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TAX HAVENS

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INTRODUCTION

In the note to the famous *Cactus Investments Pty Ltd,* the learned authors of Income Tax, Cases and Materials at page 491, JA Heffer stated 'that the tax payers remedy is to arrange his affairs, so far as he is able to, so that he does not attract inequitable or harsh results provides necessity for engaging in effective tax planning.

The world as we know it, has become a very small place – modern technology, first class infrastructure, airlinks, great strides in telecommunications have all created many opportunities, choices, pitfalls and dilemmas for the ordinary tax payer.

Ordinary law-abiding citizens and business entities disgusted by perceptions that some governments waste too much money, have started to look at greener pastures to house and preserve for their offspring, the fruits of their hard-earned labour and enterprise.

Driven by the frustration of complying with a plethora of fiscal and time-consuming administrative burdens, they seek an environment in which the spirit of free enterprise is kindled and where privacy is sacrosanct.

In this paper I shall endeavour to define the term 'tax haven'; I shall also highlight the important criteria for selecting such a jurisdiction. In addition I shall respectfully criticise the stance taken by the OECD – as being too prescriptive and its role in this instance, while not undermining its sterling work on model agreements to alleviate double taxation, as being reduced to nothing other than 'meddling in other countries' fiscal affairs' and usurping their powers to attract investment to their countries.

It is thus necessary for me to use the OECD reports on harmful tax practices as a framework from which to begin. I have tried to focus on the five tax havens which according to the latest 2004 OECD Report are regarded as being 'un-coperative', as well as briefly mentioned, other traditional well-known financial centres. I will also briefly mention what effects international terrorism, drug trafficking, and organised white collar crime have had.

HISTORICAL DEVELOPMENT, BACKGROUND AND DEFINITION OF A TAX HAVEN

The term *'off-shore'* is thought to originate with the Caribbean Islands being used as a tax shelter by some US investors. [1]

The most important characteristic of a tax haven is that it imposes little or no tax at all on certain categories of income, or it imposes a rate of tax which is low relative to the taxes imposed by the tax payers home country. [2]

By creating a veil of secrecy taxpayers can easily manipulate transactions involving tax havens to elude tax liability. Tax havens therefore offer some level of commercial secrecy in banking transactions to its clients.[3]

Banking secrecy has its origins in the common law of Britain. Common law secrecy derives from an implied contract between a banker and his client that the banker will treat his client's affairs as confidential. [4] Most of the tax haven jurisdictions have statutory affirmed and enhances the common law rules regarding secrecy. A tax haven will frequently strengthen its bank secrecy laws to improve its competitive posture *vis-à-vis* other tax havens. In U.S. vs. Field 532 F2nd 404 (5M UR, 1976), the court directed a Cayman Islands resident to give testimony concerning bank information before a United States Grand Jury, even though he would be subject to criminal penalties in the Cayman Islands because his testimony would violate their strict bank secrecy laws. The Caymans reacted by enacting the confidential relationships (preservation) law (law 16 of 1976) S

4(b) made it a crime punishable by a fine as well as a minimum two year prison sentence for an individual to obtain wilfully or to attempt to obtain confidential information to which he is not entitled. [5] Most tax havens will not breach their wall of secrecy.

Investment incentives, flexibility of corporate forms and structures economic stability, minimum of currency restrictions, free remittance of profits, secrecy of property rights protection from expropriation.

Certain countries see offshore banking as an economic salvation due to their lack of natural resources and infrastructure. [6] In some cases, the law or non-existent tax rates are part of a nations policy to attract bankers trust and corporate business. In other situations, the havens are small underdeveloped nations whose residents are poor. A poor population with a minimal tax base makes the imposition of income tax unfeasible. [7] Instead of income tax, the country will establish a licence or fee system on items such as bank licences and commercial charters to generate revenue. [8] Most tax havens aggressively tout the financial services sector because banks trust companies and other financial institutions are a stable source of revenue for them. [9]

Some of the most important low or no tax jurisdictions owe their prosperity to their initiative in setting up low tax and anonymous ownership regimes for ship registration enabling what are sometimes referred to as 'Flags of Convenience' – Panama and Liberia are the two most notable examples and a very substantial part of the world's shipping tonnage is registered under the Panamanian and Liberian flags. [10]

Ordinary investors make use of the tax havens for a myriad of *bona fide* reasons. Some that make pure economic sense simply for portfolio diversification, asset protection, expropriation and preservation, as a

currency hedge, or simply following the old adage of 'not putting all one's eggs in one basket', whilst others have reasons such as 'allowing' companies to keep joint ventures secret from business rivals as well as protection from lawsuits, [11] and secrecy reasons,

Some individuals use tax havens as a means to protect wealth, as previously mentioned, and avoid personal embarrassment. An example [12] is of a businessman trying to stop his partner from finding out that he is paying child support to his ex-wife. Other reasons cited are mainly due to personal circumstances of investors such as protection from over-zealous legal advisors in matrimonial partnership or family disputes, insolvency, and other litigation.

The organisation for economic co-operation and development , hereinafter referred to as the OECD, says that the use of tax havens is expanding at an exponential rate. A 1998 report on just two of the tax havens (The Isle of Man and the Channel Islands) estimated the size of their financial services industry at $350 billion – comparable to the gross domestic product of the Netherlands. developing a patent or software in a thoroughly competitive environment, [13] Oliver p 93.

