INTERCONTINENTAL TRUST NEWSLETTER

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New Mauritius-Kenya Double Taxation Avoidance Agreement

The new Mauritius-Kenya Double Taxation Avoidance Agreement (DTAA) and the Protocol amending the DTAA have both been ratified in Mauritius through the publication of a legal notice in the Mauritius Government Gazette in December 2019.

Although the new Mauritius-Kenya DTAA is yet to be effective as it awaits ratification by Kenya, it has certainly peeled off the veneer of uncertainty that ensued the nullification of the initial DTAA signed in May 2012 (the "Initial DTAA").

It will be recalled that in 2019, the Initial DTAA was ruled void by the High Court of Kenya over an administrative glitch – the court ruled that even if the Initial DTAA was ratified by Kenya, it was never laid before the House of Parliament within the deadline prescribed as per the Statutory Instruments Act 2013 (Kenyan local law) and therefore never came into force.

DTAA, as its name suggests, is a key element in cross-border structuring as it aims at eliminating double tax on the same streams of income and provides more clarity on the various taxation aspects that need to be considered by international investors prior to any investment decisions.

It is also important to highlight that Mauritius is a signatory to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS) (hereunder referred to as the "MLI") since July 2017. The MLI is an instrument used for implementing some of the BEPS minimum standards, including clamping down on treaty shopping through the implementation of tax treaty-related measures in DTAAs.

The definitive instrument of ratification of the MLI was deposited on the 18th October 2019, where it was noted that Mauritius included most of the countries, including all the African countries, with which it has concluded a DTAA.

The salient features of the new Mauritius-Kenya DTAA

(Including changes made through the Protocol)

	Dividends		Interest		Royalties		Capital Gains		Permanent Establishment	
	Non-Treaty	Treaty	Non-Treaty	Treaty	Non-Treaty	Treaty	Non-Treaty	Treaty*	Building Site	Provision of Services
Tax Rates	10%	8%	15%	10%	20%	12%	5%	0%/5%	183 days	6 months

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*Capital gains arising from disposal of shares may be taxed in the country of disposal if:
- the shares derived more than 50% of their value directly or indirectly from immovable property in the country of disposal at any time during the 365 days preceding the disposal; or
- at least 50% of the capital of the company were held directly/indirectly at any time during the 12 month period preceding the disposal

There is no capital gains tax in Mauritius. There is a capital gains tax of 5% in Kenya although a specific exemption exists for gains derived from securities listed in Kenya (source: PWC Worldwide Tax Summaries 2018/19)

The way forward

We now await for Kenya to pass the relevant legislations and subsequent administrative procedures to give effect to the new Mauritius-Kenya treaty.

The Mauritius-Kenyan relationship goes a long way back as both countries share nearly five decades of bilateral economic relations in areas of trade and investment. As of date, both countries have entered into several collaboration agreements and Memorandums of Understanding (MoU), namely a MoU on Cooperation for the Development of Special Economic Zones (SEZs) and Export Processing Zone in Kenya, MoU in the field of tourism, Higher Education and Scientific Research and Arts and Culture amongst others. They also share similar goals towards economic growth and improving the quality of life of their people. Remarkably, the absence of an active DTAA has never been a deterrent for inter-country trade: In 2018, Mauritius had a Balance of Trade surplus with Kenya, boasting exports of around MUR 1.95 billion (circa. USD 56m) against imports of MUR 1.4 billion (circa. USD 40m). In addition, over USD 2 billion of investment was made in Kenya through the Mauritius International Financial Centre where more than 200 structures were engaged in channeling these investments in 2018.

The forthcoming entry into force of the new Mauritius-Kenya DTAA beckons a new era of collaboration between both countries and can only further strengthen and boost inter-country investment flows and trade.

How we can help?

If you need any assistance with any aspect of Mauritius-Kenya DTAA or need assistance on your existing or potential structures involving Kenya, please do not hesitate to get in touch with your usual contact person at ITL.

For any additional information please contact us.

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