# CHAPTER II

# REVIEW OF RELATED LITERATURE

## A. Perspective of Islamic Law on Tax

In Islam, the tax is called by *dharibah* which means the load. It referred to the load because as an additional obligation on the property after the obligatory of *zakat*, so the implementation will be perceived as a burden (heavy load). Here is the definition of tax according to sharia proposed by some Islamic economists:
[10]

1. Yusuf Qaradawi argues in his book *Fiqh az-Zakah*, taxes are the obligations imposed on taxpayers that must be paid to the state in accordance with the provisions without the feed back from the state, and the results are to finance public spending on the one hand and to realize the most economic objectives, social, political, and other goals to be achieved by state.
2. Gazy Inayah argues in his book *Al-Iqtishad al-Islami wa az-Zakah ad-dharibah*, tax is the obligation to pay cash determined by the government or authorities which are binding in the absence of certain benefits. This government regulations are consistent with the ability of the owner of the property and allocated to meet food needs in general and to meet the demands for government financial policy.

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[10]Gusfahmi, *Pajak Menurut Syariah*... p. 30-31.

Currently, the tax is the duty of a citizen in a country to finance state expenditures. If the government funds are insufficient, then the expenditure for the purpose of economic, social, political, and other goals to be achieved by the state to be blocked, and will arise *al-mudharat* (bad condition). Meanwhile, to prevent *al-mudharat* is an obligation. In the rules of fiqh say:[11]

مالا يتم الواجب إلا به فهو واجب

> "Everything that cannot be abandoned in favor of the implementation of the obligations in addition to him, then that something else is obligatory."

According to Maliki, because taxes keep benefit for people through various means such as security, education, and health are mandatory, while the state treasury is not sufficient (the proof, state is still owed), then tax is becomes obligatory.[12] The obligation to pay taxes to the state is to avoid the country from unsafe conditions, and also from the condition of a lack of education for the society, as well as reduced levels of public health. To avoid those bad conditions, then that tax be required to be accomplished. And therefore, tax evasion is prohibited by the state. According to Ibn Taymiyyah in *Majmuatul Fatawa*, said that, "ban on tax avoidance even though it is not fair on the argument that it did not pay their taxes by the obligation will result in a greater burden for the other groups."[13]

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[11] Gusfahmi, *Pajak Menurut Syariah* ... p. 160.

[12] Gusfahmi, *Pajak Menurut Syariah* ... p. 159.

[13] Gusfahmi, *Pajak Menurut Syariah* ... p. 157.

## B. General Perspective of Tax Haven

### 1. Tax Haven

Tax Haven consists of the term "tax" means a tax, and a "haven" which means protection place. So, literally "tax haven" means a state that provides protection tax.[14] According to Christopher in Fuady's book, the definition of tax haven been given as a country that treats the personal income tax and corporate tax at the lowest level, so it tends to attract the millionaires, multi-national companies, and financial institutions who seek to minimize their tax liability. Due to the easiness, especially in the field of taxation and ease also in the field of strict bank secrecy, then eventually tax haven countries into the world financial centers. Hence, tax haven countries often also referred to as the following designations:[15]

- Financial center
- Fiscal paradise
- Offshore tax haven

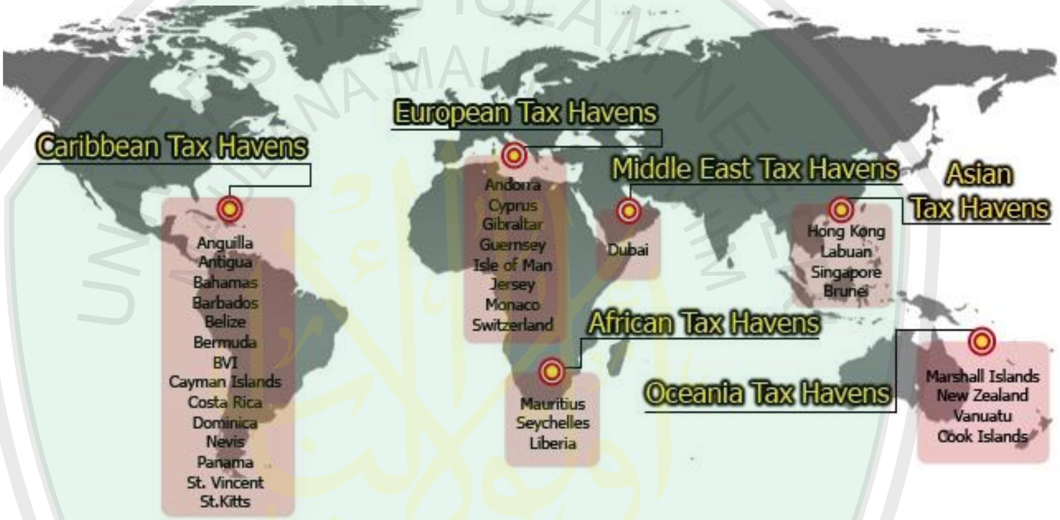
Tax havens are small countries, commonly below one million in population, and are generally more affluent than other countries. There are roughly 45 major tax havens in the world today. Examples Andorra, Ireland, Luxembourg and Monaco in Europe, Hong Kong and Singapore in Asia, and the Cayman Islands, the Netherlands Antilles, and Panama in the America. These tax havens are generally small and affluent, and tax

[14] Munir Fuady, *Hukum Perbankan Modern* (Jakarta: PT. Citra Aditya Bakti, 2004). p. 229.

[15] Munir Fuady, *Hukum Perbankan Modern*... p. 229.

havens are widely used by international investors. In 1999, 59 percent of U.S. multinational firms with significant foreign operations had affiliates in one or more tax havens.[16]

This is the location of several tax haven countries in the world map. By seeing this map below, proved that tax haven countries are very small, until cannot be visible or not appear in the world map.




