

(Legislative Supplement No. 4)

LEGAL NOTICE No. 9

THE INCOME TAX ACT

(Cap. 470)

THE DOUBLE TAXATION RELIEF (SEYCHELLES) NOTICE, 2014

IN EXERCISE of the powers conferred by section 41 of the Income Tax Act, the Cabinet Secretary for Finance declares that the arrangements made between the Republic of Kenya and the Government of the Republic of Seychelles in the articles of an agreement set out in the Schedule and signed on the 17th March, 2014, with a view of affording relief from double taxation in relation to income tax and any rates of similar character imposed by the laws of Kenya, 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 the Republic of Seychelles desiring to conclude an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, have agreed as follows:

HAVE AGREED as follows:

ARTICLE 1

PERSONS COVERED

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

ARTICLE 2

TAXES COVERED

1. This Agreement shall apply to taxes on income imposed on behalf of a Contracting State or its county governments, political subdivisions or local authorities, 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, as well as taxes on the total amounts of wages or salaries paid by enterprises.

3. The existing taxes to which this Agreement shall apply are:

- (a) In Kenya, the income tax chargeable in accordance with the provisions of the Income Tax Act, Cap. 470 of the Laws of Kenya;

(hereinafter referred to as "Kenya" tax)

- (b) In Seychelles:
- (i) the business tax;
 - (ii) the income and non-monetary benefits tax; and
 - (iii) the petroleum income tax.
- (hereinafter referred to as "Seychelles" tax)

4. This Agreement shall also apply to any identical or substantially similar taxes that are imposed by the Contracting States after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws by means of an Exchange of Notes.

ARTICLE 3

GENERAL DEFINITIONS

1. For the purposes of this Agreement, unless the context otherwise requires:

- (a) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;
- (b) the term "competent authority" means:
 - (i) in Kenya, the Cabinet Secretary responsible for finance or his authorized representative;
 - (ii) in Seychelles, the Minister responsible for finance or his authorized representative;
- (c) the term "international traffic" means any transport by ship or aircraft, operated by an enterprise which has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;
- (d) the term "national", means:
 - (i) any individual possessing the nationality or citizenship of a Contracting State; and
 - (ii) any legal person, partnership, association or other entity deriving its status as such from the laws in force in a Contracting State;
- (e) the term "person" includes an individual, a partnership, a company, an estate, a trust and any other body of persons which is treated as an entity for tax purposes.
- (f) (i) the term "Kenya" means all territory of Kenya in state boundaries, including internal and territorial waters and also special economic zone and continental shelf, and all installations erected thereon as defined in the Continental Shelf Act, over which Kenya exercises its sovereign rights for

the purpose of exploring and exploiting natural resources of the seabed, its subsoil and the superjacent waters, in accordance with international law,

- (ii) the term "Seychelles" means the territory of the Republic of Seychelles including its exclusive economic zone and continental shelf where Seychelles exercises sovereign rights and jurisdiction in conformity with the provisions of the United Nations Convention on the Law of the Sea;
- (g) the terms "a Contracting State" and "the other Contracting State" means Kenya or Seychelles, as the context requires;
- (h) the term "business" includes the performance of professional services and of other activities of an independent character;
- (i) the term "enterprise" applies to the carrying on of any business;
- (j) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;
- (k) the term "tax" means Kenya tax or Seychelles tax, as the context requires, but shall not include any amount which is payable in respect of any default or omission in relation to the taxes to which this Agreement applies or which represents a penalty imposed relating to those taxes.

2. As regards the application of this Agreement at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the laws of that State for the purposes of the taxes to which the Agreement applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

ARTICLE 4

RESIDENT

1. For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation or registration or any other criterion of a similar nature. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

- (a) he shall be deemed to be a resident only of the State in which a permanent home is available to him. If a permanent home is

available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);

- (b) if the 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 State, he shall be deemed to be a resident of the State in which he has an habitual abode;
- (c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
- (d) if he is a national of both 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 person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its place of effective management is situated.

