

Approved for tabling.

REPUBLIC OF KENYA



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THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – FOURTH SESSION – 2020

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING
.....

REPORT ON THE CONSIDERATION OF THE AGREEMENT BETWEEN THE REPUBLIC
OF KENYA AND THE REPUBLIC OF MAURITIUS ON THE AVOIDANCE OF DOUBLE
TAXATION (LEGAL NOTICE NO. 114 OF 2020)

CLERKS CHAMBERS
DIRECTORATE OF DEPARTMENTAL COMMITTEES
PARLIAMENT BUILDINGS
NAIROBI

DECEMBER, 2020

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CHAIRPERSON'S FOREWORD

In exercise of the powers conferred by section 41 of the Income Tax Act (Cap. 470), the Cabinet Secretary for National Treasury and Planning published a Notice specifying the Agreement for the avoidance of double taxation between the Government of the Republic of Kenya and the Government of the Republic of Mauritius vide Legal Notice No. 114 on 30th June, 2020. The Notice was submitted to the Clerk of the National Assembly on 7th July, 2020 and tabled before the House 15th July, 2020. The Notice was subsequently referred to the Departmental Committee on Finance and National Planning for consideration.

The Notice specified the Agreement which provides a legal framework for the elimination of double taxation of the residents of Kenya and Mauritius with respect to taxes on their income without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance.

In considering the Notice, the Committee requested for comments from members of the public on the Agreement vide advertisements placed in the print media on 25th September, 2020 and received memoranda from two (2) stakeholders. The Committee held meetings with the National Treasury, Office of the Attorney General and the Tax Justice Network Africa on 3rd November, 2020 to consider the Notice.

Having examined the Notice specifying the Agreement for the avoidance of double taxation between the Government of the Republic of Kenya and the Government of the Republic of Mauritius, the Committee resolved to **approve the Notice as published.**

The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee further wishes to thank all the stakeholders who participated in the consideration of the Agreement. Finally, I wish to express my appreciation to the Honorable Members of the Committee who made useful contributions towards the preparation and production of this report.

On behalf of the Members of the Departmental Committee on Finance and National Planning and pursuant to Standing Order 210 (4) (b) it is my pleasure and duty to present to the House, the Committee's Report on the Consideration of the Agreement for the avoidance of double taxation between the Government of the Republic of Kenya and the Government of the Republic of Mauritius (Legal Notice No. 114 of 2020).

Hon. Gladys Wanga, CBS, MP
Chairperson, Departmental Committee on Finance and National Planning

1 PREFACE

1.1 ESTABLISHMENT OF THE COMMITTEE

1. The Departmental Committee on Finance & National Planning is one of the fifteen Departmental Committees of the National Assembly established under *Standing Order 216* whose mandates pursuant to the *Standing Order 216 (5)* are as follows:-
 - i. **To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;**
 - ii. To study the programme and policy objectives of Ministries and departments and the effectiveness of their implementation;
 - iii. To study and review all the legislation referred to it;
 - iv. To study, access and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
 - v. To investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
 - vi. To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No. 204 (Committee on appointments);
 - vii. To examine treaties, agreements and conventions;
 - viii. To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
 - ix. To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
 - x. To examine any questions raised by Members on a matter within its mandate.

1.2 MANDATE OF THE COMMITTEE

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider, public finance, monetary policies, public debt, financial institutions (excluding those in securities exchange), investment and divestiture policies, pricing policies, banking, insurance, population revenue policies including taxation and national planning and development.
3. In executing its mandate, the Committee oversees the following government Ministries and departments:-
 - i. National Treasury and Planning
 - ii. State Department for Devolution
 - iii. Commission on Revenue Allocation
 - iv. Office of the Controller of Budget
 - v. Salaries and Remuneration Commission

1.3 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Finance and National Planning was constituted by the House in December, 2017 and comprises of the following Members: -

Chairperson

Hon. Gladys Wanga, CBS, MP
MP for Homabay County

ODM Party

Vice-Chairperson

Hon. Isaac W. Ndirangu
MP for Roysambu Constituency

Jubilee Party

MEMBERS

Hon. Jimmy O. Angwenyi, MP
MP for Kitutu Chache North Constituency
Jubilee Party

Hon. Christopher Omulele, MP
MP for Luanda Constituency
ODM Party

Hon. Shakeel Shabbir Ahmed, MP
MP for Kisumu East Constituency
Independent Member

Hon. Daniel Nanok, MP
MP for Turkana West Constituency
Jubilee Party

Hon. (Dr.) Christine Ombaka, MP
MP for Siaya County
ODM Party

Hon. Andrew Okuome, MP
MP for Karachuonyo Constituency
ODM Party

Hon. David Mboni, MP
MP for Kitui Rural Constituency
CCU Party

Hon. Francis K. Kimani, MP
MP for Molo Constituency
Jubilee Party

Hon. Joseph Oyula, MP
MP for Butula Constituency

ODM Party

Hon. Joshua Kandie, MP
MP for Baringo Central Constituency
MCC Party

Hon. Stanley Muthama, MP
MP for Lamu West Constituency
Jubilee Party

Hon. Edith Nyenze, MP
MP for Kitui West Constituency
WDM-K

Hon. Catherine Waruguru, MP
MP for Laikipia County
Jubilee Party

Hon. James Mwangi, MP
MP for Tetu Constituency
Jubilee Party

Hon. (Prof.) Mohamud Muhamed, MP
MP for Wajir South Constituency
Jubilee Party

Hon. Peter Lochakapong, MP
MP for Sigor Constituency
Jubilee Party

Hon. Qalicha Gufu Waro, MP
MP for Moyale Constituency
Jubilee Party

1.4 COMMITTEE SECRETARIAT

5. The Committee is facilitated by the following Secretariat: -

Ms. Leah W. Mwaura
Senior Clerk Assistant/Head of Secretariat

Ms. Jennifer Ndeto
Principal Legal Counsel 1

Mr. Josephat Motonu
Senior Fiscal Analyst

Ms. Lauren Wesonga
Clerk Assistant II

Mr. Chelang'a Maiyo
Research Officer II

2 CONSIDERATION OF THE AGREEMENT ON THE AVOIDANCE OF DOUBLE TAXATION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF KENYA AND THE GOVERNMENT OF THE REPUBLIC OF MAURITIUS