This is the background against which the OECD has launched a 'crackdown' [14] It identified a list of forty-six (46) major tax havens as being:

Anguilla, The Bahamas, Barbados, Belize, Bermuda, Cayman Islands, British Virgin Islands, Montserrat, St Kitts and Nevis, Turks and Calicos Islands, Andorra, Antigua, Aruba, Costa Rica, Dominica, Granada, Jamaica, St Lucia, Monaco, Netherlands, Antilles, Panama, St Vincent, US Virgin Islands, Bahrain, Cyprus, Dubai, Guernsey, Sark, Alderney, Gibraltar, Isle of Man, Jersey, Liechtenstein, Mauritius, Malta, San Marino, Brunei, Cook

Islands, The Maldives, Marshall Islands, Nauru, Nive, Seychelles, Tonga, Tuvalu, Vanvan, Samoa and Liberia.

In 1998, the OECD released harmful tax competition: an emerging global issue hereinafter referred to as the *1998 Report*. It specifies criteria for identifying tax havens. A jurisdiction is labelled a tax haven if it meets the following conditions:

1) It imposes no or only nominal taxes
2) It lacks a policy of effective exchange of information
3) It lacks transparency.
4) It has no requirement of substantial activities within the jurisdiction.

Permitting investment without substantial activities signals that there is no requirement that investors' activities add value to a jurisdiction and is indicative of a tax haven that allows pure tax driven activity. [15] Essentially these jurisdictions allow taxpayers to hold passive investments, book paper profits, and conceal their affairs from discovery by their resident-country taxing authorities. [16]

In the area of international taxation, the OECD undoubtedly made a major contribution to the alleviation of double taxation with its model double tax convention. [17] The OECD model facilitated the treaty process by standardising treaty structure and content which contributed greatly to the proliferation of the tax treaty network. [18] Recently, the OECD shifted its focus to harmful tax practices facilitated by globalisation. [19]

Globalisation has contributed to the proliferation of the tax competition that the OECD seeks to curb. [20] Previously remote tax regimes

are now readily accessible; communication improvements also allow for spreading and sharing of tax planning techniques between nations. [21] The 1998 Report states that tax competition facilitates the erosion of tax revenue in industrial nations. [22] It also undertook an affirmative effort to address the thorny issue of tax competition. It also mentions nineteen (19) recommendations. Top of the list of these are concerning controlled foreign corporations (CFC) or equivalent rules: that countries that do not have such rules consider adopting them. Recommendation 4 concerns foreign information reporting rules that countries that do not have rules concerning reporting of international transactions and foreign operations of resident taxpayers consider adopting such rules, and countries exchange information obtained under these rules. Recommendation 6 concerned transfer pricing rules – that countries followed the guidelines and thereby refrain from applying or not applying their transfer pricing rules in a way that would constitute harmful tax competition. Recommendation 7 concerns access to banking information for tax purposes in the context of counteracting harmful tax competition with a view to removing impediments to the access to such information by tax authorities. Recommendation 12 - that countries consider terminating their tax conventions with tax havens and consider not entering into the treaties with such countries in the future. Recommendation 13 and 14 deal with co-ordinated enforcement problems such as simultaneous examinations, specific exchange of information and assistance in the recovery of tax claims and Recommendation 15 that a Forum of harmful tax practices be established to implement the guidelines and other guidelines of the Report. It also sets the deadline by which opponent countries ' remove harmful features identified by the latest 31 December 2005.' [23]

The Forum is responsible for overseeing implement of the 1998 Report and identifying harmful tax regimes and utilising criteria thereafter. [24]

The 2000 OECD Report [25] repeats some of the criteria, for potentially harmful centres and identified thirty five (35) jurisdictions as having fulfilled the technical criteria for being tax havens. It has also initiated dialogue with non-OECD members in an effort to adhere to 31 December 2005, deadline. [26]

It also 'names and shames' eight 'un-co-operative tax havens'.

A further 2001 OECD Progress Report re-emphasises the 1998 criteria. [27]

On the 22 March 2004, [28], the OECD victoriously announced having made 'major progress in their efforts to eliminate harmful tax practices, and having abolished more than 30 of the preferential regimes identified in 2000 as potentially harmful.'

The Report also provides an update on efforts to combat practices such as lack of transparency, and lack of information exchanges for tax purposes [29], that undercut the ability of OECD countries to enforce their own tax laws. It also endeavours to reach its goals previously identified.

In the introduction to the 2004 Progress Report, it espouses to aspire to the cliched expression if its efforts were 'in pursuit of a level playing field'. It also does not seek to dictate to any country what its tax rate should be or how its tax system should be structured. It also endeavours to build support for 'fair competition', [30] but does not give concrete steps on how it proposes to implement this huge and ambitious goal.

The 2004 Report repeats the guidelines set out in the 1998 and 2000 Reports.

It also sets out a table documenting countries and sectors such as shipping and banking centres as well as headquarter centres and gives its approval by means of a tick to condemn and denounce its status as being 'harmful' or as being 'not harmful'. It also states 'that Switzerland, notwithstanding, its abstention recorded, is nevertheless ready to agree on effective exchange of information, in the context of its bilateral treaties, with respect to holding companies. [31] It also documents Luxembourg's commitment to remove its 1929 Holding Company regime.

The 2004 Report also reaffirms its commitment to the goals of 'transparency' and 'exchange of information standards' previously mentioned. It also highlights the model agreement on exchange of information on tax matters 'which seeks to promote international co-operation on tax matters'. [32] It covers information exchange upon request for both civil and criminal tax matters. The model agreement also promises to respect attorney-client privilege if the information requested would disclose a trade or business secret. It also 'ensures that countries are not at liberty to engage in fishing expeditions or request information that is unlikely to be relevant to the tax affairs of a specific tax payer.

