THE DOUBLE TAXATION ARCHITECTURE CONCEPTUALISED UNDER SECTION 41 (5) OF THE INCOME TAX ACT; CHAPTER 470, LAWS OF KENYA

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Abstract
This article analyses section 41(5) of the Kenyan Income Tax Act with a specific focus on the different categories of tax reliefs that are availed. I argue that, although the section provides for the methods of tax relief, they are not used. I also argue that the method of relief used is as provided for in the bilateral tax treaties negotiated in the country. There is thus, a disconnect between the law as is and the law as practiced within the country. Further, the bilateral treaties with Kenya that refer to taxation, are largely based on external models which may not favour developing countries. As a result, a binary system is created, and instances of double taxation continue to occur, and this affects taxpayers, investors and Foreign Direct Investment (FDI) in the country. This article argues for reform in the law on double taxation; including the methods of relief from double taxation used in Kenya.

***Key words**: Double taxation, Kenya, tax reliefs*

1. INTRODUCTION

Section 41 (5) of the Kenyan Income Tax Act (ITA), Chapter 470, provides for relief from double taxation. The reliefs can be applied in the form of: exemption, exclusion or a reduction. However, such relief is subject to double taxation agreements (DTAs) and some requirements as provided for within the sub-section. The reliefs granted under a DTA are not available to a person, who, for purposes of a DTA is a resident in the other contracting state unless: more than 50% of the underlying ownership of that person is held by an individual or individuals who are residents of that other contracting state, or the resident of the other contracting state is a company listed on the stock exchange in that other contracting state." These requirements are very limiting and unfair to companies as will be discussed in section three. The reliefs as listed under the section 45 (1) are also not applied in Kenya. A taxpayer hoping to be exempted from paying taxes on income earned across border for instance may end up paying taxes again; as the method is not currently in use. Further, there are no domestic regulations in place to articulate or enhance the application of these methods of relief to double taxation. This causes confusion in the law. 'Law as is,' is not followed. This leaves room for external sources to be incorporated as part of domestic law,

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i.e., the DTAs; which in Kenya, have previously been based on the Organisation for Economic Co-operation and Development (OECD) Model Convention that may not favour developing countries. This model bases on the residence principle and as such shift taxing rights from source states to the residence states.

The residence principle arises where a country claims taxes in income based on the residential status of a person deriving that income. This broad definition usually implies mere physical presence in the country for a minimum length of time. This has been widely followed and incorporated in a number of domestic laws and tax treaties (see section 2 of the ITA for Kenya). Indicators of residence for individuals include: physical presence; the existence of a place of aboard, family and financial ties while for legal persons its, the place of incorporation, location of the head office or place of management as determined in *De Beers Consolidated Mines v Howe (1906) AC 491*. In that case, the De Beers Company was incorporated in South Africa and carried out most of its major trading activities there i.e., diamond minding but its active board of directors implemented its powers in the United Kingdom (the main management functions were in England). When the issue of tax liability arose, the Court in determining the same (per Lord Loreburns) held that, a company exists where its actual business is conducted and where the central management and control duly abides.

Thus, the concept of residence is crucial though some tax scholars have argued that when it comes to corporations, their residence is difficult to establish and is meaningless because residence based on the place of incorporation is formalistic and subject to the control of the taxpayer while residence based on management and control can also be manipulated (Avi-Yonah 2007). The concept of source on the other hand, relates to income derived from another country, usually not the country of residence. The rules for determining source vary but source taxation is generally applied where the income has a relevant connection with a country. For example, dividend or interest, income from capital invested in a jurisdiction, wages said to employees in respect to work performed in a country all end up being taxed at source.

The findings made here show that the only method of relief from double taxation used in the country is the credit method as provided for under the DTAs; this falls short in terms of the exclusion or reduction methods. DTAs also provide for two methods of relief i.e., exemption and credit methods. Thus, there is no strict adherence to the law, there are no regulations to expound on the reliefs and the dependence on external sources creates a binary system and this may be problematic when it comes to application hence the taxpayer may end up having a higher tax burden from being taxed twice on the same income.

I thus, argue that there is need for clarity in the law; including the removal of the methods of relief that are not used, the exemption method should be used. To this end, I interrogate the architecture conceptualised under section 41 (5), the effectiveness of the reliefs thereunder in handling instances of double taxation and further find out whether the reliefs as set out in the said section are utilised in Kenya. To unpack these issues, an empirical methodology with a mixed research design in the form of qualitative and quantitative methods of data collection is used. Data was collected using open ended questionnaires and oral interviews of key persons within the Kenya Revenue Authority (KRA) and members of the legal fraternity. Further, library research and internet searches were used and these provided the essential information on double taxation although not specific to Kenya.

