.

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[54] www.Pdfs.semanticscholar.org/e741/d370374b0a8031oba7ad3f30241f69bd338.pdf accessed on 18th/March/2020

[55] Brian Van Wyk, Research design and methods, University of Western Cape: www.uwc.ac.za>students>postgraduate>documents>Research accessed on 18th/March/2020

Therefore the researcher will not be able to contact everyone within the research population[56].

3.2.3 Sample and Sampling Techniques

In this research project, the researcher will interview a population sample size of 7 (Seven) holders of key positions from the URA, UNOC and TAT. The people to be interviewed include; company secretaries, legal officers and auditors. After acquiring the necessary and accurate data, the researcher will be able to generalize the findings as the factual position. Having a sample size of the population to acquire data for the research, the researcher will generalize the results to the whole of the research population [57]

3.3 Data Collection Strategy

This study was carried out by doing a comparative analysis of the different literature works and by analysing the Reponses given by the interviewees.

A descriptive survey research design was adopted in this study. This is because respondent's viewpoints about the research problem are desired so that the researcher can draw a pattern about their opinions with regard to tax avoidance in sub Saharan Africa by multinational corporations. The challenges faced in curbing the vices and how these challenges can be resolved.

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[56] Catherine Dawson, "Practical research methods, a user- friendly guide to mastering research": ©Dr. Catherine Dawson How To Books Ltd, 3 Newtec Place, Magdalen Road, Oxford OX4 1RE. United Kingdom.Tel: (01865) 793806. Fax: (01865) 248780. email: info@howtobooks.co.uk, http://www.howtobooks.co.uk.)

[57] Ibid

The organisations and persons picked during the survey are those that deal in matters of taxation and those that that are involved in Uganda's oil and gas sector for example the Uganda Revenue Authority, UNOC and Petroleum Authority of Uganda. The holders of key positions in these companies that were interviewed include the officers in the Oil and gas (Domestic taxes) department of URA, legal officers, and auditors among others.

3.4 Instruments

The instruments that were used in the survey include; interview questions for structured and unstructured interviews. Face to face interviews were conducted with respondents that were asked in the field research. Data was also gathered through email correspondences with particular interviewees and telephone interviews.

The researcher also applied use of an achievement test to assess and determine the performance of sector institutions like URA in reducing tax avoidance and evasion in the oil and gas sector.

After collecting this data from field visits, data analysis was carried out to come up come up with the final results are discussed in the findings.

3.5 SYNOPSIS OF OTHER CHAPTERS.

Chapter four is composed of the major content of this research paper and shows the difference between tax evasion and avoidance. The chapter goes deeper and discusses the concept of tax avoidance in the oil and gas sector globally and then in Uganda. The chapter defines a nexus between tax avoidance and the role played by multinational corporations and International Oil Companies in promoting the evil. Further, it goes at large to air out the institutional frameworks in the field of taxation of the energy sector in Uganda, discuss

the laws and regulations and the institutions present in the country and the ways on how the vice can be controlled before it erodes the country's wealth to the rich multinational corporations in the sector.

Chapter five gives a comparison of Uganda's oil and gas regime in relation to other countries like Nigeria, Ghana and Kenya among others with specific reference on how Uganda borrow a leaf from the above mentioned countries.

Chapter six includes the observations of the researcher, the limitations of the study, the recommendations of the researcher and the conclusion.

CHAPTER FOUR

4.1 INTRODUCTION.

4.1.1 TAX EVASION AND TAX AVOIDANCE.

The terms tax avoidance and tax evasion can literally be construed to mean the same, as both involve the use of means or ways that are intended by the Multi-National Company to dodge tax payments. However the only underlying difference is that, tax avoidance is done through the use of legal tricks or means whereas tax evasion is the use of illegal schemes. Under tax avoidance, Multinationals take advantage of the loop holes in the tax system and end up avoiding paying tax and the common means of tax avoidance is transfer pricing or profit shifting among others as is discussed in this paper. This section of the paper shows the difference between the two terms that is tax avoidance and tax evasion.

4.1.2 TAX EVASION.

Tax evasion is the illegal and deliberate misrepresentation of the state of affairs of an individual or corporation to the tax authority to reduce the tax liability. Among the illegal means used; is honest tax reporting or overstating deductions.[58]

Tax evasion involves both illegal means of total failure to pay the tax being liable and the use of illegal methods to underpay for the specific tax liable.

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[58]Tine Orem, Tax Evasion vs. Tax Avoidance; Definitions and Prison Time. January 30th 2020, [online] https://www.nerdwallet.com/blog/taxes/tax-evasion-vs-tax-avoidance/ accessed on the 1st day of March 2020.

In Uganda, a report on illicit financial flows (IFFSs) estimates that Uganda loses at least two trillion Uganda shillings every year due to illegal activities perpetrated by Multi-National Corporations including those in the oil and gas sector.

In the Oil and Gas sector of Uganda, the famous Panama Papers reported that in 2010, Heritage Oil and Gas attempted to evade paying a Capital Gains Tax of approximately Uganda shillings 1.4 trillion. That Heritage was planning to sell 50% of its stake in Uganda's fields at Shs.5 trillion and thus Heritage decided to evade it through intent to shift its business address from the Bahamas to a tax haven in Mauritius in the hope of benefiting from taxation agreement Uganda has with Mauritius which offers a tax reprieve to Mauritanian companies investing in Uganda[59].

This subsequently led to tax battles between Uganda and Heritage Oil and Gas Limited that were concluded in the United Kingdom where Uganda won the case and Heritage oil was ordered to pay the contested tax.

[59]Independent Newspaper, Uganda in biggest tax evasion story; Panama papers expose efforts plot to dodge taxes in oil deals, 11th April, 2016, [Online], https://www.independent.co.ig/uganda-in-biggest-tax-evasion-story/ Accessed on the 29th of February 2020.

A simple table showing the methods and schemes used in tax avoidance and evasion in Uganda. (Source GIZ 2010)

Tax Evasion: Intentional falsification of tax relevant information	Tax Avoidance: Exploiting the legal scope for discretion of the tax system running counter to the purpose of the tax law
○ Non declaration of assets in offshore financial accounts ○ Trade mispricing ○ VAT fraud: − Missing trader fraud/carousel fraud − Miss classification of goods − Smuggling of goods ○ Bribing tax officials	○ Profit shifting: ○ Pricing intercompany tangible goods transactions/ ○ barter trade ○ Increase in intercompany debt ○ Bargaining for tax incentives

4.1.3 TAX AVOIDANCE

Tax avoidance is the legal usage of the tax regime to reduce the amount of tax that is payable by means that are lawful[60]. Some of the forms of tax avoidance include profit shifting, tax planning and tax sheltering.

[60]S.91 (2) of Income Tax Act cap. 340

Multinational companies create subsidiary legal entities specifically aimed at avoiding taxes. These subsidiaries are normally created in jurisdictions that are normally termed as 'Tax Havens' which normally have loopholes in their tax code. These Multinationals engage transactions amongst themselves aimed at dodging or avoiding taxes.

4.2 THE SITUATION OF TAX AVOIDANCE SPECIFICALLY IN UGANDA'S OIL AND GAS SECTOR.

Uganda is now an established petroleum province with an estimated in-place volume of petroleum resources of 6 billion barrels of oil with 1.4 billion barrels recoverable and over 500 billion cubic feet of gas to support commercial production of petroleum in the country. All this has been achieved in exploration of less than 40% of the Albertine Graben, the area with the highest potential for petroleum production in the country. The country's petroleum reserves and resources are expected to increase with more exploration.[61]

Therefore, more than 40% of the exploration blocks have been explored from the 21 discoveries that have been made and 9 out of the 14 exploration licenses have been covered. Subsequently, three new licenses were issued.

According to an interview with a legal officer from UNOC and officials from URA[62] currently five multinational Companies are licensed to carry Oil and Gas production in Uganda and remit taxes to the host government. These are; Armour Energy Limited (AEL),

[61]Oil and Gas Sector in Uganda, April 2019 <https://www.pau.ug accessed on 25th February 2020.

