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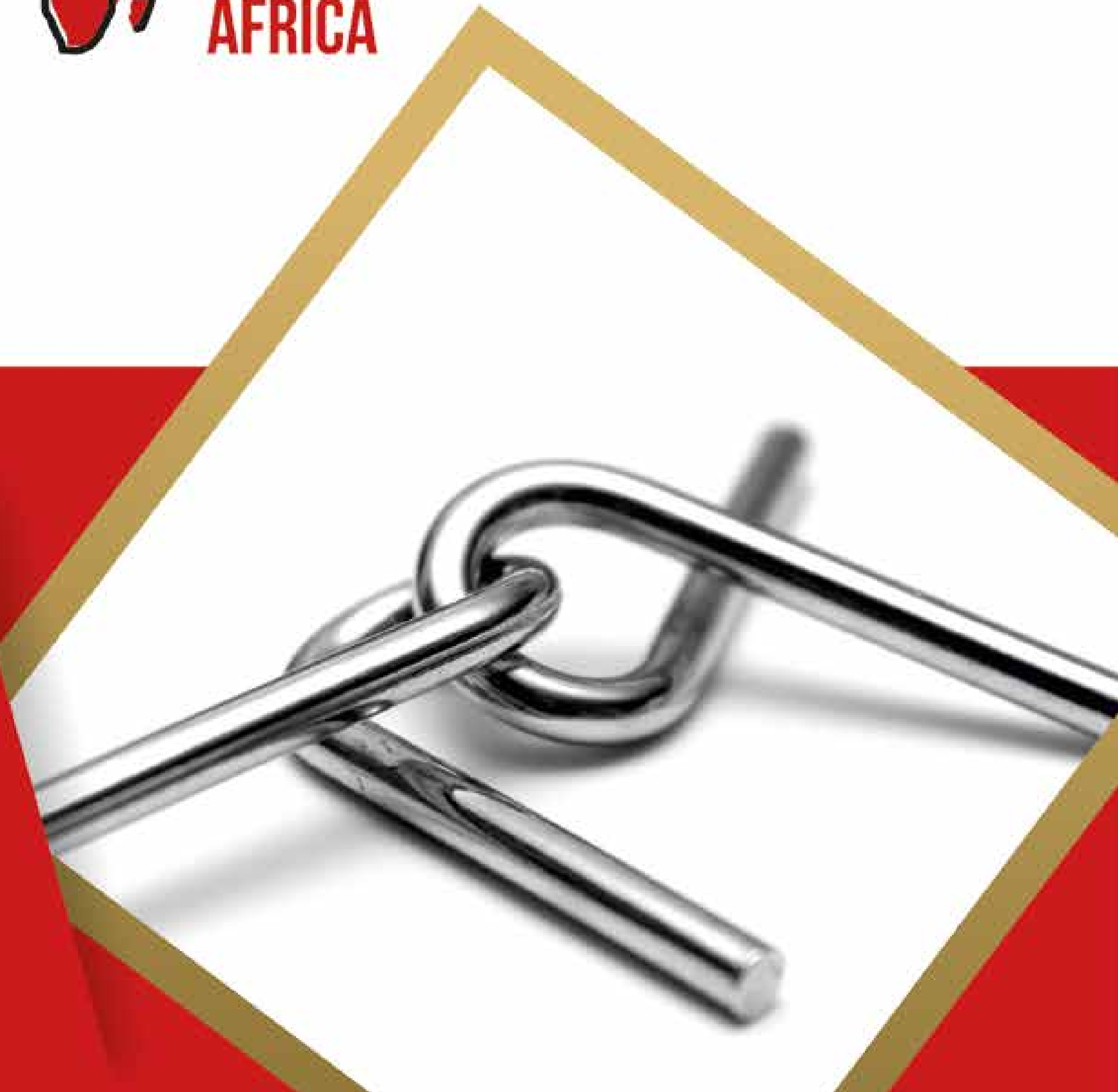

Trick or Treat(Y)?