2.1 INTRODUCTION

6. In exercise of the powers conferred by section 41 of the Income Tax Act (Cap. 470), the Cabinet Secretary for National Treasury and Planning published the Notice specifying the Agreement on the avoidance of double taxation between the Government of the Republic of Kenya and the Government of the Republic of Mauritius vide Legal Notice No. 114 of 2020 on 30th June 2020.
7. The Notice was submitted to the Clerk of the National Assembly on 6th July, 2020 and tabled before the House on 15th July, 2020.

2.2 OBJECT AND PURPOSE OF THE AGREEMENT

8. The Agreement provides a legal framework for the elimination of double taxation of the residents of Kenya and Mauritius with respect to taxes on their income without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance.
9. The primary purpose of tax treaties is mainly 'for the avoidance of double taxation' of income arising from cross-border transactions. Double taxation stifles trade and investment between countries as it penalizes businesses that trade between such countries. Tax treaties also address other issues such as the prevention of tax evasion and non-discrimination. This ensures that businesses do not avoid taxation in the two contracting states. It also provides for the non-discrimination of businesses trading in the two countries.
10. Currently, there is no Agreement on the avoidance of double taxation between Kenya and Mauritius. The Agreement between the two countries was therefore negotiated as a result of the need to have a legal framework for the administration of avoidance of double taxation with respect to taxes on income between the two countries.

2.3 OVERVIEW OF THE AGREEMENT

11. **Article 1:** Provides that the Agreement shall apply to persons who are residents of one or both of the contracting states.
12. **Article 2:** Provides the scope of the taxes to be covered by the Agreement.
13. **Article 3:** Provides the general definitions of the terms used in the Agreement.
14. **Article 4:** Provides the meaning of the term "resident of a contracting state". It makes provisions regarding a resident for the purpose of assigning taxation rights between the two contracting states and elaborates on the consideration of what determines the residence of persons in contracting states such as residence, domicile, incorporation, place of management among other criteria.
15. **Article 5:** Provides the meaning of the term "permanent establishment" which includes a place of management, a branch, an office, a factory, a workshop, warehouse, mine, installation, among others.

The determination of existence of permanent establishment is crucial for determination which of the two countries would be allocated taxation rights.

16. **Article 6:** Provides the meaning of the term “immovable property” and how income derived from immovable property shall be taxed. It makes provision assignment of taxation rights regarding income from immovable property. The taxation rights are granted to the contracting state where the person is a resident. The taxation here covers income derived from agriculture or forestry and covers matters such as direct use or letting of the immovable property.
17. **Article 7:** Business profits are covered under this Article where the consideration is on the existence of a permanent establishment in a contracting state. If an establishment carries out business in both contracting states, the apportionment of profits shall consider permanent establishment, sales in the contracting state of goods of similar kind and other business activities in the other contracting state that is similar in kind.
18. **Article 8:** Provides how profits of an enterprise from the operation or rental of ships or aircraft in international traffic shall be taxed.
19. **Article 9:** Provides how profits accruing to enterprises associated with the main enterprise shall be taxed. The consideration is on enterprises that directly or indirectly participate in the controls or management of another enterprise. This article assigns taxation rights in a manner that recognizes ownership of subsidiary companies in the contracting states.
20. **Article 10:** Provides how dividends shall be taxed. It provides that dividends paid by a company which is a resident of a contracting state, say Kenya to a resident of the other contracting state (Mauritius) may be taxed in that other state (Mauritius). However, the dividends paid by a company which is resident in say, Kenya may also be taxed in Kenya in accordance with the Kenyan tax laws but shall not exceed 8% of the gross amount of dividends.
21. **Article 11:** Provides how interest shall be taxed. The Article stipulates that interest arising in a contracting state and paid to a resident of other contracting state may be taxed in that other state. For instance, interest income paid by a company in Kenya to a company in Mauritius may be taxed in Mauritius. However, this income may also be taxed in Kenya where the interest arose, in accordance to the Kenyan tax laws. But then, this has been limited at 10% of the gross amount of interest.
22. **Article 12:** Provides how royalties shall be taxed. It provides that royalties arising in for instance, Kenya and paid to a resident of Mauritius may be taxed in Mauritius. However, such royalties may also be taxed in Kenya in accordance with the Kenyan tax laws but if the beneficial owner of the royalties is a resident of Mauritius, the tax so charged shall not exceed 12% of the gross amount of the royalties.
23. **Article 12A:** Provides how fees for technical services will be taxed. Fees for technical services arising for instance, Kenya, and paid to a resident of Mauritius may be taxed in Mauritius according to the laws therein. Nonetheless, such fees for technical services may also be taxed in Kenya in accordance with the Kenyan tax laws but will be limited to a maximum of 10% of the gross amount of fees.