[62]Interview by the researcher with Joseph Kyeyune a Supervivor and Annet Bazlilaki also a Supervisor in Uganda Revenue Authority Oil and Gas Department on the 24th of February 2020

CNOOC Uganda Limited (CUL), Oranto Petroleum Limited (OPL), Total E&P Uganda B.V. (TEPU), and Tullow Uganda Operations Pty (TUOP) Ltd with licensed Contrators being HarriBurton which began its work in Uganda in 2010 by providing cementing services to the projects undertaken by Total E&P and Tullow Oil Uganda. The second contractor is Schlumberger who entered the Uganda Oil and gas sector in October 2011and thus entered into joint initiatives with the Ministry of Energy and Mineral Development and donated geosciences programs to the government.[63]

Hence with a combined effort by the government to foster development of the country's economy, oil and gas sector in Uganda has transitioned from having only exploration, to new exploration, preparation of the discovered oil fields for production (development) and putting in place infrastructure for both commercialization of the discovered 6 billion barrels oil and gas resources, and facilitating the developments in the sector.[64]

Tax avoidance by multi – national companies is a great concern in Uganda. Findings indicate that Uganda is losing significant tax revenue due to tax avoidance. A revenue administration gap analysis by the IMF (2014) found that while the Value Added Tax (VAT) tax base had grown significantly as depicted by the increase in compliance gap from just under 5% in 2003/4 to over 6% in 2012/13, the compliance gap as a percentage of

[63]https://www.oilinuganda.irg/oil-industry-2/oilfield-engineering-and-infrastructure-services/schlumberger/ accessed on the 26th of February 2020.

[64]Ibid Note 50

potential revenue remained constant at 60% over the same period.[65] This shows that there are low compliance levels in the payment of tax by Ugandans.

The Panama Leaks also revealed how billions had been hidden by among others multinational corporations in Uganda. The Leaks also showed how Heritage decided a month to the execution of its Sale and Purchase Agreement with Tullow Oil to move its domicile from Bahamas to Mauritius to avoid paying Capital Gains Tax. The other party to the transaction Heritage admitted that the purpose was to avoid paying capital gains tax. Uganda earned up to $ 434 million in capital gains tax after protracted court and arbitration battles locally and internationally.[66]

In another development, there was an investigation by the observer and the Ministry of finance carried out in October 2015. It was discovered that between 2003 and 2009, MTN Uganda was in involved in profit shifting of 3% of its income to MTN International in

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[65]Eric Hutton, Mick Thackray, and Philippe Wingender, Uganda Revenue Administration Gap Analysis Program- The VAT Gap, April 2014, ©IMF [online]

https://www.ura.go.ug/Resources/webuploads/INLB/Uganda%20RA-GAP%20RPT%20(2).pdf accessed on 23rd January, 2020

[66] Alvin Monsioma, Panama Papers and the looting of Africa, (Norwegian Church Aid, Tax Justice Network - Norway and Save the Children Norway), Published 2016.

Mauritius. This was done in the name of 'management services" in spite of the fact that MTN Uganda is directed in Uganda and not in Mauritius.[67].

After the discovery of oil and gas in Uganda, the sector was seen as a joy and a hope to raise the economy out of poverty however this might prove to be futile due to the continued practice of tax avoidance. The oil shall not benefit the Ugandan government or the Ugandan citizen but rather the rich owners of the Multi-National Corporation leaving the local person in the Albertine region in absolute poverty.

4.3 MULTI-NATIONAL CORPORATIONS WITHIN UGANDA'S OIL AND GAS SECTOR.

According to Kasozi, the terms transnational corporations, multinational enterprise, international firm or international companies are often used interchangeably. Such companies usually control assets, factories, mines, marketing offices etc in more than two countries.[68]

The legal form of the entities concerned may or may not be subsidiaries, affiliates branches, offices or any other type of separate units of an economic enterprise organised under the law and regulations of the countries they operate.[69]

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[67] Http://www.observer.ug/businee/38-business/40339-how-mtn-uganda-s-offshore-stash-sent-ura-on-the-hunt accessed on 18th/March/2020

[68] George W. K. L. Kasozi, 'Transnational Corporations and their role in the Transfer of Technology to Developing Countries: Consideration of some Legal Issues',(1989), Vol. 5, No. 1, Lesotho Law Journal, pp. 97-125.

[69] See working paper of the inter-governmental working group on a code of conduct for transnational corporations paper II (15th January, 1980), quoted in Maynard "The commission and the center on transnational corporations" The Company Lawyer Vol. No.5 (1980) P.226

Under this paper, the researcher goes further to critically analyse the composition of these multinational companies and the roles played in tax avoidance especially through transfer pricing and profit shifting since they have worldwide subsidiaries.

Apparently, there are three major Multinational companies involved in Uganda's oil and gas sector namely[70];

4.3.1 Tullow Oil PLC.

This is an Irish company which first entered into an agreement of exploration with Uganda in 2004 following the acquisition of Energy Africa and is estimated to have extracted over 1.7 billion barrels of oil.[71] Tullow oil has now acquired three licenses with Uganda.

However, in 2017 Tullow Oil announced that it had agreed on a substantial farm-down of its assets in Uganda to Total. Tullow Oil. The company agreed to transfer 21.57% of its 33.33% interest in Exploration Areas 1, 1A, 2 and 3 in Uganda.[72]

4.3.2 Total E&P Uganda.

This is a subsidiary of the French oil giant and is the main operator for Tilenga project that covers the Lake Albert basin.

[70]https://www.oilinugansa.org/oil-industry-2/international-oil-companies/ accessed on the 19th January 2020

[71]https://www.tullowoil.com/operations/east-africa/uganda accessed on the 19th of January 2020.

[72]Ibid Note 18

The company began operations in Uganda in 2012 and in 2016 it was awarded three production licenses by the government of Uganda paving way for the Final Investment Decision to be made within the next 18 months with field oil expected soon.[73]

4.3.3 CNOOC International.

CNOOC International is amongst the largest oil and gas multi-national companies within the oil and gas sector owning 1/3 of the interest in Exploration Areas (EA) EA1/1A, EA2 and Kingfisher partnering with Total E&P Uganda and Tullow Oil but it solely operates the Kingfisher Production license.[74] The multinational started operations in the country in 2012.

In 2016, development and production licenses for eight oil fields in the EA1 and EA2 blocks were issued by the government. Subsequently, in 2017 the front-ending design of the blocks was initiated and the intergovernmental agreement for an oil pipeline was signed and also completed the front-end engineering design for ground construction and drilling for block 3A in the same year.[75]

[73]https://www.theeastafrican.co.ke/news/Uganda-issues-8-production-licences-Tullow-Oil-and-Toal/2558-3363216-mf7ksy/index.html accessed on 17th January 2020

[74]https://www.cnoocinternational.com/operations/middle-east-and-africa/uganda. Accessed on the 20th day of February 2020.

[75]https://www.oilinuganda.org/categories/feautures/companies/ accessed on the 17th of February 2020.

4.4 UGANDA'S FISCAL REGIME

4.4.1 INTRODUCTION

Like other developing countries, which lack the capacity to guarantee protection of the rights or interests of the international oil company, Uganda has adopted the application and use of Production sharing agreements within its fiscal regime system.

It should be noted that a country chooses a fiscal regime that is proportionate to its intention and objectives of the sector. Most times, a fiscal regime is coined in a way mainly to boost revenue collection.

This chapter explores the structure and organization of Uganda's tax regime by giving an elaboration on Uganda's fiscal regime. This chapter discusses among others the current tools used in the regime.

The chapter further undertakes to oversee some of the decisions that have been decided by the Tax Appeals Tribunal and the impact they have had on the fiscal regime in Uganda and the relationship these cases have created between Uganda and Multinational Corporations.

4.4.2 Production Sharing Agreements.

Production sharing regimes involve the payment of a share or value of production to the government or its agency after allocation of a fixed share of production to the investor to cover costs[76].

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[76]Johnston D, International Petroleum Fiscal Systems and Production Sharing Contracts, Tulsa Ok: Penn Well Books, 1994

This operates under a system of a fixed maximum percentage of production known as *cost recovery or cost oil* which is allocated to the Multi-National Oil Company for recovery of costs in a period and the production remaining after cost recovery, that is profit oil, is shared between the government and the international oil company.[77]

Uganda has since the start of exploration developed Production Sharing Models (PSAs) that set out the phenomenal aspects of tax collection and administering in respect of the oil sector including royalty, annual fees, product sharing[78], cost recovery[79] and state participation[80] with the current model being of 2016.

Production sharing agreements in Uganda are introduced by the Petroleum Exploration, Development and Production Act[81], which provides that the government may enter into an agreement governing the grant of a license, including conditions for grant or renewal, and for the conduct of operations.

Under the Production Sharing Agreements created by the Petroleum Exploration, Development and Production Act 2013, the government retains the rights to the resources on the ground. The government and the Oil Company agree on how the production will be shared after the royalty and tax liabilities have been paid by the International Oil Company.