Kenya's Tax Treaty giveaways to Tax Havens

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List of Abbreviations

ATAF	Africa Tax Administration Forum
BO	Beneficial Ownership
CSO	Civil society Organisations
DTA	Double Tax Agreement
EAC	East Africa Community
ECOWAS	Economic Community of West Africa States
FoA	Force of Attraction
IMF	International Monetary Fund
KE	Kenya
MU	Mauritius
NL	Netherlands
OECD	Organisation for Economic Co-operation and Development
PE	Permanent Establishment
PPT	Principle Purpose Test
SADC	South Africa Development Community
TJNA	Tax Justice Network- Africa
UAE	United Arab Emirates
UN	United Nations
WHT	Withholding Tax

About TJNA

The Tax Justice Network Africa (TJNA) is a Pan-African organisation and a member of the Global Alliance for Tax Justice. Launched in January 2007 during the World Social Forum (WSF) held in Nairobi, TJNA promotes socially-just, accountable and progressive taxation systems in Africa. It advocates for tax policies with pro-poor outcomes and tax systems that curb public resource leakages and enhance domestic resource mobilisation.

TJNA aims to achieve these by challenging harmful tax policies and practices that on one hand facilitate illicit resource outflows and on the other hand favour the wealthy while aggravating and perpetuating inequality. TJNA strives to promote the role of tax justice in the African Development Agenda. It further endeavours to provide a platform dedicated to enabling African researchers, campaigners, civil society organisations, policy makers, and investigative media to co-operate and synergise their efforts in the struggle against illicit financial flows, tax evasion, tax competition and other harmful tax policies and practices.

TJNA engages in various activities that are aimed at promoting public awareness regarding tax issues in Africa. Through networking among member organizations across Africa, TJNA seeks to raise awareness on the importance of taxation as a tool for development and enhancing democratic governance and to consolidate the efforts by CSOs to work on tax.

MISSION
To spearhead tax justice in Africa's development by enabling citizens and institutions to promote equitable tax systems through research, capacity-building and policy-influencing.

VISION
A new Africa where tax justice prevails and ensures equitable, inclusive and sustainable development.

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Summary

Most developing countries have been signing a number Double Tax Agreements even when the existing domestic laws are sufficient. The argument behind the increased signing is that DTAs will help in promoting investment and international trade. CSOs have questioned this logic following the rising demand of tax revenues and the challenges DTAs pose towards diluting the existing tax base as a result of a country redistributing its taxing rights. This analysis has looked through the recent DTAs that Kenya has signed with a view of establishing the model adopted and what ought to be included in order to promote financing development.

From the review, Kenya risks losing the much-needed public resources through instances of round tripping and treaty shopping in cases where multinational will take advantages of the ambiguities in the articles contained in the said tax treaties. Further, the treaties are likely to propagate incidences of aggressive tax planning meaning Kenya losing a lot of tax revenue instead of the intended outcome of promoting investment and international trade.

The review recommends the inclusion of the Limitation of Benefit rule , incorporation of an article on taxation of technical services and management fees and review a provision on the alienation of immoveable property in Kenya through companies established in the other contracting states (UAE, NL & MU) taking into consideration the differential property tax regimes. Overall there is need to enhance transparency, public participation, and accountability in the treaty formulation and implementation of tax treaties.

Background

Double Tax Agreements (DTAs) continue to be a subject of interest because of the rising degree of globalisation which has brought about competition between the various economies especially in raising of domestic revenues. Sub Saharan Africa alone has at least 300 double tax agreements in force majority of those have been signed with European countries (TJNA, 2015). Due to increased competition most, open economies have been forced to dilute their tax rates especially on mobile factors of production and subsequently providing room for profit shifting coupled with effects of race to the bottom (Kumar & Quinn, 2012).

DTAs have been fronted as tools to safeguard multinationals from differences in tax regimes by limiting instances of double taxation and consequently promoting investments especially in developing countries. That is tax treaties have a purpose of strengthening the ability of States to impose taxes fairly and effectively on taxpayers engaged in cross-border activities (UN, 2011). This is believed to be achieved through the allocation of taxing rights[1] between the country of residence and the country of source jointly referred to as the contracting states. Nonetheless this proposition has been criticised as a myth as DTAs do not necessarily prevent double taxation but rather easing bureaucratic hassles and coordinating tax terms between contracting states and redistribution of tax revenues from poorer countries to richer countries (Dagan, 2000). However, the extent to which the taxation rights are shared fairly between the contracting states has been a question of analysis (Baker, 2014; TJNA, 2015). It remains a concern where DTAs have instead promoted the elimination of all taxation, encouraging double non- taxation. With these levels of development developing countries have been warned to exercise caution while signing any double taxation treaty (IMF, 2014).