The joint *ad hoc* group on accounts which met in October 2002 discusses issues such as maintenance and access to accounting records, reliability of such accounts as well as the period for which such records should be retained. [33]

The thirty three (33) countries outside the OECD that have made commitments to transparency and effective exchange of information have made progress in fulfilling their commitments. The vast majority have

already taken action to improve transparency by immobilising or abolishing bearer shares [34] trust, and company service providers are ensuring that they maintain ownership information on the entities to which they provide services. [35]

The report also identifies potentially useful measures to neutralise the 'deleterious' effects of harmful tax practices. They are the use of provisions having the effect of disallowing any deduction, exemption, credit or other allowance in relation to all substantial payments made to persons located in jurisdictions engaged in harmful tax practices, except where the tax payer is able to establish satisfactorily that such payments do not exceed an 'arms length' amount and correspond to *bona fide* transactions.

The use of thin capitalisation [36] provisions restricted the deduction of interest payments to persons located in jurisdictions engaged in harmful tax practices, the use of legislative or administrative provisions having the effect of requiring any resident who makes a substantial payment to a person located in a country or jurisdiction engaged in a harmful tax practice to report that payment, transaction or ownership to the tax authorities, such requirement being supported by substantial penalties for inaccurate reporting or non-reporting of such payments. [37]

Member countries that permit foreign tax credits are urged to modify those rules to prevent pooling of income benefiting from harmful tax practices with other income and to implement systems to verify that the amounts claimed accurately constitute credible taxes.

The Report also promotes 'ensuring that withholding taxes at a minimum rate apply to all payments of dividends, interest and royalties made to beneficial owners benefiting from harmful tax practices'. [38]

It also reaffirms its earlier 'name and shame' campaign by naming the 'remaining unco-operative tax havens' as being Andorra, the Principality of Liechtenstein, Liberia, the Principality of Monaco, and the Republic of the Marshall Islands.

In Part V of the 2004 Progress Report entitled *'Taking the Work Forward'* it unashamedly and arrogantly pats itself on the back as having made 'substantial progress' [39] and promises to 'identify dialogue with non-OECD members to encourage the creation of a level playing field', [40] and promises to police – 'monitor the development of new tax havens and urge the existing five (5) unco-operative tax havens to make commitments to transparency and exchange of information for tax purposes. [41] ' Never before have tax havens been the target of such virulent attacks as those mounted against them.' [42]

As a result of continued pressure by the OECD, and derogatory and adverse publicity directed towards offshore jurisdictions the original list of thirty seen (37) labelled as harmful has dwindled to only five (5). 'They resent being told by outsiders what to do' the OECD declares. [43]

I respectfully agree with the viewpoint of various authors that the OECD wish to stifle tax competition and 'its efforts are designed to create a tax cartel' [44], to undermine international law that 'sovereign nations should be free to determine their own tax policies [45].

Tax competition is a strong factor in both maintaining and increasing the vibrancy of economies across the Gulf [46]. These competitive advances should be exploited not stifled for the greatest return on capital. [47]

One consequence of the OECD Reports is a shift away from OECD member countries to tax haven jurisdictions where books and records remain inaccessible to outside authorities. [48]

Now [49] that most countries have abolished exchange control, capital is free to go where it can obtain the best return and the best return will usually be the place where there is no or only low tax on the income earned by the investment of that capital. Capital flight is now a phenomenon which affects even the moderately wealthy.

When [50] Germany proposed a withholding tax on interest held on savings, many Germans simply went to their banks, withdrew the money and drove across the borders into Switzerland, Luxembourg and Liechtenstein and re-deposited the funds into banks in these countries where there would be no withholding tax and no reporting of the income earned to the German authorities.

Offshore structures may also be used in order to transact such business as must not be tied to a particular jurisdiction, thereby permitting active income to be earned and accumulated in a zero tax environment. The tax laws and treaty network of the investor's home country are the first and foremost factor when choosing a tax haven. [51]

Further considerations [52] which will rapidly narrow the range of possibilities are:

1) **Political stability**.

2) **Geography Communications and Transportation Facilities.**[53]

3) **Management Liability**.[54] The more liberal and capital formation rules, the more attractive the haven. Panama, the Cayman Islands, Bahamas, Jersey, Guernsey and the British Virgin Islands are amongst the other tax havens which meet these criteria.

4) **Language used**. Not only does this facilitate a better understanding of the law, but it also eliminates problems such as a breakdown in communications, costly and time-consuming translations and errors and misunderstandings. [55]

5) **Sanctity of contract, freedom from confiscation**. If a foreign government has a history of nationalisation or expropriation, or has no regard for the sanctity of contract then one has to look elsewhere. [56] Switzerland and Liechtenstein have been viewed as absolutely neutral no matter what political crisis develop in the world, and assets held in these jurisdictions have, despite world wars and political instability elsewhere have never been frozen or confiscated.

6) **History of Debt Payment**. It is obviously advisable to invest in a country with a credit-worthy reputation. [57]

7) **Stable Currency**. It must be possible to remit funds without official interference. If the local currency is not linked to hard currency, then the investor may be required to maintain holdings in a foreign currency thereby incurring a risk that the state may confiscate foreign currency accounts in order to stabilise its trade deficit. [58]

8) **Secrecy and Investor Anonymity**. There may be a need to have a nominee arrangement to preserve secrecy. It may be desirable to establish several layers of holdings in different jurisdictions. [59]

9) **The Legal System**. Does the civil and criminal justice system function honestly and efficiently? There is no point in setting up a trust in a jurisdiction where trusts are not known as legal concepts. [60]

10) **Minimum Revelation of Commercial and Financial Transactions**, [61] and availability of experts such as bankers, lawyers, accountants, trust companies, trustees and investment / portfolio managers.