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[77]P Daniel, M Keen, C McPherson, The Taxation of petroleum and Minerals: Principles, Problems and Practice., 2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN, Routledge, 2010 ©IMF, page 39

[78] Article 12 of Uganda PSA Model 2016

[79] Article 11 of Uganda PSA Model 2016

[80] Article 10 of Uganda PSA Model 2016

[81] The Petroleum Exploration, Development and Production Act 2013, Section 6.

In PSAs, the oil company bears all the costs and risks of exploration and development. It has no right to be paid in the event that no discovery and development do not occur. On the other hand if a discovery is made, the IOC is allowed to recover costs incurred known as cost oil.[82]

It should be noted that generational Production Sharing Agreements use instruments of tax collection that include royalties, cost recovery, profit oil and state participation among others as discussed below.

4.4.3 Royalties.

This can be termed as the compensation for the exploitation privileges of natural resources to the government[83] by the oil company. The royalty is paid from the initial oil production by the contracting international oil company. In simple terms, royalties are payments normally for the use of the resource by the International Oil Company and are deducted from the gross revenue.

It has been argued[84]that royalties are a fixed proportion of production but can vary basing on sliding scale of production either daily or monthly. They guarantee that the government obtains its share revenue regardless of whether the international oil company earns a profit out of the undertaking or not.

[82] P Daniel, M Keen, C McPherson, The Taxation of petroleum and Minerals: Principles, Problems and Practice., 2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN, Routledge, 2010 ©IMF, p. 99

[83] www.wgei.org accessed on 9th/23/2020

[84]Linda M Nichols, 'Accounting Implications of Petroleum Sharing Contracts', Vol.29, No.2, Petroleum Accounting and Financial Management Journal, (2010)

Given the fact that royalties have to be legally provided and negotiated by the parties i.e. the host government and the International Oil Company, Section 154 of the *Petroleum (Exploration, Development and Production)*[85]provides that the licensee shall pay royalty to the government on petroleum recovered at the delivering point as will be stipulated in that particular petroleum agreement. Failure for the payment of this royalty, dealings with the company may be suspended or halted by the government and suit for recovery may be instituted thereafter.[86]

In the due course, royalties in Uganda Oil and Gas Production can be traced the Uganda Production Sharing Agreement Models for example Article 9 of the 2016 Production Sharing Model[87] provides that payment of royalty by the licensee the *Gross Total Daily Production in Barrels of Oil Per Day (BOPD)* for each Contract Area and the respective criteria set out under Clause 2 of Article 9 of the Model.[88]

Projections had indicated that by 2020, Uganda's royalty will be secured at a higher prospect with the stabilization of the oil prices and more deals being secured by the government.[89] Although statistics are yet to be computed on if this has been achieved.

[85] *Act 2013*
[86] Section 154(3) ibid
[87] Uganda Product Sharing Agreement Model 2016
[88] 2016 PSA Model

[89] Wilburg Kiana, Uganda Secures 12.5% royalty for more than 7000 barrels of oil per day, 4th March, 2018, [online] https://www.kaieteurnewsonline.com/2018/03/04/uganda-secures-12-5-royalty-for-more-than-7000-barrels-of-oil-per-day/
https://www.kaieteurnewsonline.com/2018/03/04/uganda-secures-12-5-royalty-for-more-than-7000-barrels-of-oil-per-day/ accessed on 23rd of January 2020

4.4.4 Profit Oil

This is the amount of revenues or production that the government shares with the International Oil Company after royalties and cost oil are recovered from the gross revenues.

This profit oil is therefore shared between the international oil company and the host government, and the share of the company is the chargeable income of the company subject to be taxed.

Uganda's Production Sharing Agreement Model 2016 substitutes profit oil and with *'product sharing'* under Article 12[90] where it is provides that the government shall be entitled a share of the '*profit petroleum'* calculated using the R-Factor based on Cumulative Net Revenues and Cumulative Capital Expenditures.

This profit petroleum arises out of the state participation that is the government purchasing shares within the oil production. Under the current Model[91] state participation is restricted to the agreement of the parties[92] i.e. host government and the oil company.

The government participation can interchangeably be so used as profit oil as under government participation, the production contract stipulates the percentage extent to which the government shall be responsible through her national oil companies or parastatal although the international oil company bears the risks of production and exploration.

[90] Uganda PSA Model 2016

[91] (ibid)

[92] Article 10 of the 2016 PSA Model.

4.4.5 Cost Recovery.

This is the recovery of money by the oil company after the oil has started actually to flow.[93]These costs include exploration costs that accrued in identifying areas that may warrant examination to the prospectus of containing oil and gas reservoirs like the cost of drilling. The costs are incurred in the accessing and maintaining the oil reserves.

Under Article 11(4) of the ***Uganda Production Sharing Agreement 2016 Model***,[94] the company recovers '*cost oil'* which is the '*reimbursement*' for the costs incurred in the exploration phase and some (or all) of the costs incurred during the development and production phase.[95]

The cost recovery is the opposite of royalty, i.e. cost recovery is paid to the Oil Company to recover its costs in the exploration costs.

Therefore, it is the assurance of the oil company that it will recover the costs incurred throughout the production at a certain percentage as will be agreed.

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[93]D Johnston, *International Exploration Economics, Risk and Contract Analysis,* 1st Edition Tulsa Oklahoma, USA Penn Well, Corporation, 2003

[94] Uganda PSA 2016 (supra)

[95]PWC, Financial reporting in the oil and gas industry International Financial Reporting Standards 3rd Edition, 19th July,2017, https://www.pwc.com/gx/en/services/audit-assurance/assets/pwc-financial-reporting-in-the-oil-and-gas-industry-2017.pdf accessed on14th February 2020

4.4.6 Income Tax

The Uganda fiscal system also applies the use of income tax and thus charges an income tax of 30% from the oil company under the contract the tax is deducted over the capital costs of the oil company in the life time of the project.

Although with income tax investors usually cannot recover their costs immediately which can distort investment decisions, the Government get early revenues.

4.4.7 Signature Bonuses.

This is the one-time fee for the assignment and securing of a license paid irrespective of the economic success of the licensee. These bonuses are paid upon the signing of the agreement by the oil company. Recently, the Uganda government received over $316,000 from the Armour Energy Limited as signature bonus.[96]

4.4.8 Resource rent tax

This is sometimes referred to as Additional Profits Tax. It provides the government with a greater share of natural resource wealth and it distorts investment decisions less.

It should be noted that resource rent tax arises if the accumulated net cash flow from the oil and gas project is positive.

Resource Rent Tax is categorized into two, namely the R- factor and the rate of return scheme. R factor based Additional Profits Tax links taxation to the investment payback ratio also known as the R-factor. R-factor is the ratio of the IOC's cumulative receipts over

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[96] John Odyek, Government gets sh1 trillion in oil signature bonuses, 15th September, 2017, [online]

the cumulative costs including the upfront investment. Additional Profits Tax in this case applies when the R-factor exceeds one.

4.4.9 Capital Gain Tax.

This is the tax charged on the gains on an asset, i.e. the difference between the price of the asset at purchase and its price at the sale.

The recent dispute in Uganda regarding capital gains tax was the famous dispute of Uganda and Tullow Oil Plc which was resolved and parties agreed that Uganda shall get $250 Million as Capital gains tax.[97]

4.5 THE TAX REGIME OF UGANDA

The **Taxation Handbook**[98] defines a tax as a monetary charge imposed by the government on persons, entities, transactions or property to yield public revenue. Countries levy taxes from persons which not necessarily does not imply natural persons in order to generate revenue for the country. There for like any other economies, Uganda also relies on taxation s a mode of raising revenue for service provision to its citizens.

However, it should be noted that tax like an offense, is a creature of the Constitution of Uganda hence Article 152 (i) of the Uganda Constitution, 1995 as amended provides that no tax shall be imposed or levied save with the creation of that tax under the law. i.e. through an Act of Parliament or any subsidiary legislation.

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[97] Tullow Oil, Government of Uganda Resolve capital Gain Tax Dispute, 20th March, 2016 [online], >http://www.infrastructure.co.ug/tullow-oil-government-uganda-resolve-capital-gain-tax-dispute-0< Accessed on the 10th February 2020.

