CHAPTER III

FINDINGS AND DISCUSSION

A. Tax Haven Concept In Tax Haven Country

Each state has their respective authorities in policy making and therefore the interests of each country were different. Just as countries dubbed tax haven countries or also known as the financial center country. Tax haven 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 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.[66]

The existence of tax haven countries that have not been well explored, leading to the country in need of funding from sources of foreign direct investment because the country does not have enough income earned from the management of its resources. Therefore, policies enacted tax haven to attract international investors and conduct economic activities there. There are several concepts policies imposed on the country and the very favorable for tax haven investors will be discussed in this study.

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

1. Implementation low tariff of tax or not at all.

The presence of the implementation of tax that only levy a lower tax rate or no levy at all, can attract investors or foreign businessmen to put his wealth in tax haven countries. When a lot of people who put their wealth in that country, then the country will thrive because its financial sector to be fluent. Tax haven countries known as small countries can develop properly, and can minimize the amount of unemployment, can minimize the amount of poverty, can open a lot of jobs, and most importantly, the country can be prosper. Among the few countries that impose lower taxes facility or not at all, are countries with low tax example Barbados (maximum corporate tax/corporation of 0%-1%) and the Netherlands Antilles (the maximum corporate tax/corporation of 0%-1%).[67] 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.[68] While the countries that impose a tax-free are Cayman Islands, Bahama, Bermuda, Anquilla, Nauru, Turks & Caicos Islands, Bahrain, Cook Islands, and Djibouti.[69]

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

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

[69] Munir Fuady, *Hukum Perbankan Modern*... p. 234.

2. Giving protection with strict bank secrecy.

One of the feature of tax haven country that is the very strict laws to protect the Confidentiality bank principle. This cause many conglomerates to save money in tax haven countries than in countries that are not tax havens. Although the principle of bank secrecy can be opened, but only can be opened with special reasons and can only be opened with a complicated procedure, for example, must get permission from the court of tax haven country to open bank secrecy.[70] For example, in the Liechtenstein country or the Cayman Islands, where the tax officer or employee who leaked confidential bank of bank customers, is considered a criminal act punishable by heavy prison.[71]

There is a case that occurs to Anthony Field in 1976. Anthony Field is a managing director of a state bank in the Cayman Islands. He refused to give a statement to a federal court in Miami (USA), which is examining the case, the reason for the provision of such information is contrary to the laws in the Cayman Islands. Then, Anthony Field trial on contemp charge of court because not fulfilling the court order. Furthermore, Anthony Field acquitted by the court on the grounds that the way the United States digging evidence of Anthony Field contrary to applicable law.[72]

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

[71] Munir Fuady, *Hukum Perbankan Modern*... p. 241.

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

There is another international law case that has occurred in relation to the tax haven countries. This is a very interesting case, namely the case of the Bank of Credit and Commerce International (BCCI). Bank of Credit and Commerce International (BCCI) has a business center in the country Cayman Islands. Model loundering money by using "Operation C-Chase" is a mode of operation that is often used by the Bank of Credit and Commerce International (BCCI), a bank which is a heaven for perpetrators of money loundering activity, which then stands for the name of the bank twisted into Bank of Criminals and Crooks International. That is why C-Chase model is often referred to as the "Bank of Credit and Commerce International (BCCI) Case", which is a model of money loundering that began in Tampa (Florida) in July 1986. The model is very diverse and quite complicated. For example, is typically carried out as follows: a money courier come to the bank in Florida and save money for the USA $ 10,000,- so it is not affected by the obligation to report. The money is transferred by New York via to Luxembourg. From Luxemburg the money transferred to a bank branch in the UK and there is money converted into a Certificate of Deposit to guarantee the loan of the same amount taken by the people of Florida. The loan was made at bank in the country of tax havens in countries in the Caribbean region. Caribbean bank never collect the loan, but only dilute the Certificate of Deposit. From Florida, the money is transferred to the account of drug dealers in Uruguay country. In Uruguay, that money is distributed. Most deposited and partly divided into several companies belonging to the drug traffickers. So then, the money is expected to be safe and have clean.[73]

The case of the Bank of Credit and Commerce International (BCCI) is a mega case in banking, so as entangled with the scandal, the Bank of Credit and Commerce International (BCCI) in all over the world to the point that must be closed, even if the competent authorities in the country of Cayman Islands still underestimate the course of the case, and the principle of sticking strictly to the protection of bank secrecy there remains undisturbed. Therefore, they believe that one of the advantages as well as a state appeal of the Cayman Islands is the principle of sticking to a strict bank secrecy was.[74]