11) **Corporate Mobility**. It must be possible for a company or trust to emigrate from one offshore jurisdiction to another and/or even merge with a company in another jurisdiction. [62]

12) **Professional Accountability**. Lawyers and accountants must be adequately insured for professional liability. Any Liechtenstein trust or offshore company must have at least one director/trustee who is licensed to practice and be a resident of the principality in order to ensure that he/she is at all times subject to the control of the Liechtenstein courts. [63] The professional aptitude required in this jurisdiction is unusually high. [64] Liechtenstein bank secrecy laws are reputed to be more rigorous than the Swiss laws. [65]

The human propensity to seek certainty, shelter and stability in an increasing volatile world is a legitimate reason for concern. Investors will try their best to limit the take by authorities. Offshore centres will compete for a greater share of this growing market, as the investors are spoilt for choice.

I shall now refer to the most popular destinations used as tax havens as well as those five (5) singled out by the OECD as being 'unco-operative'.

1. THE PRINCIPALITY OF LIECHTENSTEIN.

The Principality of Liechtenstein gained its reputation as one of the world's greatest tax sanctuaries shortly after World War I, when it signed a customs treaty with Switzerland. It benefits in may ways from the traditional strength of the Swiss franc. [66]

While small in size (130 square km), it is rated as a 'giant' as far as offshore financial centres and tax havens are concerned, and is reputed to be the third richest country in the world with a population of just over 28,000 people. [67]

It's strict bank secrecy laws – the 1993 bank law demands adherence to secrecy principles to directors, officers, staff of financial institutions and their advisors. Its long history of political stability, and its strict bank secrecy reputed to be 'more impregnable' than Switzerland, makes her a 'powerhouse' to be reckoned with. [68] As one of Europe's oldest tax havens, it is reportedly a host to more than eighty (80) thousand foreign base holding companies.

Liechtenstein is known for its broad and well-defined trust law, called '*Trevhanderschaft*'. The trust may be formed so that even

the setter 'exerts' considerable influence by being a member of the board of trustees via a letter of wishes or simply by being a beneficiary. A protector may also be appointed. [69]

Holding and domiciliary companies are not subject to any taxes on profits unless they participate in business enterprises in Liechtenstein. [70]

A domiciliary or base company (*Sitzgess chaft*) is one institute that carries on its activities elsewhere, but has its domicile in Liechtenstein. [71]

'*Trevhanderschaft*' (private trust) do not have to provide financial statements to the government. [72]

A non-resident can also form an '*anshalt*' (establishment). It is a separate entity, much like a corporation. [73]

The original founder of an *anshalt* is generally commonly said to be a Liechtenstein lawyer or trust company who promptly cede, transfer and pass all rights to an unnamed successor, normally the true owner/investor by means of a 'declaration of cession'. This important document is often said to be held in a Swiss or Austrian bank vault, thereby keeping the identity of the client 'doubly' obscured. [74]

Aristotle Onassis is reputed to have kept a sizeable portion of his wealth in a Liechtenstein 'public wealth foundation', the purpose and activity of which was, and still is, a well-kept secret. [75]

A warning has been sounded by US tax experts that the IRS 'might categorise an *anshalt* as either a trust or as alter ego of the founder. [76]

Other attractive features of the non-resident domiciliary and holding companies are:

- Exemption from payment of any income tax, property tax and capital gains tax.
- Maintenance of an office in Liechtenstein, but the registered seat need be nothing more than a mailing address.
- Absolute secrecy regarding tax matters. [77]
- Maintenance of anonymity and the ability to manage one's affairs from anywhere in the world.

I shall now endeavour to define and describe the elusive entity known as the Liechtenstein Anstalt. Its main attraction would seem to be for owner anonymity and secrecy [78], as well as having the status of a corporation [79], despite the fact that only one member may be the proprietor.

The Lictenstein Anstalt was created according to the provisions of the Company Law of 1926 in order to attract foreign business [80], by the grant of special advantages. [81]

An anstalt is usually an institution of a public character dedicated to a 'charitable medical or educational purpose, created by statute and financed through public funds'. [82]

Liechtenstein Law [83] is unique in that it provides for the creation and establishment of the Private Law Anstalt.

The Liechtenstein Anstalt is deemed as being "a legally independent enterprise pursuing permanent commercial or other objectives."[84]

An anstalt is capable of being incorporated by a single individual or by a legal person [85]

Article 535 of the PGR – *Das Persalen und Gesellschafts Recht* i.e *Law of Individuals, and Companies of 20 January, 1926* [86] does not impose any restriction on nationality or residence of the founder. The founder may very well be represented by another physical or legal person.[87] A Liechtenstein Trust Company usually acts on instructions of an interested party, who may very well be the founder.[88] The identity of the true and real founder will not be disclosed in any documentation lodged for registration thereby protecting the privacy of the Founder.[89]

What are the requirements for the registration of an anstalt?

1) Written Articles of Association signed by the Founder, which may also include the Memorandum of Foundation of the anstalt are said to be necessary for its formation.[90] The articles should make mention of the word 'anstalt' and its seal.[91]

2) The object and nature of business of the anstalt.[92]

3) The capital – its, nature, value and composition.[93]

The founder may unilaterally alter the articles as well as the objects of the anstalt whenever he wishes to do so.[94] Any changes may be effected by any natural person or legal person empowered by the Articles to do so.