Source: howmoneyindonesia.com/2014/01/12/tax-haven-surga-bagi-para-pengemplang-pajak/

The map above disclose the location of several tax haven countries that aggregate thirty four (34) countries or jurisdictions or territorials, that consist of Caribbean zone, European zone, Middle East zone, African zone, Asian zone, and Oceania zone. In the Caribbean zone there are fourteen (14) countries, are Anguilla, Bahamas, Barbados, Belize, Bermuda, British

[16]James R.Hines, “Tax havens,” NBER Working Paper, (May 2007). p. 1.

Virgin Island (BVI), Cayman Islands, Costa Rica, Dominica, Nevis, Panama, St.Vincent, and St.Kitts. In the European zone there are eight (8) countries, are Andorra, Cyprus, Gibraltar, Guernsey, Isle of Man, Jersey, Monaco, and Switzerland. In the Middle East zone onlu one (1) country, it is Dubai. In the African there are three (3) countries, are Mauritius, Seychelles, and Liberia. In the Asian there are four (4) countries, are Hongkong, Labuan, Singapore, and Brunei. Di wilayah Oceania there are four (4) countries, are Marshall island, New Zealand, Vanuatu, and Cook Islands.

Organization for Economic Cooperation and Development (OECD) identifies three factors that make an area of the law can be grouped into a tax haven:[17]

*First*, taxes are very low, even no tax and providing itself as a refuge for foreigner citizens who evade taxes. *Secondly*, there is strict protection of customer information. With this protection, company or individual has the advantage of hiding the actual data from the tax authorities in their own country and it is legal according to the laws on tax havens. *Third*, there is no transparency in the operation of this tax haven.

In other litaratur mentioned that some examples of the type of tax haven countries are:[18]

[17] Kompas.com. Selasa, 7 April 2009.

1) State without income tax levies, such as the Bahamas, Bermuda, and the Cayman Islands. Bahamas only levy a tax of $ 100 a year for all companies in the Bahamas. This country does not have an agreement to avoid double taxation (tax treaty) with other countries that need the information. Since 1960, the country provides long-term guarantees not to burden the tax on manufacturing companies. Bermuda does not have an agreement to avoid double taxation and burden some sort of costs and limited liability companies are moderate. Cayman islands guarantee will not tax foreign companies for 20 years, and as well as the Bahamas and Bermuda, Cayman islands also not hold double taxation treaties with other countries.

2) Countries with low tax rates, such as British Virgin Islands which levy income tax with tariff of 12% tax on dividends by a third party (with holding tax). Netherlands Antilles is a Dutch (Holland) colony, collect taxes low enough and treat special tax on shipping companies, aviation, and holding companies.

3) State taxing only domestic income (domestic) with the exception of not taxing income derived from abroad, such as Hong Kong, Liberia, and Panama. Hong Kong income tax levy of 15% on income in the country, while the foreign income is not taxed at all. Also no tax levied on capital, profit/capital gains or dividends to shareholders sent overseas. Panama also impose the same thing, which is against

[18] Mohammad Zain. *Manajemen Perpajakan*. (Jakarta: Salemba Empat, 2003). p. 364-365.

company located in Panama, the tax is only levied on domestic income only, while overseas income not taxed at all. Panama also did not make the double taxation treaties and in accordance Limited Liability Company Law can be written in any language.

4) Countries that give special treatment, which is generally equal to the estimated treatment in tax haven countries. In general, the provision of the facility aims to foster development in a particular area or industry development throughout the country, such as the Republic of Ireland freeing levy taxes on export products manufacturing company operating in a particular area. Similarly, Puerto Rico which guarantees no tax levy for 17 years against companies operating in less developed areas.

**2. Tax law In Tax Haven Countries**

Tax laws in tax haven countries, in principle, there are several legal ease in tax haven countries, as follows:[19]

- Ease in the field of tax law.
- Ease in law on bank secrecy.
- Ease in the field of establishment of the company or the establishment of a bank.

[19] Munir Fuady, *Hukum Perbankan Modern* (Jakarta: PT. Citra Aditya Bakti, 2004). p. 234.

Looking from the tax benefits, the tax haven countries are often divided into five categories as follows:[20]

a. State tax-free.

In the countries that called state tax-free, the tax there waived for anyone. There was only a sort of stamp duty. There is not known the following taxes:

- Income tax (individual)
- Tax agency / company
- Tax work
- Tax prizes
- Tax lottery
- Land and Building Tax (PBB)
- Inheritance tax
- Sales tax / value added
- Tax wealth

b. State territorial tax system.

In countries with a territorial tax system, there is tax discrimination, namely the imposition of different taxes on income from foreign sources of income from sources within the country. Against income from foreign sources, tax exempt. However, on domestic income, subject to tax as well as usual.

[20] Munir Fuady, *Hukum Perbankan Modern*... p. 234-237.

c. Countries with low tax.

In this third group of countries, impose a tax on very low rate. Thus, the tax rate imposed is not a normal rate as is the case in other countries.

d. State only imposes certain tax.

Countries that only imposes a specific tax, does not relieve all types of taxes.

e. State tax charge for certain companies.

There are also countries in the world that impose taxes or at least provide tax incentives for certain companies. Moreover, easiness tax in the tax haven countries enthusiasts can reach foreign companies to invest in these countries, or company patent or their intellectual rights. Furthermore, the ease of that tax is also causes a lot of international companies that have a holding company domiciled in tax haven countries.