24. **Article 13:** Provides how capital gains shall be taxed. It stipulates that gains derived by a resident of say, Kenya from alienation of immovable property that is situated in Mauritius may be taxed in Mauritius. Gains from alienation of movable property forming part of the business property of a permanent establishment may be taxed in the contracting state where the permanent establishment exists, among other considerations such as ships and shares or comparable interest.
25. **Article 14:** Provides how salaries, wages and other similar remuneration derived by a resident of a contracting state in respect of an employment in the other contracting state shall be taxed.
26. **Article 15:** Provides how Director's Fees and Remuneration of Top Level Managerial Officials derived by a resident of a contracting state in his capacity as a member of the board of directors of a company which is a resident of the other contracting state shall be taxed.
27. **Article 16:** Provides how income derived by a resident of a contracting state as an entertainer or as a sportsman, from his personal activities exercised in the contracting state shall be taxed.
28. **Article 17:** Provides how pensions and other similar payments arising in a contracting state and paid in consideration of past employment to a resident of the other contracting state shall be taxed.
29. **Article 18:** Provides how salaries, wages and other similar remuneration other than pension, paid by a contracting state or a political subdivision, local authority or statutory body thereof to an individual in respect of services rendered to that state or subdivision, authority or body shall be taxed.
30. **Article 19:** Provides that a professor or teacher who makes a temporary visit to one of the contracting states for a period not exceeding two years for the purpose of teaching or carrying out research at a university, college, school or other educational institution in that state and who is, or immediately before such a visit was a resident of the other contracting state shall, in respect of remuneration for such teaching or research, be exempt from tax in the first-mentioned state, provided that such remuneration is derived by him from outside that state.
31. **Article 20:** Provides that a student or business apprentice who is present in a contracting state solely for the purpose of his education or training and who is, or immediately before being so present was, a resident of the other contracting state, shall be exempt from tax in the first mentioned state on payments received from outside that first mentioned state for the purposes of his maintenance, education or training.
32. **Article 21:** Provides for how other income (not dealt with in the foregoing Articles of the Agreement) shall be taxed.
33. **Article 22:** Provides the procedure of how each of the two contracting states will ensure that double taxation is eliminated.
34. **Article 23:** Provides for the non-discrimination of the nationals of a contracting state, that such national shall not be subjected in the other contracting state to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other state in the same circumstances may be subjected.

35. **Article 24:** Provides for a Mutual Agreement Procedure which shall be followed where a person considers that the actions of one or both of the contracting states result or will result for him in taxation not in accordance with the provisions of the Agreement.
36. **Article 25:** Provides how the competent authorities of the contracting states shall exchange such information as is foreseeably relevant for carrying out the provisions of the Agreement or to the administration or enforcement of the domestic laws concerning taxes of every kind and description, in so far as the taxation thereunder is not contrary to the Agreement.
37. **Article 26:** Provides that nothing in the Agreement shall affect the fiscal privileges of members of diplomatic missions or consular posts under the general rules of international law or under the provisions of special agreements.
38. **Article 27:** Provides for the kind of assistance that the contracting states shall lend to each other in the collection of revenue claims.
39. **Article 27A:** Provides how benefits under the Agreement will be treated.
40. **Article 28:** Provides for the procedures to be followed by either of the contracting states in terminating the agreement.
41. **Article 29:** Provides for the procedure to be followed by either of the contracting states in terminating the Agreement

3 STAKEHOLDER SUBMISSIONS ON THE AGREEMENT

42. Following the request for submission of memoranda on the Agreement for the avoidance of double taxation between the Government of the Republic of Kenya and the Government of the Republic of Mauritius on the print media on 25th September, 2020, the Committee received memoranda from the following stakeholders: -

- i. The National Treasury and Planning
- ii. The Tax Justice Network Africa; and
- iii. Mr. Paul Waga

43. The stakeholders submitted as follows:-

3.1 THE NATIONAL TREASURY AND PLANNING

In a meeting held jointly with the National Treasury and the Office of the Attorney General on 3rd November, 2020. The Cabinet Secretary for National Treasury and Planning, Hon. (Amb.) Ukur Yatani was represented by the Chief Administrative Secretary and other Senior Ministry Officials. They submitted that:-

44. The primary purpose of tax treaties is mainly for the avoidance of double taxation of income arising from cross-border transactions. Without the treaties, income earned by traders on transactions carried between two countries will be taxed in both countries. Despite the growing number of cross-border transactions between Kenya and Mauritius, there is no Agreement on the Avoidance of Double Taxation between the two countries. The Agreement between the two countries was therefore negotiated as a result of the need to have a legal framework for use by revenue authorities of the two countries in the administration of avoidance of double taxation with respect to taxes on income.

45. The initial DTA between Kenya and Mauritius was signed on 7th May, 2012 but could not be ratified because the Tax Justice Network Africa filed a petition in court on 3rd October, 2014 challenging the legality of the DTA. The court made a ruling on 15th March, 2019 nullifying the DTA on the premise that due process of ratifying the Agreement was not followed.

46. The DTA was re-signed on 10th April, 2019 during H.E. the President's State visit to Mauritius taking into cognizance the court ruling in Kenya and agreed that the Agreement be renegotiated within a period of six months to address the areas of concern. A meeting to negotiate the DTA was held between the respective delegations of Kenya and Mauritius in the National Treasury from 10th to 12th September, 2019.

47. The negotiation team from Kenya comprised of key stakeholders namely, the National Treasury, Ministry of Foreign Affairs, Kenya Revenue Authority and Office of the Attorney General. During negotiations, the two countries reviewed the DTA and developed a Protocol to amend specific Articles of the Agreement.

48. Some of the areas that were addressed was that the Preamble was expounded to clearly communicate the intention of the DTA to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance including through *treaty-shopping arrangements*. In addition, Article 1 on *Personal Scope* was beefed up to enhance clarity of the scope/circumstances under which the residents of the two countries will be taxed.