3. Lack of transparency in operating economic activities.

The lack of transparency in tax haven countries is often used as a tool by conglomerates to avoid taxes in their own country. Whether it a company, or criminals such as money laundering the proceeds of corruption, drug trafficking, and so on. Lack of transparency is that hides the real customer data from the customer country. So it cannot be known that a person or entity has the wealth in the country of residence or income in tax haven countries, so it cannot be taxed. Because of that phenomenon, India lost $500 billion because of tax evasion measures to tax havens countries by India citizens. Director of the Central Bureau of Investigation

[73] Munir Fuady, *Hukum Perbankan Modern*... p. 245-246.

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

(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 say this out capital cause great inequalities in India.[75] 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.[76] While in Indonesia, According to Dradjad calculations, an economist from INDEF, the value of the potential loss of tax revenue Indonesia who fled to Singapore about 40 billion US dollars, equivalent to 400 zillion rupiah.[77] The calculation is only available in Singapore, yet in other tax haven countries.

And how about the flow of funds in and out transition from/to Indonesia. With the enactment of the Foreign Exchange Law 24 of 1999, there is an obligation to report to Bank of Indonesia to the flow of funds. However, this provision is only intended for Indonesian banks simply knowing the magnitude of the flow of funds in and out, not to control

[75] 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.

[76] 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.

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

foreign exchange, especially for the ban. Reporting to the foreign exchange flows shall be customers of the bank based on the value of the transaction and the type of transactions carried out.[78] In connection with this, then if use transfer pricing schemes which are often encountered in the transaction are fair amount of the purchase price is reasonable, then reported only the name of the type of transaction and the amount of the transaction value. While traffic exchange will continue to run and Indonesia could not prevent.

The importance of transparency is not only useful for non-tax haven countries to obtain information. But also useful for tax haven countries themselves, like getting a good impression about tax havens. So the existence of tax havens is not considered solely as fugitive criminals.

4. Not hold Double Tax Avoidance Agreement (DTA) with countries that need information

The existence of Double Tax Avoidance Agreement (DTA) is to obtain information about a citizen in a country which has a wealth in tax haven countries, to be levied taxes payable. Such as Bahama, Bermuda, and 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 require information. Since 1960, the country's long-term guarantees to not burden

[78] Munir Fuady, *Hukum Perbankan Modern*... p. 243-244.

the tax on manufacturing companies. Bermuda also not entered into double taxation and burdensome sort of costs and limited liability companies are moderate. Cayman Islands guarantee will not tax foreign companies for 20 years, and, like the Bahamas and Bermuda, the Cayman Islands are also not hold double taxation treaties with other countries.[79] Wahyu Karya Tumakala (The Assessment of Supervision Sector and Maintenance of Tax Law, General Tax Division Office), that tax haven countries are small, there is no resources which be able to use except giving the service to assets owner pass through easiness in bureaucracy and attendance in strict of security sector. The strict of information access for financial, cause difficulty for tax authorities to make information exchange.[80]

5. Fax monitoring on traffic exchange and deposits

Fax supervision over foreign exchange flows, including deposits from foreign countries, both individuals and entities. This does not mean that the tax haven countries cannot be strict controls on foreign exchange flows in the country, but it is purposed held to attract the owners of money that comes from abroad to deposit money or funds to tax haven countries.[81] Thus, factor that loose control over foreign exchange flows and deposits was deliberately done so that more people are depositing their wealth to tax haven countries.

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

[80] Irfansyah, "*Analisis Peran Tax Haven Dalam Melakukan Penghindaran Pajak Lintas Batas Negara*", Skripsi, (Depok: FISIP-UI, 2010).

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

B. Islamic Law Perspective on Tax Haven

As the concept of tax haven that have been described in discussion before, so is in this discussion will be presented how the perspective of Islamic law to the phenomenon of tax havens. In Islam, was known some of the principles that determine whether the business activities carried out contrary to Islamic law or otherwise. Among some of principles that business activities do not contain the elements of *riba*, *maysir*, *gharar*, *haram*, and *zalim*.