As for the countries that are included in the five categories above, it mentioned in the following tabulation:[21]

[21] Munir Fuady, *Hukum Perbankan Modern*...p. 235-237.

| Category | Country |
|---|---|
| State tax-free. | - Cayman islands<br>- Bahama<br>- Bermuda<br>- Anquilla<br>- Nauru<br>- Turks & Caicos Islands<br>- Bahrain<br>- Cook Islands<br>- Djibouti |
| State territorial tax system | - Hongkong<br>- Costa Rica<br>- Panama<br>- Jibraltar<br>- Liberia<br>- Filipina<br>- Venezuela |
| Countries with low tax | - Barbados (The maximum corporate tax / corporation for 0% - 1%)<br>- Antilles Belanda (The maximum corporate tax / corporation for 0% - 1%) |

| | |
|---|---|
| State only imposes certain tax | - Irlandia (tax free up to the business of manufacturing and export processing) |
| State tax charge for certain companies. | - Luxemburg, Antilles Belanda, Singapore (members of the tax incentives for offshore companies and holding companies)<br>- Jamaica, Barbados, Granada, Antigua (reduce taxes on offshore financial companies) |

**3. Bank Secrecy Principle In Tax Haven Countries**

There are some professions or businesses that have a relationship with business partners/customers who are legally regarded as confidential relationship. One is the relationship between a bank and its customers, which in this case is called "bank secrecy". Another example is the confidential nature of the relationship between the lawyer and his client or doctor and his patient.[22]

[22] Munir Fuady, *Hukum Perbankan Modern*... p. 238.

One of the features of the tax haven countries is that the law in tax haven countries is very strict to protect the principle of bank secrecy. This causes people in safer to save money in the tax haven countries than saving money in the countries of non-tax haven. Even if the principle of bank secrecy in tax haven countries can be opened, the bank secrecy only be opened with special reasons and can only be opened with the difficult procedures, for example, must submit to the court to open a secret bank.[23]

The example case is about Anthony Field case. This case occurred in 1976. Anthony Field is a managing director of a bank in the Cayman Islands state. He refused to give information to the federal court in Miami (USA), which is examining a case, the reasons for granting such information is against the law in the cayman islands. And then, Anthony Field trial on charges of Court Contemp for failing to fulfill the court order. Furthermore, Anthony Field was released by the court on the grounds that the United States officials prying evidence of Anthony Field contrary to the applicable law.[24]

Countries in the world that protect bank secrecy by using one of the following methods:[25]

1) Moderate Protection Methods

Protection methods bank secrecy moderately is generally practiced in countries that are not classified as tax havens, such as Indonesia. In

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[23] Munir Fuady, *Hukum Perbankan Modern*... p. 238.

[24] Munir Fuady, *Hukum Perbankan Modern*... p. 246.

[25] Munir Fuady, *Hukum Perbankan Modern*... p. 238-239.

this country, the relationship between bank and the customer be considered confidential, but the principle of bank secrecy laws are not too difficult to emerge and if any offense relating to bank secrecy, the penalty is not too severe.

2) Strict Protection Methods

Countries that provide protection against strict bank secrecy, for example, is tax haven countries. In tax haven countries, the protection of bank secrecy by law is made very tight. In this case, bank secrecy can not hardly be opened at all. If it can be opened, the procedure is very strict. For example, you go through the investigation and the reasons for the open it is very selective. The reason that is often used to open bank secrecy is if the money saved in the bank results from the crime. The example, corruption and narcotics.

However, any restrictive as the protection of bank secrecy in tax haven countries that, but when it comes to crimes such as corruption and drug trafficking, the principle of bank secrecy may be breached. For example, the Cayman islands one of the tax havens, also opens up the possibility of opening of bank secrecy in connection with the drug trade. In fact, between Cayman Islands, the United Kingdom, and the United States has teamed up by signing what is called the Mutual Legal Assistance in Criminal Matters. Mutual Legal Assistance in the Cayman islands is determined that the action shall assist each other in order to combat drug trafficking, among others, assistance in the form of: [26]

1) Meet requests for assistance in connection with criminal acts, such as the issuance of summons, or arrest request.
2) Testified.
3) Provide assistance in criminal cases.
4) Prepare documents required court.
5) Present witnesses in court.
6) Provides information about the whereabouts of a person.

The commitment in the Cayman Islands country to join the combating crimes such as drug trafficking or corruption, has given the impression that the tax haven countries is not a den of thieves or robbers keep the money from them.

## 4. Company Formation Options

Here is a selection of the formation of the company at the rate of 0% or lower tax rates.[27]

| No. | Country | The company tax rate (%) |
|---|---|---|
| 1 | Bermuda | 0 |
| 2 | Cayman Islands | 0 |

[26] Munir Fuady, *Hukum Perbankan Modern...* p. 239.

[27] Thomas Sumarsan. *Tax Review dan Strategi Perencanaan Pajak*. (Jakarta: Indeks, 2013). p. 256.

| | | |
|---|---|---|
| 3 | Channel Islands | 0 |
| 4 | Isle of Man | 0 |
| 5 | Cyprus | 10 |
| 6 | Barbados | 1 |
| 7 | Vanuatu | 0 |
| 8 | Bahamas | 0 |
| 9 | British Virgin islands | 0 |
| 10 | Nevis | 0 |
| 11 | Anguilla | 0 |
| 12 | Irlandia | 12.5 |
| 13 | Gibraltar | 0 |
| 14 | Panama | 0 |
| Note that in this country tariff of 0% only apply to income derived from abroad. | | |

Since a few years ago until today, the use of tax havens for the purpose of minimizing the amount of tax payable globally are increasingly popular around the world and is the core (nucleus) of the world offshore and defined "any country that implements tax rates are low or zero tariffs on all income or certain categories of income and offer the assurance of confidentiality with respect to a bank or business. "Based on these definition in this world has officially recorded 32 countries known as tax haven countries, known as the major tax havens and some tax haven countries other that can be categorized as a tax haven, depending on the circumstances of the country concerned. Tax haven countries that depend on the conditions and the situation in the country, referred to as marginal and incidental tax havens and this category has been recorded in 13 countries. These countries are as follows:[28]

**Major Tax haven**

| | | | |
|---|---|---|---|
| 1. | Anguilla | 17. | Liechtenstein |
| 2. | Antigua and Barbuda | 18. | Luxemburg |
| 3. | Aruba | 19. | Malta |
| 4. | Austria | 20. | Monako |
| 5. | Bahamas | 21. | Montserrat |
| 6. | Barbados | 22. | Nauru |
| 7. | Bermuda | 23. | Belanda |
| 8. | British Virgin Islands | 24. | Netherlands Antilles |
| 9. | Cayman Islands | 25. | Nevis |
| 10. | Channel Islands | 26. | Panama |
| 11. | Cook Islands | 27. | St.Vincent |
| 12. | Gibraltar | 28. | Singapura |
| 13. | Hong Kong | 29. | Switzerland |
| 14. | Irlandia | 30. | Turks and Caicos |
| 15. | Isle of Man | 31. | Vanuatu |