[98]Taxation Handbook, A guide to Taxation in Uganda, 2nd Edition, 2015, [online],> https://www.ura.go.ug< Accessed on the 27th of February 2020

Therefore, among the tax legislations in Uganda include the Income Tax Act cap. 340 as amended, the Value Added Tax Act cap 349, the Customs Tariff Act cap 337, Stamps Act cap 342 among others.

It should be noted that the oil and gas sector is mainly dealt with under the Income Tax Act and the Value Added Tax Act than in the other Acts. Income tax is normally charged on the gross income of the company in this case after the allowable deductions have been removed as under provided under Part 4 of the Income Tax Act. On the other hand, Value Added Tax is charged on the imports made by companies in this case Oil Companies have imported services or goods into the country.

The lead institution for tax collection is the Uganda Revenue Authority which is established by the Uganda Revenue Authority as a body corporate capable of suing and being sued.[99]

The functions of the Authority are set out under Section 3 of the URA Act as to administer and give effect to provisions of the law regarding tax collection, advise the minister on revenue implications, tax administration and aspects of policy changes relating to the given taxes and to perform the functions as directed by the Minister in this case the minister for finance.

The Authority is composed of board of directors and the office of the Commissioner General with their staff empowered to carry out the implementation of taxes in the country. Further the Authority is composed of departments including corporate affairs, domestic taxes, tax investigations, customs, internal audit, among others of which the most

[99]Section 2 of the URA Act cap. 196(as amended)

concerned departments herein is the legal department and the newly created oil and gas department solely tasked to implement the collection of taxes from the international oil companies in the oil and gas sector.

As earlier noted the main taxes incurred by the multinational companies include income taxes known as corporate income tax from the gross income of the company annually at a rate of 30% and the capital gains of the company after the disposal of the company's assets.[100]

The other institution that assists in the collection of tax and implementation of tax laws under which the Minister has the authority to guide the government and the Uganda Revenue Authority on the policies to be implemented and the laws to be enacted to effectively levy taxes upon companies or individuals.[101]

Further the Minister has the power to make guidelines or regulations that are in line with the implementation of tax laws and generally the conduct of taxation of the country.

4.6 CASE LAW ON TAX AVOIDANCE IN UGANDA.

Several of the cases in Uganda involving tax avoidance are pending under the Tax Appeals Tribunal and hence I am barred to comment on the same but some few cases have been

[100]Part IV of the Income Tax Act cap 340

[101]Article 152(ii) of the Constitution of Uganda, 1995 as amended.

decided outside Uganda but touch matters concerning tax avoidance originating from Uganda as discussed hereunder.

HERITAGE OIL & GAS LIMITED VERSUS UGANDA REVENUEAUTHORITY [102]

This was an appeal against the findings of the Tax Appeals Tribunal (the Tribunal) in Miscellaneous Application[103] arising out of TAT Applications Nos. 26 and 28 of 2010 The appellant sold its interests under a sale and purchase agreement to Tullow Uganda Limited. As a result of the said sale, and under the authority of the Income Tax Act, (ITA), the respondent issued tax assessments for Capital Gains Tax which the appellant objected to and filed two applications in the Tribunal.

One of the grounds of appeal was that: The Tribunal erred in law in holding that the Tax Appeals Tribunal mandate cannot be fettered by a contractual provision in an agreement. The court held that taxes are statutorily provided for and any acts to make it contractual would be ultra vires.

Court further said that article 152 (1) of the Constitution of Uganda provides that no tax shall be imposed except under the authority of an Act of Parliament. The ITA and other tax statutes specify the taxes payable and the URA is mandated to collect those taxes. That mandate of the URA to collect tax in accordance with the laws of Uganda cannot not be fettered or overridden by an agreement.

[102] Civil Appeal No. 14 of 2011

[103] No.6 of 2011

The court further cited the case of *K.M. Enterprises and Others v Uganda Revenue Authority* [104] where Egonda J decided that:

> *"…exercise of statutory powers and duties* ***cannot be fettered or overridden by agreement****, estoppels, lapse of time, mistake and such other circumstances…"* (Emphasis mine).

The rationale for making tax matters statutory and not contractual is to enable Governments achieves the objectives of taxation which, as stated by ***Bakibinga***[105] are inter alia: to raise revenue; to achieve economic stability and development etc. That taxation is the most reliable source of funds for most developing economies and therefore leaving it to the impulses of contractors and Government Officials would create uncertainty and inequity on the amounts payable and cause economic instability.

The court further held that held that it could not have been the intention of Government to agree that a tax dispute would be referred to arbitration as any attempt to do so would be contrary to the laws of Uganda. It would also be contrary to Article 14 of the PSA which clearly stated that tax would be paid in accordance with the laws of Uganda in *a timely fashion*. Allowing the tax dispute to go through the arbitration process in London would definitely not facilitate the timely payment of the taxes as agreed. This means that tax by inference was accepted from the scope of the arbitration agreement and as such it was not one of the contemplated arbitrable disputes under section 26.1 of the PSA. The high court dismissed the suit and confirmed the decision of the tribunal.

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[104] *HCCS No. 599 of 2001*,
[105] J.D. Bakibinga, Revenue Law in Uganda, (2006), Fountain Publishers, p.5

The above case, shows a clear picture of tax avoidance whereby the appellant, Heritage Oil and Gas Ltd, sought to avoid or delay the payment of the taxes due from the sale of it's interests to Tullow Uganda. This was done by relying on clauses in the Production Sharing Agreements that provided for arbitration in the London Permanent Court of Arbitration. However the court decided that taxes are a creature of statute and cannot be impeded by contractual provisions. As such the tax due was payable to the Government of Uganda.

THE CASE OF HERITAGE OIL GAS LIMITED Vs GOVERNMENT OF UGANDA AT THE LONDON PERMANENT COURT OF ARBITRATION[106]

On July 26, 2010, Heritage Oil, sold its exploration licenses in the Albertine Rift to Tullow Oil. The two IOCs were joint partners in the explorative blocks in issue. With the sale, Tullow became the sole company licensed to operate in those areas. Tullow purchased Heritage's stake for US $1.45 billion, after which Heritage ceased to operate within Uganda. Shortly afterwards, the Uganda Revenue Authority (URA), requested for $434 million—or 30 percent of the sale—in capital gains taxes. Heritage disputed the tax, saying that its lawyers believed that the sale was not taxable, given that the Production Sharing Agreements (PSAs) which the company signed with the government failed to mention such a payment. Heritage further argued that the sale of its assets to Tullow Oil was not taxable in Uganda because the sale itself took place outside Uganda (in the Channel Islands off the coast of France) and because the company itself is not incorporated in Uganda (being

[106] It should be noted that the researcher could not obtain the actual citation of the arbitration proceeding after conducting an electronic search. Following a telephone conversation with one, Ali Sekatawa, the former URA Assistant Commissioner for litigation and lead counsel in the matter at the London Permanent Court of Arbitration; it was established that proceedings and awards by the court are confidential and not easily obtained by the public.

domiciled in Mauritius). The Government of Uganda argued that the assets sold were located in Uganda, and that their sale was done with the consent of the Ugandan government, making the transaction taxable under Ugandan law.[107]

The commissioner general of URA decided that disposal of the Business Assets with a capital gain by Heritage Oil And Gas Limited attracted liability to tax. Heritage Oil and Gas Limited holding in EAs 1& 3A was a business asset within meaning of ITA as a disposal of interest in immoveable property. All this was decided in according to Sections 79 ITA and under Uganda Income Tax Act. Similarly under sections 4, 17, 18, 79 (g) and 79(s) plus Art 13(4) Mauritius/Uganda DTA – Income taxable in Uganda. Heritage Oil And Gas Limited did not agree with all above hence the tax dispute. Heritage Oil Gas Limited appealed objecting against the decision to the Tax Appeals Tribunal and the High Court and Judgment was entered against Heritage Oil And Gas Limited (both TAT and High Court).

