

LEGAL NOTICE No. 61

THE INCOME TAX ACT

(Cap. 470)

THE DOUBLE TAXATION RELIEF (INDIA)
NOTICE, 1989

IN EXERCISE of the powers conferred by section 41 of the Income Tax Act, the Minister for Finance declares that the arrangements specified in the Schedule hereto, being arrangements made between the Government of the Republic of Kenya and the Government of India in the articles of an agreement signed on the 12th April, 1985, with a view to affording relief from double taxation in relation to income tax and any taxes of similar character imposed by the laws of India, shall, notwithstanding anything to the contrary in the Act or any other written law, have effect in relation to income tax under the Act.

SCHEDULE

The Government of the Republic of Kenya and the Government of India desiring to conclude an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital.

HAVE AGREED AS FOLLOWS:

ARTICLE 1

Personal Scope

This Convention shall apply to persons who are residents of one or both of the Contracting States.

ARTICLE 2

Taxes Covered

1. This Convention shall apply to taxes on income imposed on behalf of each Contracting State, irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income including taxes on gains from the alienation of movable or immovable property and taxes on the total amounts of wages or salaries paid by enterprises.

3. The existing taxes to which the Convention shall apply are, in particular—

(a) in the case of India—

the income tax including any surcharge thereon imposed under the Income Tax Act, 1961 (43 of 1961); and the

surtax imposed under the Companies (Profits) Surtax Act, 1964 (7 of 1964) hereinafter referred to as "Indian Tax");

(b) in the case of Kenya—

the income taxes imposed under the Income Tax Act (Cap. 470), hereinafter referred to as "Kenyan Tax".

4. This convention shall apply also to any identical or substantially similar taxes on income which are imposed after the date of signature of this Convention in addition to, or in place of, the existing taxes. The contracting states shall notify each other of significant changes which have been made in their respective taxation laws.

ARTICLE 3

General Definitions

1. In this Convention unless the context otherwise requires—

(a) the term "Kenya" means the Republic of Kenya, including any area outside the territorial waters of Kenya which, in accordance with international law, has been or may be designated, under the laws of Kenya concerning the Continental Shelf, as an area over which Kenya may exercise sovereign rights with respect to the exploration for and exploitation of natural resources;

(b) the term "India" means the territory of India and includes the territorial sea and airspace above it as well as any other maritime zone referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (Act No. 80 of 1976), in which India has certain rights and to the extent that these rights can be exercised therein as if such maritime zone is a part of the territory of India;

(c) the terms "a Contracting State" and "the other Contracting State" mean Kenya or India as the context requires;

(d) the term "tax" means Kenyan tax or Indian tax as the context requires, but shall not include any tax which is payable in respect of any default or omission in relation to the taxes to which this Convention applies or which represents a penalty imposed relating to those taxes;

(e) the term "person" means an individual, a company and any other body of persons treated as an entity for tax purposes;

(f) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;

(g) the terms "Kenyan enterprise" and "Indian enterprise" mean respectively an industrial or commercial enterprise or undertaking carried on by a resident of Kenya and an industrial or commercial enterprise or undertaking carried on by a resident of India and the term "enterprise of a Contracting State" means a Kenya enterprise or an India enterprise, as the context requires;

(h) the term "national" means an individual possessing the nationality of Kenya or India as the case may be and all legal persons, partnerships and associations deriving their status as such from the law in force in Kenya or India as the case may be;

(i) the term "competent authority" means—

(a) in the case of Kenya, the Minister of Finance or his authorized representative;

(b) in the case of India the Ministry of Finance (Department of Revenue);

(j) the term "international traffic" means any voyage of a ship or aircraft operated by an enterprise of a Contracting State, except where the voyage is confined solely to places within the other Contracting State.

2. In the application of the provisions of this Convention by a Contracting State any terms not otherwise defined herein shall, unless the context otherwise requires, have the meaning which it has under the laws in force in that Contracting State relating to the taxes which are the subject of the present Convention.