Most DTAs have been developed based on the United Nations Model Tax Convention (UN Model), the Organisation for Economic Co-operation and Development Model Tax Convention (OECD Model) and, the recently developed Africa Tax Administration Forum Model (ATAF Model). The ATAF model has been developed based on the

[1] Who has the obligation to tax income on basis of either source or residency.

UN and OECD models taking into consideration the economic dynamics in Africa. Further regional economic blocs like East Africa Community (EAC), Economic Community of West African States (ECOWAS) and South Africa Development Community (SADC) have developed regional DTA models geared towards harmonising regional tax policies in the respective regions.

Kenya has been at the forefront of signing DTAs with many jurisdictions with the core objective of promoting trade and investments amongst the respective jurisdictions, as well as minimising incidences of double taxation and ensuring a fair distribution of taxing rights. Most recently, Kenya ratified DTAs with the United Arab Emirates (UAE), via Legal Notice, No. 218 of 2016 and the Netherlands, vide Legal Notice No. 169 of 2017, amongst other DTAs that are in the pipeline or under negotiation.

Following the ratification[2] of a DTA, the next step requires that the contracting states notify each other, in writing, of the completion of procedures required under domestic law and their consent to be bound by the treaty so that the treaty becomes effective.

It is worthy to note that besides the objective to minimise instances of double taxation, DTAs should be negotiated to ensure that the provisions contained therein do not propagate instances of double non- taxation, tax avoidance and evasion. Equally the provisions should mitigate aspects of discrimination in the likely preferential tax treatment between foreign investors and domestic investors and to ensure that no contracting state is left worse off by surrendering all its taxing rights to the other contracting state.

This paper has carried out a high level analytical review of a select articles in double tax agreements Kenya has signed with Mauritius (MU), United Arab Emirates (UAE) and Netherlands (NL) with a view of: evaluating the legal framework on which DTA development is anchored in Kenya; which model between the OECD, UN and ATAF has been adopted in the development; what are the key tax concerns that emanate from the articles contained in the DTAs and propose the likely amendments based on the best practices in DTA formulation considering the economic dynamics.

Legal framework of Double Tax Treaties in Kenya

The treaty making process in Kenya is anchored on Article 2(6) the Constitution of Kenya, 2010 which provides that “any treaty or convention ratified by Kenya shall form part of the law of Kenya ...” and the Treaty Making and Ratification Act, 2012 “the Ratification Act”, specifically with reference to Sections 6, 7 and 8, which provides the considerations that the executive should include during the treaty making process.

Section 6 of the Ratification Act stipulates that the executive shall be bound by the values and principles of the constitution and shall consider the regulatory impact of any proposed treaty.

Section 7 further highlights the need for consultation with the Attorney General in submission of a memorandum outlining the objects and subject matter of the treaty, any constitutional implications including the fact that the treaty is consistent with the Constitution and promotes constitutional values and objectives. Section 8, on the other hand, provides that the proposed treaty should be submitted to the National Assembly for consideration and emphasizes the need for public participation to be facilitated by the relevant parliamentary committee.

Further, the Constitution requires the exercise of openness, accountability, public participation and equity to guide the design and implementation of public finance. Article 201 (b) provides that:

[2] According to Vienna Tax convention Ratification means a state establishes on the international place its consent to be bound by the treaty

The public finance system shall promote an equitable society, and in particular

> *i) the burden of taxation shall be shared fairly,*
> *ii) …*

Further, Section of the Kenya Income Tax Act Cap 470 provides for special arrangement for relief from double taxation. Subsection (1) denotes that a minister shall give a notice geared towards extending double tax relief which should be in line with Kenya's income tax laws and any other laws.

> *(1) …"the Minister may from time to time by notice declare that arrangements, specified in the notice and being arrangements that have been made with the government of any country with a view to affording relief from double taxation in relation to income tax and other taxes of a similar character imposed by the laws of the country, shall,* ***subject to subsection (5) but notwithstanding any other provision to the contrary in this Act or in any other written law, have effect in relation to income tax****, and that notice shall, subject to the provisions of this section, have effect according to its tenor."*

Subsection 5 highlights the extent to which the benefits extended by a treaty may be available to any person:

> *(5) … where an arrangement made under this section provides that income derived from Kenya is exempt or excluded from tax, or the application of the arrangement results in a reduction in the rate of Kenyan tax, the benefit of that exemption, exclusion, or reduction shall not be available to a person*[3] *who, for the purposes of the arrangement, is a resident of the other contracting state if fifty per cent or more of the underlying ownership*[4] *of that person is held by an individual or individuals who are not residents of that other contracting state for the purposes of the agreement.*

Tax Justice Network Africa has been championing for the need to a reassess the objectives and impact of tax treaties that the government is signing taking into consideration their impact on financing for development and promoting domestic revenue mobilisation.

