



CM ADVOCATES LLP



KENYA'S DOUBLE TAX AGREEMENT NETWORK: HOW TREATIES ELIMINATE DOUBLE TAXATION AND WHO MAY RELY ON THEM

INTRODUCTION

Double taxation arises where comparable taxes are imposed by two or more countries on the same taxpayer, in respect of the same income or capital, for the same period. It is a familiar friction in cross-border trade and investment where income is earned in one country (the source jurisdiction) and received by a person resident in another (the residence jurisdiction), and both assert taxing rights. Left unrelieved, this overlap inflates the effective tax burden.

To mitigate this, countries conclude Double Tax Agreements (DTAs), bilateral treaties that allocate taxing rights between themselves and provide mechanisms for relieving double taxation where both states retain a right to tax. DTAs are largely modelled on the Organisation for Economic Co-operation and Development Model Tax Convention on Income and Capital (OECD MTC), with influences from the UN Model Convention.

This article explains the forms double taxation takes, the legal basis for treaty relief in Kenya, the

mechanisms through which DTAs eliminate double taxation, and critically, who qualifies for treaty benefits following the High Court's decision in *Nairobi Bottlers Limited v Commissioner of Domestic Taxes [2025] KEHC 9540 (KLR)*

UNDERSTANDING DOUBLE TAXATION

Juridical Double Taxation

Arises where two or more states tax the *same person on the same income*. For example, a Kenyan resident working abroad is taxed on his or her salary in the country where the employment is exercised, and Kenya taxes the same salary again because Kenyan residents are taxed on their worldwide employment income.

Economic Double Taxation

Arises where *two different persons* are taxed on the same income. For example, a Kenyan company pays corporation tax at 30% on its profits, and the shareholder then suffers withholding tax on the dividend distributed out of those same profits.

THE LEGAL FRAMEWORK: THE OECD MODEL AND THE INCOME TAX ACT

Section 41 of the Income Tax Act, Cap 470, Laws of Kenya (“the ITA”) empowers the Cabinet Secretary to give effect, by notice in the Gazette, to arrangements made with the government of another country.

KENYA'S TREATY NETWORK

As at the date of this article, Kenya has ratified and brought into force DTAs with: **Canada, Denmark, France, Germany, India, Iran, the Republic of Korea, Norway, Qatar, Seychelles, South Africa, Sweden, the United Arab Emirates, the United Kingdom and Zambia.**

Kenya has additionally signed, but not yet brought into force, DTAs with the Republic of Italy, the State of Kuwait, the People's Republic of China, the East African Community partner states, the Portuguese Republic, the Republic of Singapore and the Kingdom of the Netherlands. The position of the Kenya–Mauritius DTA warrants particular care, the original treaty was invalidated for want of proper ratification.

HOW DTAS ELIMINATE DOUBLE TAXATION

1. The credit method

Under the credit method, the residence state taxes the income but allows a credit for tax already paid in the source state. Domestically, Section 42 of the ITA gives effect to this mechanism where a DTA is in force. A Kenyan resident who earns income in, say, the United Kingdom and suffers UK tax may credit that tax against the Kenyan liability on the same income.

2. The exemption method

Under the exemption method, one contracting state cedes its taxing right entirely, and the income is taxed only in the other state.

3. Reduced withholding tax rates

DTAs typically cap the withholding tax (WHT) that the source state may impose on passive

and service income flows, including dividends, interest, royalties, and management, professional and technical service fees. These preferential rates frequently undercut the domestic non-resident WHT rates under the Third Schedule to the ITA, and are accordingly a central consideration for multinational groups and foreign investors structuring profit extraction from Kenya. For example, the domestic WHT rate on management and professional fees paid to a non-resident is 20%; under the Kenya–UAE DTA, however, the applicable rate is 0%.

WHO QUALIFIES: LIMITATION OF TREATY BENEFITS

Treaty protection is not automatic. The High Court's decision in *Nairobi Bottlers Limited v Commissioner of Domestic Taxes* makes plain that a taxpayer must first satisfy the threshold requirements of **Section 41 of the ITA**, which governs the domestic application of treaties.

Section 41(2)(3), Kenya's limitation of benefits (LoB) rule, provides that where a DTA confers benefits on a resident of the other contracting state, those benefits are unavailable unless that non-resident demonstrates that it is either listed on a stock exchange in the contracting state, or that more than fifty per cent of its underlying ownership is held by individuals who are residents of that contracting state.

Therefore, conduit structures interposed in treaty jurisdictions purely to access preferential WHT rates (treaty shopping) will fail the LoB test.

CONCLUSION

Kenya's DTA network is a powerful tool for managing cross-border tax exposure, but treaty benefits can only be enjoyed by those who can demonstrate genuine residence, beneficial ownership and economic substance in the treaty partner state. Investors should therefore treat treaty eligibility as a substantive analysis to be evidenced at the outset of any structure.

KEY TREATY WITHHOLDING TAX RATES

DTA Country	Dividends %	Interests %	Royalties %	Professional and Management Fees %
Canada	15	15	15	15
Denmark	20	20	20	20
France	10	12	10	0
Germany	15	15	15	15
India	10	10	10	10
Iran	5	10	10	0
Norway	15	20	20	20
Qatar	10	10	10	0
Seychelles	5	10	10	10
South Africa	10	10	10	0
South Korea	10	12	10	0
Sweden	15	15	20	20
UAE	5	10	10	10
United Kingdom	15	15	15	12.5
Zambia	0	0	0	0

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