[28] Mohammad Zain. *Manajemen Perpajakan*. (Jakarta: Salemba Empat, 2003). p. 367-368.

| | | | |
|---|---|---|---|
| 16. | Costarica | 32. | Samoa Barat |

**Marginal and Incidental Tax Haven**

| | | | |
|---|---|---|---|
| 1. | Andorra | 8. | Madeira |
| 2. | Bahrain | 9. | Malaysia |
| 3. | Belize | 10. | Palau |
| 4. | Campione | 11. | Seychelles |
| 5. | Siprus | 12. | Sri Lanka |
| 6. | Grenada | 13. | Truk |
| 7. | Liberia | | |

From the description above, it can be concluded that there are basically three categories of tax haven countries, namely:[29]

1) There is not a tax haven country that absolutely does not matter to tax on the income of individuals or entities, the transfer of capital, ownership of land, inheritance, and so on. The same treatment will be applied both to the taxpayer from the population of the country concerned, and the taxpayers who are not residents of the country concerned.

2) The second category are countries that just taxing the income or profits derived from domestic sources, and does not tax the income or profits derived from foreign sources.

[29] Mohammad Zain. *Manajemen Perpajakan*... p. 368.

3) The third category, such as Liechtenstein is a country that gives special rights to a certain type of company, such as Holding Company in Liechtenstein granted the right to use a low tariff.

Meanwhile, there is also a mention of the characteristics of a tax haven country, are:[30]

1) Do not raise taxes at all, or if the tax levy, the tariff rate is low.
2) It has strict rules on bank secrecy and/or business confidential and will not disclose such confidentiality to anyone or any country, although it is possible disclosure based on international agreements. Banking or other financial institutions are the backbone of the economy tax haven countries.
3) The facilities of modern communication tools that enable communication across the world without any obstacles.
4) Monitoring loose over foreign exchange flows, including deposits originating from foreign countries, individuals and entities. This is does not mean that states can not tax havens strict controls on foreign exchange flows in the country, but it is intentionally held leeway to attract the owners of the money that comes from abroad to deposit money or funds to tax haven countries.
5) The promotion and belief that tax haven countries is a financial center that good and secure.

[30] Mohammad Zain. *Manajemen Perpajakan*... p. 369.

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Almost all tax haven countries always will practice secrecy associated with his business. Some countries that have a tax haven law that protects customers from disclosure of financial information relating to its customers, and indeed, some tax haven countries like Lichtenstein, the Cayman Islands and Vanuatu will impose severe sanctions for those who commit violations of confidentiality the bank. If confidentiality is a mandate, it is more convincing account holders that the Act would protect its interests with the record should not automatically assume that confidentiality will protect the confidentiality.[31]

Besides offering financial confidentiality issues and services that are quite profitable, tax haven countries also encourage domestic investment to stimulate the development of industrialization that will create new jobs to reduce unemployment. The investment incentives vary from country to country tax havens other tax havens. For example, one of the tax haven countries have extensive programs, including the provision of tax exemption (tax holidays), fund / cash assistance (grants) and long-term loans which can be a stimulus for investment. For investors who are serious, funds and investment incentives can become as new opportunities are quite exciting. Incentives such investment is a sign that shows the

[31] Mohammad Zain. *Manajemen Perpajakan*... p. 374.

progress of the country and opens wide opportunities for companies that will invest in tax haven countries.[32]

The last is location problem. Location problem is an important problem for investors. The investors want to invest in tax haven countries that are not too far from their own country, than the investment to tax haven countries that were located thousands of miles away. Location preference is really only part that is not too absolute of the entire electoral process. In fact indicates that the real problem is just the location of the fulfillment of psychological interest.[33]

**5. Double Tax Avoidance Agreement (DTA)**

According to John Hutagaol in Sony's and Siti's book, Double Tax Avoidance Agreement is an agreement between two countries (bilateral) which regulates the distribution of taxing rights on income earned or received by residents of one or both Contracting States.[34]

Then the rights owned by the state taxation of income sources that have been set in the domestic law is limited by the provisions stipulated in the Double Tax Avoidance Agreement if in contact with the subject matter of foreign income tax in the source country. Legal force or position Avoidance of Double Tax above legislation domestic income tax. Avoidance of Double Tax is a reconciliation of two different taxes, which

[32] Mohammad Zain. *Manajemen Perpajakan...* p. 374.

[33] Mohammad Zain. *Manajemen Perpajakan...* p. 375.

[34] Sony Devano dan Siti Kurnia Rahayu, *Perpajakan. Konsep, Teori, dan Isu* (Jakarta: Kencana, 2006). p. 207.

divide the taxing rights on the subject and the object of foreign tax, meaning that the two countries signed an agreement on sharing of the rights of taxation on income residents who do business in other countries.[35]

To avoid double taxation on the same tax object, it is necessary to double taxation avoidance agreement or bilateral tax treaty. Besides, the presence of double taxation avoidance agreement is also intended to close the gap of international tax evasion, estab-section area of taxation, a joint decision on the issues of international taxation and economic cooperation for development. Empirical studies have indeed shown that the tax treaty has a positive effect on foreign investment. Blonigen and Davies (2000) conducted research on the effect of the agreement bilateral tax treaties between the United States with its partner countries. The period of the observations made in this study starts from 1966 to 1992. The results showed that there is a negative correlation between the emergencies of significant new bilateral tax treaties with the US Outbound Foreign Direct Investment (FDI). These findings reinforce the idea that the tax treaty is not intended to encourage FDI but to press the case of tax evasion.[36]

In doing Avoidance of Double Taxation, there are two ways to do that is the way of bilateral and multilateral. Bilateral or multilateral negotiations conducted through an inter-state concerned to avoid double

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[35] Sony Devano dan Siti Kurnia Rahayu, *Perpajakan. Konsep, Teori, dan Isu*... p. 207-208.