49. The taxation rate for Dividends under Article 10 on *Dividends* was reviewed upwards from 5 percent to 8 percent. Equally, the taxation for royalties under Article 12 on *Royalties* was reviewed upwards from 10 percent to 12 percent. The amendment also introduced the Article on *Technical Fees* which had been initially omitted. The introduction of the Article was critical to Kenya to enable it impose withholding tax on payments for managerial, technical and consultancy services offered by residents of Mauritius.
50. The teams also agreed on a more comprehensive term on *Permanent Establishment* (PE) in the sense of defining what does and what does not constitute PE. This helped to widen the scope of the PE that can be taxed. Finally, there was the introduction of a provision to ensure that there is no treaty abuse, to prevent base erosion and profit shifting, which are new developments in the DTA arena.
51. In order to carry out Public Participation, the National Treasury submitted both the DTA signed on 10th April, 2019 and the Protocol signed on 16th October, 2019 to the Office of the Attorney General to facilitate public participation. The Attorney General published the Legal Notice on 30th June, 2020 as Legal Notice No.114 of 2020.
52. Pursuant to Section 11 (1) the National Treasury prepared and submitted an Explanatory Memorandum on the Legal Notice No.114 on the Kenya – Mauritius DTA and the said Legal Notice to the Clerk of the National Assembly on 6th July, 2020 for consideration by the National Assembly.
53. Upon ratification, the DTA is expected to foster economic benefits to the two countries, including enhanced investment by the residents of the two countries, removing or reducing double taxation on investment and removing tax discrimination on investors. It is also expected to foster deeper diplomatic and political ties between Kenya and Mauritius.

3.2 TAX JUSTICE NETWORK AFRICA

54. In a meeting held with the Tax Justice Network Africa on 3rd November, 2020, the Executive Director, Mr. Alvin Mosiomi submitted that the Agreement poses the following risks: foreign companies are likely to abuse the treaty by using the loopholes to avoid paying taxes; large swathers of emerging industries especially in the service sector are likely to be left out of the Agreement; slight modifications in the treaty discourages employment creation in Kenya; exemptions will likely lead to a major loss of revenue to Kenya; and the treaty will encourage active tax avoidance particularly in digitalised services. They proposed the following amendments to the Agreement:-
55. Amend sub-articles 5(3)(a) and 5(3)(b) by replacing ‘twelve months’ with ‘three months’ and including the following Force of Attraction article, ‘*The profits of an enterprise of a contracting shall be taxable only in that state unless the enterprise carries on business in the other contracting state through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other state but only so much of them as attributable to: (a) that permanent establishment; (b) sales in that other state of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other state of the same or similar kind as those effected through that permanent establishment.*’.
56. Amend Article 3 by including the definition of the term ‘*fees for technical services*’ to mean ‘*any payment in consideration for any service of a managerial, technical or consultancy nature unless the payment is made: (a) to an employee of the person making the payment; (b) for teaching in an educational institution or for teaching by an education institution; or by an individual for services for the personal use of an individual means...and that domestic law will prevail where there is an ambiguity*’.

on the treatment of taxation on these fees. (d) the said services must involve the application by the service provider of specialised knowledge, skill or expertise on behalf of a client or the transfer of knowledge, skill or expertise to the client’.

57. Include a definition of ‘royalties’ in Article 12 as follows, ‘payment of any kind received as a consideration for the use of or the right to use, any copyright (including the copyright of literary, artistic, scientific work, payment of any kind in respect of motion picture films and works on film, videotape or other means of reproduction for use in connection with television, broadcasts or cinematograph films, motion pictures or movies), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience’.
58. Include the following sub-articles in Article 13 on Capital Gains: ‘(5) Gains derived by a resident of a contracting state from the alienation of shares or comparable interests such as interests in a partnership or trust, may be taxed in the other contracting state if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 percent of their value directly or indirectly from immovable property, as defined in the Article on Income from Immovable Property, situated in that other state; and (6) gains, other than those to which the preceding paragraph applies, derived by a resident of a contracting state from the alienation of shares of a company, or comparable interests, such as interests in a partnership or trust, which is a resident of the other contracting state, may be taxed in that other state if the alienator, at any time during the 365 days preceding such alienation held directly or indirectly at least – percentage (the percentage is to be established through bilateral negotiations) of the capital of that company or entity’.
59. Including the following sub-article in Article 21 relating to Other Income as follows: ‘Notwithstanding the provisions of the preceding paragraphs, items of income of a resident of a contracting state not dealt with in the foregoing Articles of this Convention and arising in the other contracting state may also be taxed in that other state’.

3.3 MR. PAUL WAGA

In his submission, Mr. Paul Waga stated that:-

60. Article 11 of the Agreement limits withholding of interest at source at 10% which is very different to the current Kenyan rate which is 15% thereby adversely affecting the tax base thus undermining the principles of sustainable development.
61. Article 12 of the Agreement limits the withholding of royalties at 10% at royalties which is different from the Kenyan domestic rate which is at 20% thereby significantly reducing the tax to be collected by KRA and opening up loopholes for exploitation. It may also encourage round tripping among citizens of the two countries.
62. Article 20 of the Agreement reserves all taxation of other income not dealt with in specific Articles to the resident state effectively reducing withholding tax to 0% on services, management fees, insurance commission and others. This is different in Kenya where withholding tax rates on the same stands at 20% thus opening room for potential loss of tax revenue thereby breaching the principle of good governance, integrity and accountability.

63. He was in support of the Agreement if the above amendments are made because it is important in making a good business relation between Kenya and Mauritius. It is important to come up with a proper Agreement to ensure that both countries will not suffer tax losses.

4 COMMITTEES' FINDINGS

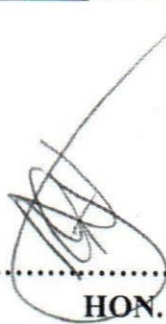
Having examined the Agreement on the avoidance of double taxation between the Government of the Republic of Kenya and the Government of the Republic of Mauritius, the Committee observed that:-