This article is also written bearing in mind that, the Income Tax Bills, 2018, 2019 are the most recent attempts at revising certain unrealistic provisions within the ITA, Chapter 470 and section 41 is part. As at 2020 however, the Income Tax Bill (National Assembly Bill. No 12 of 2020) stood withdrawn.
From the foregoing, section 1 of this article, introduces the problem, section two discusses the historical development of the law on double taxation and the guiding theory while reflecting on how it can be used to further enhance the law. Section 3 discusses the available reliefs in Kenya and their effectiveness in handling instances of double taxation. Section 4 makes recommendations before concluding.

2. TRACING THE DEVELOPMENT OF THE LAWS ON DOUBLE TAXATION AND THE RELIEFS

Double taxation arises where income earned in one country (the source country) by a citizen or resident of another country, (the residence country) is taxed by both countries. Legally, both countries have legitimate claims to either tax or not to tax the income (Hearson & others, 2016). Although states have the right to establish and to collect taxes, there have been competing interests when it comes to income sourced across borders. As a result, international tax rules had to be developed to resolve these competing claims on the jurisdiction to tax. Thus, to eliminate double taxation on the one hand, most countries began negotiating tax treaties/ DTAs while on the other hand amending their domestic laws to allow for provisions that are aimed at eliminating double taxation. To unpack this, I delve into the history of the development of the law on double taxation (both internationally and domestically) and thereafter use Hart's legal philosophy to contextualise it further.

2.1.History around formulation of double taxation laws

Under this sub-section, I briefly discuss the historical events that led to the formulation of the laws on double taxation.

2.1.1. International development

The laws on double taxation can best be traced to the first bilateral DTA entered into by Prussia and Austria in 1899, to the model tax treaties; which have a long history and more recently the national tax legislations. Beginning with early diplomatic treaties of the nineteenth century; the objective of which, was to ensure that diplomats of one country working in another country would not be discriminated against. After the First World War (WWI), the League of Nations began investigating the problems of juridical double taxation in response to an appeal by the 1920 Brussels International Financial Conference. In 1923, a report on double taxation was prepared by an eminent group of fiscal economists who submitted it to the League's Economic and Financial Commission (Journal of the Royal Statistical Society, (2014) 87 99). That report formed the first draft model of DTA, published in 1928 and it favoured allocation of taxing rights on international transactions to a taxpayer's country of residence. This model was not broad in scope.

The League of Nations then established its Fiscal Committee in 1929 to consider further developments of the model. The Fiscal Committee prepared a Draft multilateral DTA on the allocation of income from industrial and commercial enterprises in 1933 and revised it in 1935, but, the model was never adopted. The Fiscal Committee continued its work over the following decade and it culminated into regional conferences in 1940 and 1943 in Mexico City with representatives of countries in North and South America. The outcome of the conference was a new draft DTA (Mexico draft); its significant feature was its underlying premise that the primary taxing jurisdiction was to be the state of source of income; a position that was advantageous to developing countries. In 1946, it was reviewed in London and became the "London draft." This draft changed the underlying premise back in favour of the state of residence of a taxpayer. The two drafts were followed during the period 1946 to 1955 and over 70 bilateral DTAs were signed by various countries. However, the drafts had several gaps and as a result, they were not unanimously accepted or followed. Nevertheless, the increasing economic interdependence of European countries highlighted the importance of measures for preventing double taxation, and having DTAs with uniform principles, definitions, rules and methods and this became increasingly desirable (McIntyre, Michael J, 2005).

When the United Nations (UN) succeeded the League of Nations (in 1945), this work continued. The United Nations Economic and Social Council (ECOSOC) of the UN Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries was established (Resolution 1273 (XLIII). By 1954 the Commission had failed to take initiative in significantly advancing the work on developing the model DTA. This role was then taken up by the Organisation for European Economic Cooperation (OEEC). The OEEC established a Fiscal Committee in 1956, which worked on a model bilateral DTA and the intention was that it would be widely accepted and help in eliminating existing problems. While undertaking its activities, the OEEC transformed into the Organisation for Economic Co-operation and Development (the OECD) in 1960/1961; now the predominant body driving fiscal discussions and the international development of DTAs. Its Model Convention was first published, in draft form, in 1963; at which time it was converted to a loose-lead format in order to facilitate more frequent revisions. Since then, revisions have been made every few years; 1977, 1992, 1994, 1995, 1997, 2000, 2003, 2008, 2010 and most recently in 2017. It became the model standard for bilateral DTA negotiation between states and was particularly appropriate for DTAs between two or more developed countries. This was not or may have not been appropriate for developing countries. As a result, developing countries devised their own model treaty under the auspices of the UN as the wide spread success of the OECD model in the 1970's provoked their reaction- since the Mexico draft was the only draft where the interests of developing countries were given high prominence (Mclntyre, Micheal J, 2005).