Further regulation of the relationship between more than one founder may be encapsulated in the by-laws.[95] An important point to be noted is that the by-laws are exempt from the requirements of registration thereby providing excellent privacy and secrecy to the founders as well as the benefactors.[96]

REGISTRATION:

An anstalt may be registered by the Founder or his attorney; it should contain the Memorandum, details about how the capital is structured,[97] the names and addresses of administrators/officers, as well as notarized or court certified copies of the Memorandum and Articles of Association.[98] Upon receipt of all documents, incorporation will take place at the time of registration. An anstalt acquires legal personality by being entered into the register.[99]

Liechtenstein law requires the anstalt to maintain proper accounting data. An anstalt which 'only has its seat in Liechtenstein[100] but which carries out all its business operations abroad is also exempt from publication of its details of incorporation in the local news media – either *'The Liechtensteiner Vaterland'* or the *'Lichetensteiner Volksblatt'*.[101]

Whilst an anstalt is free to choose its own name this is however subject to the prior approval of the authorities, since it should

'not resemble any other registered name'.[102] A fair, reasonable and common requirement evidenced even in our own Company Law.

An anstalt which is only domiciliary and does not transact any business in Liechtenstein need not use the German language – as opposed to one that conducts business there – 'with the proviso that the name must include the world 'ANSTALT'.[103] Business can thus be transacted in the mother-language or language of choice of the investor. The registered office also known as The Seat must be situated in Liechtenstein.[104]

The primary aim of the anstalt has to be clear from the stated objects and also the nature of business to be conducted.[105] The PGR, i.e. Law on Individuals and Companies of 20 January 1926,[106] permits the broad and wide description of the objects of the company.

A minimum amount of thirty thousand Swiss francs is the capital required in order to incorporate an anstalt.[107] Any increase or decrease in the capital structure has, according to Article 549 [108]of the PGR, 'to be recorded and published'.

An anstalt may serve the interests of the family of the founder, i.e. a *stipulation alteri*; it may perform the important function of asset protection from over-zealous creditors[109] and litigation. This protection, however, is only limited to the beneficiaries as the founder's right, title and interest in anstalt may be attached by his creditors.[110] He is thus not insulated but left unprotected in this instance; he is exposed and vulnerable to attack from his creditors, despite the fact that 'an anstalt is

endowed with legal personality'[111] having an independent legal existence.

An anstalt is established either by a trustee or by an attorney in their own personal capacities.[112] A mechanism exists to pass ownership of the true owner by leaving the name of the true owner blank.[113] This blank transfer of ownership document 'is certified by the Registration Office',[114] and delivered to the transferee who may elect who the true founder is to be. This procedure protects the identity of the true owner and is further evidence of a system in which confidentiality is sacrosanct.

Although the anstalt is modelled on a 'stock corporation' or *Actiengesellschaft*,[115] which allows flexibility so that the founder may only use these 'organs'[116] which best favour his *modus operandi*, it is ideally suited for a 'one-man entity'[117]. The founder may thus tailor the use of his anstalt to suit his exact needs.

The true owner of an anstalt is afforded the liberty to amend the articles, nominate new beneficiaries, attribute the proceeds and also dissolve it.[118] Another safeguard to owner identity is that he may re-transfer ownership of the anstalt to the attorney or trust company official and thereafter then eventually re-transfer it into his own name.[119] A Liechtenstein resident/citizen who is either an attorney, trustee, auditor or be in possession of a commercial qualification has to be one of the directors of an anstalt.[120]

An anstalt may be created in perpetuity.[121]

The founder of an anstalt is liable for stamp duty of two percent of his capital.[122] An 'active' anstalt is liable to pay capital tax, i.e. *kapitalstever,* at two percent of its capital and reserves as well extremely attractive low progressive rates ranging from a miniscule seven and a half percent to twelve percent.[123]

An annual capital tax (*kapitalstever*[124]) also called Special Corporation Tax (*besondere gesellschaftsstever*) of one percent of capital and reserves (the minimum being one thousand Swiss francs) is levied on non-Liechtenstein domiciliary corporations.

Property Tax (*vermogensstever*) is levied on all property situated in Liechtenstein and held by the legal entity of the anstalt.[125]

Tax is levied on dividends declared for those anstalts whose capital is divided into shares at the extremely low rate of four percent.[126]

There are a staggering number of corporations registered, resulting in a constant flow of money in director's emoluments, income for attorneys, trust companies, bank and other related service providers. The large amount of corporations registered also generate huge amounts of revenue for the principality from the various direct taxes and administration fees levied.[127]

The question that begs to be asked is 'how willing are the foreign taxing authorities to recognise and embrace this unique trading/holding vehicle known as the anstalt'?

Predictably domestic tax jurisdictions do not take very kindly to tax competition as anstalts are felt to be interfering with their tax base and as most of the anstalts are established by non-

residents of Liechtenstein they do not contribute their 'fair-share' to their domestic infrastructure.

The legal status of an anstalt has, however, been successfully challenged in a few jurisdictions.

In Belgium, the Belgian Court of Cessation[128] held that "a one-man foreign corporation had no standing,[129] while the court side-stepped the issue of deciding on the legality of a Liechtenstein anstalt in Belgium, it held that a Belgian corporation could not be validly incorporated by just one person.[130]

The Courts in West Germany[131] also gave the anstalts the cold shoulder. They went on to describe them as 'shams' which had no mechanism in place to protect the German public from 'improper dealings'[132]. The Court[133] held the director of an anstalt to be personally liable since the anstalt had no legal personality and that their acts were void.[134]

The position in Italy is that owner-anonymity and 'transfer of ownership in secrecy'[135] is found to be repugnant. The founder of an anstalt is held personally liable for all juristic acts undertaken in respect of the anstalt.[136]

Many countries have gone on the offensive and have implemented stringent measures to counter the threat to their tax base. For example, in Austria the 'actual economic facts of a transaction'[137]versus the 'apparent form'[138] are used as *indicia* of where tax liability accrues. The powers that be are ready,

willing and able to 'pierce the corporate veil' and reveal, if any, sham and resultant erosion of its tax base is being perpetrated.