Issues of concern with DTAs

Whereas DTAs have been hailed as enablers of international trade and investment by equitably and efficiently sharing the taxing rights between the participating countries; studies have indicated that DTAs have been used by developed countries at the benefit of their multinational corporations in exploiting developing countries. Some of the concerns raised as regard tax treaties are as detailed below:

Source vs Residence Based Principle Income is taxed on the basis of either the relationship of the income (tax object) to the taxing state or the relationship of the taxpayer (tax subject) to the taxing state based on residence or nationality (UN, 2011). This denotes that source principle applies where a tax payer is taxed on basis that the income in question was earned within a country. This applies especially to incomes eared by foreign investors with the country. On the other hand, residence principle denotes that income is taxed on the basis that the taxpayer resides in a country. There has been a big challenge of balancing between the source and residence development for DTAs. This call for developing countries the balance between source and residence taxation while negotiating for treaty (Mensah, 2017)

Treaty Shopping This refers to a situation where a party that is not a resident of either of

[3] Person includes an individual, company, partnership, trust, government, or similar body or association;

[4] Underlying Ownership - in relation to a person, means an interest in the person held directly, or indirectly through an interposed person or persons, by an individual or by a person not ultimately owned by the individuals

the contracting states will route its investment through one of the contracting state with a view of enjoying the treaty benefits. This often arises where a firm uses the preferential tax advantages and existence of DTAs as a key determinant to execute an investment. Treat shopping will see firms carry out an analysis of existing treaties network to determine the possible investment route with a view of determining the one that offer a favourable tax treatment ending up in treaty abuse. Treaty shopping contributes to instances of tax avoidance leading to loss of tax revenues.

Round Tripping This arises where a resident of one country routes his investments through another country back to his own country as foreign direct investment. This often happen where there are often huge tax rate differences or preferential tax treatments between the two countries. For Instance, assume that DTA between Kenya and Mauritius provides for no capital gains tax for any investment to either country. However, Kenya has in place capital gains tax on any investment. In this scenario, Kenyan investors are likely to transfer capital to Mauritian registered corporate entity. The investors will then invest in Kenya through the entity as "foreign direct investments" to Kenya leading to round tripping.

These schemes have often contributed to instances of tax avoidance and subsequently led to review of many DTAs such India which has just revised its over three decades old DTA with Mauritius. The revised treaty is meant curbs situations where firms in Mauritius that invest in India are not just "shell" companies.

Principle of Tax Neutrality It provides that different parties in similar circumstances ought to be taxed using the same rates on similar incomes. The principle of neutrality emphasises that generally the tax system should strive to be neutral so that decisions are made on their economic merits and not for tax reasons. However, it is worth noting that in some cases neutrality may be subjected to distortions and as such there is need to measure the extent to which any tax system departs from this principle. Even with acceptable cases of distortions tax neutrality is often violated in DTA negotiations through tax concessions that are often reached between the contracting states. The preferential tax rates negotiated between the contracting states fail to take into consideration the impact on other tax payers who are operating in similar economic situations but not subject to the DTA in question. Tax system are geared towards raising revenue needed by the government in providing public services, thus there is need to ensure that these goals are attained without distorting decisions of individuals and firms which otherwise could have been made purely economic reasons (Furman, 2008).

Limitation of Treaty Benefits This stipulate that reduced withholding rates and other treaty provisions apply only to companies that meet specific tests of having some genuine presence in the treaty country (such as a minimum share of ownership by its residents or a minimum level of income from conducting an active trade or business there) (IMF, 2014). Most treaties have been subject of abuse of whom should the tax benefits contained therein should apply. This has raised concern especially where multinational have set up box offices in given jurisdictions primarily to take advantage of the treaty benefits. Inclusion of a provision on limitation of benefits in a double taxation treaty will contribute towards mitigation of treaty abuses where investments are routed through given jurisdictions to benefit from the existing treaty. Many of the treaties signed by Kenya have not incorporated any limitation clauses to safeguard against the imminent abuse of the treaties. This is often the case because in practice under international law, domestic laws become subordinate to the international law being implemented.

