



# Tax Alert:

## Professional fees under Kenya - France DTA are not subject to Withholding Tax



### Background

This Alert brings to your attention the Tax Appeals Tribunal's judgment in the case of **Total Kenya Limited (Taxpayer) vs Commissioner of Domestic Taxes (KRA)** Appeal No 151 of 2016 (Consolidated with Appeal No. 16 of 2017).

The Taxpayer entered into a General Assistance Agreement with Total Outré Mer (TOM) for technical and general assistance services. These services included general management, strategy development, human resources, corporate affairs, logistic supply and commercial development. Consequently, the Taxpayer withheld tax on the payments for technical services made to TOM.

On 4 December 2007, the Government of Kenya and France entered a Double Tax Agreement (DTA). The Taxpayer stopped remitting WHT for technical services on the effective date of the DTA on grounds that Kenya had no taxing rights and TOM had no Permanent Establishment (PE) in Kenya.

KRA rejected this position and demanded WHT for the period 2011-2012 and 2013- 2015 amounting to **KES 310,068,589** and **KES 256,849,272** respectively. KRA cited Article 21(4) of the DTA dealing with 'other income' and Section 35 (1) of the Income Tax Act (ITA).

The Taxpayer objected and invoked Article 24 of the DTA initiating a Mutual Agreement Procedure (MAP) with the competent authorities to resolve the dispute. However, this was closed without resolution and the matter brought back to the Tribunal for determination.

### The Taxpayer's grounds of appeal at the Tribunal

The Taxpayer challenged the KRA's decision on the following grounds:

- i. KRA erred in levying WHT on the payments for technical assistance by the Taxpayer to TOM since TOM does not have a PE in Kenya.

- ii. The technical assistance payments to TOM are not a distinct and separate source of income. They constitute an element of business income.
- iii. Article 7 of the DTA provides for the profits of an enterprise of a Contracting State to be taxable only in that State unless the enterprise carries on business in the other Contracting State through a PE situated therein.

Consequently, the taxpayer submitted that based on the UN Model Tax Convention, Kenya's taxing rights are limited to dividends (under Article 10), interest (Article 11) and royalties (Article 12). The other items of income not expressly stated in the DTA, are exempt and only taxable in the Resident State, herein, France.

The taxpayer further relied on Paragraph 77 of the Commentary on Article 7 of the OECD Model Tax Convention, which states that the effect of the deletion of Article 14 is that income derived from professional services is now dealt with under Article 7 as business profits.

The Taxpayer urged the Tribunal to find as it had established in **McKinsey & Company Inc. Africa Proprietary Limited-vs-Commissioner of Legal Services and Board Co-ordination [TAT Appeal No.199 of 2020]**

### KRA's arguments

In rebutting the Taxpayer's arguments, KRA contended that:

- i. Income derived from the Technical Assistance Agreement between the Appellant and TOM accrues in Kenya, and the existence or non-existence of a PE can only be tested in the Kenyan, not French, context.
- ii. While the DTA does not specifically address the taxation of management or professional fees, Article 21 covers items of income not specifically

provided for under the other Articles e.g. management and professional fees.

- iii. Further, KRA relied on Article 7(7) to opine that it gives precedence to all other Articles within the DTA which have provided for the item in question. Thus, technical fees will be covered under Article 21(4) of the DTA between Kenya and France which gives Kenya the WHT taxing rights while France retains the right to tax profit.

The KRA opined that Article 22 of the DTA provides a remedy to a situation where a party may be subjected to double taxation. Therefore, in the spirit of the DTA and taxes paid by TOM in Kenya under Article 21, these should be recognized, and a relief thereof be given in France pursuant to Article 22.

### Issue(s) for determination

From the parties' pleadings, and written submissions, the Tribunal found only one issue for determination; Whether KRA erred in demanding Withholding Tax from the Taxpayer in respect of professional fees paid to TOM?

### The Tribunal's findings

The Tribunal determined the matter in favour of the Taxpayer. In its decision, the Tribunal observed that:

- i. Article 7 of the DTA in relation to business profits takes supremacy where income is not expressly provided for. Therefore, a reading of the definition of business under the Kenyan Income Tax Act against Article 7 places the income from management fees and professional fees squarely under business profits.
- ii. The services rendered by TOM fall under professional services and as such within the definition of a business.
- iii. Article 21 has no relevance in so far as income from professional and management fees is concerned.

Consequently, the Tribunal found that KRA has no taxing right on the management and professional fees payable to TOM as the same fall under Article 7, which in lieu of a PE, gives the taxing right to France. The Tribunal allowed the appeal and vacated the assessments for the periods 2011-2012 and 2013- 2015.

### Our opinion

The decision affirms the position taken by the Tribunal in **McKinsey & Company Inc. Africa Proprietary Limited-vs-Commissioner of Legal Services and Board Co-ordination [TAT Appeal No.199 of 2020]**. In this case, the Tribunal determined that fees paid to the South African entity fell within business profits and was not attributable to a PE in Kenya. Thus, it was held that South Africa had the taxing right of such income being professional fees.

Thus, this decision provides clarity on the position to be taken by the revenue authority where the circumstances are similar and in relation to professional or management fees under the Kenya -France DTA.

The Court's decision also brings to focus other DTAs such as those with the United Arab Emirates, Qatar, Mauritius, and Korea that have no clear provisions on management or professional fees. In the absence of any decisions on the position to be taken in the respective DTAs, we remain guided by the interpretations and findings in the **McKinsey** and now, **Total Kenya** cases.

KPMG is happy to assist on any issues arising from this decision.

## Contact us

### Peter Kinuthia

Partner and Head of Tax  
& Regulatory Services  
KPMG East Africa

E : [pkinuthia@kpmg.co.ke](mailto:pkinuthia@kpmg.co.ke)

### Alex Kanyi

Regulatory Lead  
Tax & Regulatory Services  
KPMG East Africa

E : [akanyi@kpmg.co.ke](mailto:akanyi@kpmg.co.ke)

[home.kpmg/ke/en/home](http://home.kpmg/ke/en/home)