ARTICLE 4

Fiscal Domicile

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature.

2. Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his residential status shall be determined in accordance with the following rules—

(a) he shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (hereinafter referred to as his "centre of vital interests");

(b) if the Contracting State in which he has his centre of vital interests cannot be determined, or if he does not have a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;

(c) if he has an habitual abode in both Contracting States or in either of them, he shall be deemed to be a resident of the Contracting State of which he is a national;

(d) if he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1, a company resident of both Contracting States, then this case shall be determined in accordance with the following rules—

- (a) it shall be deemed to be a resident of the Contracting State of which it is a national;
- (b) if it is a national of neither of the Contracting States, then it shall be deemed to be a resident of the Contracting States in which its place of effective management is situated.

4. Where by reason of the provisions of paragraph 1, a person other than an individual or a company is a resident of both Contracting States, it shall then be deemed to be a resident of the Contracting States in which its place of effective management is situated.

ARTICLE 5

Permanent Establishment

1. For the purpose of this Convention, the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on.

2. The term "permanent establishment" shall include especially—

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop;
- (f) a mine, oil well, quarry or other place of extraction of natural resources;
- (g) a farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on;
- (h) a building site or construction or assembly project which exists for more than six months;
- (i) the provision of supervisory activities for more than six months on a building site or construction or assembly project.

3. The term "permanent establishment" shall not be deemed to include—

- (a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;
- (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;

- (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collection of information for the enterprise;
- (e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character for the enterprise.

4. A person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State, other than an agent of an independent status to whom the provisions of paragraph 6 apply, shall be deemed to be a permanent establishment in the first mentioned State if—

- (a) he has, and habitually exercises in that State, an authority to conclude contracts for or on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or
- (b) he maintains in that first mentioned State a stock of goods or merchandise belonging to that enterprise from which he regularly fulfils orders on behalf of that enterprise.

5. An insurance enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if it collects premiums in that other State or insures risks therein through an employee or through a representative who is not an agent of independent status within the meaning of paragraph 6.

6. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. However, where the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise he would not be considered an agent of an independent status within the meaning of this paragraph.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company, a permanent establishment of the other.

ARTICLE 6

Income from Immovable Property

1. Income from immovable property including income from agriculture or forestry may be taxed in the Contracting State in which such property is situated.

2. For the purposes of this Convention, the term "immovable property" shall be defined in accordance with the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property, apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property and to profits from the alienation of such property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of professional services.

ARTICLE 7

Business Profits

1. The profits of an enterprise of a Contracting State 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 or has carried on business as aforesaid, the profits of the enterprise may be traced in the other State but only so much of them as is attributable to (a) that permanent establishment (b) sales in the 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.

2. Where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to the permanent establishment the profit which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.

4. In so far as it has been customary in a Contracting State, according to its law, to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that State from determining the profits to be taxed

by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles laid down in this Article.

5. No portion of any profits arising to an enterprise of a Contracting State shall be attributed to a permanent establishment situated in the other Contracting State by reason of the mere purchase of goods or merchandise within that other State for the enterprise.

6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

ARTICLE 8

Air Transport

1. Profits derived by an enterprise of a Contracting State from the operation of aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. The provisions of paragraph 1 of this Article shall also apply to a share of the profits from the operation of aircraft in international traffic derived by an enterprise of a Contracting State through participation in a pooled service, in a joint air transport operation or in an international operating agency.

3. For the purpose of paragraph 1, interest on funds directly connected with the operation of aircraft in international traffic shall be regarded as income from the operation of such aircraft, and the provisions of Article 12 shall not apply in relation to such interest.

ARTICLE 9

Shipping

1. Profits derived by an enterprise of a Contracting State from the operation of ships in international traffic may be taxed in both Contracting States according to the law of each Contracting State:

• Provided that where such an enterprise derives profits from such operation in the other Contracting State—

(a) such profits shall be deemed to be an amount not exceeding 5 per cent of the full amount received by the enterprise on account of the carriage of passengers or freight embarked in that other State;

(b) the tax chargeable in that other State shall be reduced by an amount equal to 50 per cent thereof.