The court of arbitration decided that the disposal amounted to taxable capital gain since it was disposal of interest in immovable property and/or attributable to activities carried out in Uganda. HERITAGE OIL AND GAS LIMITED move to Mauritius was an unsuccessful Treaty Shopping attempt. Assessments can be raised on Taxpayer that is disposing all assets (clearly leaving Uganda) prior to end of Tax Year. That tax Disputes are not subject to arbitration but to be resolved following procedures under domestic tax laws (ITA)

[107] Angelo Izama and Hashim Wasswa Mulangwa, Understanding the tax dispute: Heritage, Tullow ant the Government of Uganda, Advocates Coalition for Development and Environment, ~~infosheet~~info sheet No.16 of 2011, [Online], https://www.acode-u.org/uploadedFiles/infosheet16.pdf page 1-2

Tax matters in Uganda are statutory and not contractual that is why in Article 14 of the PSA it was agreed that all taxes, duties, levies or other lawful impositions applicable to the licensee would be paid by the licensee in accordance with the laws of Uganda in a timely fashion. As such the Article of the PSA also implied that any dispute relating to the payment of those taxes would be resolved in accordance with the laws of Uganda. This is because the mechanism for tax dispute resolution in Uganda is explicit under the ITA." per Obura J High Court Commercial Division. This entire tax of USD 434 was collected by URA and remitted to the treasury. HERITAGE OIL AND GAS LIMITED was ordered to pay costs to Government of Uganda amounting to US$ 4,000,000.[108]

It was agreed at the International levels that the government of Uganda was justified in charging the tax due. URA managed to recover a large sum of money from Heritage Oil and Gas Limited. The IOC was trying to avoid payment of the tax due but URA reigned in and collected USD 434m in capital gains tax.

4.6.1 UNILEVER KENYA LTD V. COMMISSIONER OF INCOME TAX,[109]

Under this case, Unilever Kenya Ltd (UKL) and Unilever Uganda Ltd (UUL) were both subsidiaries of Unilever PLC, a United Kingdom multinational group. Pursuant to a contract, Unilever Kenya Limited (UKL) manufactured goods on behalf of, and supplied them to UUL at a price lower than the price UKL charged to unrelated third parties. The

[108] Doris Akol, Case Study on Tax dispute: HOGL and GOU, Uganda Revenue Authority, 2016, [Online], https://www.imf.org/external/np/seminars/eng/2016/taxation/pdf/da.pdf accessed on 16th/ 10/ 2020 p. 6-11
[109] Income Tax Appeal No. 753 of 2003 [2005] EKLR (High Court of Kenya)

commissioner income tax raised an assessment against UKL in respect of sales made by UKL to UUL on the basis that UKL's sales to UUL were not at 'arm's length prices.'

The court held that it was UKL to demonstrate the consistency of its Transfer Pricing Policy within OECD guidelines which guidelines provide a detailed description of various methods that may be used to apply, the arm's length principle, which are traditional transaction methods or transactional profit methods.

Further, the Kenyan High Court went ahead to rule that the Transfer Pricing Policy has been developed in accordance with principles promulgated by OECD and specifically in accordance with OECD Guidelines.

Visram J observed that:

> '*the Transfer Pricing Policy has the arm's length principle as its underlying principle, that is, that the prices set between companies within the Unilever Group should approximate those set by unrelated parties for comparable goods and under comparable circumstances in an open and free market.'*[110]

Therefore, in accordance with the arm's length principle the Transfer Pricing Policy requires that pricing between companies in the Unilever Group should, where it is possible be based on market prices.

The use of these guidelines has been adopted in Uganda's Transfer Pricing Regulations of 2011[111].

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[110] Income Tax Appeal No. 753 of 2003, Unilever Ltd v Commission of Income Tax at page 5

[111] See. Part II of the Transfer Pricing Regulations 2011

4.7 TULLOW UGANDA LIMITED AND TULOW OPERATIONAL PTY LTD VERSUS UGANDA REVENUE AUTHORITY. [112]

This was an appeal to the Tax Appeals Tribunal of Uganda arising from a dispute between the parties regarding tax assessment.

The facts were that on about the 26th January 2010, Tullow Uganda Limited and a company Heritage Oil Limited signed a Sale and Purchase Agreement under which Tullow Uganda Limited would acquire Heritages 50% participation rights in Exploration Areas EA1 and EA3A.

On the 18th October 2010, Uganda Revenue Authority raised assessment number SA/LTO/2569 of US$ 390,924,460 and assessment number SA/LTO/2570 of US$ 84,999,660 on Tullow Uganda Limited and Tullow Operational Pty Ltd respectively being income tax (Capital Gains Tax). Subsequently, on the 1st December 2010, the applicants objected to the assessments.

On the 24th February 2011, the respondent made an objection decision that adjusted the assessment on the TUL. The assessment No. SA/LTO/2569 of US$ 390,924,460 was amended to US$ 387,748,469, while assessment No. SA/LTO/2570 of US$ 84,999,660 was unaffected, resulting in a total of US$ 472,748,128.

Therefore, on the 25th March 2011, the applicants filed an application for review before the Tax Appeals Tribunal (TAT) contesting the assessments and the objection decision by the Commissioner of the respondent.

[112] Tax Appeals Tribunal Tat Application No. 4 Of 2011.

The Tribunal ruled that applicants pay capital gains tax of US$ 407,095,366 being the amount after the pre-investment relief and that the total amount of capital gain tax before the pre-investment relief was US$ 542,793,821.

The Tribunal hence observed that the powers to re-characterize under S. 91 of the Income Tax Act are discretionary. The Tribunal cannot interfere with the Commissioners exercise of his powers unless he exercised them illegally, irrationally or without procedural impropriety. The Tribunal in particular observed:

When one peruses Sections 91(1)(a) and 91(2) of the ITA one cannot avoid feeling that the framers of the Income Tax Act wanted to empower the Commissioner to shift goal posts when a tax payer is about to score. In other words, where a taxpayer uses mechanisms which may reduce its tax liability, the Commissioner is empowered to disregard them as long as it is plainly clear the taxpayer wanted to reduce its liability…………..

This empowered the tribunal to look rather at the substance of transaction not the form. Therefore the assessment of the Authority was upheld.

4.8 TARGET WELL CONTROL UGANDA LIMITED VS COMMISSIONER GENERAL, UGANDA REVENUE AUTHORITY[113]

The plaintiff sued the defendant seeking interalia for: a declaration that equipment lease payments do not attract withholding tax deductions under Double Taxation Agreement between Uganda and the United Kingdom. Further that the Plaintiff is entitled to input tax

[113] HCCS NO. 751 OF 2015

credit of UGX. 23,191,098.47/= on invoices issued by Neptune Petroleum Uganda Limited.

The Defendant on the other hand carried out comprehensive tax audits on the Plaintiff Company and assessed tax of UGX 1,957,185,593/= in the following terms;

a) Corporation tax credit of UGX 200,176,619/=

b) Withholding Tax of UGX 1,230,855,735/=

c) Pay As You Earn of UGX 545,427,194/=

d) Value Added Tax of UGX 180,902,664/=.

It was held that for a permanent establishment to exist, the party in the source country must be dependent on the other. The plaintiff was not dependent on Target Well Control (UK) Limited. In the absence of permanent establishment in the taxing country, no tax would be collected. The Permanent establishment must have a fixed place of business like an office or warehouse where business for the external party is conducted.

The court also cited the Indian case of *Nokia Networks OY vs JCIT*[114] *Article 5(7) of the Model Convention*. This was a case of a company with a subsidiary relationship but which lays the emphasis on the permanent establishment subject. It was held;

> ''*It is generally accepted that the existence of a subsidiary company does not, of itself constitute that subsidiary company a permanent establishment of its parent company.*''

[114] (2018) 65 ITR 23/167 DTR 137/194 TTJ 137/171 ITD 1 (SB) (DELHI (TRIB)

Therefore it was found that because it is a well-established principle of corporate tax that a subsidiary has separate legal existence from that of its parent and should be treated as a separate entity even for tax purposes.

In the present case there is no proof that the Plaintiff did or had authority to conclude contracts on behalf of Target Well Control (UK) Limited.

The Plaintiff was an independent legal entity which entered into independent drilling agreements. It used equipment it hired from Target Well Control (UK) Limited and paid for them. Moreover it was taxed on the profits it made from its activities.

Since under the Convention, Target Well Control (UK) Limited would only pay tax if it was shown to trade or act through a permanent establishment, and this has not been established, it is not liable to pay the tax as its collection was barred by the double taxation covenant between Uganda and UK.

The Court also found that the VAT collected by Neptune Petroleum Uganda limited from the Plaintiff during the period in question is recoverable by the Plaintiff.

All in all the Plaintiff acquired judgment against the defendant as the equipment lease payments made to Target Well Control UK were not subject to withholding tax under the Income Tax Act as its collection was barred by the double tax covenant between Uganda and UK.

The Defendant was restrained from collecting any tax in respect of the subject of this suit and ordered to refund UGX. 23,191,098.47/= as tax input credit to the plaintiff.