The response was for the UN to develop a model DTA, which reflected developing country interests. Through the Fiscal and Financial branch of the Department of International Economic and Social Affairs of the UN Secretariat, a *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries* was published. This led to the publication of *the United Nations Model Taxation Convention between Developed and Developing Countries* (The UN Model Convention) in 1980. The UN Model Convention was revised in 2001, 2011 and 2017. However, it still follows the pattern set by the OECD Model Convention and many of its provisions are identical, or nearly so (Brian J Arnold, 2015). The success of both international model conventions has been astounding. Virtually all existing bilateral tax treaties are based on them. Currently, there are over 3000 bilateral tax treaties in existence (Sunita, 2011, p.1).

Specific to elimination of double taxation, the model agreements provide two alternative methods of relief: namely, article 23A on exemption method and article 23B on the credit method. Each of the methods of relief plays an important role. The exemption method promotes capital import neutrality where the overall burden of taxation on capital income earned within a given country is the same regardless of the investor's country of residence while the credit method promotes capital export neutrality where the overall burden of taxation on capital owned by a resident of a given country is the same whether that capital is invested abroad or at home." The 2011 update to the UN model provides however that, "the method by which a country gives relief from double taxation depends primarily on its general tax policy and the structure of its tax system. Owing to the difference which exists in the various tax systems, bilateral tax treaties provide the most flexible instrument for reconciling conflicting tax systems and for avoiding and mitigating double taxation (United Nations Model, 2011 update).

2.1.2. Domestic development

With colonisation, colonial masters replicated their laws in the colonies they had; most of which were developing countries (Waris, 2007). However, the decolonisation wave started sweeping across developing countries (Africa) and developing nations got independence. They however, continued with the tax systems already established and no much revision was done (Waris, 2007). With regard to treaty negotiations, the earlier treaties negotiated were done with Western Europe (half of which were negotiated before the UN Model treaty was first published in 1980) that were and still are sources of foreign Direct Investments (FDI) and aid. African countries have since developed their models and these models include; the African Tax Administration Forum (ATAF) (ATAF, 2012), Economic Community of West African States (ECOWAS), Southern African Development Community (SADC), and the East African Community (EAC) Model Tax Agreements (EAC, 2014). These are also replicas of both the UN and OECD Model treaties and most African countries still largely follow the OECD Model Convention (Hearson, 2015).

With time, countries started including these laws within their domestic laws as international double taxation could now be dealt with nationally and it has been the case in most countries, including in the African states (Picciotto, 2019). Peart, however argues that, every African jurisdiction has its particular quirks or challenges and advice should be sought before making investment decisions and deciding how best to extract profits from a particular jurisdiction (Peart, 2016). In Kenya, the laws on double taxation are as provided for under section 41 (5) and also as provided for in the DTAs. This shall be examined further in section three. Thus, the laws on double taxation exist and recline on domestic laws and bilateral tax treaty networks. Rosenblom calls it "a triumph of international law" (Avi-Yonah, 2007). While tax treaties create particularly complex interactions between national and international law (Picciotto, 2019), these tax treaties are largely the same in policy language, and they constitute an international tax regime, which has definable principles that underlie it and are common to treaties.

2.2. The guiding legal theory and its application to the law on double taxation

This sub-section expounds on the discussion by taking a theoretical point of view. It helps give insight and understanding to section 41 (5). I particularly look at Hart; a positivist because he used legal positivism to clarify the meaning of law. His theory also describes the legal system within which tax law operates; the laws on double taxation being part. Law as is must therefore be followed.