ARTICLE 10

Associated Enterprises

1. Where—

- (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State; or
- (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where profits on which an enterprise of a Contracting State has been charged to tax in that State are also included in the profits of an enterprise of the other Contracting State and taxed accordingly, and the profits so included are profits which would have accrued to that enterprise of the other State, if the conditions made between the enterprises had been those which would have been made between independent enterprises, then the first-mentioned State shall make an appropriate adjustment to the amount of tax charged on those profits in the first-mentioned State. In determining such an adjustment due regard shall be had to the other provisions of this convention in relation to the nature of the income.

ARTICLE 11

Dividends

1. Dividends paid by a company which is resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the law of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed 15 per cent of the gross amount.

3. The term "dividends" as used in this Article means income from shares or other rights not being debt-claims, participating in profits as well as income from other corporate rights assimilated to income from shares or any other item which is deemed to be a dividend or distribution of a company by the taxation law of the Contracting State of which the company making the distribution is a resident.

4. The provisions of paragraph 2 shall not apply if the recipient of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State professional services from a fixed base situated there, and the holding by virtue of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 16, as the case may be, shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except in so far as such dividends are paid to resident of that other state or in so far as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

ARTICLE 12

Interest

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may be taxed in the Contracting State in which it arises; and according to the law of that State, but the tax so charged in the Contracting State in which the interest arises shall not exceed 15 per cent of the gross amount of the interest.

3. Notwithstanding the provisions of paragraph 2, interest arising in a Contracting State and paid to the Government of the other Contracting State or local authority thereof, the Central Bank of that other Contracting State, or any agency wholly owned by that Government or local authority, shall be exempt from tax of the first mentioned Contracting State. The competent authorities of the Contracting State may determine on mutual agreement any other governmental institution to which this paragraph shall apply.

4. The term "interest" as used in this Article means income from Government securities, bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and other debt-claims of every kind as well as all other income assimilated to income from money lent by the taxation law of the Contracting State in which the income arises.

5. The provisions of paragraph 2 shall not apply if the recipient of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises through a permanent establishment situated therein, or performs in

that other State professional services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 7 or Article 16, as the case may be, shall apply.

6. Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and that interest is borne by that permanent establishment or fixed base, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

7. Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the interest paid, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount, in that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

ARTICLE 13

Royalties

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties may be taxed in the Contracting State in which they arise, and according to the law of that State, but the tax so charged in the Contracting State in which the royalties arise shall not exceed 20 per cent of the gross amount of the royalties.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, and films or tapes for radio or television broadcasting), 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.

4. The provisions of paragraph 2 shall not apply if the recipient of the royalties, being a resident of a Contracting State carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein; or performs in that other State professional services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 7 or Article 16, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political subdivision, a local authority or a resident of that State. Where, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

6. Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of royalties paid, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

ARTICLE 14

Capital Gains

1. Gains from the alienation of immovable property, as defined in paragraph 2 of Article 6 may be taxed in the Contracting State in which such property is situated.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing professional services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in that other State.

3. Notwithstanding the provisions of paragraph 2 gains by an enterprise of a Contracting State from the alienation of ships and aircraft which it operates in international traffic and movable property pertaining to the operation of such ships and aircraft shall be taxable only in that State.

4. Gains from the alienation of—

(a) shares of a company the property of which consists principally of immovable property situated in a Contracting State; and

(b) interest in a partnership or a trust, the property of which consists principally of immovable property situated in a Contracting State,

may be taxed in that State. For the purpose of this paragraph the term "immovable property" includes the shares of a company referred to in subparagraph (a) or an interest in a partnership or a trust referred to in subparagraph (b).

5. Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs 1, 2, 3 and 4 shall be taxable only in that State.