The above case shows that URA is not always successful in prosecuting matters of tax avoidance in the Ugandan courts. This was due to the presence of a double tax treaty between Uganda and the UK. Uganda lost over 2billion shillings in taxes to the plaintiff which would have been used in the improvement of the livelihood of the people thereof.

The Executive Director of the URA noted that the above case showed an instance of multi-national companies that are intent on abusing the benefits of Double Tax Agreements (DTA). It is easy for these companies to pay tax but they are determined to carry on their "immoral" ways of avoiding taxes.[115]

[115]Ismail Musa Ladu, How to deal with tax leakages in Double Taxation Agreements: Daily Monitor Newspaper, Tuesday, 20th August, 2019

5.0 CHAPTER FIVE

COUNTRY COMPARISONS

5.1 INTRODUCTION

Tax avoidance is a worldwide threat to many economies and most especially the developing countries and the sub Saharan countries. This is because the multinational companies are well equipped with the resources and means through which they defeat the countries' tax systems and pay lesser taxes than what they ought to have paid. These countries normally create subsidiaries among these countries with the sole aim of taking advantage of the loopholes in the tax system of a given country and end up legally dodging the payment of the given tax.

The oil sector is the most affected since the transactions therein in most cases involve big multinational companies with international branches and firms that assist them in succeeding with their tax avoidance schemes.

Some of the counties that are greatly affected by tax avoidance within their oil and gas sector include Kenya, South Africa, Nigeria and Ghana among others.

This paper therefore discusses how each of these countries have been affected by the tax avoidance schemes by the multinational companies and how these countries have dealt or managed to curb this vice.

5.2 KENYA.

According to OXFAM[116], in Kenya there are a total number of thirty-five separate companies that hold a percentage stake in at least one of the 41 active petroleum licenses in Kenya. These subsidiaries are ultimately owned by twenty-seven separate parent companies. Seventeen of these parent companies own petroleum rights in Kenya directly through a subsidiary registered in a tax haven. Ultimately, all but five of the parent companies make use of a tax haven or low-tax jurisdiction as part of their wide corporate structure.

The **Report**[117] goes ahead to observe that most of the Oil Companies in Kenya use tax havens that include the Cayman Islands, Delaware in the US, Bermuda, Mauritius, Panama and Bahamas among other tax havens. These Multinational hold petroleum rights in Kenya but transfer both their profits and costs to these low tax jurisdiction countries and tax havens. This is through having their subsidiaries registered in low tax jurisdictions.

[116]Hubert Don, The Use of Tax Havens in the Ownership of Kenyan Petroleum Rights, May 2016, [online] https://www.oxfam.org/en/research/use-tax-havens-ownership-kenyan-petroleum-rights accessed on the 26th of February 2020

[117]Ibid Note 74.

Unlike Nigeria which has over 18 subsidiaries under one company, Shell and within the country, the Oil companies in Kenya have their subsidiaries outside their jurisdiction which enables these multinationals to make transactions among themselves by taking advantage of the loopholes of the tax system.

5.3 NIGERIA

Nigeria is ranked among the biggest resource holders of oil and natural gas in Africa. Not only does the country produce 25% of all African crude oil and 3% of the world total but also is a member of the Organization of Petroleum Exporting Countries (OPEC).[118]

The Nigerian Government adopts both use of Joint Ventures[119] and Product Sharing Agreements[120] through which taxes like royalties, capital gains tax and income tax are charged under the Petroleum Profit Tax and the Companies Income Tax 2004.

However, it should be noted that Nigeria's tax system is still being taken advantage of by the Multinational Companies present including Shell Co. Ltd, Total Ltd and ENI Ltd, an Italian company who have used the tax loop holes in the system to avoid paying taxes especially Shell Co. Ltd.

Therefore the common modes of tax avoidance in Nigeria include among others thin capitalisation and profit shifting.

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[118] Accessed via https://resourcegovernance.org/countries/africa/nigeria/extractive-industries on the 1st of March 2020.

[119]A. O. AMEH: The Shift from Joint Operating Agreement to Production Sharing Contracts in the Nigerian Oil Industry: Any Benefits for the Players? CEPML Annual Review. 2006

[120] Adeyemo Victor: A Comparative Study of The Petroleum Fiscal Systems Of Nigeria And Angola. 2016

Sadly, the government does not have explicit laws or rules against tax avoidance but in 2012, the *Federal Inland Revenue Service (FIRS)* issued the *Transfer Pricing Regulations*[121] with the aim that companies carrying on transactions with related parties are required to conduct transfer pricing studies to ensure that connected transactions have been appropriately priced to conform with arm's length standards, thereby preventing companies from shifting profits as a result of transfer mispricing[122].

Further, under Nigerian economy, Multinationals can apply and get tax holidays under the 'Pioneer status.'[123] This incentive however that is aimed at attract investment can often be misused by greedy and sharp multinationals as a mode of avoiding taxes by continuously applying to be granted the holiday.

However, in 2014, the *Nigerian Investment Promotion Commission (NIPC)* published *Pioneer Status Incentive Regulations*[124] with specific provisions to the law and stipulation as to the conditions for the application of a pioneer status.

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[121]The Income Tax (Transfer Pricing) Regulations No 1, 2012

[122]Ernst & Young, Global oil and gas tax guide 2015, [online], https://www.ey.com/Publication/vwLUAssets/EY-2015-Global-oil-and-gas-tax-guide/$FILE/EY-2015-Global-oil-and-gas-tax-guide.pdf, accessed on the 2nd March, 2020.

[123] Industrial Development (Income Tax Relief) Act of 1971. (Nigeria)

[124]https://nipc.gov.ng/pioneer-status-incentive Accessed on the 1st of March 2020

5.4 GHANA

Ghana started on commercial production of oil in 2010 but the country is expected to be among the highest oil producing countries within the sub Saharan region with a prospect of 240,000bopd by this year (2020) but currently the oil production is at 190,000bopd and is expected to rise in the near future.[125]

The country adopts the use of legislations that include the Internal Revenue Act No. 592 of 2000(as amended) and the Income Tax Act 2015 which repealed the Petroleum Income Tax Act.

The Income Tax Act provides for the taxation of income of Contractors and Subcontractors[126]. It also provides for transactions outside the scope of the Petroleum Agreements in instances where there is a fiscal stability clause in their Petroleum Agreements. [127]

Further, the Ghana fiscal regime adopts the use of Petroleum Agreements and Concessions whereat the government charges the Multinational Company, capital gains tax, royalties among other taxes.

It should be noted that Ghana applies ring fencing that is that profits from one project cannot be used to offset the losses of another project unless both projects are of the same type.[128]

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[125]https://www.theoilandgasyear.com/market/ghana/ accessed on the 28th of February 2020.

[126]See Part IV of the Income Tax Act No. 896 of 2015.

[127]Ibid Note 92.

[128]See. Section 68 of the Income Tax Act No. 896 of 2015.

Further Ghana's tax laws[129] include measures to ensure that cross-border trading does not unnecessarily erode local taxable profits of companies in their dealings with their parent or related entities.

The commissioner-general of the Ghana Revenue Authority has wide powers to disallow expenses or make adjustments if it is believed that an attempt is being made by the taxpayer, in dealing with the parent or any other related entity, to reduce the tax payable in Ghana. The commissioner-general has the power to determine the acceptability and taxability or otherwise of any pricing module that exists between related parties.

It should be noted that Ghana has the Transfer Pricing Regulations also attempt to ensure that transactions between an entity and its parent or other related persons is uniformly regulated in Ghana and in conformity with the tax code of the country.

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[129]For example the Income Tax Act, the Internal Revenue Act and Petroleum (Exploration and Production Law), 2016 Act 919

6.0 CHAPTER SIX.

6.1 INTRODUCTION.

As it had already been noted throughout the discussion within this paper, this chapter undertakes to give an analysis of the existing legal framework and the structural framework in the country that tackles tax avoidance in light of need for a streamlined and organised set up aimed and reducing or fighting tax avoidance in the Uganda oil and gas sector.

It should be noted that there are in place legal frameworks and schemes to fight tax avoidance but the worry is that these schemes deal with the top most multinational companies that are well equipped with the resources and are willing to do whatever it takes to avoid paying taxes. Therefore, as shall be seen under this chapter, regional governments must fight so hard to tighten the loop holes within their tax systems in order to win the fight against these wealthy multinational corporations.

6.2 FINDINGS

6.2.1 LEGAL FRAMEWORK.

The Uganda tax framework is mainly governed by the Income Tax Act cap 340, which is an Act aimed at consolidating the laws on income tax in Uganda.[130]

[130]See. Preamble of the Income Tax Act cap. 340 as amended.