2.2.1. Hart's concept of rule of recognition, internal aspects of rules, open textures and the minimum content of law

Hart expressed a modern understanding of the ancient ideals of 'the rule of law and not of men,' and provided a powerful and widely applicable rationalisation of the nature of legal authority in a pluralistic world. As a result, he produced a theory which spoke to the social realities in a secular and democratic age using four concepts to explain his position; these are: the concept of rule of recognition; the "internal aspects" of rules; open textures; and the minimum content of the law (Hart, 1964). His concept of the rule of recognition helps to understand how the national laws on tax must be aligned and in the event of a dispute, the rule of recognition explains how the tax issues will be resolved. In the case of Kenya, the laws on double taxation recline on both national and bilateral tax treaties, however, there are no regulations to give guidance on how these methods should be applied. This could explain why reliance is placed on tax treaties.

He also distinguished between two kinds of rules and claimed that their merger is, key to the science of jurisprudence, i.e., *"primary rules and secondary rules: the former guides human action through either telling one what to do or what not to do; they are duty imposing and concern actions of humans or changes while the latter clarify, expound and are parasitic on the primary rules and in essence extinguish or modify old ones or in various ways determine their incidence or control their operation. These are power conferring and give the policy for designing and varying obligations. Hart further suggests "rules of change" which identify how to eliminate existing primary rules and add new rules and the rules of adjudication which empower individuals to decide when a primary rule has been breached or otherwise and the procedures to be followed in making the change. This Hart regarded as the "elements of law and the heart of a legal system"* (Hart, 1964, Chapters 2-6).

In Kenya like in any other parts of the world, the law is interpreted by the courts and it's evident that the rules of change go hand in hand with the rules of adjudication (The Constitution of Kenya, 2020). Persons affected i.e., the aggrieved taxpayer may seek judicial interpretation of a given rule or text of the law. Where after, decisions are made by the court and this forms the basis for 'rules of change' commonly termed amendments. One such case brought to court in this area is the case of *the Tax Justice Network- Africa (TNJA) V Cabinet Secretary for National Treasury and 2 Ors, Petition No.494 of 2014* where, primary rules were flouted leading the court to declare the DTA between Kenya-Mauritius unconstitutional. In this case, TJNA sued the Cabinet Secretary-Treasury, Kenya Revenue Authority (KRA) and the Attorney (AG) General challenging the constitutionality of the DTA. The court struck down the tax agreement for being unconstitutional for lack of public participation and lack of parliamentary scrutiny among other reasons and court termed it a double tax avoidance agreement. This decision comes after TJNA had been calling upon African countries to "review all their tax treaties, particularly those signed with tax havens as local companies and investors could potentially use the treaty to dodge Kenyan tax by round-tripping their investments illicitly." This is progress for Kenya in terms of litigation in the area of double taxation, and DTAs; and indeed, Kenya should consider reviewing its DTAs. With the exception of the above case that serves as precedent, there is very limited litigation in the area of double taxation in Kenya.

2.2.2. The role of KRA in administering the laws on double taxation

The minimum content of law dictates that the social aspects of law be considered. This speaks to the implementation of the law itself. In doing this, Hart analysed institutions. He suggests that, when analysing social institutions or social practices, a theory which considers, or helps to explain, the way participants understand those institutions or practices is, by that fact alone significantly better than one that does not do so thus, distinguishing pure power from institutions; and the rules accepted by the community at large" (Bix, 2014). In Kenya, the KRA is the institution mandated with tax collection and administration. How does KRA administer law in the area of double taxation? In this regard, KRA can be analysed using the principles of administrative law: legality, reasonableness, procedural fairness, and fulfilling legitimate expectations. The overall concern of administrative justice is to ensure fairness in administrative judicial-making as it entails adhering to the principles of administrative law. Consequently, emphasis must be made to procedural fairness; particularly its importance in tax administration; especially in the area of double taxation. This is in terms of rulemaking, rule application and the adjudication of disputes. Procedural fairness also encourages voluntary self-reporting which enhances the efficiency of a tax system and reduces the costs of tax collection.

It is widely accepted by tax scholars that there should be administrative justice in tax administration, realising this goal is often a daunting task for many jurisdictions. There is a need to balance the rights of taxpayers with the need for efficient tax collection (Akech, 2016). Ideally, KRA should make and apply the rules, and also adjudicate disputes arising from the exercise of its powers relating to the administration of income related taxes. In this regard, three overall concerns are looked at: first, whether and the extent to which KRA's administrative practices adhere to the principles of administrative law; second, to establish whether and the extent to which there is public participation in the decision-making process of the KRA; and finally, the role and impact of judicial review on KRA's decision making.