The above concerns have been highlighted in TJNA's concerns to the Kenya Mauritius tax treaty whose enforcement is currently in a subject of Court determination. TJNA has queried the constitutionality of the Kenya- Mauritius tax treaty, arguing that the treaty making process contravened Article 10 and 201 of the constitution. In brief TJNA sought the following orders from the Court:

- Declaration that the Government of Kenya failed to subject the Kenya- Mauritius DTA to ratification in accordance with the process provided for in the Treaty Making and Ratification Act, 2012;

- Withdrawal of Legal Notice 59 of 2014 by the Cabinet Secretary to the Ministry of Finance and to embark on a new process of ratification as required by the provisions of the Treaty Making and Ratification Act, 2012.

The subject of tax treaties, their effect on revenue mobilisation and their use in facilitating illicit financial flows especially in developing countries remains critical and of interest. Findings from the HLP Report on Illicit Financial Flows from Africa identify tax treaties as one of the key avenues through which illicit financial flows takes place. Further the IMF Policy Paper of 2014 cautions developing countries of issues that come by signing double tax treaties and need for review if the intended objectives of signing a treaty can be achieved through existing domestic law (IMF, 2014). This caution has been reiterated by a report released by ActionAid in 2016 which points out that developing countries are losing more in tax revenues through the treaties that have been signed (Action Aid, 2016).

Despite the concerns raised in the on-going court case on the ratification and enforcement of the Kenya Mauritius double tax treaty and findings from various studies, Kenya continues to sign and ratify tax treaties on the premise of promoting international trade and investment.

This is on the backdrop of the fact that there is no tangible evidence the already existing DTAs have contributed to the increase in investment and that investors from such countries could have suffered significant instances of double taxation were it not for the DTA.

Worse off is the fact that, according the recently concluded Financial Secrecy Index (FSI) 2018 UAE and Netherlands have been scored highly on their levels of secrecy. UAE has been ranked number nine with a secrecy score of 84% while Netherlands has been ranked 14 with a secrecy score of 66%. Further, the taxation regime of the two countries has been characterised with low tax rates subsequently being classified as tax havens. The wide spread of tax rates between two contracting states in most cases presents the challenge on distribution of taxation rights. Tax havens will always negotiate for low tax rates which may be like the existing domestic rates while the country with higher tax rates will be pushed towards the low tax rates hence affecting revenue collection for the high rate state. DTAs with tax haven present the challenge of the harmful practices relating treaty shopping, round tripping and other forms of treaty abuse.

The table below provides a comparative analysis of the selected articles as contained in the UN, OECD and ATAF models and how they have been incorporated in the recently ratified treaties. From the table we further propose the possible consideration as best practices that ought to be considered when developing treaties going forward.

Comparative Analysis on the key tax provisions between the Mauritius, Netherlands and United Arab Emirates as signed by Kenya on basis of the UN, OECD and ATAF Models

DTA Provision[5]	KEY TAX PROVISIONS				
	OECD	**UN Model**	**ATAF Model**	**Provisions in the selected DTAs**	**Recommendations**
Permanent Establishment	• Building site or construction or installation can qualify for PE after 12 months	• Building site or construction or installation can qualify for PE after 6 months • Provides for creation of service PE that will arise where services are rendered for a period of more than 183 days	• Building site will create a PE like provided for in the OECD. • Art. 5(3) (b) provides for creation of a service PE, where the services have been carried out within the contracting state for a period of 6 Months within 12 Months.	**MU – KE**, Building site PE will arise in 12 months in line with the OECD model **UAE – KE**, Building site constitutes a PE in 6 months within 12 months **NL – KE**, Building site PE will arise in 9 Months **MU – KE & UAE KE** Further, provides for a creation of service PE >= 4months within 12 months	• There is need to incorporate anti-fragmentation rules within this article to guard against the abuse through splitting of contracts. • Need to harmonise the timelines under which the PE may arise in different Scenarios. • There is need to consider shorter period of three months considering incorporation of technology especially in construction can reduce the period of construction significantly. • Should include force of attraction[6] (FoA) rule to cover other associated activities linked to the PE • Should include aspects of Service PE
Business Profits	The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the	This has been drafted in line with the OECD model conventions.	This has been drafted in line with the OECD model conventions	**NL – KE**, has been drafted in line with OECD model Convention.	• There is need to clarify, the treatment of deductions in determining PE profits.