ARTICLE 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" shall include:

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop;
- (f) a warehouse, in relation to a person providing storage facilities for others; and
- (g) a mine, an oil or gas well, a quarry or any other place of exploration, extraction or exploitation of natural resources including any installation or structure used for the exploration, extraction or exploitation of natural resources.

3. The term "permanent establishment" likewise encompasses:

- (a) a building site, a construction, installation or assembly project, or supervisory activities in connection therewith, but only if such site, project or activities last for more than 6 months;
- (b) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged

by the enterprise for such purpose, but only where activities of that nature continue for the same or a connected project within the Contracting State for a period or periods exceeding in the aggregate 6 months in any twelve month period commencing or ending in the tax year concerned.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not 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 collecting information for the enterprise;
- (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character; and
- (f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2 of this Article, a person acting in a Contracting State on behalf of an enterprise of the other Contracting State (other than an agent of an independent status to whom paragraph 7 of this Article applies) notwithstanding that he has no fixed place of business in the first-mentioned State shall be deemed to have a permanent establishment in that State if:

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

6. Notwithstanding the preceding provisions of this article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.

7. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

8. 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 derived by a resident of a Contracting State from immovable property, including income from agriculture or forestry, is taxable in the Contracting State in which such property is situated.

2. The term "immovable property" shall have the meaning which it has under 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 income 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.

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 business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment; (b) sales in that other state of goods or merchandise of the same or similar kind as those sold through that permanent establishment; (c) other business activities carried on in that other state of the same or similar kind as those effected through that permanent establishment.

2. Subject to the provisions of paragraph 3, 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 that permanent establishment the profits 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 determining the profits of a permanent establishment:

- (a) there shall be allowed as deductions expenses which are incurred for the purposes 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. Nothing in this paragraph shall require a Contracting State to allow the deduction of any expenditure which, by reason of its nature, is not allowed as a deduction under the taxation laws of that State; and
- (b) no account shall be taken of amounts charged, by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices.

4. In so far as it has been customary in a Contracting State 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 Contracting 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 contained in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise 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 Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

ARTICLE 8

SHIPPING AND AIR TRANSPORT

1. Profits from the operation of ships or aircrafts in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. For the purpose of this Article, profits from the operation in international traffic of ships or aircraft shall include in particular:

- (a) profits derived from the rental or lease by the enterprise on a bare boat charter basis of ships or aircraft used in international traffic where such rental or lease is ancillary to the transportation of passengers or cargo;
- (b) profits derived from the use, maintenance, rental or lease of containers by the enterprise where such use, maintenance, rental or lease is ancillary to the transportation of cargo.

3. If the place of effective management of a shipping enterprise is aboard a ship or boat, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident.

4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

ARTICLE 9

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 a Contracting State includes in the profits of an enterprise of that State -- and taxes accordingly -- profits on which an enterprise of the other Contracting State has been charged to tax in that other State and where the competent authorities of the Contracting State agree, upon consultation, that all or part of the profits so included are

profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those agreed profits. In determining such adjustment, due regard shall be had to the other provisions of this Agreement.

3. A Contracting State shall not change the profits of an enterprise in the circumstances referred to in paragraph 1 after the expiry of the time limits provided in its national laws.

4. The provisions of paragraph 3 shall not apply in the case of fraud, evasion, wilful default or neglect.

ARTICLE 10

DIVIDENDS

1. Dividends paid by a company which is a 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 laws of that State, but if the recipient is the beneficial owner of the dividends and is a resident of the other Contracting State, the tax so charged to the beneficial owner shall not exceed 5 percent of the gross amounts of the dividends.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

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 which is subjected to the same taxation treatment as income from the shares by the laws of the Contracting State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner 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, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such a case, the provisions of Article 7 shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, no tax may be imposed on the beneficial owner in that other State on the dividends paid by the company except in so far as such dividends are paid to a 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 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 11

INTEREST

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

2. However, such interest may also be taxed in the Contracting State in which it arises and according to the law of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 percent of the gross amount of the interest.