Although KRA is responsible for the application of the laws in the area of double taxation, its rule making power is limited. A reading of the laws reveal that there are no rules to guide the application of the laws on double taxation in Kenya. The guiding principles are sourced from the DTAs that draw from external sources. Since the Cabinet Secretary (CS) is solely responsible for making the rules or regulations necessary for realising the purposes of all the tax laws (Income Tax Act, Chapter 470), it is important that the applying body and rule making body both work together. Further, with KRA operating a self-assessment system, administrative actions taken may centre on their best judgment to determine the amount of taxes due where a taxpayer files returns. This considerably confers wide discretionary powers that are bound and may impact on the taxpayer; both positively and negatively. In an interview that I conducted with an officer from KRA, the official gave an example of one of the cases they handled where the taxpayer company shareholding had changed, as new shares had been bought and the company was not able to benefit from the reliefs under the DTA as the shareholders were not residents of any of the contracting states (Interview 1). There was no further data with regard to the administration of double taxation reliefs beyond this.

Therefore, tax administration entails balancing the need to collect taxes efficiently with fair treatment of taxpayers. The KRA is therefore, expected to improve tax administration and implement reforms. Tax administration here refers to the aspect of "how to do it" in respect of the various taxes. It is the means to actualise the tax laws and systems and as such important for the achievement of the wider taxation goals (Njaramba, 2015, p.1). The quality of the administration also influences the investment climate and private sector development in Kenya. However, the change in dynamics and the fact that globalisation and growth in cross-border transactions by both individuals and corporates have led to the need to establish an international legal framework against instances of double taxation; which international standards Kenya adheres to: first by being a member of the global community and second through the constitution- ratification process; negotiating tax treaties is further adherence to international law. This process must be subject to both parliament and public participation; which are critical to ensuring that laws reflect the position of the people as established in the TJNA case. The KRA must therefore administer efficiently and effectively in the area of double taxation as it is sensitive and cross border in nature. This tied with the main purposes of taxation which are: "to raise government revenue, distribute wealth, promote policy formulation and application with an intended impact on the public's consumption habits enhances and better equips the laws on double taxation.

3. CONCEPTUALIZING THE ARCHITECTURAL DESIGN OF SECTION 41 (5)

This section analyses section 41(5), assesses the available reliefs and their effectiveness in handling instances of double taxation and highlights the requirements for granting the reliefs.

3.1. The methods of relief from double taxation

The reliefs listed under section 41(5) are: exemption, exclusion or reduction. Despite the three listed reliefs, the only relief method used in Kenya is the credit method as earlier stated; which is found in DTAs. The methods in the DTAs also leave a gap in terms of the reduction and exclusion methods. Another method of relief from double taxation is the deduction method, however, it will not be discussed. I therefore explain the methods of relief as listed in section 41(5) and the one under the DTAs and discuss when they apply to the taxpayer and the circumstances under which the apply including how effective they have been.

3.1.1. The exemption method of relief

This method of relief is provided for under both the national tax law and the DTAs. The bedrock of exemption is that the source states have better rights of taxation and that the exempting states have to "give way." In other words, "it's based on the right of the source state to tax income which arises within its territory per the benefit principle of equity (Gutuza, 2013). The resident state has to exempt that income from tax and by this, the country of residence allows businesses or enterprises in the source state to be competitive because such a business will not be exposed to a higher tax burden than a competitor in the source state.

Thus, a higher tax burden may be imposed, where a limited tax credit relief is applied and the tax rate in the residence state is higher than in the source state. Under a pure source basis of taxation, the exemption method of relief for international double taxation is a consequence of using the source as a jurisdictional link; meaning, the form of exemption would be automatic. Note that

Gutuza speaks to the automatic nature of relief via the exemption method, in Kenya however, the wording of section 41(5) reveals that all the reliefs do not accrue automatically to the taxpayer, i.e., *"Kenya may (the use of may connotes uncertainty in legal drafting and as such generally pegged on the fulfilment of certain conditions) take into account the exempted income."* The exemption method is fairly a good method of elimination of double taxation and it is also simpler to implement. However, Kenya does not use this method, therefore I am not in the position to examine its efficiency in relieving taxpayers from double taxation. The country should thus reconsider using it alongside the credit method.

3.1.2. The exclusion or reduction method

The question that comes to mind is whether by, exclusion or reduction, the draftsman gave an alternative between the two. Noting that these two words are not synonymous, as exclusion means to bar, ban while a reduction simply means the action of making something less in amount, more like cutting back. Did the draftsman then use reduction to mean deduction? The meaning of a statute inevitably depends on the precepts with which interpreters approach its text. Statutes do not have pre-interpretive meanings, and the process of interpretation requires courts to draw in background principles. These principles are usually not 'in' any authoritative enactment but instead are drawn from the particular context and, more generally, from the legal culture (Sunstein, 2019). It is important to identify the prevailing principles and to subject them to scrutiny.