[5] The tax provisions have been selected on judgemental basis and the perceived impact on tax revenues

[6] Force of Attraction rule, provides that where an enterprise is said to have a PE in another country, it exposes itself to taxation the entire spectrum of income that it earns from carrying on activities in that other country, whether or not through that PE.

DTA Provision	KEY TAX PROVISIONS				
	OECD	**UN Model**	**ATAF Model**	**Provisions in the selected DTAs**	**Recommendations**
Business Profits (contd.)	other Contracting State through a permanent establishment situated therein. Departs from the source based principle of taxation when a PE is created	Art. 7 (1) (c) Emphasis is on the limited force of attraction rule[7]		**MU – KE, UAE – KE,** have been drafted in line with the Models. In line with Art 7(3) of the UN Model Convention the DTAs provide further clarification on the treatment of deduction in determining PE profits.	The UN and ATAF Models have attempted to address this challenge. • Treaties should incorporate the force of attraction rule to minimise the levels of ambiguity that may arise from any restrictions.
Taxation of dividends	Provides that where the beneficial owner is a resident WHT on dividends will be either a maximum of 5% for where the BO directly holds at least 25% of shareholding or a maximum of 15% in all other cases.	Art. 10(2) sets a threshold of BO at a shareholding of at least 10% of share capital. However, the model does not provide for the maximum rates that ought to apply. The rates are subject to a bilateral agreement between the contracting states.	Art. 10(2) sets a threshold of BO at a shareholding of at least 10% of share capital. However, the model does not provide for the maximum rates that ought to apply. The rates are subject to a bilateral agreement between the contracting states.	**MU – KE**, has been developed on basis of UN model, with BO set at 10%. Where BO is a resident a max WHT of 5% will charged on the gross dividend, else a maximum WHT of 10% will apply. **NL – KE**, based on the OECD, Further provide for no taxation on dividend where the BO holds at least 10% of capital of the paying company. **UAE – KE**, has been developed on basis of OECD with adoption of the minimum rate of 5%. However, it fails to define how to determine BO.	• The WHT tax on dividends should be set at the same level with other foreign investors to minimise the levels of discrimination. This will equally ensure that there is minimal repatriation in the process of taking advantage of reduced rates. • There is need to define when and what criteria should be used to evaluate beneficial ownership. • The threshold of beneficial ownership should be clearly included in the company's Act to minimise on the discretionary actions as shown.

[7] Under the rule, where an enterprise carries out business in a contracting state through a PE, such an enterprise will be taxed not only on its business profits attributable to the PE but also on profits that relate to the PE but arise from activities conducted outside the contracting state.

DTA Provision	KEY TAX PROVISIONS				
	OECD	**UN Model**	**ATAF Model**	**Provisions in the selected DTAs**	**Recommendations**
Management, technical and professional fees	No provisions have been made on the taxation of management, technical and professional fees	No provision	Art 13 captures technical fees, and provides definition of what entails technical fees	No inclusion has been made in the three DTAs	• There is need provide a clear definition of what qualifies as technical fees, management fees and professional fees. • This should equally be included as one of the articles in the DTA to minimise ambiguities and ensure fair allocation of taxing rights on the subsequent incomes. • Inclusion in the DTA that domestic law will prevail where there is ambiguity on the treatment.
Taxation of Royalties	Provides for taxation of royalties based on the resident country.	Royalties, Taxation is based for source country taxation for royalties.	Adopts UN proposal of source based taxation. Unlike the OECD & UN Models Art. 12(3) provides a detailed definition of what qualifies to be royalty the meaning of copyright[8].	All the three DTAs have been drafted on basis of the UN Model.	Provide a detailed definition of what entails royalties as in the case of the ATAF Model this minimises the ambiguities arising from interpretations.