6.2.1.1 INCOME TAX CAP. 340 AS AMENDED.

The ITA, as amended provides under Section 25 provides for interest deductions on the income incurred by an individual and thus reads;

"The amount of deductible interest in respect of all debts owed by a taxpayer who is a member of a group, other than a financial institution or person carrying on insurance business, shall not exceed thirty per cent of the tax earnings before interest, depreciation and amortization."

According to Mbanga,[131]this amendment borrows from the Organization for Economic Cooperation and Development's Base Erosion Profit Shifting policy, which seeks to become a blueprint for a model global taxation policy.

It should be noted that this provision came in the 2019 amendment of the Income Tax and it was aimed at strengthening the rules against thin capitalization by the multinational companies within the oil and gas sector.

This by far is a fundamental step in ensuring tax avoidance is reduced i.e. through coaching the law to bend the multinational companies towards obeying the law though concerns have been expressed that it could reduce investment given the fact that Uganda is entering the take off stage i.e. stating on the construction of oil pipelines for the transportation of the oil.

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[131]Jeff Mbanga, New tax rules to limit how much companies borrow, 28th May, 2018, [online] https://observer.ug/businessnews/57775-new-tax-rules-to-limit-how-much-companies-borrow accessed on 27th of February 2020.

Furthermore, section 89 of the Act disallows deduction of interest paid by the company that year in case that company has a foreign debt in equity in excess of the 2 to 1 ratio. Much as this Act was sought to be amended and done away with, the section still stands.

The Act further under Section 91 gives the commissioner powers to re-characterize a transaction or an element of a transaction that was entered into as part of a tax avoidance scheme, disregard a transaction that does not have substantial economic effect, re-characterize a transaction the form of which does not reflect the substance. Therefore under S.91 (2) tax avoidance schemes to include any transaction one of the main purposes of which is the avoidance or reduction of liability to tax.

The commissioner has the powers to determine the type of the transaction being entered into by the company associates.[132] This provision is one of the General Anti-Tax Avoidance Rules**.**[133]

6.2.1.2 THE INCOME TAX (TRANSFER PRICING) REGULATIONS[134]

The Income Tax (Transfer Pricing) Regulations 2011 were enacted under S.90 of the Income Tax Act intended to curb the uncontrolled practices of transfer pricing.

[132]See. Section 90 of the Income Tax Act.

[133]The regulation allows tax officials to deny tax benefits, if a deal is found without any commercial purpose other than tax avoidance.

[134] Statutory Instrument No… of 2011

Under *Regulation* 2, the Transfer Pricing Regulations shall apply to a controlled transaction if a person who is a party to the transaction is located in and is subject to tax in Uganda and the other person who is a party to the transaction is located in or outside Uganda.

Therefore *Regulation 3* defines a transaction to include any arrangement, understanding, agreement, or mutual practice whether or not legally enforceable or intended to be legally enforceable, and includes dealing between a branch of a person and another part of the person.

The **Regulations** further set out the common and recognized transfer pricing methods which are; the comparable uncontrolled price method, the resale price method, the cost plus method, the transaction net margin method, the transactional profit split method and uncontrolled transaction.[135]

These Regulations move from the GAAR provisions to rather Specific Anti-Tax Avoidance provisions.

The fact that even the Regulations import the application of the OECD Guidelines makes the Regulations stronger in the definition of tax avoidance schemes including the use of what has been termed as the 'arm's length principle.'[136]

Additionally, the Regulations adopt the requirement of documentation of the transactions which are controlled i.e. transactions between associates and it shall be a punishable offence if that individual fails to do documentation or recording[137]. All this is aimed at

[135]See. Regulation 3 of the Transfer Pricing Regulations.

[136]See. Regulation 6 of the Transfer Pricing Regulations.

[137]Regulation 8 of the Transfer Pricing Regulations.

streamlining the collection of taxes from these individuals which in the oil sector and multinational companies.

Therefore if this is duly implemented, revenue loss through tax avoidance is meant to substantially reduce accordingly since compliance shall be high for fear of penalties against these multinationals.

6.2.2 STRUCTURAL FRAMEWORK.

6.2.2.1 UGANDA REVENUE AUTHORITY

The Uganda Revenue Authority is a creature of the Uganda Revenue cap. 196 and is a corporate entity concerned with the collection of local revenue from individuals and companies within and outside the country.[138]

The Authority as noted under Chapter four of this paper is composed of about seven departments including the newly created oil and gas department.

In an interview with the officials from the Authority[139] it was established that the Authority has an Oil and Gas Department that was established in October 2019 which works in coordination with the International Tax Unit under the Large Tax Payers Office in ensuring that multinational companies comply with their respective tax obligations regularly.

Further, the Authority has a Tax Investigations Unit which undertakes the duty to investigate any complaints or whistle blower information regarding cases of tax avoidance and evasion by any entity, and then conduct the prosecution of the offenders there under.

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[138]Section 3 of the URA Act

[139]See. Note 53

It was further established that the Authority regularly carries out general compliance audits, transfer pricing audits, related party review and also checking treaty abuses that are stipulated under S. 88(5) of the Income Tax Act as amended.

According to **Kyeyune and Bazilaki**[140], the Authority in the bid to strengthen its capacity and man power, does frequent trainings of their employees in association with organisations like International Monitory Fund (IMF). This is also through tax clinics for educating tax payers about tax compliance.

Additionally, the Authority provides free access to all the information needed through arrangements of free international information exchange especially in cases of tax fraud investigations.

Despite the efforts to curb wholly the existence of tax avoidance by the Uganda Revenue Authority and despite the existence of these stringent legislation, concern is still expressed that however much the Authority tries to fight this vice, each day the multinational corporations discover new loopholes within the system. Be as it may, few case have been identified involving tax avoidance by the Authority but according to Wamani Solomon, a Legal Officer at the Uganda Tax Appeals Tribunal, most cases of tax avoidance when discovered normally end in consent with Uganda Revenue Authority and the other few pending cannot be commented about because of the sub-judice rule.

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[140]Interview by the researcher with Joseph Kyeyune a Supervivor and Annet Bazlilaki also a Supervisor in Uganda Revenue Authority Oil and Gas Department on the 24th of February 2020

However, the Heritage case was a good battle for Uganda Tax system as court stipulated the liability of Heritage Oil Company to pay for the capital gains tax arising out of the transaction with Tullow Oil Company.

6.2.2.2 TAX APPEALS TRIBUNAL

The Tax Appeals Tribunal is a creature[141] of the Tax Appeals Tribunal Act 1998 to provide the taxpayer with easily accessible, efficient and independent arbitration in tax disputes with Uganda Revenue Authority.

The tribunal is composed of at least three members with a chairperson who must be qualified as a judge of the High Court of Uganda.

Under Section 14 of the Act, the Tribunal has the powers to hear an application to review the tax decision made by the Uganda Revenue Authority and the Tribunal may either vary, set aside or affirm the decision under review.[142]

It should be noted that in case the party is not contented with the decision of the Tribunal, such decision is appealable to the High Court within thirty days from date of ruling.[143]

6.3 LIMITATIONS OF THE STUDY

In regard to the sample size, it was difficult to determine how many people to interview at first in order to create a very good research paper. The researcher thought that the more

[141] Section 2 of the Tax Appeals Tribunal Act 1998

[142] Section 19 (ibid)

[143] See Section 27 of the Tax Appeals Tribunal Act.

people to be interviewed, the better but could only access a few people in the specified sample size.

There is inadequate and unreliable data on taxation of multi – nationals in Uganda's oil and gas sector. This is because the oil and gas sector in Uganda is a relatively new industry. This is due to the fact that modern exploration and production began around 2002 and 2004 when HERITAGE and ENERGY AFRICA were licensed to carry out the exploration.[144] Therefore accessing data on the same is not easy.

In addition to the above, it is difficult to access prior research studies on the topic as the data is inadequate.

Access to people, organisations, data and documents was not easy. Sometimes access was denied or limited. Getting access to officials in the Uganda Revenue Authority was not easy. The researcher had to go to the URA Tower at Nakawa so many times before access was granted. In addition she had to write many emails and letters back and forth before access was granted due to a firmly established procedure by the URA, human resource department. Coupled with the above, access to some officials at the URA's, oil and gas department was limited due to their busy schedule or absence. Then the officials at PAU could not participate in the research as they thought that URA was in a better place to answer the research questions.