In the conventional account the tools of statutory construction are language, structure and history. Superficially clear statutory language may upon concentrated analysis prove ambiguous and in search for statutory meaning, context trumps literalism; in other words, there is no plain meaning without context (Wesotsky, 2009). The ITA uses the word 'or.' This again is, "is a function of conventional English usage." In its elementary sense the word 'or' is a disjunctive particle that marks an alternative, generally corresponding to 'either,' as either this or that,' though not always the case. Accordingly and in the context of exclusion or reduction, this could have been a drafting problem. The Act is also not clear and there is no regulation to further explain, the how question. This would have been a loophole for construction fanatics. Again, I could not assess its effectives in relieving taxpayers for double taxation. This should thus be deleted from the section.

3.1.3. The credit method of relief

The credit method is not listed among the available reliefs under section 41(5) however it is the only method of relief used to avoid double taxation in Kenya.

Under section 42 of the ITA, computation of credits under special arrangements is provided for and DTAs provide these special arrangements. Section 41(1) provides the basis for negotiating these DTAs. Accordingly, a Kenyan taxpayer is allowed a credit against their Kenya income tax liability only on foreign-sourced income. Gutuza quoting Vogel states that "*all that the credit method is designed to do is mitigate an excessive burden considered unfair or economically harmful by reducing the level of the taxation of the state giving the credit* (Gutuza, 2013 pp 60-61)." The credit method is implemented by either a full tax credit; which allows the resident taxpayer to credit the full amount of the foreign tax against his resident country tax or a limited credit that limits the tax credit to the amount of tax that would have been paid in the country of residence. This is normally used where the amount of tax paid in the country of source is greater than the amount of tax paid in the country of residence- and there is a 'reimbursement' element. This is limiting; the taxpayer cannot credit more from the foreign tax to the actual tax due in the country of residence; and also the country of residence will not owe the taxpayer any refund in case the foreign tax paid is more. In Kenya, the limited credit method is used, i.e., a taxpayer is only allowed credit up to the rate paid in the other country and a taxpayer can't claim refunds.

Thus, law is being applied on a selective basis and if it suits the tax administration. This in itself goes against the principles of administrative law as discussed in section 2. To give understanding to how this method of relief is applied, I used the explanations of Avi-yonah. "Where a resident taxpayer has foreign-sourced income equal to say, 100 and subject to foreign tax of 30. That income will appear on the person's income tax return in the resident country. The person reports the entire foreign income (70) including the amount paid in tax (30) and calculates the resident country tax before the credit. Say the tax due in the resident country for such income is 35; the person will take the foreign tax credit of 30 and remains with a net tax liability in the resident country of only 5 (paraphrased)." He argues that today this is the major mechanism for the prevention of international double taxation (Avi Yonah, 2007).

However, Gutuza argues that there are some disadvantages of the credit system and they include: the complexity of its administration, the requirements that need to be met before a tax credit is granted, whether the tax credit would apply to group company taxation and whether it would also provide relief for economic double taxation (Gutuza, 2013). As earlier noted, findings from the primary data collected revealed that the relief available to a taxpayer under a DTA is the credit method in Kenya. However, when asked about the other methods, KRA's answer was the credit method; meaning no income is exempt. As for reduction or exclusion, the argument is that- it was a drafting issue. The research also found that the iTAX system provides for this, in that, a person can give detail and request a credit online. Data in this regard is not disaggregated thus actual statistics on how many taxpayers have been granted relief so far out of the 2.7 million registered taxpayers proved futile and one wonders whether the data exists in the first place.

3.2. The requirements for granting relief from double taxation in Kenya

The reliefs provided for under section 41 are: exemption, exclusion or reduction. These reliefs are not granted automatically. Meaning its limited to DTAs and upon one of the two requirements there under being met. I have already shown that the only method of relief used is the credit method. For one to qualify for the relief, some requirements have to be met as per clause 5 of section 41.