64. The Notice was published in the gazette vide Legal Notice No. 114 of 2020 on 30th June, 2020, submitted to the Clerk of the National Assembly on 7th July, 2020 and laid on the table of the House on 15th July, 2020 being within the requisite statutory timelines under section 11(1) of the Statutory Instruments Act, 2013.
65. The Notice was submitted pursuant to section 41 of the Income Tax Act and the Statutory Instruments Act, 2013. The Committee's role was either to approve or annul hence any amendments were not permissible.
66. In preparation of the Agreement, consultations were held with key stakeholders and the public. Consultative meetings were convened with the Kenya Revenue Authority, Ministry of Foreign Affairs and Office of the Attorney General. A public notice was also issued and uploaded on the National Treasury and Planning website soliciting for views of the public on 18th May, 2020.
67. The regulation making authority submitted a Regulatory Impact Statement as required by Sections 6, 7, and 8 of the Statutory Instruments Act, 2013.
68. The Notice fully meets the relevant considerations referred to in section 13 of the Statutory Instruments Act, 2013.
69. The Committee could not make any amendments to the Agreement because it was submitted under the Statutory Instruments Act, 2013 and therefore the Committee recommends that the law be amended so that future Double Taxation Agreements be considered under the Treaty Making and Ratification Act (No. 45 of 2012)

5 COMMITTEE RECOMMENDATION

70. Having examined the Agreement for the Avoidance of Double Taxation between the Government of the Republic of Kenya and the Government of the Republic of Mauritius against the Constitution, the Interpretations and General Provisions Act (Cap. 2), the Income Tax Act (Cap. 470) and the Statutory Instruments Act (No. 23 of 2013), **the Committee recommends that the House approves the Notice as published.**

SIGNED.....



DATE.....

1st December 2020

**HON. GLADYS WANGA, CBS, MP
CHAIRPERSON**

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING
ADOPTION SCHEDULE FOR THE REPORT ON THE CONSIDERATION OF THE AGREEMENT FOR
AVOIDANCE OF DOUBLE TAXATION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF
KENYA AND THE GOVERNMENT OF THE REPUBLIC OF MAURITIUS

DATE: 30TH NOVEMBER, 2020

NAME	SIGNATURE
1. HON. GLADYS WANGA, CBS, MP – CHAIRPERSON	
2. HON. ISAAC W. NDIRANGU, MP – VICE-CHAIRPERSON	
3. HON. JIMMY N. O. ANGWENYI, MGH, MP	
4. HON. CHRISTOPHER OMULELE, MP	Virtual
5. HON. SHAKEEL SHABBIR AHMED, CBS, MP	Virtual
6. HON. DANIEL E. NANOK, MP	
7. HON. (DR.) CHRISTINE OMBAKA, MP	
8. HON. ANDREW A. OKUOME, MP	
9. HON. DAVID M. MBONI, MP	
10. HON. FRANCIS KURIA KIMANI, MP	
11. HON. JOSEPH M. OYULA, MP	
12. HON. JOSHUA KANDIE, MP	
13. HON. STANLEY M. MUTHAMA, MP	
14. HON. EDITH NYENZE, MP	
15. HON. CATHERINE WARUGURU, MP	
16. HON. JAMES GICHUHI MWANGI, MP	
17. HON. (PROF.) MOHAMUD SHEIKH MOHAMED, MP	
18. HON. PETER LOCHAKAPONG, MP	
19. HON. QALICHA GUFU WARIO, MP	

MINUTES OF THE 60TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD IN THE COMMITTEE ROOM ON 4TH FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS ON MONDAY, 30TH NOVEMBER, 2020 AT 02.30 PM

PRESENT

1. Hon. Gladys Wanga, MP - **Chairperson**
2. Hon. Isaac W. Ndirangu, MP - **Vice Chairperson**
3. Hon. Jimmy O. Angwenyi, MGH, MP
4. Hon. Christopher Omulele, MP
5. Hon. Shakeel Shabbir Ahmed, CBS, MP
6. Hon. David M. Mboni, MP
7. Hon. Joshua C. Kandie, MP
8. Hon. Edith Nyenze, MP
9. Hon. Catherine Waruguru, MP
10. Hon. James Gichuhi Mwangi, MP
11. Hon. Qalicha Gufu Wario, MP

ABSENT WITH APOLOGY

1. Hon. Daniel E. Nanok, MP
2. Hon. (Dr.) Christine Ombaka, MP
3. Hon. Andrew A. Okuome, MP
4. Hon. Francis K. Kimani, MP
5. Hon. Stanley M. Muthama, MP
6. Hon. Peter Lochakapong, MP
7. Hon. (Prof.) Mohamud Sheikh Mohamed, MP

INATTENDANCE

SECRETARIAT

1. Ms. Leah Mwaura - Senior Clerk Assistant/Head of Secretariat
2. Ms. Lauren Wesonga - Clerk Assistant II
3. Mr. John Njoro - Serjeant-At-Arms
4. Ms. Euridice Nzioka - Audio Officer

AGENDA

1. Prayers
2. Communication from the Chairperson
3. Confirmation of Minutes
4. Matters Arising
5. **Meeting to consider and adopt the Report on the consideration of the Agreement on the Avoidance of Double Taxation between the Government of the Republic of Kenya and the Government of the Republic of Mauritius.**
6. Adjournment/Date of the next meeting

MIN.NO.NA/F&NP/2020/287: COMMUNICATION FROM CHAIRPERSON

The meeting was called to order at 02.57 p.m. and a prayer was said. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

MIN.NO.NA/F&NP/2020/288: CONFIRMATION OF MINUTES

Agenda deferred

MIN.NO.NA/F&NP/2020/289: CONSIDERATION AND ADOPTION OF THE REPORT ON THE AGREEMENT FOR THE AVOIDANCE OF DOUBLE TAXATION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF KENYA AND THE GOVERNMENT OF THE REPUBLIC OF MAURITIUS

In considering the report, the Committee noted that:-

1. The law should be amended so that Double Taxation Agreements are considered under the Treaty Making and Ratification Act (No. 45 of 2012) in order to allow the Committee to make amendments to the Agreements if need be as opposed to the current scenario where it was submitted under the Statutory Act, 2013 where the Committee can only either approve or annul the Agreement in its entirety.
2. When submitting Agreements for consideration by Parliament, the parent Ministry should be providing data on the matter being addressed by the Agreement so that it can guide Members in making their decision on the said Agreement.

