# Overview of Double Taxation Agreements
# A Global Perspective

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# Double Taxation

The imposition of tax on the same income by multiple jurisdictions.

<u>Two forms exist:</u>

- ➢ Economic double taxation – the taxation of the same income, in the hands of different taxpayers, by multiple jurisdictions.

- ➢ Juridical double taxation – the taxation of the same income, in the hands of the same taxpayer, by multiple jurisdictions.

<u>Implications of double taxation</u>

- ➢ Discourages international trade;
- ➢ Discourage foreign direct investment; and
- ➢ Slows economic growth.

# Double Taxation Agreements

DTAs are agreements negotiated between countries or jurisdictions to provide for reciprocal rights of a territory with respect to taxation.

Bi-lateral international treaties/agreements purposed at allocating taxation rights between multiple jurisdictions.

**What are the objectives of DTA's?**

- Eliminate double taxation;
- Encourage exchange of tax information;
- Promote foreign direct investment; and
- Provide avenues for dispute resolution

# How DTA's Work

Unless the treaty expressly states otherwise – tax will be paid in Kenya in the first place and claimed by the other party (if possible) in the home country

Acceptable evidence of the tax paid in Kenya may vary from country to country but may include KRA receipts or certificates

Where the treaty rate is higher than the non-treaty rate, the lower rate applies.

# How DTA's Work

DTAs typically eliminate double taxation through two major approaches

**The exemption method:**

The State of residence does not tax the income which according to the DTA may be taxed by the Source State or PE/Fixed Base

**The credit method:**

The State of residence calculates its tax basis of the taxpayer's total income including the income from the other State.

It then allows a deduction from its own tax for the tax paid in the other State

# DTA Authority

International Law • Vienna Convention on the Law of Treaties (VCLT)

➢ Article 2 – Defines a treaty as an international agreement concluded between States and governed by international law.

➢ Article 27: Provides one cannot invoke internal law for failure to perform a treaty- Supremacy of the DTA’s

# DTA Authority

**Domestic Legislation**

Article 2 (6) Constitution of Kenya, 2010

- ➢ The supreme law of the land.
- ➢ Provides – 'Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this Constitution.

**Treaty Making and Ratification Act, 2012**

- ➢ Domestic legislation implementing Article 2 (6) Constitution of Kenya, 2010.
- ➢ Provides the treaty entering, ratification and enforcement process.

**Income Tax Act, 2014**

- ➢ Section 41 – seeks to implement DTAs in domestic legislation.

# Domestic vs International Law

**Income Tax Act, 2014**

➢ Section 41 (5) – Limitation of Benefits clause.

➢ Seeks to limit the application of DTA in domestic legislation. •

**Hierarchy of Laws**

➢ Per VCLT, international law trumps domestic law. Can the Income Tax Act limit the application of DTAs on the domestic level? •