1. *Riba*

Riba, normatively has forbidden in the Qur'an. God has given clues about the prohibition of usury through the condemnation of usury in the Jewish community. This is conveyed in Surah an-Nisa verse 161 which reads:[82]

و أخذ هم الربوا وقد نهوا عنه وأكلهم أموال الناس بالباطل وأعتدنا للكافرين منهم عذابا أليما

> It means, "And because they devour *riba*, when in fact they have been banned from it, and because they take peoples wealth by vanity. We have prepared for the disbelievers among them a painful punishment."

As we know, an interest instrument developed in the conventional economy and as the only parameter in the financial system is in contrast to

[82] Euis Amalia, *Keadilan Distributif Dalam Ekonomi Islam*. (Jakarta: PT. Raja Grafindo Persada, 2009). p. 134-136.

the Islamic economic system. The system of *riba* or interest in reality containing aspects such injustice exploitation of the parties against the other parties. Economic justice and social balance may not be realized when the interest-based system is still practiced.[83] In tax haven country, the system of bank used is conventional system. So that the system of interest is still practiced. The system of interest in tax haven country it can be by selling buying exchange transaction that not cash, in the connection with the free of traffic exchange among countries. And it can be by deposits, so that the saving become fold pleated that one of characteristic of *riba*. That is explained in surah Ali-Imran verse 130 that reads:[84]

يأيهاالذين ءامنوا لا تأكلوا الربوا أضعافا مضاعفة واتقوالله لعلكم تفلحون

> It means, "O you who believe, do not take *riba* with fold pleated and obidient to Allah in order to you may prosper."

That verse in general should be understood that the criteria fold pleated is not a requirement of the *riba*, but it is a trait or characteristic of practice the money when it.[85] So, clearly has explained that *riba* is forbidden in any form of business transaction.

[83] Euis Amalia, *Keadilan Distributif Dalam Ekonomi Islam*... p. 134-135.

[84] Euis Amalia, *Keadilan Distributif Dalam Ekonomi Islam*... p. 136.

[85] Euis Amalia, *Keadilan Distributif Dalam Ekonomi Islam*... p. 136.

2. *Maysir*

Gambling (*maysir*) is a form of the object which is defined as a place to make easy something. Said to make easy something because someone who is supposed to take the road which painstakingly but look for shortcuts in the hope of achieving what you want, even if the shortcut is contrary to the values and rules of sharia. God has banned all forms of gambling that are cast in the letter of al-Maidah verse 90-91, it is:[86]

يأيها الذين ءامنو إنما الخمر والميسر والأ صنا ب والأزلام رجس من

عمل الشيطن فاجتنبوه لعلكم تفلحون ○

إنما يريد الشيطن أن يوقع بينكم العد وة والبغضاء فى الخمر والميسر

ويصد كم عن ذ كر الله وعن الصلواة فهل أنتم منتهون ○

It means, "O you who believe! (Drinking) *khamr*, gambling, (sacrifice to) idols, raffle fate with arrows, including deeds are devils. So stay away from the deeds in order to you may prosper. Indeed, the devil wish cause enmity and hatred among you because of (drinking) *khamr* and gambling, and hinder you from the remembrance of God and prayer. So stop you (from doing that job)."

[86] Ismail Nawawi, *Ekonomi Kelembagaan Syariah; Dalam Pusaran Perekonomian Global Sebuah Tuntutan dan Realitas,* (Surabaya: CV. Putra Media Nusantara, 2009). p. 39-40.

Thus, any form of gambling, and anyone involved in such acts are forbidden in Islam. In the connection with the basic purpose of the existence of tax havens in the conduct of international tax avoidance is as a tool for tax evasion. Tax evasion through tax haven countries can occur in two categories, namely tax evasion in order to minimize the liability to pay tax loophole to exploit the domestic tax laws or which are known as tax avoidance and escape capital in order loundering money or tax evasion form of the stolen money such as corruption, the sale of illegal firearms, gambling, etc are forbidden by law.[87] Thus, that act is forbidden in Islamic law.

3. Gharar

Etymologically, *gharar* means unknown or certain danger. Meanwhile, according to the terminology or the *fiqih* term, *ghahar* interpreted by specialists in religious law as a result of ignorance of the case (transaction), or ambiguity between the good with the bad.[88]

Tax haven, which has been widely used by individuals or entities such as multinational corporations, has been detrimental to many countries that are not tax havens. Such as Indonesia, India, and Africa, as well as other countries where income tax state of the sector continues to decrease. This is due to the taxpayers who manipulate the amount of tax payable by the

[87] Irfansyah, "*Analisis Peran Tax Haven Dalam Melakukan Penghindaran Pajak Lintas Batas Negara*", Skripsi, (Depok: FISIP-UI, 2010).