The Committee adopted the report having been proposed and seconded by Hon. Isaac Ndirangu, MP and Hon. Catherine Waruguru, MP respectively. The Committee agreed on the following findings and recommendations:-

COMMITTEES' OBSERVATIONS

Having examined the Agreement on the avoidance of double taxation between the Government of the Republic of Kenya and the Government of the Republic of Mauritius, the Committee observed that:-

1. The Notice was published in the gazette vide Legal Notice No. 114 of 2020 on 30th June, 2020, submitted to the Clerk of the National Assembly on 7th July, 2020 and laid on the table of the House on 15th July, 2020 being within the requisite statutory timelines under section 11(1) of the Statutory Instruments Act, 2013.
2. The Notice was submitted pursuant to section 41 of the Income Tax Act and the Statutory Instruments Act, 2013. The Committee's role was either to approve or annul hence any amendments were not permissible.
3. In preparation of the Agreement, consultations were held with key stakeholders and the public. Consultative meetings were convened with the Kenya Revenue Authority, Ministry of Foreign Affairs and Office of the Attorney General. A public notice was also issued and uploaded on the National Treasury and Planning website soliciting for views of the public on 18th May, 2020.
4. The regulation making authority submitted a Regulatory Impact Statement as required by Sections 6, 7, and 8 of the Statutory Instruments Act, 2013.
5. The Notice fully meets the relevant considerations referred to in section 13 of the Statutory Instruments Act, 2013.
6. The Committee could not make any amendments to the Agreement because it was submitted under the Statutory Instruments Act, 2013 and therefore the Committee recommends that the law be amended so that future Double Taxation Agreements be considered under the Treaty Making and Ratification Act (No. 45 of 2012)

COMMITTEE RECOMMENDATION

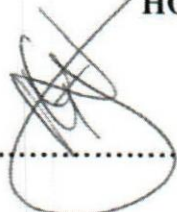
Having examined the Agreement for the Avoidance of Double Taxation between the Government of the Republic of Kenya and the Government of the Republic of Mauritius against the Constitution, the Interpretations and General Provisions Act (Cap. 2), the Income Tax Act (Cap. 470) and the Statutory Instruments Act (No. 23 of 2013), **the Committee recommends that the House approves the Notice as published.**

MIN.NO.NA/F&NP/2020/290: ADJOURNMENT/DATE OF NEXT MEETING

There being no other business to deliberate on, the meeting was adjourned at 03.45 p.m. The next meeting will be held on Tuesday, 1st December, 2020 at 10.00 a.m.

**HON. GLADYS WANGA, CBS, MP
(CHAIRPERSON)**

SIGNED.....DATE.....



1st December 2020

MINUTES OF THE 53RD SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD AT THE MINI CHAMBER, COUNTY HALL ON WEDNESDAY, 3RD NOVEMBER, 2020 AT 9.00 AM

PRESENT

1. Hon. Gladys Wanga, MP - **Chairperson**
2. Hon. Jimmy O. Angwenyi, MGH, MP
3. Hon. (Dr.) Christine Ombaka, MP
4. Hon. Andrew A. Okuome, MP
5. Hon. David M. Mboni, MP
6. Hon. Francis K. Kimani, MP
7. Hon. Joshua C. Kandie, MP
8. Hon. Stanley M. Muthama, MP
9. Hon. Edith Nyenze, MP
10. Hon. James Gichuhi Mwangi, MP
11. Hon. (Prof.) Mohamud Sheikh Mohamed, MP
12. Hon. Qalicha Gufu Wario, MP

ABSENT WITH APOLOGY

1. Hon. Isaac W. Ndirangu, MP - **Vice Chairperson**
2. Hon. Christopher Omulele, MP
3. Hon. Shakeel Shabbir Ahmed, CBS, MP
4. Hon. Daniel E. Nanok, MP
5. Hon. Joseph M. Oyula, MP
6. Hon. Catherine Waruguru, MP
7. Hon. Peter Lochakapong, MP

INATTENDANCE

SECRETARIAT

1. Ms. Leah Mwaura - Senior Clerk Assistant/Head of Secretariat
2. Ms. Jennifer Ndeto - Principal Legal Counsel I
3. Mr. Josephat Motonu - Research Officer II
4. Ms. Euridice Nzioka - Audio Officer

TAX JUSTICE NETWORK AFRICA

1. Mr. Alvin Mosioma - Executive Director TJNA
2. Mr. Leornard Wanyama - Officer TJNA
3. Ms. Evelyn Kavenge - Officer TJNA
4. Ms. Brenda Oloo - Officer TJNA
5. Mr. Kigen Kiplimo - Officer TJNA

NATIONAL TREASURY & KENYA REVENUE AUTHORITY

1. Hon. Nelson Gaichuhie - Chief Administrative Secretary
2. Mr. Musa Kathanje - Director
3. Mr. Joseph Ngugi - Deputy Director
4. Mr. Maurice Oray - Deputy Commissioner
5. Mr. Benard Apind - Economist
6. Mr. Susan Karuri - National Treasury
7. Ms. Wanjiru Kiaire - KRA
8. Ms. Isabella Kogei - Parliamentary Liaison Officer

9. Mr. Moses Muia - Deputy Commissioner Logistics
 10. Mr. Julian Kondo - KRA

STATE DEPARTMENT FOR PUBLIC WORKS

1. Major Gen. (Rtd) Dr. Kihalang'wa - Principal Secretary
 2. Mr. Linus Kibisu - Deputy Chief Architect

KENYA NATIONAL HIGHWAYS AUTHORITY

1. Eng. Peter M. Mundinia - Director General
 2. Mr. Paul Omondi - Deputy Director

ATTORNEY GENERAL & DEPARTMENT OF JUSTICE

1. Mr. Samson Maundu - State Counsel
 2. Ms. Christine K Omwakwe - State Counsel

AGENDA

1. Prayers
2. Communication from the Chairperson
3. Confirmation of Minutes
4. Matters Arising
5. **Meeting with the Tax Justice Network Africa to consider their memorandum on the Agreement between the Republic of Kenya and the Republic of Mauritius on the Avoidance of Double Taxation**
6. **Meeting with the National Treasury and Planning; the State Department for Public Works; the State Department for Infrastructure; and the Kenya National Highways Authority to discuss the cause for the delay in the handover of the Malaba One Stop Border Post to the Kenya Revenue Authority (User Department)**
7. **Meeting with the National Treasury and the Attorney General and Department to discuss the Agreement between the Republic of Kenya and the Republic of Mauritius on the Avoidance of Double Taxation**
8. Adjournment/Date of the next meeting