ARTICLE 15

Management and Professional Fees

1. Management or professional fees arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such management or professional fees may be taxed in the Contracting State in which they arise, and according to the law of that State, but the tax so charged shall not exceed 17½ per cent of the gross amount of the management or professional fees.

3. The term "management or professional fees" as used in this Article means payments of any kind to any person, other than to an employee of the person making the payments, in consideration for any services of a managerial, technical, professional or consultancy nature.

4. The provisions of paragraph 2 shall not apply if the recipient of the management or professional fees, being a resident of a Contracting State, has in the other Contracting State in which the management or professional fees arise a permanent establishment with which the services giving rise to the management or professional fees are effectively connected. In such a case the provisions of Article 7 shall apply.

5. Management or professional fees shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the management or professional fees, whether he is a resident of that State or not, has in a Contracting State a permanent establishment in connection with which the liability to pay the management or professional fees was incurred and such management or professional fees are borne by such permanent establishment, then such management or professional fees shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

6. Where, owing to a special relationship between the payer and the beneficial owner of the management or professional fees or between both of them and some other person, the amount of the management or professional fees paid, having regard to the service for which they are paid, exceeds the amount which would have been in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case the excess part of the payment shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

ARTICLE 16

Independent Personal Services

1. Income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State unless—

- (a) he has a fixed base regularly available to him in the other Contracting State for the purposes of performing his activities, in which case so much of the income may be taxed in that other State as is attributable to that fixed base; or
- (b) he is present in the other Contracting State for the purpose of performing his activities for a period or periods exceeding in the aggregate 183 days in the calendar year concerned in the case of Kenya or the previous year concerned in the case of India, in which case so much of the income may be taxed in that other State as is attributable to the activities performed in that other State.

2. The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities, as well as the independent activities of physicians, lawyers, engineers, architects, dentists, and accountants.

ARTICLE 17

Dependent Personal Services

1. Subject to the provisions of Articles 18, 19, 20, 21, 22 and 23, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in the other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if—

- (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned; and
- (b) the remuneration is paid by, or on behalf of an employer who is not a resident of the other State; and
- (c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration in respect of an employment exercised aboard a ship or aircraft in international traffic, may be taxed only in the Contracting State in which the place of effective management of the enterprise is situated.

ARTICLE 18

Directors' Fees

Directors' fees and similar payments 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 may be taxed in that other State.

ARTICLE 19

Artistes and Athletes

1. Notwithstanding the provisions of Articles 7, 16 and 17, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which those activities are exercised

2. Notwithstanding anything contained in this Convention, where the services of a public entertainer or an athlete mentioned in paragraph 1 are provided in a Contracting State by an enterprise of the other Contracting State, the profits derived by that enterprise from providing those services may be taxed in the first-mentioned State.

3. The provisions of paragraphs 1 and 2 shall not apply to services of public entertainers and athletes, if their visit to a Contracting State is supported wholly or substantially from public of the other Contracting State.

ARTICLE 20

Government Service

1. (a) Remuneration, other than a pension, paid by a Contracting State or a political subdivision or a local authority thereof to any individual in respect of services rendered to that State or political subdivision or local authority thereof shall be taxable only in that State.

(b) However, such remuneration shall be taxable only in the Contracting State of which the recipient is a resident if the services are rendered in that State and the recipient did not become a resident of that State solely for the purpose of performing the services.

2. The provisions of paragraph 1 shall not apply to remuneration in respect of services rendered in connection with any trade or business carried on by one of the Contracting States or a political subdivision or a local authority thereof.

ARTICLE 21

Pensions

1. Any pension (other than a pension of the kind referred to in paragraph (2) of this Article) and any annuity, derived from sources within a Contracting State by an individual who is a resident of the

other Contracting State may be taxed in the first-mentioned Contracting State but if the individual is subject to tax in the other Contracting State in respect of the pension or annuity the tax so charged in the first-mentioned Contracting State shall not exceed the lower of—

- (a) 5 per cent of the pension or annuity; or
- (b) the amount of tax chargeable on the pension or annuity in the other Contracting State.