Legislation in Belgium is couched in very wide terms encompassing 'interest of any kinds, royalties for use of patents, inventions, trademarks, and manufacturing processes'[139] including 'sale, transfer of stock, bonds, credits or loans'[140]. The taxpayer has to prove a nexus in the course of a 'legitimate financial or economic interest'[141] and the 'actual value'[142] and benefit derived to the taxpayer.

'Profit shifting'[143], capital flight and price-manipulation are what the French taxing authorities are on the prowl for, especially to low-tax jurisdictions, such as Liechtenstein.

Transfer of monies, profits, royalties, interest payments etc are fastidiously monitored to vet whether the transactions are 'not normal' nor that they are 'exaggerated in their scope'[144].

Controlled foreign corporations legislation in the United States also thwarts any attempts to displace the revenue.

Whilst the utilization of tax havens by individuals and corporations is to be lauded as a legitimate tax planning tool and shelter, many of the characteristics outlined in this paper have also attracted the attention of nefarious individuals and groups who perpetrate their cowardly acts on helpless individuals.

'Money laundering' is the process whereby the proceeds of crime are filtered using *prima facie* legitimate businesses to disguise their dubious origin.

The Caribbean Financial Action Task Force, also known as CAFIC[145] is one of the united fronts that has been forced to combat drug trafficking.

Their geographic location and lack of administrative resources make them an ideal breeding ground for violent crimes perpetrated in the United Kingdom.[146]

The United Nations[147] has enacted[148] sanctions aimed at money laundering, international criminal activity as well as international terror.

The Vienna Convention[149] specifically relates to drug trafficking, whilst the Palermo Convention deals with international organised crime.[150]

The Financial Action Task Force (FATF) has its focus on the eradication of money laundering, as well as terrorist financial operations. Bank robbery is said to be a popular generator of money by terrorists in Italy and Spain.[151]

The objectives of the FATF are[152]

- to criminalise the funding of terrorism
- to freeze and confiscate terrorist assets[153]
- to report 'suspicious transactions[154]
- to intensify client identification

especially in money-transfer transactions and importantly to ascertain and verify that 'non-profit' organisations[155] are not used to fund acts of terror.

It's aim is also to deny access to the financial markets to owners of 'tainted' suspect funds of questionable origin.

2. LIBERIA.

Liberia is situated at the south-western corner of West Africa, on the Atlantic Ocean. Monrovia is said to boast one of the most modern ports in Africa. Despite being located near the turbulent states of Sierra Leone and Guinea, it continues to remain one of the three greatest flag-of-convenience nations. [156]

It offers non-resident investors and business people numerous incentives as a haven for holding, trading, shipping and manufacturing companies, and zero tax inducements. A Liberian corporation is not subject to taxes in Liberia if (1) more than 25% of the corporate stock is owned by non-Liberians and (2) corporate income is derived from sources outside of Liberia. [157]

Generous allowances are allowed to claim necessary business expenses, uninsured business losses, interest and charitable contributions not exceeding 15% of net income. Exempt are:

- Income from source outside Liberia.
- Real or personal property, tangible or intangible, which are not physically present within Liberia.
- Earnings from the operation of Liberian-documented vessels not engaged exclusively in Liberian coastal trade.
- Interest received. [158]

In addition to which is the absence of tax on accumulated earnings. It's 'open door policy' provides freedom of movement of capital. In an attempt to attract foreign investment it provided a tax holiday period of between five (5) and ten (10) for certain wide categories of investments such as processing raw material, for activities such as agriculture, logging and fishing. Custom duty exemptions have also been granted to those enterprises receiving investment incentives contracts. [159] Relief even as high as 100% exemption on cost of imported construction materials, machinery and equipment is granted. [160]

Government assistance is given for leasing of state owned land, securing of loans, guarantees, technical assistance, expediting the issue of entry/exit residence and work permits to all managerial, technical and skilled foreign personnel. [161]

Section 140 of the Liberian Internal Revenue code grants 'significant exemptions' [162] of tax on gross earnings of a Liberian corporation even thought such shipping vessels are 'not exclusively [163] engaged in Liberian coastal trade.'

A non-Liberian trust or corporation may apply for registration as a 'foreign maritime trust' for purposes of owning and operating a Liberian-flag vessel in terms of Chapter 13 of the Liberian Business Corporation Act of 1996. [164] it has also reduced its registration fees to a flat tariff of $2,500 per ship, in order to attract clientele, resulting in huge savings of up to $110,000 per ship to those ready to fly the Liberian flag. [165]

3. THE PRINCIPALITY OF MONACO.

Monaco is located in mainland Europe with easy access to and from all the corners of the world. It is also the favourite playground of the rich and famous and venue of the Grand Prix . Moreover, it provides wide flexibility in the operation of administrative and headquarters companies. It has a highly sophisticated network of banking and management services, having an excellent reputation for integrity, confidentiality and service, as well as a country virtually without street crime. [166]

Monaco holds the distinction of being the only country on the European continent (except for Andorra – also blacklisted by the OECD as being involved in 'harmful' tax practice) where individuals are not liable for the payment of income tax. [167]

Income tax was abolished in 1969 under the sovereign order signed by HSH Prince Charles III. [168]

Tax-free living attracts wealthy expatriates who have a penchant for the good life and whose expenditures are a welcome source of income. [169]

Tax advantages include no inheritance tax, no wealth tax and no duties on property situated in Monaco.