3. Interest arising in a Contracting State shall be exempt from tax in that State if it is derived and beneficially owned by:

- (a) the Government, its county governments, political subdivisions or local authorities of the other Contracting State; or
- (b) any institution, body or board which is wholly owned by the Government, its county governments, political subdivisions or local authorities of the other Contracting State.

4. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

5. The provisions of paragraphs 1, 2 and 3 of this Article shall not apply if the beneficial owner 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, 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, 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, its county governments, political subdivisions or local authorities 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 in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the State in which the permanent establishment is situated.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, 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 beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount of interest. In such a case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

ARTICLE 12

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 also be taxed in the Contracting State in which they arise, and according to the law of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed 10 percent 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:

- (a) the use of, or right to use any patent, invention, design or model, secret formula or process, trademark, or other like property or right;
- (b) the use of, or right to use any copyright of a literary, artistic, or scientific work (including computer software, cinematograph films or films or video tapes or discs for use in connection with radio or television broadcasting;
- (c) the receipt of, or right to receive, any visual images or sounds, or both, transmitted by satellite, cable, optic fibre, or similar technology in connection with television, radio, or internet broadcasting;
- (d) the supply of any technical, industrial, commercial, or scientific knowledge, experience, or skill;
- (e) the use of or right to use any industrial, commercial, or scientific equipment; or
- (f) the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any property or right referred to in paragraphs (a) through (e).

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner 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 and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such a case, the provisions of Article 7 shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, its county governments, political

subdivisions or local authorities or a resident of that State. Where, however, 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 with which the right or property in respect of which the royalties are paid is effectively connected, and such royalties are borne by such permanent establishment, then such royalties shall be deemed to arise in the State in which the permanent establishment is situated.

6. Where by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, 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 beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such a 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 Agreement.

ARTICLE 13

MANAGEMENT, PROFESSIONAL OR TECHNICAL FEES

1. Management, professional or technical fees arising in a Contracting State which are derived by a resident of the other Contracting State may be taxed in that other State.

2. However, such management, professional or technical fees may also be taxed in the Contracting State in which they arise, and according to the law of that State, but where the beneficial owner of such management, professional or technical fees is a resident of the other Contracting State, the tax so charged shall not exceed 10 percent of the gross amount of the management, professional or technical fees.

3. The term "management, professional or technical 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 technical, managerial, professional or consultancy nature.

4. The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the management, professional or technical fees, being a resident of a Contracting State, carries on business in the other Contracting State in which the management, professional or technical fees arise through a permanent establishment situated therein, and the management, professional or technical fees are effectively connected with such permanent establishment. In such a case, the provisions of Article 7 shall apply.

5. Management, professional or technical fees shall be deemed to arise in a Contracting State when the payer is that State itself, its county governments, political subdivisions or local authorities or a resident of that State. Where, however, the person paying the

management, professional or technical fees, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the obligation to pay the management, professional or technical fees was incurred, and such management, professional or technical fees are borne by that permanent establishment, then such management, professional or technical fees shall be deemed to arise in the State in which the permanent establishment is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the management, professional or technical fees paid exceeds, the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last mentioned amount. In such 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 Agreement.

ARTICLE 14

CAPITAL GAINS

1. Gains derived by a resident of a Contracting State from the alienation of immovable property, referred to in Article 6, and situated in the other Contracting State may be taxed in that other Contracting State.

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 including such gains from the alienation of such permanent establishment (alone or with the whole enterprise), may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State.

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

ARTICLE 15

INCOME FROM EMPLOYMENT

1. Subject to the provisions of Articles 16, 18 and 19 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 that 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 tax year; 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 which the employer has in the other State.

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

4. The term "tax year" means a year of income.

ARTICLE 16

DIRECTORS' FEES

Directors' fees and other 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 17

ENTERTAINERS AND SPORTSMEN

1. Notwithstanding the provisions of Articles 7 and 15, income derived by a resident of a Contracting State as an entertainer such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman from his personal activities as such exercised in the other Contracting State, may be taxed in that other Contracting State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be taxed in

the Contracting State in which the activities of the entertainer or sportsman are exercised.