2. Pensions paid by, or out of funds created by, a Contracting State to an individual for services rendered to that Contracting State in the discharge of governmental functions may be taxed only in that Contracting State.

3. The term "annuity" means a stated sum payable periodically at stated times, during life or during a specified or ascertainable period of time, under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

ARTICLE 22

Students and Apprentices

1. A student or business apprentice who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is present in the first-mentioned Contracting State solely for the purpose of his education or training shall be exempt from tax in the first-mentioned Contracting State on payments made to him by persons residing outside that first-mentioned Contracting State for the purposes of his maintenance, education or training.

2. The benefits of this Article shall extend only for such period of time as may be reasonably or customarily required to complete the education or training undertaken, but in no event shall any individual have the benefits of this Article for more than three consecutive years.

ARTICLE 23

Professors and Teachers

1. A professor or teacher who visits a Contracting State for a period not exceeding one year for the purpose of teaching or conducting research at a university, college, school or other educational institution in that Contracting State and who is, or was immediately before such visit, a resident of the other Contracting State shall be exempt from tax in the first-mentioned Contracting State on any remuneration for such teaching or research in respect of which he is subject to tax in the other Contracting State. However, any remuneration for such work received from sources outside the State shall not be deductible in the first-mentioned State.

2. This Article shall not apply to income from research if such research is undertaken primarily for the private benefit of a specific person or persons.

ARTICLE 24

Income not expressly mentioned

1. Items of income of a resident of a Contracting State which are not expressly mentioned in the foregoing Articles of this Convention in respect of which he is subject to tax in that State shall be taxable only in that State.

2. However, if such income is derived by a resident of a Contracting State from sources in the other Contracting State, such income may also be taxed in the State in which it arises, and according to the law of that State.

ARTICLE 25

Method of Elimination of Double Taxation

1. The laws in force in either of the Contracting State will continue to govern the taxation of income in the respective Contracting states except where provisions to the contrary are made in this Convention.

2. (a) The amount of Kenyan tax payable, under the laws of Kenya and in accordance with the provisions of this Convention, whether directly or by deduction, by a resident of India, in respect of income from sources within Kenya which has been subjected to tax both in India and in Kenya, shall be allowed as a credit against the Indian tax payable in respect of such income provided that such credit shall not exceed the Indian tax (as computed before allowing any such credit) which is appropriate to the income derived from sources within Kenya; so, however, that where such resident is a company by which surtax is payable in India, the credit aforesaid shall be allowed in the first instance against income tax payable by the company in India, and as to the balance, if any, against surtax payable by it in India;

(b) For the purposes of the credit referred to in subparagraph (a) above, the term "Kenyan tax payable" shall be deemed to include any amount which would have been payable as Kenyan tax any year but for (i) any investment deduction granted under paragraph 24 of the Second Schedule to the Income Tax Act, Cap. 470; (ii) the lower Corporation rate of income tax provided by paragraph 2 (b) of the Third Schedule to the Income Tax Act, Cap. 470; (iii) any other provisions which may subsequently be enacted granting an exemption or reduction of tax which the competent authorities of the Contracting States agree to be for the purpose of economic development.

3. (a) The amount of Indian tax payable, under the laws of India and in accordance with the provisions of this Convention, whether directly or by deduction, by a resident of Kenya, in respect of income from sources within India which has been subjected to tax both in India and Kenya, shall be allowed as a credit against Kenyan tax payable in respect of such

income provided that such credit shall not exceed the Kenyan tax (as computed before allowing any such credit) which is appropriate to the income derived from sources within India;

(b) For the purposes of the credit referred to in subparagraph (a) above, the term "Indian tax payable" shall be deemed to include any amount by which Indian tax has been reduced by the special incentive measures set forth in the following sections of the Income Tax Act, 1961—

(a) sections 10 (4), 10 (4A), 10 (6) (vii), 10 (15) (iv), 10A, 32A, 33A, 35B, 35CC, 80HH, 80I, 80K, 80L; and

(b) any other provisions which may subsequently be enacted granting a deduction from taxable income or exemption from or reduction of tax which the competent authorities of the Contracting States agree to be for the purposes of economic development.