[8] Copyright of literary, artistic, scientific work, broadcasts, motion picture films and works on film or other means of reproduction for use in connection with television

DTA Provision	KEY TAX PROVISIONS				
	OECD	**UN Model**	**ATAF Model**	**Provisions in the selected DTAs**	**Recommendations**
Capital Gains[9]	Provides for taxation of gains from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.	In addition to the provisions of OECD Model it provides clarity by detailing on how and who should the 50% threshold apply i.e. company, partnership, trust or estate engaged in the business of management of immovable properties, Further, it provides for taxation of gains on the alienation of shares of a company which is a resident of the other Contracting State, may be taxed in that other state, subject to an agreed threshold of direct or indirect shareholding.	This has been developed on basis of UN model provisions	All treaties have not included Art 13(4), which implies limitation on taxation of any gains realised on disposal of immovable properties. Further no provision has been made for the disposals of shares where the entity had either direct or indirect relationships.	To limit abuse there is need to include Art, 13(4) and art 13(5) of UN Model. Considering the way, the DTAs have been drafted Kenya has limited window of taxing gains from disposal of shares and disposal of immovable other properties initiated from the contracting states.
Other Incomes	Resident country will have the right to tax any other income even though other income arises in the other contracting state.	In addition to the proposals in OECD models Art 21(3) provides for source taxation where the country laws provide so.	Based on the UN Model provisions.	**MU – KE** and **UAE – KE**, have been draw on basis of UN Model. **NL – KE** has been drawn on basis of OECD.	Other incomes should be taxed in line with domestic legislation of the contracting state where the income arises. This will minimise instances of double taxation that may arise. Art 21(1) and Art (3) of the UN Model should be adopted.

[9] Capital gains tax is a property tax that arises one realises a gain on disposal of properties

DTA Provision	KEY TAX PROVISIONS				
	OECD	**UN Model**	**ATAF Model**	**Provisions in the selected DTAs**	**Recommendations**
Elimination of Double Taxation	Proposes use of either the Art 23A **exemption method**, the resident contracting state does not tax income that has been taxed in the source contracting state or Art 23B **Credit method**, where resident contracting state computes tax on the basis of total including income arising from the source contracting state. The resident contracting state will then allow credit for tax paid in the Source Contracting state.	Proposes the adoption of Credit method approach.	Like the UN Model it proposes the use of credit method approach.	**UAE – KE**, proposes the adoption of credit method **MU – KE** & **NL – KE** they provide for tax sparing which may be at the expense of Kenya.	May consider using **unilateral tax relief** regime, such that all countries take into consideration the tax that has been paid in the other state of operation.

Note:

Article 29 of the Netherlands DTA provides for extension DTA provision either in its entirety or with any necessary modifications beyond the Netherlands territory to include jurisdictions like Aruba, Curaçao, Sint Maarten among others. This may subject the agreement to abuse considering the proposed jurisdictions have their independent tax regime and legislation. Further Art. 29(2) provides that any termination should not apply to the other jurisdictions shall not also terminate any extension of the Convention to any part of the Kingdom of the Netherlands. Withholding Tax (WHT) of specific flows of income and capital gains tax has remained a central focus during negotiations, overlooking the other key articles contained in the tax treaties. This focus on WHT capital gains tax has meant that developing countries that depend more on corporate income tax within their tax base are more likely to sign tax treaties with wealthier countries, and more likely to negotiate higher WHT rates in those treaties, but they are not able to obtain better results overall (Hearson, 2017). The table below provides a summary of WHT rates proposed to apply with the DTA Compared to rates applicable to other foreign and domestic investors who are not subject to the DTA.

Form of WHT Tax	Mauritius DTA	UAE DTA	Netherlands DTA	Applying Rate, No DTA	Domestic Tax Rates
WHT on Dividends	5% of the gross amount if the BO is a company that controls at least 10% of the capital of the paying company. 10% of the gross amount on the for all other cases	5% of gross amount the beneficial owner of the dividends	10% of gross amount where paying company is a resident in Kenya and 15% of gross amounts where the paying company is a resident of Netherlands No WHT where a company controls directly or partly divided at least 10% of capital f the dividends paying company.	10% of the gross amount p ayable amount With 10% of the gross amount payable amount	With < 12.5% shareholding 5% >12.5% shareholding – Exempt
WHT on Interest	10% of the gross interest	10% of the gross interest	10% of interest amount	15% of the gross interest	15% of the gross interest
Royalties	10%	0%	10% of gross royalties	20% of the gross royalties	5% of the gross amount
Technical, professional and Management fees	0%	0%	0%	20% of the gross amount	5% of the gross amount
Capital Gains	0%	0%	0%	5% of the net gains	5% on the net gains

Conclusion

Based on the forgoing it is evident that:

- All the treaties reviewed have not included an article on taxation of technical, management services. Exclusion of this from the DTA has been used as an avenue in limiting the extent of taxation of incomes realised from the provision of technical services. This is critical in the understanding that developing countries especially in Africa are net importers of services and as such any loophole will be detrimental in raising of the needed revenue to finance development.