MIN.NO.NA/F&NP/2020/249: COMMUNICATION FROM CHAIRPERSON

The meeting was called to order at 9.30 a.m. and a prayer was said. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

MIN.NO.NA/F&NP/2020/250: CONFIRMATION OF MINUTES

Agenda deferred

MIN.NO.NA/F&NP/2020/251: MEETING WITH THE TAX JUSTICE NETWORK AFRICA TO CONSIDER THEIR MEMORANDUM ON THE AGREEMENT BETWEEN THE REPUBLIC OF KENYA AND THE REPUBLIC OF MAURITIUS ON THE AVOIDANCE OF DOUBLE TAXATION

The Chairperson invited the Executive Director Tax Justice Network Africa (TJNA) to make the presentation on the Agreement between the Republic of Kenya and the Republic of Mauritius on the Avoidance of Double Taxation. The Executive Director presented as follows:-

- (i) The TJNA moved to Court challenging the legality of the Kenya Mauritius Double taxation Avoidance Agreement to Ratification citing that the Agreement was not made pursuant to the Treaty making and Ratification Act 2012 Contravened Article 10 (a) (c) and (d) and 201 of the Constitution of Kenya;
- (ii) That the Court declared the said Agreement null and void for having not adhered to the Statutory Instruments Act, 2013 which requires the involvement of Parliament in the ratification process;
- (iii) The TJNA had also moved to Court challenging the constitutionality of nine other Double Taxation Agreements (DTAs) that Kenya has signed;
- (iv) That Mauritius is globally ranked no.14 according to the Corporate Tax Haven Index, and No.51 in terms of the Financial Secrecy Index and is noted as being on the EU non-cooperative tax jurisdictions watch list. It is therefore important to take precautions as Kenya may be subjected to loss of revenue;
- (v) Some Kenyan companies and other companies intending to do business in Kenya, have moved to Mauritius and set business there as permanent establishment; taking advantage of the DTAs. This has provided an unfair completion ground for the Kenya SMEs who are unable to compete favorably with these companies who are in the same business. Examples include companies in the digital space such as Uber, Netflix etc.
- (vi) It was important for the Kenya Revenue Authority to provide data on the Economic benefits of the DTAs to establish whether there is any tax loss;
- (vii) That the TJNA was opposed to this Kenya Mauritius Double taxation Avoidance Agreement as it was bound to have several challenges including lack of tax neutrality where different parties in similar circumstances ought to be taxed using the same rates on similar incomes. The principle of neutrality emphasizes that generally the tax system should strive to be neutral so that decisions are made on their economic merits and not for tax reasons;
- (viii) Most DTAs are developed based on the United Nations Model Tax Convention (UN Model), the Organization for Economic Co-operation and Development Model Tax Convention (OECD Model) and the recently developed Africa Tax Administration Forum Model (ATAF Model) which is a mix of the former two. However, the TJNA recommended that the DTAs should be modelled according to the ATAF Model which is more favorable to developing countries;
- (ix) TJNA recommended that there was need to develop a policy on the DTA which will give guidelines on the minimum requirements to ensure all treaties signed meet the quality threshold;

Way forward

The Committee having listened to the presentation directed the TJNA to submit the reports that indicted Mauritius as a possible tax haven and would be an avenue for tax avoidance.

MIN.NO.NA/F&NP/2020/252: MEETING TO DISCUSS THE CAUSE FOR THE DELAY IN THE HANDOVER OF THE MALABA ONE STOP BORDER POST TO THE KENYA REVENUE AUTHORITY (USER DEPARTMENT)

The meeting had been convened as follow up meeting to discuss the cause for the delay of handover of the Malaba OSBP to the Kenya Revenue Authority. The teams present included, the National Treasury and Planning; the State Department for Public Works; the State Department for Infrastructure; and the Kenya National Highways Authority.

The Chairperson invited Major Gen. (Rtd) Dr. Kihalang'wa, the PS State Department for Public Works to present the updated report having been requested to do provide an updated report as the previous didn't provide the facts as they were on the ground. The PS informed the Committee as follows:-

- (i) The contract for the Construction of the Malaba OSBP was awarded to *M/S Vaghiyani Enterprises Limited* on 26th April, 2012 at a contract sum of KSh. 533,159,168 for a contract period of fifteen (15) months. The contract was revised to KSh.622,860,329;
- (ii) Due to challenges relating to budgetary provision in the financial year 2016/17 there was a delay in the release of exchequer and prolonged delay of contractor's payment;
- (iii) The construction of the project was terminated on 17th October, 2018 as the retention of the contractor on the site would have attracted cost for the idle time;
- (iv) The project having started in 2012, the member states could not immediately agree on a common design and that is why the World Bank credit facility expired in 2018. TMEA came in to finance the gap of KSh.80 million while GoK component was KSh. 15 million;
- (v) Efforts have been put in place to ensure that the project achieves its intended objectives of simplifying processes at the border and facilitating trade. The Project Implementation Team have explored various intervention measures to ensure the project is completed, these are:-
 - a. There has been various requests for sufficient budget provisions through the Ministry of Transport Infrastructure, Housing and Urban Development.
 - b. The Project Implementation Team approached the Ugandan Government through the Ministry of East African Community with a view of varying their existing Ugandan contracts to undertake the works on the Kenyan side. TMEA was to make payments under this agreement. However, this did not succeed as the outstanding works on the Kenyan side exceeded the threshold for variation of the Ugandan contracts.
 - c. There has been spot maintenance intervention works within the OSBP, implemented by KeNHA's Maintenance Department.
 - d. Trade Mark East Africa have committed Kshs.325 million towards the completion of the outstanding works at the OSBP while GoK will cater for KSh. 25 million. The Draft Financing Agreement had been shared with the Attorney General for clearance and was at the final stages in the execution process.
 - e. TMEA and KeNHA have procured a design review Consultant, M/s Conte Designs to package the outstanding works at the OSBP for tender. The Consultant is on site and the design review is at 75% progress.
- (vi) The second phase of the project will have TMEA carry out a study on the possibility of installing a water treatment plant that will be used to purify the water from river Malaba;
- (vii) The KENHA surveyors were onsite exploring the possibility of establishing a truck parking facility

