



Tax Alert

Tax Appeals Tribunal Upholds Withholding Tax Not Applicable on Management or Professional fees under the Kenya-France and Kenya-South Africa Double Tax Treaties

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The Tax Appeals Tribunal (“TAT” “Tribunal”) has reaffirmed its stance on the application of withholding tax on management or professional fees, under the Kenya–France and Kenya–South Africa Double Tax Treaties (“DTTs”). In a recent judgment delivered on 30 August 2024, the TAT upheld its earlier rulings in *Total Kenya Limited vs. Commissioner of Domestic Taxes and McKinsey and Company Inc. Africa Proprietary Limited vs. Commissioner of Legal Services and Board Coordination*. The TAT confirmed that where a DTT does not contain a separate article on management or professional fees, such income should be classified as business profits and is, therefore, not subject to withholding tax unless a Permanent Establishment (“PE”) has been triggered in Kenya.

Background

The Appellant in this case had entered into agreements with third-party marketing agents based in France and South Africa for the provision of marketing services. The Kenya Revenue Authority (“KRA”) issued an assessment demanding withholding tax on the agency fees paid by the Appellant to these marketing agents.

The Appellant argued that the KRA had misinterpreted the Kenya–France and

Kenya–South Africa DTTs by claiming that the agency fees paid to the third-party marketing agents were taxable under the “other income” articles of the two DTTs (Article 21 and 22 respectively) rather than the “business profits” article (Article 7). The Appellant maintained that the agency fees paid to the non-resident marketing agents qualified as business profits and as such were not subject to withholding tax on the basis that the marketing agents had not triggered a PE in Kenya.

In response, the KRA argued that the Kenya–France and Kenya–South Africa DTT did not have an express provision on taxation of management or professional fees in which case the “other income” article of the two DTTs which deals with items of income not dealt with by other articles of the DTTs was applicable and granted Kenya taxing rights over the agency fees.

Determination

The Tribunal found that under Article 7 of the DTTs, Kenya had no taxing rights on



the income received by the marketing agents, as they did not have a PE in Kenya. The Tribunal further held that the “other income” article did not apply since the income was classified as business profits and therefore taxable under Article 7. The Tribunal referenced previous cases (Total Kenya Limited vs. Commissioner of Domestic Taxes and McKinsey and Company Inc. Africa Proprietary

Limited vs. Commissioner of Legal Services and Board Coordination), where the commentaries to the OECD and UN Model Tax Conventions were relied upon in determining that the management or professional fees qualified as business profits.

Impact of the ruling

This ruling verifies and strengthens the general interpretation of double

taxation agreements that do not have a specific article on management or professional fees. It remains to be seen whether the KRA will appeal this judgment in light of the High Court’s recent affirmation that withholding tax is not applicable on management or professional fees under the Kenya-France DTT in the absence of a PE (Commissioner of Domestic Taxes vs Total Kenya Limited, E044 of 2021).



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