



International tax - Tax treaties and developments of BEPS action plan 6

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Agenda



1. Introduction
2. Tax planning objectives
3. Action Plan 6
4. DTA Structure
5. Key provisions
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Introduction

- Double tax agreements
- Double taxation? or Double non –taxation ? – who bears the incident of taxation
- Economic double taxation? or Juridical double taxation? – where is the tax burden directed to.
- Why concerns on double taxation or non taxation?
 - Discourages international trade;
 - Discourage foreign direct investment; and
 - Slows economic growth
- What is the remedy? – Double tax agreements (DTA)

Introduction

DTAs – international tax instrument, mostly bi lateral in nature aimed at allocating taxation rights between multiple jurisdictions through:

- Minimising instances of double taxation and non taxation
- Encourage exchange of tax information
- Promote foreign direct investment
- Kenya's DTA network - 14 DTAs with France, Germany, India, Iran, Norway, South Africa, Sweden, United Kingdom, Zambia, United Arab Emirates, Qatar, South Korea, Denmark and Canada
- Provision of the DTA are supreme to the domestic laws where there is a conflict - Vienna convention Art. 27
- What could be the place of DTAs in the digital economy?

Tax planning objectives

- What is the aim of tax planning and what do you look at?
 - At investments – physical presence, deductibility of expenses and transfer pricing
 - Cross border transfer - fees, dividends or profits, foreign exchange controls
 - Effective tax rates for the group – Ultimate parent
- How can DTAs help in tax planning?
- 3Ds of tax planning (Divert (spread the functional risks), Deduct (take advantage of reduced rates or exemptions as the case may be) or Defer – put on hold the intended moves)
- The aggressive tax planning around DTAs necessitated the Action plan 6 aimed at preventing tax treaty abuse

BEPS Action plan 6

- Proposes specific rules and recommendations to address other forms of treaty abuse (Treaty abuse practices – treaty shopping, round tripping)
- Incorporates minimum standard that contracting should implement at the negotiation process:
- Inclusion of express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty-shopping arrangements.
- Contracting states have also committed to include at least 1 of the ant treaty shopping clauses below :
 - Principal purpose test (PPT) plus a simplified version of limitation of benefit rule
 - PPT alone or
 - Detailed version of LOB



BEPS Action plan 6

- What has Kenya done to curb the instances of abuse ..? (Section 41(5) limitation of benefit rule)- Is this enough ?
- Is there need for states to renegotiate DTAs?

DTA Structure

- Standard DTA has about 31/32 articles, grouped according to their functions

Article Range	Function
1-2	Beneficiaries of the DTA, and taxes covered. `
3-5	Definitions of specific terms utilised in the DTA.
6-21	Taxation of income - critical
22	Taxation of capital
23	Elimination of double taxation –relief
24-30	Special provisions (MAP exchange of information ...)
31- 32	Final provisions- termination and entry into force

Key provisions

- Art. 5 Permanent establishments – discussed earlier
- Art. 7 Business profits
- Profits of an enterprise of a contracting state shall be taxable only in that state unless the enterprise carries on business in the other state through a Permanent establishment.
- Management & professional fees, royalties, dividends and interest – subjected to withholding tax often DTA offer preferential rates.
- Only profits attributable to the PE are taxable in the contracting state

Case review

- Mumbai v. Morgan Stanley & Co case went AAR & went to the high court
 - *If MS & Co. have a PE in India through the arrangement;*
 - *If the method used for transfer pricing between MS & Co. and MSAS was the most appropriate method, and was the price paid at arm's length; and*
 - *If there is a PE in India, would there be anything further attributable to the PE if the PE was compensated on an arm's length basis.*
- Commissioner of Income Tax vs Hyundai Heavy Industries Co. Ltd on 18 May, 2007



Next steps

Should you have any questions please let us know

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