4. Where under this Convention a resident of a Contracting State is exempt from tax in that Contracting State in respect of income derived from the other Contracting State then the first-mentioned Contracting State may, in calculating tax on the remaining income of that person apply the rate of tax which would have been applicable if the income exempted from tax in accordance with this Convention had not been so exempted.

ARTICLE 26

Non-Discrimination

1. The nationals of a Contracting State 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 are or may be subjected.

2. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities.

3. Nothing in this Article shall be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

4. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected.

5. In this Article the term "taxation" means taxes which are the subject of this Convention.

6. Notwithstanding the provisions of the foregoing paragraphs, a company which is a resident of India and which has a permanent establishment in Kenya shall remain subject to an additional rate of tax in accordance with the provisions of Kenyan law, but such additional rate shall not exceed 7.5 per cent. However, such a company will not be subjected to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected.

ARTICLE 27

Mutual Agreement Procedure

1. Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Convention, he may, notwithstanding remedies provided by the national laws of those States, present his case to the competent authority of the State of which he is a resident. The case must be presented within three years of the date of such action or the latest of such actions as the case may be.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with this Convention. Any agreement reached shall be implemented notwithstanding any time limits in the national laws of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Convention. They may also consult together for the elimination of double taxation in cases not provided for in this Convention.

4. The competent authorities of the Contracting States may communicate directly with each other for the purposes of applying the provisions of this Convention. When it seems advisable in order to reach agreement to have an oral exchange of opinion, such exchange may take place through a commission consisting of representatives of the competent authorities of the Contracting States.

ARTICLE 28

Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Convention or for preventing fraud or fiscal evasion concerning taxes covered by this Convention in so far as the taxation thereunder is in accordance with this Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons or authorities other than those concerned with the assessment or collection of the taxes which are the subject of this Convention.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on one of the Contracting States the obligations—

- (a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;
- (b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy.

ARTICLE 29

Diplomatic and Consular Officials

Nothing in this Convention shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special agreements.

ARTICLE 30

Entry into Force

1. This Convention shall come into force on the date when the last of all such things shall have been done in India and Kenya as are necessary to give the Convention the force of law in India and Kenya respectively.

2. The Contracting States shall notify each other of the completion of the requirements mentioned in paragraph 1 of this Article. The exchange of diplomatic notes certifying that this requirement has been completed shall take place at Nairobi.

3. Upon the exchange of such diplomatic notes, this Convention shall have effect:

(a) In Kenya—

- (i) in respect of taxes withheld at the source on amounts paid or credited to non-residents on or after 1st January, in the calendar year following the year in which all the required formalities are completed;
- (ii) in respect of other taxes on income arising for the year of income commencing on or after the 1st January, in the calendar year in which all the required formalities are completed.

(b) In India, in respect of income assessable for any assessment year commencing on or after 1st day of April, in the year in which all the required formalities are completed.

ARTICLE 31

Termination

4 This Convention shall continue in effect indefinitely but either of the Contracting States may, on or before the thirtieth day of June in any calendar year beginning after the expiration of a period of five years from the date of its entry into force, give the other Contracting State, through diplomatic channels, written notice of termination and, in such event, this Convention shall cease to have effect:

(a) In Kenya—

- (i) in respect of tax withheld at the source on amounts paid or credited to non-residents on or after the 1st day of January, in the calendar year next following that in which the notice is given;
- (ii) in respect of other tax on income arising for the year of income next following that in which the notice of termination is given, and subsequent years.

(b) In India, in respect of income assessable for the assessment year commencing on the 1st day of April, in the second calendar year next following the calendar year in which the notice is given, and subsequent years.

Made on the 20th February, 1989.

GEORGE SAITOTI,
Minister for Finance.