

Kenya's High Court nullifies Kenya-Mauritius Double Taxation Agreement

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Executive summary

The High Court of Kenya, on 15 March 2019, invalidated the Kenya-Mauritius Double Taxation Agreement (DTA) pursuant to a petition filed by the Tax Justice Network-Africa.

This was due to a failure by the Cabinet Secretary in charge of Finance to table the legal notice which gave the DTA effect before the National Assembly as required by the *Statutory Instruments Act, 2013* (SIA 2013).

Detailed discussion

The Petitioner filed a petition because the Kenya-Mauritius DTA had not been subject to ratification pursuant to the *Treaty Making and Ratification Act, 2012* (TMRA 2012). The DTA was also deemed to have violated the Constitution of Kenya.

The Petitioner challenged various Articles of the DTA including those that reduce withholding tax rates, exempt certain sources of income from tax in Kenya and failed to be United Nations or Organisation for Economic Co-operation and Development compliant.

Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya under the Constitution. The TMRA 2012 was enacted to give effect to the provisions of Article 2(6) of the Constitution and to provide the procedure for negotiation and ratification of Treaties and connected purposes.

Additionally, a DTA is published via a legal notice which is a statutory instrument under the SIA 2013. Sections 10 and 11 of said Act require that a statutory instrument should be tabled before Parliament within seven days after its publication.

The Court observed that while the DTA was ratified according to the TMRA 2012, the DTA published via a legal notice, should have been tabled before the National Assembly within seven days for approval, failure to which it ceases to have effect and becomes void.

Next steps

The Government of Kenya is expected to subject the Kenya-Mauritius DTA to the required legal and legislative process to bring it into force.

Taxpayers, on the other hand, should ensure that legal notices issued by the Government in respect of their operations such as tax exemptions, reliefs or such other related matters are subjected to the proper legal and legislative processes.

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EYG no. 000874-19Gbl

1508-1600216 NY
ED None

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