3. The provisions of paragraph 2 of this Article shall not apply if it is established that neither the entertainer or the sportsman nor persons related thereto, participate directly or indirectly in the profits of the person referred to in that paragraph.

4. Income derived by a resident of a Contracting State from activities exercised in the other Contracting State as envisaged in paragraphs 1 and 2 of this Article, shall be exempt from tax in that other State if the visit to that other State is supported wholly or mainly by public funds of the first-mentioned Contracting State or takes place under a cultural agreement or arrangement between the Governments of the Contracting States, their county governments, political subdivisions or local authorities.

ARTICLE 18

PENSIONS, ANNUITIES AND SOCIAL SECURITY PAYMENTS

1. Subject to the provisions of paragraph 2 of Article 19, pensions, annuities and similar payments arising in a Contracting State and paid in consideration of past employment to a resident of the other Contracting State, may be taxed in the first-mentioned State.

2. However, such pensions and other remuneration may also be taxed in the other Contracting State if the payment is made by a resident of the other Contracting State, or a permanent establishment situated therein.

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.

4. Notwithstanding the provisions of paragraphs 1 and 2 pensions paid and other payments made under a public scheme which is part of the social security system of a Contracting State, its county governments, political subdivisions or local authorities, shall be taxable only in that State.

ARTICLE 19

REMUNERATION AND PENSION IN RESPECT OF GOVERNMENT SERVICE

1. Remuneration, other than a pension, paid by, or out of funds created by a Contracting State, its county governments, political subdivisions or local authorities in the discharge of governmental functions shall be taxable only in that State. Such remuneration shall be taxable only in the other Contracting State creating the funds if the services are rendered in that other State and the individual is a resident of that State and:

- (a) is a national of that State; or

(b) did not become a resident solely for the purpose of rendering the services.

2. (a) Any pension paid by, or out of funds created by, a Contracting State, its county governments, political subdivisions or local authorities to an individual in respect of services rendered to that State or sub-division, authority or body in the discharge of governmental functions shall be taxable only in that State.

(b) However, such pension shall be taxable only in the other Contracting State if the individual is a resident of, and a national of, that State.

3. The provisions of Articles 15, 16, 17 and 18 shall apply to remuneration and pensions in respect of services rendered in connection with a business carried on by a Contracting State, its county governments, political subdivisions or local authorities.

ARTICLE 20

PROFESSORS, TEACHERS AND RESEARCHERS

1. Notwithstanding the provisions of Article 15, a professor, teacher or researcher who makes a temporary visit to the other Contracting State for a period not exceeding three years from the date of first arrival in that State, solely for the purpose of teaching or carrying out research at a university, college, school or other educational institution and who is, or immediately before such visit was, a resident of another Contracting State shall, in respect of remuneration for such teaching or research, be exempt from tax in the first-mentioned State, provided that such remuneration is derived by him from outside that State.

2. The provisions of this Article shall not apply to income from research if such research is undertaken not in the public's interest but wholly or mainly for the private benefit of a specific person or persons.

ARTICLE 21

STUDENTS AND BUSINESS APPRENTICES

A student or business apprentice who is present in a Contracting State solely for the purpose of his education or training or who is, or immediately before being so present was, a resident of the other Contracting State shall be exempt from tax in the (first-mentioned State) on payments received from outside that first-mentioned State for purpose of his maintenance, education and training.

ARTICLE 22

OTHER INCOME

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2,

Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, and the right or property in respect of which the income paid is effectively connected with such permanent establishment. In such a case, the provisions of Article 7 shall apply.

3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing articles of this Agreement and arising in the other Contracting State may also be taxed in that other State.

ARTICLE 23

ELIMINATION OF DOUBLE TAXATION

1. Where a resident of a Contracting State derives income which in accordance with the provisions of this Agreement may be taxed in the other Contracting State, the first-mentioned State shall allow as a deduction from the tax on the income of that resident an amount equal to the income tax paid in that other State. Provided that such deduction shall not exceed that part of the income tax as computed before the deduction is given, which is attributable as the case may be to the income which may be taxed in that other State.