Clause 5 is to the effect that the reliefs granted under a DTA are not available to a person, who, for purposes of a DTA is: a resident in the other contracting state unless: more than 50% of the underlying ownership of that person is held by an individual or individuals who are residents of that other contracting state, or the resident of the other contracting state is a company listed on the stock exchange in that other contracting state." This means that relief is limited to companies. What then is the plight of individuals? Data from the KRA showed that generally there is a problem with clause five (5) as it is unfair. An official from the KRA gave an example of one of the cases they handled where the taxpayer company shareholding had changed, as new shares had been bought and the company was not able to benefit from the reliefs under the DTA as the shareholders were not residents of any of the contracting states as already stated in section two. She opined that where there is a valid reason, relief should be given under the Principle Purpose Test (PPT) as introduced by the OECD BEPS project (Interview, 1. The policy department at the KRA have since made some suggestions for amendment especially to incorporate the PPT rule; which proposal was submitted to the treasury and awaits implementation.

For the above to work, treaties are essential**.** The OECD argues that, "*it is inefficacy in tax treaties that have triggered double non-taxation in a number of situations."* In February 2013, the OECD released its report on addressing BEPS and subsequently in July 2013, the OECD released its 15-point action plan to address BEPS. In this plan, treaty abuse, in particular, treaty shopping was considered to be one of the most important sources of BEPS concern. According to Theodosopoulos, "*action 6 was dedicated to preventing treaty abuse and it is also one of the minimum standards countries participating in the BEPS inclusive framework are to implement. This thus came with a choice for either the PPT or the without detailed or simplified Limitation of Benefits (LOB) and other treaty abuse recommendations within the action 6; with countries preferring the PPT* *over the LOB. The PPT is applied if 'it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction'- thus the two elements of reasonableness and the main purpose test is introduced*" (Theodosopoulos, 2018, pp 20-35). The latter is to the effect that treaty benefits will be denied under the PPT if it is proved that *"a main purpose"* or *"one of the principal purposes"* for entering into a transaction/arrangement was to obtain a tax benefit. There is also the objective element under PPT rule which provides that it needs to be checked if the favourable tax position defeats the *"object and purpose of the relevant"* tax treaty provisions and concerning burden of proof (Theodosopoulos, 2018).

In Kenya, a proposal for the introduction of the 183 days rule per the income tax bill 2018 was made (Income Tax Bill, 2018- the same seems to be maintained to date) under section 46 (b) which strengthens the section further and the addition of the active participation of the person in the activities of the company. Suggestions to include the PPT as already discussed has been made. This is to widen the requirements and not cut companies out. Concerning individuals, there are no requirements as such and one could argue that the relief (credit) applies automatically. This then ties with our theories as espoused in section 2 in that administration must be efficient and effective and be people oriented.

4. RECOMMENDATIONS AND CONCLUSIONS

Interrogating double taxation and the available reliefs in Kenya was very exciting and difficult at the same time owing to scarcity of relevant literature. However, this presents a first mile stone and the following recommendations may be taken up by the institutions, law and policy makers:

4.1.Amendment of the ITA

The research proposes an amendment to section 41 (5) of the ITA, as the said section as is, is inadequate to address the area in question. At the writing of this paper, the Income Tax Bill 2019 was yet to be tabled before parliament for discussion and public participation, and it was hoped that the proposals made would be part and parcel.

The paper recommends that: first, the act should provide a definition for double taxation or provide explanatory notes on the same and the principles that underlie it; second, the exclusion or reduction as reliefs should be deleted since they are not used and the exemption and credit methods be used in complying with international standards; third, the study proposes the inclusion of the 183 days, taking into account active participation of persons in the activities of the company and also incorporate the BEPS project action 6- PPT. This will further strengthen clause 5 and finally, section 41 should be in tandem with the constitution.

The beginning subsection could read as follows:

"*Relief from double taxation is available to…*" This starts the provision on a positive note.

Additional clause to supplement clause 5 already discussed:

" subject to clause 5, a benefit under a DTA shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of a DTA."

Definition/explanatory note

In this act/part, "*double taxation means a situation where income earned in the source state by a citizen or resident of another state is taxed by both states*."

Principles that underlie double taxation are: the principles of residence and source of the taxpayer as defined in section 2 (definition section).

4.2. Tax administration

Tax administrators are the implementers of laws and the implementation ought to be done according to the law. The tax administration must have thoroughly understood; the what, who, why, where, when and how it will work before implementing a law. Further, since tax returns are made on the iTAX system, which according to KRA is simple, swift and sure, the reality on ground speaks otherwise as most taxpayers do not know how to use the iTAX system and end up engaging tax consultants or cyber operators who may not even give the correct position. The tax administration should thus consider both the use of the iTAX system and the use of the manual system, where companies can file in documents; this is helpful; for purposes of audits.

