



Mauritius Double Taxation Agreement (DTA) Ruling and Housing Levy Update

01. The High Court of Kenya declares Legal Notice No. 59 of 2014 on the Kenya - Mauritius Double Taxation Agreement (DTA) invalid

The High Court of Kenya, Constitutional, Judicial Review and Human Rights Division, sitting in Nairobi, on 15 March 2019 delivered judgement declaring that Legal Notice No. 59 of 2014, gazetting the Kenya – Mauritius DTA, was not properly laid out before Parliament in accordance with Section 11(4) of the Statutory Instruments Act 2013 and is therefore null and void.

Background

The Judgement of the High Court follows a suit against the Cabinet Secretary for National Treasury, the Kenya Revenue Authority and the Attorney General (“The Respondents”) by the Tax Justice Network – Africa (“The Plaintiff”), which sought a declaration that the failure, refusal and

or neglect of the Respondents to subject the Kenya – Mauritius DTA to ratification in accordance with the Treaty Making and Ratification Act 2012 amounted to a contravention of Articles 10 ((a), (c) and (d)) and 201 of the Constitution of Kenya 2010. Similarly, the Plaintiff sought

orders directing the Cabinet Secretary for National Treasury to withdraw Legal Notice 59 of 2014 and commence the process of ratification in accordance with the Treaty Making and Ratification Act 2012.

Judgement and Determination

In its Judgement and Determination, the High Court sided with the Respondents in concluding that the Kenya – Mauritius DTA was indeed constitutional as its drafting, negotiation and ratification was in conformity with the relevant provisions of the Constitution of Kenya 2010, as read together with the relevant subordinate legislation, such as the Treaty Making and Ratification Act 2012.

However, the Court held that Legal Notice No. 59 of 2014 was not tabled before parliament in accordance with Section 11 (4) of the Statutory Instruments Act 2013. Consequently, the Court ordered that Legal Notice No. 59 of 2014 be declared null and void in line with Section 11 (4) of the Statutory Instruments Act 2013.

Our view

We note that the Judgement of the High Court presents a win-lose situation for the Respondents.

The judgement did not invalidate the Kenya – Mauritius DTA but rather reaffirmed that constitutional principles were followed in the drafting, negotiation and ratification of the Kenya – Mauritius DTA. This, we believe, is welcome by the Respondents and serves

to support the Government's practice in drafting, negotiating and concluding bilateral tax agreements.

However, the above notwithstanding, the Court declared Legal Notice No. 59 of 2014 null and void on the basis that it was not tabled before parliament in accordance with Section 11 (4) of the Statutory Instruments Act 2013. Consequently, we note that the Kenya – Mauritius DTA is not currently in force as Section 41 of the Income Tax Act requires that the Cabinet Secretary for National Treasury notifies the public of the coming into force of any taxation agreements through a notice in the National Gazette.

We therefore contend that following the Court's judgement as discussed hereinabove, the Cabinet Secretary for National Treasury would need to issue a fresh Legal Notice in the National Gazette and table the same before parliament within 7 days of publication.

Away from this particular judgement, there have been concerns raised by some stakeholders that the DTA would have adverse consequences for the country. We believe that this concern is addressed by the safeguards provided within our

tax laws as well as the ongoing reforms under the Base Erosion and Profit Shifting (BEPS) initiative spearheaded by the Organisation for Economic Cooperation and Development (OECD) to counter treaty abuse. Specific provisions to prevent treaty abuse include limitation of benefit clauses, beneficial ownership requirements and provisions that address double non-taxation that have now been included under updated treaties as well as the Multilateral Instrument developed by the OECD that many countries are now adopting.

Accordingly, we are of the view that tax treaties are beneficial for Kenya (and the partner states) as they are a key means of relieving double-taxation and providing greater certainty on tax matters for investors and taxpayers at large. As a matter of fact, Kenya has very few double tax treaties and we believe the Government should move fast to conclude more treaties with our trading and investment partners. For instance, ratification of the treaty with East African member states is long overdue and the result is that doing business in East Africa is more costly as businesses suffer double taxation and higher taxes when transacting within the region.

02. The High Court of Kenya extends stay of National Housing Development Fund Levy

The Employment and Labour Relations Court, on 18 March 2019, extended its stay orders granted with respect to the application of the National Housing Development Fund Levy introduced through an amendment of the Employment Act 2007 via the Finance Act 2018 and supported by the Housing Fund Regulations.

The order, initially granted to the petitioner, Central Organisation of Trade Unions (COTU), on 19 December 2018, suspended the implementation of Section 31A of the Employment Act 2007 which sought to establish the National Housing Development Fund levy.

We understand that Court, through the extension of its stay orders, sought to grant additional time to the parties challenging the legality of the National Housing Development Fund as established under Section 31A of the Employment Act 2007 to reach an out-of-court settlement on the matter.

The matter is scheduled for mention on 8 April 2019 wherein the Court will determine the way forward, having considered the parties' out of court negotiations.

The National Housing Development Fund Levy, which was initially set to take effect upon the gazettment of the Housing Fund Regulations, requires employers and employees to contribute 1.5% of an employee's monthly basic salary, with the combined contribution being capped at KES 5,000.

Should you wish to discuss the above further, kindly contact your relationship manager at Deloitte who will be more than glad to offer you guidance and assistance.

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