[144] https://www.pau.ug/about-us/profile/petroleum-exploration-history/<accessed on 10th January 2020.>

Another limitation is: Inadequate funds available to complete the research paper in the shortest time possible. This includes funds to purchase mobile data to carry out research from the internet, funds for stationary, airtime and transport among other expenses.

Lastly research is expensive in terms of the time put in to develop a very good research paper. The researcher had to juggle between being a wife, a mother, a working woman in her law firm and the research paper. Juggling it all requires bravery as one can easily give up.

6.4 RECOMMENDATIONS

By far, the Uganda fiscal system is structured strategically to enable it control tax avoidance. However, it should be noted that when dealing with strong multinational corporations especially in the oil and gas sector like the Total company limited that has been widely recognised as among the top tax avoiders in developing countries,[145]the preparations and the legislative structure or institutional framework must be ready and strong enough to fight off this battle.

Therefore, the government must improve funding in the research on tax systems in order to equip the tax organs with the desirable skills and knowledge to counter or prevent whatever methods multinationals adopt or intend to use to avoid paying the required taxes.

Secondly, the government and tax organs should continuously, conduct reviews and reforms on the tax laws from time to time depending the commercial relations of the country, the need to attract investment vis-à-vis the need to raise the revenue of the country.

[145]See. Panama Papers Note. 88

In order to attract investment developing countries Uganda inclusive tend, to give tax holidays and incentives to investors, who are Multinational companies for a given period time prior to the take of the investment which in turn leads to unreasonable extensions of this period and leading to loss of income to the state. Thus the government must reduce on these frequent holidays and incentives.

There should be adoption of other methods of encouraging investment like creation of a favourable political environment than adopting the tax avoidance encouraging schemes.

OXFAM[146] suggests that tax avoidance can be reduced by the governments ending tax havens, ending corporate tax secrecy, re-balancing tax deals and lead the way on tax reform.

Most times, developing countries engage in the oil and gas production but lack the capacity to regulate or control the sector reasons of which include the vulnerability and need to attract investment and maintain good international relations. Secondly, these multinational countries are normally from well developed countries or politically strong countries and thus the decisions of developing countries are dictated over by these countries or Multi-National Corporations. It is majorly to this factor that developing countries enter into arrangements that themselves encourage tax avoidance for example treaty shopping and tax holidays.

[146]OXFAM, Stopping the Scandals, Five ways government can end Tax Avoidance. OXFAM Briefing Note November 2017. Accessed via www.oxfam.org last accessed on 10th January 2020.

However, this could be prevented by empowering these vulnerable countries to change their policies or make tax reforms.

Hence this paper engages and suggests how tax reforms can be made within the oil and gas sector and therefore proposes on modes of re balancing these tax deals within the country in order to prevent the continued practices of tax avoidance.

The international framework through the OECD in 2017 entered into an understanding on the governance and addressing the issue of base erosion and transfer pricing based on the frameworks that included the domestic legal and administrative framework, the exchange of information framework and the confidentiality and appropriate use of Country-by-Country reports. These were aimed at enhancing and streamlining the fight to put to order the international corporate tax governance.[147]

Tax avoidance by multi- nationals is based on BEPS policies.[148] These stemmed from the **2015 BEPS Report** that was premised on the *15 actions* including; addressing the tax challenges of the digital economy, neutralising the effects of hybrid mismatch arrangements, designing effective controlled foreign corporation rules, llimiting base erosion involving interest deductions and other financial payments, countering harmful tax practices more effectively, taking into account transparency and substance, preventing the

[147] OECD, Base Erosion and Profit Shifting: BEPS Action 13 on Country-by-Country Reporting. Peer Review Document OECD/G20, Paris 2017, [online] https://www.oecd/tax/beps/beps-action-13-on-country-by-country-reporting-peer-review-documents.pdf accessed on the 28th of February 2020.

[148] Annet Wanyana Oguttu, *Tax Base Erosion and Profit Shifting in Africa –Part 1: Africa's Response to the OECD BEPS Action Plan,* ICTD Working Paper 54, 90 Tottenham Court Road, London W1P 9HE, UK, The Institute of Development Studies, June 2016, pp 6

granting of treaty benefits in inappropriate circumstances, preventing the artificial avoidance of permanent establishment status, aligning transfer pricing outcomes in line with value creation, measuring and monitoring BEPS, mandatory disclosure rules, transfer pricing documentation and country-by-country reporting, making dispute resolution mechanisms more effective and developing a multilateral instrument to modify bilateral tax treaties[149].

However it has been noted that Action 5 and Action 13 introduce exchange of business information. Nevertheless the technical capacity of developing countries and the protection of confidentiality will also need to be evaluated. Action 13 deals with transfer pricing documentation that provides for exchange of documentation such as master file, local file and country- by country reports among countries. The question that arises is how the confidentiality of the business and tax payer information exchange in these actions will be protected in developing countries.[150]

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[149]Sol Picciotto et al, The G20 and the "Base Erosion and Profit Shifting (BEPS) Project", Bonn 2017, [online] https://www.die-gdi.de/uploads/media/DP_18.2017_02.pdf accessed 3rd June, 2020

[150] See also Filip Debelva and I.J. Mosquera, 'Privacy and Confidentiality in Exchange of information Procedures: Some uncertainities, many issues, But Few solutions', (2017), Volume 45(5), International Tax Review, pp. 362-381. Available at SSRN: https://ssrn.com/abstract=2955616

Further the lack of technical resources, personnel capacity, technical knowledge and economic means of developing countries constitutes a challenge for these countries to implement measures concerning international assistance.[151]

6.4 CONCLUSION.

It should be noted that tax avoidance is a worldwide threat to many economies most especially the developing countries' economies in the sub Saharan region. These countries have emerging economies in growth and in most cases with failed sectors hence their 'newly found hope' is the discovery of oil and gas within their region.

However, what could have been hope for growth has slowly been turned into an exploitation ground where Multinational companies take advantage of these amateur economies, spot the loopholes in their oil and gas fiscal systems through the sharp usage of their resources basically in accounting to avoid paying taxes.

These companies carry out transactions among themselves especially through their subsidiaries that are placed in low or no taxing jurisdictions through profit shifting and creating tax havens among other methods which subsequently erodes the revenue of these contracting oil host governments.

However, the Uganda government has like other countries including Kenya, Nigeria and Ghana tried to shape its legislation system in a way to make it ready for any eventualities of tax avoidance including the several and frequent amendments of the Income Tax Act cap 340 with general provisions against tax avoidance and the introduction of the Transfer Pricing Regulations of 2011 have proved to make an impact on the struggle to fight against

[151] Irene Burgers and Irma Mosquera, 'Corporate Taxation and BEPS: A Fair slice for Developing Countries'? (2017), Volume 1, Erasmus Law Review.
www.elevenjournal.com/tijdschrift/ELR_2017_10_01_004 accessed on 5th/3/2020

tax avoidance in Uganda though they are yet to be tested in the courts of law as the most cases are barred by the *subjudice rule*.

Nonetheless, the Uganda Revenue Authority as a governing and overall body responsible for tax collection in Uganda has structured itself in a manner that makes it fit to perform its duties in that the Authority has been set into different units that assist in investigating, prosecution and collecting taxes from different companies.

Therefore, as Uganda seeks to conduct active commercial production of oil and gas as expected in the near future more reforms must be conducted in the Uganda legislation for example by giving the Commissioner General supreme powers of determining the transactions engaged in, that could be aimed at avoiding tax like what is in Ghana.

Further the provisions of deductions on interest under section 25 of the Income tax should be maintained since multinationals have been taking advantage of the lack of direct thin capitalisation clauses in Uganda tax system to evade and avoid taxes.

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LIST OF ABBREVIATIONS

CSBAG- Civil Society Budget Advocacy Group

DTA – Double Tax Agreements

GDP-Gross Domestic Product

IMF-International Monetary Fund

IOC- International Oil Company

MNE- Multinational Enterprises

OECD- Organization for Economic Co-operation and Development

PAU – Petroleum Authority of Uganda

PSA – Production Sharing Agreement

PWC – Price Water House Coopers

UNISA – University of South Africa

UNOC-Uganda National Oil Company

URA- Uganda Revenue Authority

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LIST OF TABLES

1. A table showing the schemes used in tax avoidance and evasion in Uganda. (Source GIZ 2010) p.47

Annexure I

LIST OF DIAGRAMS

An illustration of countries where transfer pricing takes place. They are also well known tax havens.

Transfer Pricing[152]

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