- Tax treaties have been often used as tools of aggressive tax planning and subsequently contributing to tax avoidance. For instance, exclusion of how and what rates should apply for to some streams of income may be considered as a deliberate move to create ambiguity in the law which ultimately forms an avenue for room of tax avoidance. From the tax treaties reviewed no provision has been made on the how and what rates should be applied on technical, management and professional fees. This ambiguity and silence in the DTA has led to subjective interpretation of the said treaties with a huge negative impact on domestic resource mobilisation in Kenya considering the continuous increase in the importation of services.

- All the DTAs under review have not incorporated provisions of Art 13(4) & (5) of UN treaty model. Failure to include this provision limits taxation rights of gains made from the sale of company shares especially in the case of indirect transfers. This can provide an avenue for acquisitions to be done through companies' resident in other contracting states like Mauritius and the government can have no right to tax any gains from the subsequent sale of such companies. Kenya has limited window of taxing gains from disposal of shares and disposal of immovable other properties initiated from the contracting states.

- Risk of treaty shopping and round tripping, given that unique and preferential tax rates negotiated through DTAs investors may be tempted to route their investment in a way to enjoy the tax benefits. This will mean that the country compromises on the amount tax revenues that are critical in financing development. Kenya is likely to be a victim of the said abuses especially because the DTAs discussed herein involve countries that have been classified as tax havens and the preferential tax rates that the DTAs offer.

- The treaties conflict the principle on tax neutrality by subjecting investors to different tax treatment on similar incomes. This is often the case where investors routing their investment through countries with DTA enjoy preferential tax rates as compared to their counterparts from non – DTA countries on similar flows of income. This challenge often means that investors will in most cases make their decision based on the tax reason and not their economic merits. This may affect investments which the treaty intends to promote considering the preferential tax treatment extended by DTAs may crowd out other worthy investors. A country that negotiates for some more uniform rates of taxation promotes investment allocation and reduces the instances of tax avoidance reduce which ultimately boosts development.

Recommendations

1. Include Limitation of benefit Rule as an article in the ratified DTAs. To ensure consistency with in Section 41(5) of Kenya Income Tax Act which provide the extent to which one can take advantage of the DTAs' preferential treatment, there is need for DTA to clearly include an article on the limitation of benefits .It is notable that the three treaties have not included any provision to curb abuses to the DTA through instance of treaty shopping and round tripping which may be linked through investors routing their investments through the treaty countries into the country.

   This form of abuses of tax treaties have informed the review of many existing DTAs across the world and hence to clarify the extent of who is the beneficiary of the treaty at the time of negotiation. In addition, to the limitation of benefit rule the treaty may consider incorporating principal purposes test (PPT) provisions to ensure that if one of the principal purposes of transactions or arrangements entered by the entity is to obtain treaty benefits, these benefits would be denied unless it is established that granting of these benefits would be in accordance with the object and purpose of the provisions of the treaty.

2. Inclusion an article on taxation of technical, management services, this should form bear minimum that should be included in any treaty to initiate the treaty negotiation process. This practice has been adopted in countries like Ghana to provide basis of a meaningful negotiations. Inclusion of this article will minimise the ambiguities that have been experienced on how to tax imported services in cases where there is a treaty in existence and that the service provider has not created a permanent establishment. This is equally important because imported services from other non-contracting states are often subjected to withholding taxes in line with the provisions of the Income Tax Act.

3. The treaties should include Articles 13(4) and 13(5) of the UN Model Convention, this will help to minimise the loopholes for tax avoidance through enabling the alienation of immoveable property in Kenya through companies established in the other contracting states (UAE, NL & MU). Differential regimes on capital gains tax in the contracting states often provide room for round tripping by the fact that where one contracting state does not have in place capital gains tax and the treaty has been drawn such that any investment from/through that country will not be subjected to capital gains tax taking into consideration that the right to tax has been vested on the country of residence.

   Additionally, where either or both states may not be allowed to tax capital gains with the differential tax regime according to their own tax laws provides an environment may encourage round-tripping where Kenyan companies can avoid taxation of dividends paid to foreign investors through share buy-back plans.

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