KENYA - MAURITIUS DOUBLE TAXATION AGREEMENT

The comprehensive Double Taxation Agreement between Kenya and Mauritius has been gazetted.

In exercise of the powers conferred by Section 41 of the Income Tax Act, the Cabinet Secretary for the National Treasury has gazetted the double tax avoidance treaty with Mauritius.

Ratification

The comprehensive Double Taxation Agreement between Kenya and Mauritius which had been signed on 7th May 2012 was ratified and published by Kenya on 24th May 2014 vide legal notice 59 of 2014.

Effective Date

As per Article 28 of the DTAA with respect to entry into force, the provisions of the treaty will take effect on or after the first day of January next following the date upon which the DTAA enters into force i.e. as from 1 January 2015.

The agreement was signed with a view to affording relief from double taxation in relation to income tax and any other taxes of similar nature imposed by the laws of either country.

Highlights

The Kenya Mauritius DTA has the following key provisions.

The DTAA includes a Service PE Clause in Article 5 – Permanent Establishment, as follows:

The term “permanent establishment” shall include the following:-

1. A fixed place of business through which the business of an enterprise is wholly or partly carried on
2. A building site or construction, installationor assembly project including supervisory activities in connection therewith only if the site, project or activity lasts more than 12 months
3. Furnishing of service including consultancy services by an enterprise through employees or other personnel provided such activities continue for same or connected project for a period(s) of more than 6 months within any 12 month period

Example: A Mauritius company which engages in providing consultancy services to a Kenyan company for duration of less than 6 months will not trigger the permanent establishment issue in Kenya. As such, the profit generated by the Mauritius company in Kenya will not be taxed in Kenya.

Where a resident of Mauritius derives income or gains from Kenya, the amount of tax on that income or gains payable in Kenya may be credited against the Mauritius tax. Further, where a company resident in Kenya pays dividend to a resident of Mauritius who controls directly or indirectly at least 5% of the company paying the dividend, credit shall take into account the underlying tax paid by the Kenyan company on the profits out of which dividend was paid.

CAPITAL GAINS TAX

The treaty provides that gains arising from the disposal of property - excuding immovable property and property associated with a PE, ship or aircraft - may be taxable only in the state of the seller.

In case of exit from the Kenyan investment, gains arising on the disposal of the shares by the Mauritius company will be taxable only in Mauritius by virtue of the DTAA. In Mauritius there is no capital gains tax. It should be highlighted that the provision applies irrespective of what constitute the assets of the Kenyan company.

Capital gains are taxed at a rate of 5% of the gains arising from the disposal of property (marketable securities, land and buildings) in Kenya.

WITHHOLDING TAX RATES

Type of Income	Rate under Double Tax Treaty	Rate under Kenyan Law
Dividends	5% if the beneficial owner is a	10%
	company (other than a partnership)	
	which holds directly at least 10% of	
	the shares	
	10% in all other cases	
Interest	10% of the gross amount	15% of the gross amount
Royalties	10%	20%
Capital Gains	Respective rates in the countries	5%
Management, training,	No rate has been specified in the treaty,	20%
consultancy or	hence there is no withholding tax currently	
professional services	deductible on these services.	

**Rates under Kenyan Law in the above table refer to the rates applied to non-resident individuals from countries with which Kenya does not have a double tax treaty.*

KEY POINT TO NOTE

As with most other DTAs the DTA with Mauritius has provisions on elimination of double taxation, non-discrimination clauses, mutual agreement procedure, and most importantly **exchange of information with a view to reducing revenue leakage.**

Mauritius has often been considered a ''tax haven'' whereas it can more accurately be described as a ''low-tax jurisdiction'' thus rendering transactions **with Mauritius tax residents/companies open to a higher level of scrutiny.**

KEY POINT TO NOTE (Contd.)

In order to deter investors from **"treaty shopping"**, the Finance Act of 2014 introduced Subsection 5 of Section 41, which states that the reductions, exemptions and exclusions of double tax treaties will not be available to a person (company or individual) who is a resident of the other contracting state if **50% or more** of the underlying ownership of that person is held by individuals who are not residents of the other contracting state.

Example: If one or more Kenyan residents own more than 50% shareholding in a Mauritius based company, then all of the provisions of the double tax treaty as detailed above would be voided and the normal Kenyan tax laws regarding non-resident companies will apply.