[36] Nurhidayat, "*Tax Treaty dan Foreign Direct Investment Di Indonesia*" Finance and Banking Journal, (Juni 2012). p. 45.

taxation. Bilateral agreements made by the two countries, while multilateral performed by more than two countries, which is better known as treaties or tax treaty. The process of bilateral and multilateral, would require considerable time as each country has tax principle each according to his own country's sovereignty. Tax evasion by bilateral generally the most widely performed by a state. Indonesia has been doing double taxation treaties with other countries which until now reached 49 countries. While tax avoidance treaty done by multilateral rarely occurs, due to the difficulty of intensive talks with several countries at once. For example, in 1922 never attempted held multinational agreements in the field of direct taxation, namely inter-country Italy, Yugoslavia, Austria, Poland, Romania, Czechoslovakia, and Hungary, but failed.[37]

Legal domicile taxation treaties between countries, back to the Constitution, Article 11 paragraph (1) of the 1945 Constitution and its amendments, which states, "the President with the approval of the House of Representatives declare war, make peace and agreements with other countries." Referring to the legal basis, of course, will require considerable time. Therefore, in consideration of practicality, especially in the international legal traffic between Indonesia and other countries are quite intensive, it is no longer needed the approval of Parliament, but quite notified only. The practice was based on the letter of President Sukarno Number 2826 / HK / 60 dated August 22, 1960, which is still a reference

[37] Wirawan B. Ilyas dan Richard Burton, *Hukum Pajak* (Jakarta: Salemba Empat, 2007). p. 148.

in making agreements with other countries, including taxation agreements with other countries.[38]

Under the provisions of Article 11 UUD 1945 above, it can be concluded that the legal position taxation agreement (tax treaty) is the same as the national laws such as the law on income tax. The legal position of a tax treaty is not higher than the national tax laws. In the event of a conflict between a tax treaty with national tax laws, then apply the adage that states that the provisions of a specific nature (lex) defeated general provisions (lex generalis). Thus, if there are provisions in the tax treaty and the national tax laws are equally set on the same issue, the provision of a special nature will prevail. In other words, the provision of a special nature will override the provisions of a general nature.[39]

### 6. Tax Haven Impact Toward Economic Matters

As explanation in previous discussion, that foreign investment is an effective solution to boost the economy in a country by attracting investors to make investments in the country. According to Sarwedi, in Nurhidayat research, the influx of foreign capital is to boost economic growth. This gives a signal that the policy direction should be taken of the policies that lead to economic openness. Policies to attract foreign capital in enhancing economic growth should be a priority given, in the connection with the competition between other investment destinations country. One of the

[38] Wirawan B. Ilyas dan Richard Burton, *Hukum Pajak* ... p. 148.

[39] Wirawan B. Ilyas dan Richard Burton, *Hukum Pajak* .... p. 148-149.

economic policy is a policy in the field of taxation.[40] And that's why countries popularly known as tax havens implement a tax protection policy to attract investors in order to conducting economic activity in tax haven countries. Type of economic activity which we have known since the first is trading. In the era of globalization, the existence of trade impact on increasing international transactions, in which each state has different rules and policies. The businessman was trying to maximize the revenue and to minimize capital owned. One of the way is using policies that implemented in tax haven countries. Tax protection policy will greatly businesses benefit because it can reduce the amount of tax liability which have to pay to his own country.

We have seen tax receipt very helpful in building and economic development in Indonesia. If the tax revenue is reduced, then the process of development in Indonesia will be hampered. And if not combated, it will be inequality in Indonesia as it did India. India lost $500 billion because of tax evasion measures to tax havens countries by India citizens. Director of the Central Bureau of Investigation (CBI) India, AP Singh said "People of India is the largest foreign bank customers. Funds are sent to countries that adopted the system of tax-free (tax havens) such as Mauritius, Switzerland, Lichtenstein, and British Virgin Islands." Analysts

[40] Nurhidayat, "*Tax Treaty dan Foreign Direct Investment Di Indonesia*," Finance and Banking Journal, ( Juni 2012). p. 1.

say this out capital cause great inequalities in India.[41] According to the Tax Justice Network (TJN) in a report that the existence of tax haven countries as one of the causes of poverty and declining welfare of many countries. This is due to the central role of tax haven countries to commit money laundering to accommodate the proceeds of corruption, drug trafficking and capital flight.[42]

Organization of Economic Developed Countries (OECD) countries accuse those tx haven countries does not respect to international provisions on taxation. Former Finance Minister, Sri Mulyani Indrawati, also said that the world saw a tax haven has disrupted world economic activity. She said, "Many companies are deliberately located in tax haven, where they can operate internationally but with tax evasion. It's complicated challenge for us, especially the Directorate General of Taxation. Tax haven is different with a small tax doer for tax evasion because groove of tax avoidance complicated. To pursue tax evasion involving tax haven countries like this need people who are able to understand the accounting and legal (law)."[43]

The former finance minister also admitted that the phenomenon of tax haven can be threat to the development of the Indonesian state. Tax sector,

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[41] Antara, "India Kehilangan US$ 500 Miliar Dari Pengelakan Pajak", http://bandung.bisnis.com/read/20120214/34276/144281/tax-havens-india-kehilangan-us500-miliar-dari-pengelakan-pajak, accesed at 13 January 2015.

[42] Kinaya, "Negara Tax haven, Surga Para Pengemplang Pajak dan Koruptor", http://www.fiskal.co.id/berita/fiskal-15/3108/negara-tax-heaven,-surga-para-pengemplang-pajak-dan-koruptor#.VMCKaCyDjIU, accesed at 13 January 2015.