Way forward:

The National Treasury confirmed that the Draft Financing Agreement was to be signed that day which will give a go ahead for the contractor to move to site with an expected completion date being March 2022.

MIN.NO.NA/F&NP/2020/253: MEETING WITH THE NATIONAL TREASURY AND THE ATTORNEY GENERAL TO DISCUSS THE AGREEMENT BETWEEN THE REPUBLIC OF KENYA AND THE REPUBLIC OF MAURITIUS ON

The National Treasury and the Office of the Attorney General represented by the Chief Administrative Secretary and other Senior Ministry Officials submitted that:-

- (i) The primary purpose of tax treaties is mainly for the avoidance of double taxation of income arising from cross-border transactions. Without the treaties, income earned by traders on transactions carried between two countries will be taxed in both countries. Despite the growing number of cross-border transactions between Kenya and Mauritius, there is no Agreement on the Avoidance of Double Taxation between the two countries. The Agreement between the two countries was therefore negotiated as a result of the need to have a legal framework for use by revenue authorities of the two countries in the administration of avoidance of double taxation with respect to taxes on income;
- (ii) The initial DTA between Kenya and Mauritius was signed on 7th May, 2012 but could not be ratified because the Tax Justice Network Africa filed a petition in court on 3rd October, 2014 challenging the legality of the DTA. The court made a ruling on 15th March, 2019 nullifying the DTA on the premise that due process of ratifying the Agreement was not followed;
- (iii) The DTA was re-signed on 10th April, 2019 during H.E. the President's State visit to Mauritius taking into cognizance the court ruling in Kenya and agreed that the Agreement be renegotiated within a period of six months to address the areas of concern. A meeting to negotiate the DTA was held between the respective delegations of Kenya and Mauritius in the National Treasury from 10th to 12th September, 2019;
- (iv) The negotiation team from Kenya comprised of key stakeholders namely, the National Treasury, Ministry of Foreign Affairs, Kenya Revenue Authority and Office of the Attorney General. During negotiations, the two countries reviewed the DTA and developed a Protocol to amend specific Articles of the Agreement;
- (v) Some of the areas that were addressed was that the Preamble was expounded to clearly communicate the intention of the DTA to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance including through *treaty-shopping arrangements*. In addition, Article 1 on *Personal Scope* was beefed up to enhance clarity of the scope/circumstances under which the residents of the two countries will be taxed;
- (vi) The taxation rate for Dividends under Article 10 on *Dividends* was reviewed upwards from 5 percent to 8 percent. Equally, the taxation for royalties under Article 12 on *Royalties* was reviewed upwards from 10 percent to 12 percent. The amendment also introduced the Article on *Technical Fees* which had been initially omitted. The introduction of the Article was critical to Kenya to enable it impose withholding tax on payments for managerial, technical and consultancy services offered by residents of Mauritius;
- (vii) The teams also agreed on a more comprehensive term on *Permanent Establishment (PE)* in the sense of defining what does and what does not constitute PE. This helped to widen the scope of the PE that can be taxed. Finally, there was the introduction of a provision to ensure that there is no treaty abuse, to prevent base erosion and profit shifting, which are new developments in the DTA arena;
- (viii) In order to carry out Public Participation, the National Treasury submitted both the DTA signed on 10th April, 2019 and the Protocol signed on 16th October, 2019 to the Office of the Attorney General to facilitate public participation. The Attorney General published the Legal Notice on 30th June, 2020 as Legal Notice No.114 of 2020;

- (ix) Pursuant to Section 11 (1) the National Treasury prepared and submitted an Explanatory Memorandum on the Legal Notice No.114 on the Kenya – Mauritius DTA and the said Legal Notice to the Clerk of the National Assembly on 6th July, 2020 for consideration by the National Assembly; and
- (x) Upon ratification, the DTA is expected to foster economic benefits to the two countries, including enhanced investment by the residents of the two countries, removing or reducing double taxation on investment and removing tax discrimination on investors. It is also expected to foster deeper diplomatic and political ties between Kenya and Mauritius.

Way forward

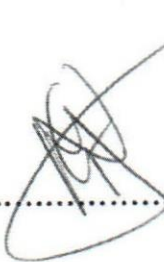
Having received the representations from the National Treasury and the Tax Justice Network-Africa, the Committee resolved to expeditiously consider the Legal Notice No. 114 of 2020 in line with the considerations stipulated under Section 13 of the Statutory Instruments Act, 2013 and Section 41 of the Income Tax Act, Cap 490. The Committee noted that there were only two policy options available i.e. the Committee could either approve or annul the Legal Notice.

MIN.NO.NA/F&NP/2020/254: ADJOURNMENT/DATE OF NEXT MEETING

There being no other business to deliberate on, the meeting was adjourned at 12:21 p.m. The next meeting will be held on notice.

**HON. GLADYS WANGA, CBS, MP
(CHAIRPERSON)**

SIGNED.....



.....DATE.....

1st December 2020