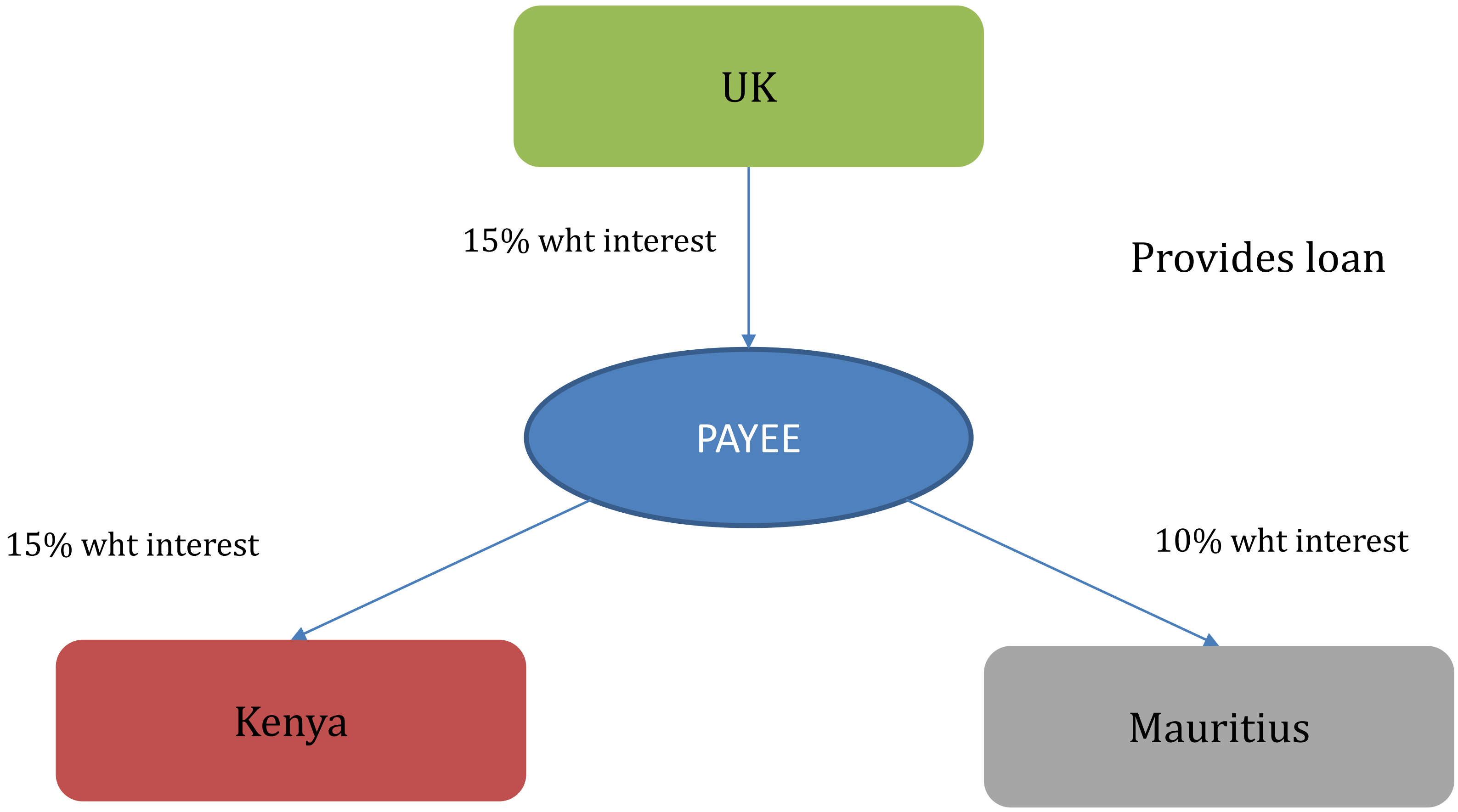
**DTAs Post-2010**

➢ Some post-2010 (Kenya India DTA) – expressly note that DTA provisions may by limited through domestic legislation. –

Sec 41 (5) -2014

"*where an arrangement made under this section provides that income derived from Kenya is exempt or excluded from tax, or the application of the arrangement results in a reduction in the rate of Kenyan tax, the benefit of that exemption, exclusion, or reduction shall not be available to a person who, for the purposes of the arrangement, is a resident of the other contracting state if fifty per cent or more of the underlying ownership of that person is held by an individual or individuals who are not residents of that other contracting state for the purposes of the agreement*".

# Treaty Shopping



# DTA Format

**Scope of the Treaty**

1 Persons Covered
2 Taxes covered

This part provides for persons covered and taxes

**Definitions**

3 General definitions
4 Residency status
5 Permanent establishment

Provides for general terms as to be interpreted in the DTA

# DTA Format

**Taxation of Income**

| | |
|---|---|
| 6 | Income from Immoveable property |
| 7 | Business profits |
| 8 | Shipping and air transport |
| 9 | Associated enterprises |
| 10 | Dividends |
| 11 | Interest |
| 12 | Royalties |
| 13 | Capital gains |
| 14 | Inpependent personal services |
| 15 | Employment services |
| 16 | Directorss fees |
| 17 | Entertainers and Sportspersons |
| 18 | Pensions |
| 19 | Government services |
| 20 | Professors, Teachers, Researchers |
| 21 | Students |
| 22 | Other income |

Provides for the taxaxtion of the various incomes listed

# DTA Format

**Methods of elimination of double tax**

| | |
|---|---|
| 23 | Eliminitation of double taxation Credit method |

Provides how one can get creit of tax suffered in the other country

Two methods:

- Non-taxation
- Credit

**Special provisions**

| | |
|---|---|
| 24 | Non-discrimination |
| 25 | Mutual agreement procedure |
| 26 | Exchance of information |
| 27 | Assistance in the collection of taxes |
| 28 | Diplomatic missions and consular posts |

Administrative provisions

**Final Provisions**

| | |
|---|---|
| 29 | Entry into force |
| 30 | Termination |

Give procedures for entry and termination

# Resident

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

(*a*) he shall be deemed to be a resident only of the State in which he has a permanent home available to him ; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests) ;

(*b*) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode ;

(*c*) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the Contracting State of which he is a national ;

(*d*) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

Company

Place of effective management

# Management fees vs Business Income

ARTICLE 7

BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other Contracting State but only so much of them as is attributable to that permanent establishment.

Management fees?

KRA interprets as "other fees"

ARTICLE 14

INDEPENDENT PERSONAL SERVICES

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State:

# Dividends

ARTICLE 10

DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. *(a)* Dividends mentioned in paragraph 1 may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the dividends.

*(b)* This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

(4) Dividends derived from a company which is a resident of Kenya by a resident of the United Kingdom may be taxed in the United Kingdom. Such dividends may also be taxed in Kenya but the tax so charged shall not exceed 15 per cent of the gross amount of the dividends if the recipient of the dividends is subject to tax on them in the United Kingdom.

# Interest

ARTICLE 11

INTEREST

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State the tax so charged shall not exceed 12 per cent of the gross amount of the interest.

# Concluded DTAs

| | |
|---|---|
| **UK** | **LN 14 of 1973** |
| Germany | LN 20 of 1980 |
| Canada | LN111 of 1987 |
| Denmark | LN 5 of 1973 |
| Norway | LN 6 of 1973 |
| Sweden | LN 14 of 1973 |
| Zambia | LN 10 of 1970 |
| India | LN 61 of 1989 |
| France | LN 140 of 2009 |
| South Africa | LN 141 of 2014 |
| South Korea | LN of 2016 |
| UAE | LN 218 of 2016 |
| Iran | LN 60 of 2014 |
| Qatar | LN 59 of 2015 |
| Seychelles | LN 5 of 2015 |
| Mauritius | LN 173 of 2019 |

Awaiting ratification

- EAC
- Kuwait
- Italy
- Netherlands
- Turkey

# Non-Resident Rates

| | Management fees (Company) | Dividends | Royalties | Interest |
|---|---|---|---|---|
| **UK** | 12.5% | 10% | 15% | 15% |
| **Germany &Canada** | 15% | 10% | 15% | 15% |
| **Denmark Norway Sweden Zambia** | 20% | 10% | 20% | 15% |
| **India** | 10% | 10% | 10% | 10% |
| **France** | 0%/20% | 10% | 10% | 12% |
| **Mauritius^** | 0%/20% | 5%* | 10% | 10% |
| **South Africa** | 0%/20% | 10% | 10% | 10% |
| **South Korea** | 0%/20% | 10% α | 10% | 12% |
| **UAE** | 0%/20% | 5% | 10% | 10% |
| **Iran** | 0%/20% | 5% | 10% | 10% |
| **Qatar** | 0%/20% | 10%$^{\pi}$ | 10% | 10% |
| **Seychelles** | 10% | 5% | 10% | 10% |

# Taxation of the Digital Economy

**3.** Section 3 of the Income Tax Act is amended—

Amendment of s. 3 of Cap. 470.

(a) in subsection (2) by inserting the following new paragraph immediately after paragraph (c)—

(ca) income accruing through a digital marketplace;

(b) by inserting the following new subsection immediately after subsection (2)—

(2A) The Cabinet Secretary shall make regulations to provide for the mechanisms of implementing the provisions of subsection (2) (ca).

airbnb

# Fair Taxation of Digital Economy EU

In order to make tax rules fit for the digital economy, the European Commission proposed two Council directives in March 2018:

a short-term solution, to be delivered by an interim digital services tax on revenues from certain digital services

a long-term solution where Member States would be able to tax profits that are generated in their territory, even if a company does not have a physical presence there.

# Digital Economy

ICPAK
Uphold Public Interest


The factories of the future will only have two employees.
A man and a dog.
The man to feed the dog and the dog to keep the man from touching the machines.