Monaco is also a popular destination for multinational companies using it as headquarters. It also may serve as a base for a company located in another tax haven. [170] Shipping companies have also taken advantage of the low-cost headquarters operating facilities. [171]

4. THE REPUBLIC OF MARSHALL ISLANDS.

A former United States trust territory used for extensive atomic and hydrogen bomb tests during and after World War II, the Marshall Islands, now a South Pacific island has entered the tax haven world by becoming a flag of convenience nation and offshore business centre. [172]

There are no natural resources, the Parliament, the *Nitijela,* passed laws granting freedom from income and asset withholding and stamp taxes to foreign maritime entities, as well as to non-resident corporations, partnerships, trusts and unincorporated associations. [173] It's ship registry program is popular among Japanese vessel owners who are impressed by the presence of its many Japanese-speaking residents. [174]

Chapter 1 of the Associations Law/1990 grants: 'A non-resident investor of a foreign corporation or trust a blanket exemption from payment of any corporate tax, corporate profits tax, income tax and withholding tax. Interest, dividends, royalties, rents, distributions of income to another non-resident or corporation are also exempt from any tax and withholding provisions. [175]

The normal corporate tax rate is twelve (12) percent with companies being entitled to a five year tax holiday. [176]

Any breach of confidentiality carries a criminal sanction.

Other noteworthy features are that the country has a good credit rating, there are no exchange controls, there are no restrictions on remittances, and that English is the official commercial language.

5. **THE PRINCIPALITY OF ANDORRA.**

Andorra is a no tax jurisdiction with no direct taxation being levied on income, capital or corporations. Nor do wealth and inheritance taxes exist. [177]

Banks are said to offer 'a wide range of professional, discrete and confidential services with banking secrecy being upheld by law. [178]

I will now highlight a few of the other popular well-known off-shore financial centres:

1. **CHANNEL ISLANDS.**

The reward for establishing a holding company controlled by non-residents of Jersey, Guernsey, Alderney and Sark is exemption from the payment of income, capital transfer, capital gains as well as estate duties. [179]

Holding companies known as 'exempt companies' pay a £110 in Jersey or £100 in Guernsey and Alderney plus a capital duty of £50. [180]

Investors in the more remote island of Alderney need not file balance sheets and profit and loss statements despite being public companies, whereas they are obliged to do so in Jersey. [181]

A Guernsey exempt company owned by residents may be granted exempt status as mentioned. They pay no taxes in Guernsey but are subject to a flat rate of corporate duty.

Guernsey has signed double taxation agreements which provide for the exchange of information with the United Kingdom. A minimum of one director may be appointed and there is no requirement of having to be a resident. [182] There are no specific statutory provisions governing secrecy but English law – which applies does impose a common law duty of professionals to keep the affairs of their clients confidential. [183]

2. PANAMA.

Panama has one of the largest number of vessels registered of any country in the world. Although shipping earnings are derived outside of Panama, they are not subject to Panamanian taxes. [184]

Panama is also an important counter trade and barter transactions centre. [185]

3. SWITZERLAND.

Switzerland has enjoyed political stability and prosperity for over 200 years. It has remained politically neutral and has been unaffected by two world wars. The Swiss economy is oriented towards foreign trade because of the lack of raw materials, poor soil and insufficient crops. [186]

It's worldwide reputation as a financial centre as well as its currency, the Swiss franc, is legendary.

Violations banking secrecy is a penal offence under the Swiss Banking Law of 1934. Banks must, however, where directed, do so by Government order, or where there is a suspicion of fraud.

Act 47/1999 revisited the Federal Law on Bank/1934 and states that 'anyone who divulges confidential information entrusted to him/her without the consent of the account holder will be punished with imprisonment for up to six months and/or a (heavy) fine. [187]

Despite protection of privacy being one of the hallmarks of the Swiss banking system, it is clear that Switzerland will co-operate in international proceedings where it is clear that funds are there to promote international terrorism and crime. [188]

It is, I respectfully add, submitted that Switzerland would like to retain its prestige and unassailable reputation as a premier offshore financial centre. Its willingness to co-operate in instances where it is clear that serious transgressions involving humanity, drug-trafficking, huge financial scandals involving fraud on minorities and international terrorism have been perpetrated , and that it does not want to be known as a destination that welcomes 'tainted income', such as the hugely embarrassing, unpleasant 'Nazi Gold' incident, which besmirched its status but it wants to instead move forward with a 'clean bill of health'.

4. ISLE OF MAN.

The Isle of Man (Manx) is also a popular off-shore financial centre. It is part of the British Isles, yet not part of the United Kingdom. [189] Certain advances accrue to investors here due to the fact that the 'manx' VAT number is indistinguishable from the UK number. Great potential for creative price manipulation transactions exist here.

Companies deriving income from trading or passive investment coulde be structured as exempt from taxes.[190] It is also a favoured destination for the registration of ships.[191]

Canada is also said to offer tax incentives in its drive to attract wealthy citizens. Non Canadian source income is exempt from income tax as well as capital gains tax.[192] It also has no Estate taxes. [193]

Other popular havens are the Bahamas and Brunei.[194]

3

CONCLUSION

Unfortunately, the advantages presented by the tax havens do not only attract ordinary, law-abiding citizens trying to manage their affairs as best they can but also 'Latin American drug cartels, the Italian and Russian mafia as well as providing a refuge for ill-gotten gains of dictators and organised criminals'. *

These delinquents and perpetrators have sullied the previously impeccable reputations of havens such as Liechtenstein and Monaco. Even Switzerland, the world's principal bank-secrecy jurisdiction has bowed to international pressure and has agreed to exchange banking information under appropriate circumstances.

While most tax havens lack natural resources, they have steadfastly refused to become humble recipients of 'strings attached' financial aid from the super powers, and have instead tried to create incentives to attract investors as well as tourists as a spin-off to highlight the God-given beauty of their destinations.

It is a sad but true fact that organised criminals have exploited these very same features to further their not-so honourable objectives by manipulating the system and laundering billions of dollars annually.