[43] Antara, "Para Menkeu Dunia Bahas Dampak tax haven", http://www.antaranews.com/berita/151266/para-menkeu-dunia-bahas-dampak-tax-haven, accesed at 13 January 2015.

which dominate the financial sector to the growth of the Indonesian state, can decrease the amount of acceptance. In addition, tax evasion groove very complicated to understand. To counteract this problem (tax haven) we all have to really understand what the tax havens, which countries impose a tax haven, what are the facilities offered, how are some related to tax havens, and so on. By understand the overall details of tax haven could find ways to counteract tax havens. The ways then poured in the regulation, because this problem depend on the tax haven regulation and supervision as well as good governance. All legal actors should be responsible and obey the rule, should not give opportunity for offenders by anyone. If violations can no longer be combated, the Indonesian country would be a crisis in which the crisis can influence the financial sector and then impact to poverty.

In conclusion, tax havens phenomenon great affect the financial sector in the countries around the world. If the financial sector in a country is good, then it would be good also the development of the country. And if the financial sector in a country is not good, then the development in the country will be hampered. Each state has its own requirements. As well as tax haven countries that do not has resources to run the government. By providing tax regulation and strict financial secrecy then tax haven country can cultivate the country.

Cultivate a country is the need of every country in the world. However, countries that impose a tax haven policy is able to control its financial sector well and fluent, because the country income also fluent. This is different with the countries that do not impose a tax haven policy. Countries that do not impose a tax haven policy will threaten in financial sector because of the wealth of their citizens entrusted to the tax haven countries.

In Indonesia, according to Dradjad's calculation, an economist from INDEF, the value of the potential loss of Indonesia tax revenue that fled to Singapore about 40 billion US dollars, or equivalent to Rp 400 zillion.[44] The phenomenon of tax havens should be immediately found the right solution, considering these countries have strict confidentiality and considering also that Indonesia should be continue to gain acceptance in taxes to operate the development process and development of the country. Allen Kagina, former Commissioner General of the Uganda Revenue Authority said "we should elevate ourselves from being just tax collectors and tax administrators to being state builders." While Sergei Kiriyenko, former Prime Minister of Russia said "if the state does not learn to collect taxes, it will cease to exist." Statement of two figures from around the world and a different time space shows the importance of a country do taxing the right way to make progress or even to maintain its existence.[45]

[44] Antara, "Para Menkeu Dunia Bahas Dampak tax haven"...accesed at 13 January 2015.

[45] Gatot Subroto, "Administrasi Pajak Ideal Masa depan", http://www.pajak.go.id/content/article/administrasi-pajak-ideal-masa-depan, accesed at 13 January 2015.

## 7. The Issue of Tax Haven

Literally tax haven is a country that provides protection taxes. According to Pass and Christopher in Fuady's book, the definition of tax have been given as a country that treats the personal tax income and corporate tax at the lowest level, so it tends to pull the millionaires, multi-national companies, and financial institutions are trying to minimize their tax liability.[46]

Due to the easiness, especially the ease in the field of taxation and also in the field of strict bank secrecy, then finally a tax haven countries into the world financial centers. But the most popular term is tax haven (protection of tax) not a financial center country because it contains a negative connotation. In tax haven countries are not only given tax facilities, but also imposed strict bank secrecy system. Thus the tax haven countries often likened to a piggy bank. It means once people put money into it, it was safe forever without being able to be bothered by anyone. That is why tax haven countries have side effects, it is can be a safe haven for crime doers of money loundering, become a transit or storage place money derived from drug trafficking or corruption. That is why the Bank of Credit & Commerce International (BCCI), the famous bank as money laundering place, choose Cayman Island countries as the most important central business.[47]

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[46] Munir Fuady, *Hukum Perbankan Modern* (Jakarta: PT. Citra Aditya Bakti, 2004). p. 229.

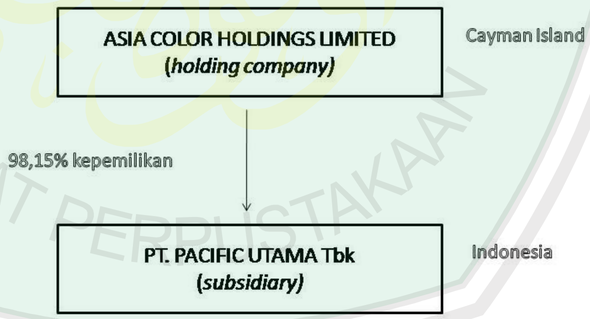
[47] Munir Fuady, *Hukum Perbankan Modern*... p. 229-230.

Usually, those who take advantage of tax haven is a person who has a strong lobby and great financial strength in Indonesia. Capital flight mode which is conducted through transfer pricing, non-repatriation of export earnings, the use of a special purpose vehicle, such as British Virgin Islands are then registered in Singapore.[48]

As for some media in using tax haven that will be explained in the following points along its scheme:

a. Holding Company

Holding company or parent company is an entity that holds great control in a subsidiary company because the majority assets ownership or more over the company. In general, companies that want to do tax avoidance by this media, will open the parent company in the state of tax haven.[49]

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[48] Koran Jakarta, "Pemerintah Belum Seriusi Tax Haven", www.rumahpajak.com/content/view/12343/, accesed at 13 January 2015.

[49] Desiyana, *Analisis Sistem Perpajakan dan Hukum di Negara Tax Haven Serta Kaitannya Dalam Praktik Penghindaran Pajak Lintas batas negara*. Skripsi (Jakarta: Binus University, 2013), p. 3.