2. The tax payable in a Contracting State mentioned in paragraph 1 shall be deemed to include the tax which would have been payable but for the tax incentives granted under the laws of that Contracting State and which are designed to promote economic development.

Provided that the income tax that would have been payable but for the tax incentives granted under the laws of a Contracting State shall not be allowed for deduction in the other Contracting State.

ARTICLE 24

NON-DISCRIMINATION

1. 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 the other State in the same circumstances are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

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. This provision shall not 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.

3. 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.

4. Except where the provisions of paragraph 1 of Article 9, paragraph 7 of Article 11, paragraph 6 of Article 12 or paragraph 5 of Article 14 apply, interest, royalties, technical fees and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State.

5. The term "taxation" means taxes which are the subject of this Agreement.

ARTICLE 25

MUTUAL AGREEMENT PROCEDURE

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within two years from the first notification of the action resulting in taxation not in accordance with the provisions of this Agreement.

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 a satisfactory 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 which is not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law 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 Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.

5. If it seems desirable to amend any Article of the Agreement without affecting the general principles thereof, the necessary

amendments may be made by mutual consent by means of exchange of diplomatic notes.

ARTICLE 26

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic law concerning taxes covered by this Agreement in so far as the taxation there under is not contrary to the Agreement, in particular for the prevention of fraud or evasion of such taxes. The exchange of information is not restricted by Article 1.

2. Any information so exchanged shall be treated as secret in the same manner as information obtained under the domestic law of that State and shall be disclosed only to persons or authorities (including courts or administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:

- (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 information which is 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.

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

ARTICLE 27

DIPLOMATIC AGENTS AND CONSULAR OFFICERS

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

ARTICLE 28

ENTRY INTO FORCE

1. The Contracting States shall notify each other, by means of exchange of diplomatic notes, of the completion of the procedures required by their laws for the bringing into force of this Agreement. The Agreement shall enter into force on the date of receipt of the latter of these notifications.

2. The provisions of the Agreement shall apply as follows:

- (a) In the case of Kenya, to income in respect of any year of income beginning on or after the first day of January next following the date upon which this Agreement enters into force.
- (b) In the case of Seychelles,
 - (i) with regard to taxes withheld at source, in respect of amounts paid or credited on or after the thirtieth day following the date upon which the Agreement enters into force; and
 - (ii) with regard to other taxes, in respect of years of assessment beginning on or after the date upon which this Agreement enters into force.

ARTICLE 29

TERMINATION

1. This Agreement shall remain in force indefinitely but any of the Contracting States may terminate the Agreement through diplomatic channels, by giving to the other Contracting State written notice of termination not later than 30th June of any calendar year starting five years after the year in which the Agreement entered into force.

2. In such event the Agreement shall cease to have effect as follows:

- (a) In the case of Kenya, to income in respect of any year of income beginning on or after the first day of January next following the date upon which such notice is given.
- (b) In the case of Seychelles,
 - (i) with regard to taxes withheld at source, in respect of amounts paid or credited on or after the thirtieth day following the date upon which such notice is given; and
 - (ii) with regard to other taxes, in respect of years of assessment beginning on or after the date upon which such notice is given.

PROTOCOL

At the signing of the Agreement between the Government of the Republic of Kenya and the Government of the Republic of Seychelles for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, the undersigned have agreed that the following provisions shall form an integral part of the said Agreement.

1. With reference to Article 6

For the purpose of this Article, both parties have agreed that the term "agriculture" includes fish farming, breeding and processing and raising aquatic species including specifically prawns, crayfish, oysters and shell fish.

2. With reference to paragraph 3 of Article 13

For the purpose of this Article, both parties have agreed that the term "management, professional or technical fees" shall also include payments in consideration for any agency or contractual services.

3. With reference to Article 26

For the purpose of this Article, both parties have agreed to the wording for a "Mode of Application" that prescribes the process to be followed for the exchange of information between each Contracting States.

The Mode of Application for the exchange of information is reproduced hereunder.

