Tax Alert

Kenya ratifies Income Tax Treaties with Korea and the United Arab Emirates

Kenya has taken significant steps towards expanding its double tax treaty network with the ratification of tax treaties with the Republic of Korea and the United Arab Emirates vide Legal Notices 217 and 218 of 2016 respectively.

What next?

Kenya and each of its treaty partners must notify each other in writing of the completion of the procedures required under domestic law for the tax treaties to enter into force.

Once the formal notification process has been completed, the treaties will only apply from the 1st of January following the year in which the notification occurs. Therefore, the earliest date that the treaties may be applied is 1 January 2018 although whether this actually happens remains to be seen.

Key features of the treaties

Generally, both treaties are based on the OECD Model Tax Convention framework with some modifications.

The salient features of the tax treaties are discussed below:

Issue	Kenya – Korea tax treaty	Kenya – United Arab Emirates tax treaty
Permanent Establishments Timeline for creation of Building site, Installation and Construction PE's	12 months	6 months
Creation of Service PE's	None	Yes. Where an enterprise provides services through its employees or other personnel in a contracting state for a period of more than 4 months within a 12 month period
Income from Hydrocarbons	No treaty provisions	Treaty expressly provides that domestic tax laws & regulations will apply
Dividends	To a beneficial owner with direct shareholding ≥25% 8% Any other instances 10%	5%
Interest	12%	10%
Royalties	10%	10%
Capital Gains	Source jurisdictions may tax gains arising from the alienation of shares that derive >50% of their value directly or indirectly from immovable property located in their jurisdictions.	No treaty provisions on indirect disposals of immovable property.

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Issue	Kenya – Korea tax treaty	Kenya – United Arab Emirates tax treaty
Limitation on Benefits ('LoB')	The treaty contains an LoB Article which provides that the treaty provisions on Dividends, Interest, Royalties and Capital Gains will not apply in instances where: i. The recipient is controlled directly or indirectly by persons who are not residents in that contracting state; and ii. The main purpose or one of the main purposes of the transaction is to take advantage of treaty benefits. Furthermore, the tax treaty expressly states that any anti-avoidance/ evasion measures contained in domestic legislation will continue to apply.	No LoB provisions within the tax treaty.

Key Facts:

Ratification of the two additional treaties is a positive step towards eliminating double taxation between Kenya and Korea and Kenya and the UAE. However, the challenges currently being faced by taxpayers due to the LoB provisions contained in Kenya's domestic legislation are also likely to greatly restrict access to these new treaties.

In the long-run, it will be necessary to address this and other issues arising in order for taxpayers to fully take advantage of Kenya's tax treaty network.

Look out for more information on this and other developments in our March 2017 Newsletter.

For further information with respect to this alert, please write to your usual contact at HH&M or contact the following:

The LoB provisions contained in the Kenyan Income Tax Act effectively require that at least 50% of the ownership of an entity which is tax resident in a treaty partner state has to be held by individuals who are also tax resident in that same state.

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