Holding Companies widely used to make investments in developing countries. The performance is set up or funded companies in the tax haven country, then the holding company invest (or sometimes provide loans) to companies in developing countries. Another engineer is to set up a company between interposing companies or SPV in Tax Haven, between parent companies in developed countries with subsidiary company in developing countries. This company sometimes called by money box companies.[50]

b. Intermediary Company

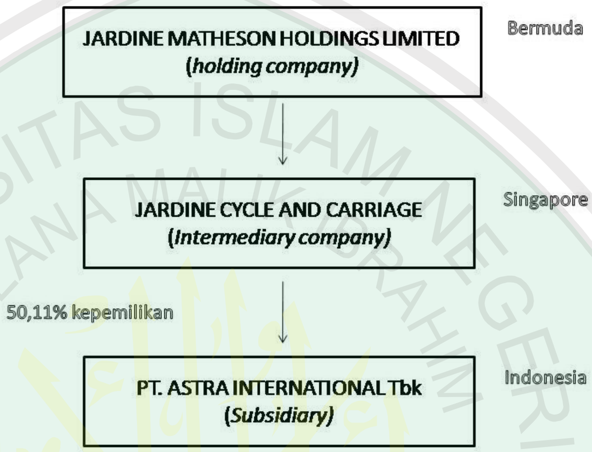
In general, an intermediary is a person or service that is involved as a third party between two or more end points in a communication or transaction.[51] Intermediary company refer to any corporation, firm, partnership, limited partnership, limited-liability company, trust or other form of business organization other than a natural person. It is a holding company with respect to a corporation, limited partnership or limited-liability company which holds or applies for a license to carry on gaming activities. An intermediary company may also be a subsidiary with respect to any holding company.[52]

[50] Onne Dyahayu K Sulistyo, "Aspek Pajak Dalam Bisnis Surga Pajak", http://onnedyahayuksulistyo.blogspot.com/2013/07/aspek-pajak-dlam-bisnis-surga-pajak.html, accesed at 13 January 2015.

[51] Margaret Rouse, "Intermediary", http://searchcio.techtarget.com/definition/intermediary, accesed at 13 January 2015.

[52] "Intermediary Company (Gaming Law) Law & Legal Definition", http://definitions.uslegal.com/i/intermediary-company-gaming-law/, accesed at 13 January 2015.

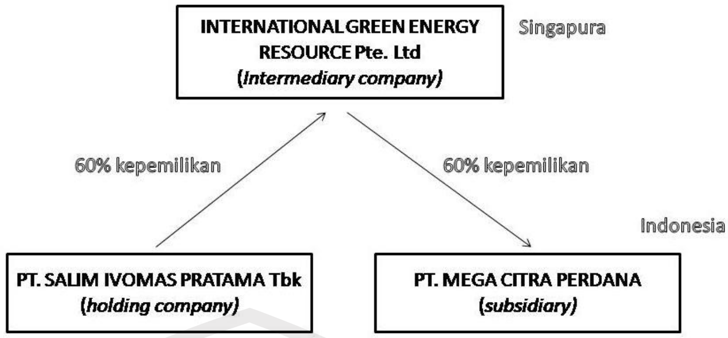
Establishment intermediary company consists of 3 schemes. *First*, the scheme of foreign direct investment (FDI) to Indonesian using tax haven country. This scheme is made to open intermediary company firstly in tax haven country, and then create a subsidiary in Indonesia.[53]



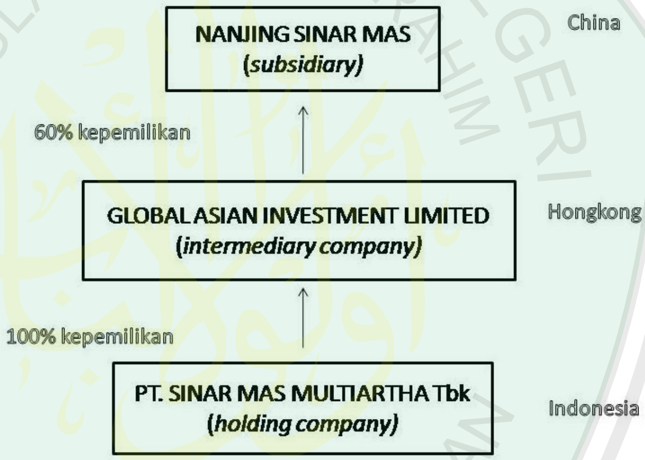

*Second*, tax avoidance schemes by intermediary company occurs when Indonesian company wants to develop its business and opened a branch in Indonesia itself, but also want to take advantage of tax havens. [54]

[53] Desiyana, *Analisis Sistem Perpajakan dan Hukum di Negara Tax Haven Serta Kaitannya Dalam Praktik Penghindaran Pajak Lintas batas negara*. Skripsi (Jakarta: Binus University, 2013), p. 3.

[54] Desiyana, *Analisis Sistem Perpajakan dan Hukum di Negara Tax Haven Serta Kaitannya Dalam Praktik Penghindaran Pajak Lintas batas negara*. Skripsi (Jakarta: Binus University, 2013), p. 3-4.



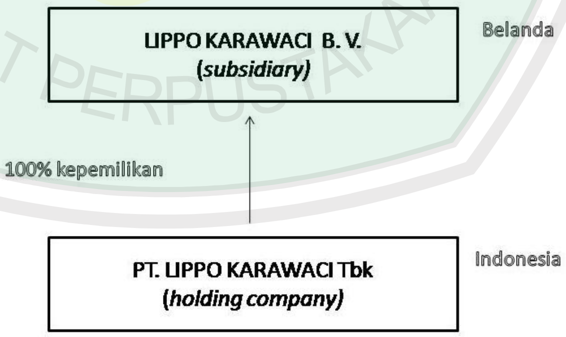

*Third*, the scheme of direct investment from Indonesian to abroad by using intermediary company. [55]




[55] Sistem Perpajakan dan Hukum di Negara Tax Haven Serta Kaitannya Dalam Praktik Desiyana, *Analisis Sistem Perpajakan dan Hukum di Negara Tax Haven Serta Kaitannya Dalam Praktik Penghindaran Pajak Lintas batas negara*. Skripsi (Jakarta: Binus University, 2013), p. 4.

c. Subsidiary Company

Subsidiary company is an entity that can be controlled fully by a parent company or holding company.[56] The subsidiary can be a company, corporation, or limited liability company. In the United States railroad industry, an operating subsidiary is a company that is a subsidiary but operates with its own identity, locomotives and rolling stock. In contrast, a non-operating subsidiary would exist on paper only (i.e., stocks, bonds, articles of incorporation) and would use the identity and rolling stock of the parent company. Subsidiaries are a common feature of business life, and all multinational corporations organize their operations in this way. Examples include holding companies such as Berkshire Hathaway, Time Warner, or Citigroup; as well as more focused companies such as IBM or Xerox. These, and others, organize their businesses into national and functional subsidiaries, often with multiple levels of subsidiaries.[57]




[56] Desiyana, *Analisis Sistem Perpajakan dan Hukum di Negara Tax Haven Serta Kaitannya Dalam Praktik Penghindaran Pajak Lintas batas negara*. Skripsi (Jakarta: Binus University, 2013), p. 4.