MODE OF APPLICATION FOR THE EXCHANGE OF
INFORMATION BETWEEN THE GOVERNMENT OF THE
REPUBLIC OF KENYA AND THE GOVERNMENT OF THE
REPUBLIC OF SEYCHELLES REGARDING ARTICLE 26 OF THE
AGREEMENT

The Government of the Republic of Kenya and the Government of the Republic of Seychelles on signing the Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income have added the following provisions with respect to the application of Article 26 of the Agreement.

1. It is agreed that the competent authority of the Contracting State from which information is sought (hereinafter referred to as the "Requested State") shall provide on request of the competent authority of the Contracting State requesting the information (hereinafter referred to as the "Requesting State") for purposes referred to in Article 26 of the Agreement.

2. The competent authority of the Requesting State shall provide in support of its written request to the competent authority of the Requested State, relevant evidence and include the following information when presenting a request for information under the Agreement, to demonstrate the foreseeable relevance of the information to the request:

- (a) the identity of the person under examination or investigation and, if banking records are sought by the Requesting State, the identity of the specific bank from which information is sought; and in every case a statement of all supporting evidence and other circumstantial proof which the request is based upon;
- (b) the precise period on which information is requested;
- (c) the indications on the information sought, notably its nature and the form in which the Requesting State wishes to receive information from the Requested State;
- (d) the tax purpose for which the information is requested;
- (e) a statement of whether or not the person under examination or investigation has committed or is suspected of having committed an offence under the laws of the Requesting State; and, if so, specify what offence or suspected offence, with reference to the applicable statute or other law of the Requesting State;
- (f) reasons which allow the Requesting State to conclude that the information requested is held in the Requested State or is in the possession or under the control of a person within the jurisdiction of the Requested State;
- (g) the name and, to the extent known, address of any person which the Requesting State believes to be in possession of the requested information;
- (h) a written declaration that the request is in conformity with the law, regulations and the recognised administrative practices of the Requesting State, that if the requested information was within the jurisdiction of the Requesting State, then the competent authority of the Requesting State would be able to obtain the information under the laws of the Requesting State or in the normal course of administrative practices and that it is in conformity with this Agreement;
- (i) a statement that the Requesting State has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

3. The competent authority of the Requested State may decline to provide the requested information if the request is not made in conformity with the Agreement or in accordance with this Mode of Application for the Exchange of Information.

4. The competent authorities have mutually agreed that ordinary costs that are incurred for the purpose of responding to a request for information will be borne by the Requested State. Such ordinary costs will normally cover internal administration costs of the competent authority and any minor external costs such as the cost of couriers.

The competent authorities have also mutually agreed that each of them shall reimburse the other for all direct/extraordinary costs incurred in providing information pursuant to this Agreement.

If a direct/extraordinary cost pertaining to a specific request is expected to exceed five hundred United States dollars, the Requested State will contact the competent authority of the Requesting State to determine whether the Requesting State wishes to pursue the request and to bear the cost.

Examples of direct/extraordinary costs include, but are not limited to, the following:

- (i) legal fees for non Government counsel appointed or retained with approval of the competent authority of the Requesting State, for litigations in the courts or pre-litigations processes of Requested State related to a specific request for information;
- (ii) reasonable costs for stenographic reports of interviews, depositions or testimony ;
- (iii) reasonable costs of locating, reproducing and transporting documents or records to the competent authority of the Requesting State;
- (iv) fees and expenses, determined in accordance with amounts allowed under applicable law or common practices, of a person who voluntarily appears in the Requested State for interview, deposition or testimony relating to a particular information request; and
- (v) reasonable remuneration for persons, if any, hired by the Government of the Requested State, specifically and exclusively to administer requests received under the Agreement.

5. The competent authorities may jointly decide, in writing, to amend this Mode of Application for the Exchange of Information at any time, including in the case of introducing a form of request.

Any amendment will take effect from the date of the jointly signed letter confirming the amendment.

Dated 3rd October, 2014

HENRY ROTICH,
Cabinet Secretary for the National Treasury.