KRA should reconsider conducting audits again as during the interviews (Interview 2), it was established that KRA has stopped auditing and the reason for the same was not given. Audits are important in the area of double taxation and considering that the method of assessment in Kenya is self-assessment, audits can be done to establish the actual taxes due.

KRA should also work towards data disaggregation: it was evident during the interviews at KRA that tax data is not disaggregated meaning everything is in one pool. The tax administrator does not know the number of taxpayers who declare foreign sourced income, whether individuals or companies. All declared taxes are clamped on the iTAX system. The study thus proposes that KRA works towards having a system that disaggregates data for easy management and efficiency. This in turn enhances accountability.

Need for further research: various research and studies have shown that the area of double taxation and DTAs still have challenges; as no proper and concrete solutions lie in place. For instance, scholars have often argued that the OECD model tax convention favours the residence principle; DTAs were found to shift taxing rights from the source state to the residence state. Between two economies with largely reciprocal FDI positions and with an asymmetric investment position (and has a DTA signed), the capital-importing country is at a risk of forfeiting tax revenues. This is the case for developing countries, which have to balance the costs, for example of revenue losses with benefits like increase of FDI. Thus, understanding double taxation and DTAs is very critical for the tax environment in Kenya. Specific attention can be given to tax laws which have to be applied in context, for instance, this study has focused on an analysis of section 41 and the available reliefs, the other studies could focus on aspects of double taxation and FDI, how to strengthen the law around double taxation, the effectiveness of say the credit method, monitoring and enforcement of double taxation, and how exchange of information will affect double taxation.

There is a need for a tracking system; for the benefits of the treaties: Kenya should take a cost benefit analysis of having these treaties. Have like a gauge system; especially on the revenue the country has lost under the agreements over the years so as to confirm whether the treaty is beneficial for the country. This is in line with TNJA's call for African countries to renegotiate their tax treaties.

The need for sensitization in the area of double taxation: taking a budgetary angle, it is pertinent to know that KRA spends on tax education. As at the end of 2016, Kenya shillings 110,131,000.00 was spent on taxpayer education; how much of this is spend on creating taxpayer awareness on the law around double taxation and DTAs is unknown. The research revealed that a number of legal practitioners had no clue or did not understand double taxation. There is thus a need to intensify on the awareness programmes in all matters tax: in schools and in, work places. A positive step by KRA in 2018 was the partnership between KRA and the Kenya Institute of Curriculum Development (KICD); mainstreaming tax education in the education curriculum. Further, KRA can take up the initiative and partnership with other agencies to offer trainings to professionals like lawyers, accountants and auditors who normally deal with matters tax. Whatever mode of sensitization is used, the same should have both medium and long term goals. There is an urgency of educating the young- the next generation of taxpayers. Use of social media, TV, radio platforms helps the population appreciate the civic responsibility of paying taxes; even if foreign sourced. The universities through their different departments can be a major contributor to this; for instance, the Committee on Fiscal Studies (CFS) of the University of Nairobi under the leadership of Waris together with the different stakeholders have taken a step towards the right direction by mentoring and training the next generation of tax advocates on the continent.

Finally, interrogating the architecture conceptualised under section 41 (5), the effectiveness of the reliefs thereunder in handling instances of double taxation and further finding out whether the reliefs as set out in the said section are utilised in Kenya was not a walk in the park. The theory advanced in section two helped stress the need to have laws that are followed, the need for effectively functioning tax administrative systems so as to capture society's needs and advance laws. This paper tackled all the issues raised and indeed established the non-effectiveness of these methods of relief and further proved that none of the methods listed under section 41 are actually used in Kenya. The only method of relief in Kenya is the credit method of relief; which is provided for under DTAs. Thus, since international double taxation occurs due to the distinct concepts that underlie the imposition, and not the different structures of the tax systems, there is a need for countries to come together because double taxation affects the order and rivalry of exports of goods and the international elimination of the same represents a necessity to secure the improvement of the economic relations.

This article asserts that matters double taxation and reliefs from it will require a collective walk involving all stakeholders including lawyers and as Picciotto puts it, the techniques of lawyer, particularly in interpretation of laws is very paramount (Picciotto, 2019). Thus the law on double taxation needs to be reformed including approving and publishing the policies currently awaiting approval to guide the process; especially of negotiating DTAs, the pending withdrawn Tax (Amendment) bill needs to be debated and assented to so as to keep the tax laws in line with the constitutional provisions.

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