[88] Shalah ash-Shawi & Abdullah al-Mushlih, *Fikih Ekonomi Keuangan Islam,* (Jakarta: Darul Haq, 2001). p. 379.

financial statements. Thus, the own country of taxpayers do not know the actual information, and can only tax the information provided by the taxpayer.

As is often the case that the economic activity of the people who use tax havens. As proposed by Zaharuddin in his article entitled Differences Between Islamic and Conventional Banks, that "the avoidance of economic activities involving Speculation (*ghahar*).”[89] That is why such actions are forbidden in Islamic law.

4. *Haram*

Investment made by an investor is required to avoid muslim from *haram* element. Something unlawful is everything that is forbidden by Allah and His Messenger in the Qur'an and hadith. Something unlawful means are forbidden to do. In *usul fiqh* rules illicit defined as:[90]

> “*Haram* is something that is provided penalties (*'iqab*) for the conduct and provided rewards for those who left because intended to run his law.”

[89] Ust Hj Zaharuddin Hj Abd Rahman, “Differences Between Islamic Bank and Conventional,” http://zaharuddin.net/senarai-lengkap-artikel/38/297-differences-between-islamic-banks-a-conventional.html, accesed at 16 February 2015.

[90] Ismail Nawawi, *Ekonomi Kelembagaan Syariah; Dalam Pusaran Perekonomian Global Sebuah Tuntutan dan Realitas...* p. 43.

In Nawawi Ismail book that the titlte *Institutional Economics Sharia*; *In A Global Economy Vortex Claims and Reality* in outline, unlawful categorized into two, namely:[91]

a. *Haram* in substance, such as pigs, khamr, blood, carrion, gambling, and everything that is dedicated to other than Allah.
b. *Haram* due process adopted to obtain something. *Halal* food or goods obtained by false (stealing, robbing and others) is not *halal*.

Based on the explanation above, it can be concluded that something illicit substances can be located on the goods themselves (pork, khamr, blood, carrion, gambling, etc.) and can also be located in such a way to obtain items that are not good deeds. As already explained that the basic purpose of tax haven in international tax evasion is as a tool for tax evasion. In other word, taxpayers who take advantage from tax haven countries to get benefit as much as possible in economic activities, but by way to avoid paying taxes from the own country, is against the law. This can be detrimental to the own country. So that according to Islamic law, including the ways in which the forbidden category to be done because of the process is not well taken, by way of escape from the obligation to pay taxes to the state.

[91] Ismail Nawawi, *Ekonomi Kelembagaan Syariah; Dalam Pusaran Perekonomian Global Sebuah Tuntutan dan Realitas*... p. 43.

5. Zalim

Zalim is an act forbidden by Allah and includes one of the major sins. Humans who do *zalim* will get a reply in the world and a painful punishment in the hereafter. In a prohibited transaction if it violates the principle of:

" لا تظلمون ولا تظلمون "

namely the principle of do not oppress and do not be *zalim* or tyrannized.[92] Then, there is also the word of God in the Qur'an letter Ash-Shura verse 42, which reads:

إنما السبيل على الذين يظلمون الناس ويبغون فى الأرض بغير الحق

أولئك لهم عذاب أليم

> It means, "The great sin upon those who do evil to humans and beyond the limits of the earth without right. They got a painful punishment".

Pay taxes to the state is an obligation for taxpayers. Because taxes are remitted to the state to finance state expenditures are intended for general benefit. If the taxpayer does not pay taxes, or pay taxes but not according to the amount of wealth held, the state has the authority to impose penalties on taxpayers who are not honest, because such actions including *zalim*. While in tax havens there is a factor that supports dishonesty

[92] Mardani, *Hukum Ekonomi Syariah di Indonesia*, (Bandung: PT. Refika Aditama, 2011). p. 16.

taxpayer. Namely in terms of information exchange with the country of taxpayer own country.

Exchange of information which in practice is done through Double Tax Avoidance Agreement (DTA) is not carried out by tax havens. As with any country such as Bahamas, Bermuda, and Cayman Islands. These countries do not hold Double Tax Avoidance Agreement (DTA), so the amount of information related to the identity and richness of customers is always safe.