FOOTNOTES

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4 Xxxxxx and xxxxx
5 *op cit.* Footnote 22, p 679.
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7 *op cit* p679.
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11 *Double Decline*, Michael Peel, p3.
12 *op cit*, p3.
13 *op cit*, p1.
14 *op cit*, p3.
15 Salinas, p4, 25: *Houston Journal International Law, 1998 OECD Report* p22.
16 *The Global Schoolyard Bully: And Coercive Efforts to Control Tax Competition.* A Townsend Jnr, 25 Fordham Internal Law Journal, p 6.
17 *op cit*, p4.
18 *op cit*, p4.
19 *op cit*, p4.
20 *op cit*, p4.
21 *op cit*, p5.
22 *op cit*, p5.
23 *op cit*, p27.
24 *op cit*, p29.
25 Olivier *et al.*, p 99
26 *op cit*, p99.
27 *op cit*, p99.
28 OECD website – www.oecd.org
29 *OECD Report*, p 4.
30 *OECD Report*, p 4.
31 *2004 Report*, p 10.
32 *op cit*, p13.
33 *op cit*, p14.
34 *op cit*, p14.
35 *op cit*, p14.
36 *op cit*, p15.
37 *op cit*, p16.
38 *op cit*, p16.
39 *op cit*, p17.
40 *op cit*, p17.
41 *op cit*, p18.
42 *Diamond vs Diamond,* Tax Haven of the World. *op cit,* p 17.
43 *op cit*, p18.
44 *Global Schoolyard Bully,* A Townsend, p1.
45 *op cit*, p1.
46 *op cit*, p8.
47 *op cit*, p8.
48 *No Low Tax Jurisdictions,* www.eurolegal.org p1.
49 *op cit*, p8.
50 *Liechtenstein As a Tax Haven,* www.arcomm.li/trending , p1.
51 *op cit*, p2.
52 *Diamond & Diamond,* Introduction, p6-9.
53 *op cit*, p70.

[54] *op cit*, p71.
[55] *op cit*, p71.
[56] *op cit*, p71.
[57] *Leichtenstein As a Tax Haven,* p2.
[58] www.eurolegal.com, *p6.*
[59] *op cit*, p6.
[60] *op cit*, p3.
[61] *op cit*, p5.
[62] *op cit*, p5.
[63] *op cit*, p6.
[64] *op cit*, p7.
[65] *op cit*, p8.
[66] *op cit*, p8.
[67] Diamond, *op cit*, p4. Liechtenstein.
[68] Liechtenstein, IBC Tax Havens, p1.
[69] *op cit,* p1.
[70] *op cit,* p8.
[71] *op cit,* p5.
[72] *op cit,* p6.
[73] *op cit,* p23.
[74] Liechtenstein IBC Tax Havens, p1.
[75] *op cit,* p1.
[76] *op cit,* p1.
[77] *op cit,* p2.
[78] Analysis of a Tax Haven: The Liechtenstein Anstalt, p 929.
[79] *op cit*, p929.
[80] *op cit.*, p930.
[81] *op cit.*, p930.
[82] *op cit.*, p930.
[83] Individuals and Companies – 20 January 1926.
[84] *op cit.*, p931.
[85] *op cit.*, p932.
[86] *op cit.*, p932.
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[128] *op cit.*, p944.
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[130] *op cit.*, p944.
[131] *op cit.*, p944.
[132] *op cit.*, p945.
[133] *op cit.*, p945.
[134] *op cit.*, p945.
[135] *op cit.*, p946.
[136] *op cit.*, p946.
[137] *op cit.*, p948.
[138] *op cit.*, p948.
[139] *op cit.*, p949.
[140] *op cit.*, p949.
[141] *op cit.*, p950.
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[144] *op cit.*, p950.
[145] www.eurolegal.org.moneylaun.htm p9.
[146] *op cit.*, p9.
[147] *op cit.*, p9.
[148] UN Charter, Chapter VII, *op cit.*, p3.
[149] *op cit.*, p3.
[150] *op cit.*, p3.
[151] *op cit.*, p2.
[152] *op cit.*, p8.
[153] *op cit.*, p8.
[154] *op cit.*, p8.
[155] *op cit.*, p8.
[156] Diamond & Diamond, *Tax Havens of the World*, p2.
[157] *op cit,* p3.
[158] *op cit,* p3.
[159] *op cit,* p5.
[160] *op cit,* p6.
[161] *op cit,* p6.
[162] *op cit,* p6.
[163] *op cit,* p6.
[164] *op cit,* p7.
[165] Diamond & Diamond, *Tax Havens of the World,* Monaco, p2.
[166] *op cit,* p4.
[167] www.monaco.consulate.com , p1.
[168] Diamond & Diamond, *Tax Havens of the World,* Monaco, p4.
[169] *op cit,* p3.

[170] *op cit,* p3.
[171] Diamond & Diamond, *Tax Havens of the World,* Marshall Islands, p1.
[172] *op cit,* p1.
[173] *op cit,* p2.
[174] *op cit,* p2.
[175] *op cit,* p2.
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[177] www.off-shoresimple.andorra.htm , p5.
[178] *op cit,* p5.
[179] Diamond & Diamond, *Tax Havens of the World,* Channel Islands, p1.
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[181] *op cit,* p2.
[182] *op cit,* p3.
[183] www.offshore.com-guernsey.htm , p1.
[184] *op cit,* p2.
[185] Diamond & Diamond, *Tax Havens of the World,* Panama, p10.
[186] Diamond & Diamond, *Tax Havens of the World,* Switzerland, p21.
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[188] Expressions Magazine, 2004. Part I, p17.
[189] www.isleofman.htm p1.
[190] *op cit.,* p1.
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