KAPLAN&STRATTON NEWSLETTER

High Court Decision on Withholding Tax for Foreign Professional Fees: Kenya-France Double Taxation Agreement (DTA)

Kaplan & Stratton is pleased to announce that we successfully represented Total Kenya Limited in *Commissioner of Domestic Taxes v. Total Kenya Limited* (2024), *Income Tax Appeal E044 of 2021.* On 4 July 2024, the High Court of Kenya rendered its judgment, finding that Withholding Tax (**WHT**) does not apply to management or professional fees paid by Total Kenya to its parent company, Total Outre Mer (TOM). This decision follows an appeal by the Commissioner of Domestic Taxes, Kenya Revenue Authority (KRA), challenging the prior ruling on the matter rendered by the Tax Appeals Tribunal (**Tribunal**).

Facts

Total Kenya, a key player in East Africa's oil and gas sector and part of the global Total Group is a wholly owned subsidiary of TOM, an entity incorporated and resident in France. A dispute arose between the KRA and Total Kenya in relation to the fees paid by Total Kenya to TOM for professional services provided by TOM.

Following an audit of Total Kenya's tax affairs from 2011 to 2015, KRA assessed additional tax on the basis that Total Kenya did not account for WHT on the management and professional fees paid to TOM. KRA opined that these payments constituted "other income" under Article 21(4) of the Kenya - France Double Taxation Agreement, 2009 (DTA), which provides that income of a resident of a contracting state, not dealt with in the DTA may be taxed in the country where the income arose. In view of this, KRA sought to subject the fees to WHT pursuant to section 35(1) (a) of the Income Tax Act.

Total Kenya relied on Article 7 of the DTA which provides that in the absence of TOM's permanent establishment in Kenya, then TOM's income is subject to tax in the country where TOM is resident, which is France. The Tribunal dismissed KRA's arguments and held that TOM's income was only taxable in France, leading KRA to appeal that decision to the High Court.

High Court Analysis

The High Court noted that:

i. Under Article 7(1) of the DTA, profits of an enterprise from a contracting state are taxable only in that state (in this case, France), unless the enterprise has a permanent establishment in the other contracting state (Kenya).

ii. The Court observed that income from management and professional fees constitutes business profits, which is only taxable in the country of residence, in the absence of a permanent establishment in the other state.

iii. The Court rejected KRA's reliance on Article 21(4) of the DTA to justify withholding tax on "other income," noting that this provision pertains to "miscellaneous income" rather than management and professional fees.

iv. A DTA ought to be read and interpreted in a manner that supports its objectives and purpose which includes encouraging cross-border trade, rather than stifling the same. Disputes concerning interpretation of the DTA should be resolved in a manner that promotes dealing with common tax concerns in the field of international judicial double taxation.

The Court therefore upheld the Tribunal's decision and held that in the absence of a permanent establishment in Kenya, Kenya does not have taxing rights over the professional or management fees paid by Total Kenya to TOM.

What this judgment means for you

The judgment has significant implications for businesses engaging in similar cross-border transactions with entities based in Countries which have a DTA with Kenya. We recommend that such entities seek professional advice to ensure that payments made to entities resident outside Kenya comply with the DTA.

Businesses should leverage the decision in this judgment to avoid potential instances of double taxation on management and professional fees paid to entities resident in countries with DTA's that have similar provisions to the Kenya - France DTA.

Should you have any questions regarding this Judgment or its implications, please contact our team members below:

Nazima Malik, Partner

NMalik@kapstrat.com

Noreen Wanyoike, Senior Associate

NWanyoike@kapstrat.com