[57] Wikipedia, “Subsidiary”, http://en.wikipedia.org/wiki/Subsidiary, accesed at 13 January 2015.

While the methods used in the use of media in the above, namely:

1) Transfer Pricing

*Organization for Economic Co-operation and Development* (OECD) defining transfer pricing as the price specified in the transactions between group members in a multinational company where the specified transfer price can deviate from the fair market price of all suitable for the group. They may deviate from the fair market price for their position being in a free state to adopt any appropriate principles for corporate. "*..In a multinational enterprise (MNE) many transaction normaly take place between members of the group. The price charged for such transfer do not necessarily represent a result of the free play of market forces, but may, for a number of reasons and because the MNE is in a position to adopt whatever principle is convenient to its as a group (OECD,1979)".*[58]

In the context of taxation, transfer pricing is usually in the form of manipulation of the price of the product is such that most of the charges accumulated in high tax countries and most of the profits collected in countries with small tax. In general, transfer

[58] Ita Salsalina Lingga, "Aspek Perpajakan Dalam *Transfer Pricing* dan Problematika Praktik Penghindaran Pajak (*Tax Avoidance*)," Jurnal Zenit, (Desember 2012), p. 210-221.

pricing regulations require the affiliate transaction must agree with reasonable price (called by the arm's length price).[59]

2) Thin Capitalization

Some countries have undertaken tax reform that limits the interest deduction in some way, usually through the thin capitalization rules.[60] Thin capitalization is the formation of a company's capital structure with debt contribution as much as possible and as little capital as possible. The practice of thin capitalization is based on the difference in tax treatment of the interest (in return on debt) and dividends (in return on capital). Interest cost is an element of a deduction in the computation of taxable income. While the dividend is not an element of a deduction in the computation of taxable income. With the practice of thin capitalization, which usually involves holding companies in countries with low tax rates, the tax should be the right of a country can be transferred to other countries. The mode is in funding subsidiary, a holding company will contribute in the form of debt (not capital). Thus subsidiary will burdened interest cost that is a deduction element in the calculation of taxable

[59] Darussalam, John Hutagaol dan Dany Septriadi, "Konsep dan Aplikasi Perpajakan Internasional," InsideTax, Media Tran Perpajakan Dibalik Suap Pajak (Mei-Juni 2013). p. 63.

[60] Adhitya Benigno, *Analisis Atas Transaksi Intercompany Loan (Thin Capitalization) Sebagai Salah Satu Praktek Penghindaran Pajak*. Thesis, (Makagiansar, 2010).

income, so taxes are borned by the subsidiary can be shrink automatically.[61]

Capital for the establishment of company can be obtained by selling assets or loans. If capital is obtained by selling assets, the company must pay dividends to investors whose funds are taken from net income. But, if capital is derived from the loan fund, the company must pay interest to the creditor. Thus, the greater the interest cost, the smaller the taxable income. Regulation thin capitalization will essentially cancel interest payments magnitude above a certain amount.[62]

3) Treaty Shopping

Treaty Shopping is a scheme that is done to get the facility, such as a tax deduction rate reduction (with holding taxes) is provided by a Double Tax Avoidance Agreement, with the tax subjects that are not eligible for the facility. Efforts abuse of Double Tax Avoidance Agreement also referred to as abusive. This is because the use of clauses in Double Tax Avoidance Agreement are not in accordance with the intent and purpose of

[61] Novia Suci Nuraini, *Analisis Faktor-Faktor Yang Mempengaruhi Thin Capitalization Pada Perusahaan Multinasional Di Indonesia*, Skripsi (Semarang: Universitas Diponegoro, 2014).

[62] Darussalam, John Hutagaol dan Dany Septriadi, “Konsep dan Aplikasi Perpajakan Internasional,” InsideTax, Media Tran Perpajakan Dibalik Suap Pajak (Mei-Juni 2013). p. 63.

the Double Tax Avoidance Agreement, which is to avoid double taxation and prevent tax evasion.[63]

4) Controlled Foreign Corporation (CFC)

Controlled Foreign Company (CFC) is controlled company owned by the taxpayer in the country are located in countries with low tax or no tax at all (tax haven country) which was formed with the intention to delay the recognition of revenue in the context of tax evasion (tax avoidance). Avoidance of tax by taxpayer in this country is done by transferring income from abroad to the CFC company deliberately formed in the tax haven country.[64]

CFC is essentially incorporate income earned overseas subsidiaries as the parent company income. In Indonesia, the Minister of Finance is authorized to establish that taxpayer in the country has received dividends from overseas companies they control although there is actually no real money flow.[65]

[63] Meme Bali, "Treaty Shopping", http://memebali.blogspot.com/2013/06/treaty-shopping.html, accesed at 13 January 2015.

[64] Dudi Wahyudi, "Controlled Foreign Company (CFC)", http://dudiwahyudi.com/pajak/pajak-penghasilan/controlled-foreign-company-cfc.html, accesed at 13 January 2015.

[65] Darussalam, John Hutagaol dan Dany Septriadi, "Konsep dan Aplikasi Perpajakan Internasional," InsideTax, Media Tran Perpajakan Dibalik Suap Pajak (Mei-Juni 2013). p. 63.