

Tax Alert

High Court affirms that WHT on Management and Professional fees is not payable in Kenya under the Kenya-France DTA

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The High Court has this month issued a judgment in *Commissioner of Domestic Taxes vs Total Kenya Limited, E044 of 2021* on whether management/professional fees paid by Total Kenya to its French resident holding company should be subject to withholding tax (“WHT”).

Get in touch

Titus Mukora

Partner/Director
+254 20 285 5000
titus.mukora@pwc.com

Brian Rono

Senior Associate
+254 20 285 5000
brian.rono@pwc.com

The Tax Appeals Tribunal (TAT) had previously decided that no WHT was applicable on the payments. The Commissioner of Domestic Taxes (“Commissioner”) appealed to the High Court. Please see our alert on the TAT decision [here](#).

Appeal before the High Court

The issue that the Commissioner had sought for the High Court to determine on appeal was whether management or professional fees paid to Total Kenya’s parent company resident in France was subject to Withholding tax (WHT) in Kenya.

The dispute between the Commissioner and Total Kenya arose because the Kenya-France DTA does not contain an express provision on which country between Kenya and France has taxing rights over management or professional fees.

This is because, the DTA is modelled on the OECD Model Taxation Convention (“MTC”) version which effective 29 April 2000 was revised to delete Article 14 which had previously given the taxing rights for management and professional services to the source state that is, where the payment was being made from.



Parties’ arguments

According to the taxpayer, the effect of the deletion of Article 14 was that in the absence of a permanent establishment in the source state, the income derived by a non-resident from such fees is taxed as business profit of the non-resident in its country of residence as provided under Article 7 of the DTA. On the other hand, the Commissioner argued that Article 21 of the DTA which deals with items



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of income that are not dealt with in the other Articles is applicable. Article 21 gives the Commissioner the authority to tax income which has not been dealt with in any other Articles of the DTA.

Judgement

In its determination, the High Court agreed with the decision of the TAT. It noted that commentaries on model tax conventions are instructive in relation to their interpretation and referenced paragraph 77 of the Commentary on Article 7 of the OECD MTC which expressly and in plain and ordinary words provides that income derived from professional services are dealt with under Article 7 as business profits.

The Court further stated that the Commissioner's position that management and professional fees were subject to tax as other income under Article 21 was not supported by law as the other income contemplated under Article 21 were 'miscellaneous incomes' such as alimony, lottery

income and rent from a property in a third state which are not similar or identical to management and professional fees.

The Court also highlighted that if Kenya intended to tax these payments, it should have included specific provisions in the DTA similar to those found in agreements with Seychelles, China, and Mauritius which have incorporated Article 12A of the UN MTC 2017 or Article 5(3)(b) of the UN MTC which expressly provide for taxation of management and professional fees.

Implications of the judgment

The High Court decision affirms that WHT is not applicable to management and professional fees where the Kenya – France DTA is applicable.

It is expected that the same reasoning would apply to Kenyan DTAs that have a similar architecture to the Kenya – France DTA.