17 August 2020

Global Tax Alert

Kenya amends recently gazetted DTA with Mauritius

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Executive summary

The Government of Kenya has issued a subsequent legal notice which revoked the earlier issued legal notice regarding the Double Taxation Agreement (DTA) between Kenya and Mauritius. An EY Global Tax Alert summarizing the key provisions of the now revoked DTA can be found here.

There are several material changes that have been made through the subsequent legal notice particularly in relation to withholding tax rates. Additionally, the creation of a permanent establishment (PE) has been aligned with the recommendations in Action 7 of the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) project.[1]

This Alert summarizes the significant changes made in the DTA.

Detailed discussion

Permanent Establishment

The Article regarding the creation of a PE has been aligned with the proposals contained in BEPS Action 7 to counter artificial avoidance of a PE through:

- Expansion of the definition of a dependent agent by including not only persons habitually concluding contracts in the name of a foreign enterprise but also persons who play the principal role that lead to the conclusion of contracts by the foreign enterprise.

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- Introduction of the anti-fragmentation rule in a bid to combat PE avoidance through fragmenting a cohesive operating business into several small operations.
- Introduction of an automatic rule for aggregating number of days connected activities relating to a project that have been undertaken on separate occasions so as to prevent artificial avoidance of PE by splitting up of contracts.

Other key changes include:

- Service PE threshold has been reduced to three months from six months.
- Building, installation or construction PE threshold has been reduced to 183 days from 12 months.

Reduced withholding tax rates

The treaty has amended withholding tax rates as set forth below:

Payment	Previous rate (%)	New rate (%)
Dividends	5, 10 (a)	8
Interest	10	10
Royalties	10	12
Technical fees[2]	–	10

(a) The 5% rate was applicable if the beneficial owner of the dividends was a company (other than a partnership) which held directly at least 10% of the capital of the company paying the dividends.

Treaty abuse

In terms of treaty abuse, a treaty benefit will be denied if it is reasonable to conclude that it is one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit unless it is established that the benefit in these circumstances would be in accordance with the objective and purpose of the DTA.

A treaty benefit will not be denied if the person makes a request to the relevant Contracting State and demonstrates the fact that the tax benefit would have been granted in the absence of the transaction or arrangement. For this purpose, Kenya and Mauritius shall consult with each other to agree on the extent of the benefit.

Capital gains tax

Capital gains realized by a resident of one state on the transfer of shares or similar interests, may be taxable in the other Contracting State if during the past year, the shares or similar interests, directly or indirectly derived more than 50% of their value from immovable property in that other State.

Additionally, gains derived by a resident of a Contracting State from the sale of shares of a company which is resident in the other Contracting State may be taxed in the other Contracting State if the seller at any time during the 12-month period preceding such transfer held directly or indirectly at least 50% of the capital of that company.

Endnotes

1. A project initiated by the OECD and G20 Member States with a view of tackling BEPS (i.e., tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid. Action 7 proposed measures of preventing artificial avoidance of PE.

2. Technical fees are any payment in consideration for any service of managerial, technical or consultancy nature unless it is made to an employee, for teaching in an educational institution or for teaching by an educational institution or by an individual for services for the personal use of an individual.

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EYG no. 005648-20Gbl

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