

**1977 No. 1299****INCOME TAX****The Double Taxation Relief (Taxes on Income) (Kenya)****Order 1977***Laid before the House of Commons in draft*

Made - - - - 29th July 1977

At the Court at Windsor Castle, the 29th day of July 1977

Present,

The Queen's Most Excellent Majesty in Council

Whereas a draft of this Order was laid before the House of Commons in accordance with the provisions of section 497(8) of the Income and Corporation Taxes Act 1970(a), and an Address has been presented to Her Majesty by that House praying that an Order may be made in the terms of this Order:

Now, therefore, Her Majesty, in exercise of the powers conferred upon Her by section 497 of the said Income and Corporation Taxes Act 1970, section 98(2) of the Finance Act 1972(b) and section 39 of the Finance Act 1965(c), as amended, and of all other powers enabling Her in that behalf, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as the Double Taxation Relief (Taxes on Income) (Kenya) Order 1977.

2. It is hereby declared—

- (a) that the arrangements specified in the Agreement set out in Part I of the Schedule to this Order and in the Protocol set out in Part II of that Schedule have been made with the Government of Kenya with a view to affording relief from double taxation in relation to income tax, corporation tax or capital gains tax and taxes of a similar character imposed by the laws of Kenya; and
- (b) that it is expedient that those arrangements should have effect.

*N. E. Leigh,*  
Clerk of the Privy Council.

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(a) 1970 c.10.

(b) 1972 c.41.

(c) 1965 c.25.

## SCHEDULE

## PART I

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF KENYA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL GAINS

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya;

Desiring to conclude an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains;

Have agreed as follows:

## ARTICLE 1

**Personal scope**

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

## ARTICLE 2

**Taxes covered**

(1) The taxes which are the subject of this Agreement are:

- (a) in the United Kingdom of Great Britain and Northern Ireland:
  - (i) the income tax;
  - (ii) the corporation tax; and
  - (iii) the capital gains tax;
- (b) in Kenya:
  - (i) the income tax; and
  - (ii) the graduated personal tax.

(2) This Agreement shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State 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 to each other any changes which are made in their respective taxation laws.

## ARTICLE 3

**General definitions**

(1) In this Agreement, unless the context otherwise requires:

- (a) the term "United Kingdom" means Great Britain and Northern Ireland, including any area outside the territorial sea of the United Kingdom which in accordance with international law has been or may hereafter be designated, under the laws of the United Kingdom concerning the Continental Shelf, as an area within which the rights of the United Kingdom with respect to the sea bed and sub-soil and their natural resources may be exercised;
- (b) the term "Kenya" means the Republic of Kenya, including any area adjacent to the territorial waters of Kenya designated, in accordance with international law, as an area within which Kenya may exercise rights with respect to the sea bed and sub-soil and their natural resources;
- (c) the term "nationals" means:
  - (i) in relation to the United Kingdom, all citizens of the United Kingdom and Colonies who derive their status as such from their connection with the United Kingdom and all legal persons, partnerships and associations deriving their status as such from the law in force in the United Kingdom;

- (ii) in relation to Kenya, all citizens of the Republic of Kenya and all legal persons, partnerships and associations deriving their status as such from the law in force in Kenya;
  - (d) the term "United Kingdom tax" means tax imposed by the United Kingdom being tax to which this Agreement applies by virtue of the provisions of Article 2; the term "Kenya tax" means tax imposed by Kenya being tax to which this Agreement applies by virtue of the provisions of Article 2; but neither of these terms are to include any tax payable in the United Kingdom or Kenya which is payable in respect of any default or omission in relation to the taxes which are the subject of this Agreement or which represents a penalty imposed under the law of the United Kingdom or Kenya relating to those taxes;
  - (e) the term "tax" means United Kingdom tax or Kenya tax, as the context requires;
  - (f) the terms "a Contracting State" and "the other Contracting State" mean the United Kingdom or Kenya, as the context requires;
  - (g) the term "persons" means
    - (i) in relation to the United Kingdom an individual, a company and any other body of persons;
    - (ii) in relation to Kenya an individual, a company and any other body of persons treated as an entity for tax purposes;
  - (h) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;
  - (i) 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;
  - (j) the term "competent authority" means, in the case of the United Kingdom the Commissioners of Inland Revenue or their authorised representative, and in the case of Kenya the Minister for Finance or his authorised representative.
- (2) As regards the application of this Agreement by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of this Agreement.

#### ARTICLE 4

##### Fiscal domicile

- (1) For the purpose of this Agreement, the term "resident of a Contracting State" means, subject to the provisions of paragraphs (2) and (3) of this Article, any person who, under the law 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. The terms "resident of the United Kingdom" and "resident of Kenya" shall be construed accordingly.
- (2) Where by reason of the provisions of paragraph (1) of this Article an individual is a resident of both Contracting States, then his 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 closest (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 has not 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 neither 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) of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting 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 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, display or delivery 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, display or delivery;
  - (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 advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise.
- (4) An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if it carries on the activity of providing the services within that other Contracting State of public entertainers or athletes referred to in Article 19.
- (5) 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 the provisions of paragraph (7) of this Article 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 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 that former State a stock of goods or merchandise belonging to the enterprise from which he regularly fulfils orders on behalf of that enterprise.

(6) 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 (7).

(7) 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. An agent shall not, however, be deemed to be an agent of an independent status within the meaning of this paragraph if his activities are devoted wholly or almost wholly to the business of that enterprise.

(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

##### Limitation of relief

Where under any provision of this Agreement any person is relieved from tax in a Contracting State on certain income if (with or without other conditions) that person is subject to tax in the other Contracting State in respect of that income and that person is subject to tax in respect of that income in that other State by reference to the amount thereof which is remitted to or received in that other State, the relief from tax to be allowed under this Agreement in the first-mentioned Contracting State shall apply only to the amounts so remitted or received.

#### ARTICLE 7

##### Income from immovable property

(1) Income from immovable property may be taxed in the Contracting State in which such property is situated.

(2)(a) The term "immovable property" shall, subject to the provisions of subparagraph (b) below be defined in accordance with the law of the Contracting State in which the property in question is situated.

(b) The term "immovable property" 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) of this Article shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

(4) The provisions of paragraphs (1) and (3) of this Article 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.

(5) Notwithstanding the preceding provisions of this Article profits derived by an agricultural, forestry or plantation enterprise shall be dealt with in accordance with the provisions of Article 8.

## ARTICLE 8

**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 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 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 at arm's length with the enterprise of which it is a permanent establishment.

(3) In the determination of the profits of a permanent establishment situated in a Contracting State, there shall be allowed as deductions expenses of the enterprise (other than expenses which would not be deductible under the law of that State if the permanent establishment were a separate enterprise) 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.

(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) of this Article 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 of 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 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 9

**Shipping and air transport**

A resident of a Contracting State shall be exempt from tax in the other Contracting State on profits from the operation of ships or aircraft other than profits from voyages of ships or aircraft confined solely to places in the other Contracting State.

## ARTICLE 10

**Associated enterprises**

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.

#### ARTICLE 11

##### Dividends

(1)(a) Dividends derived from a company which is a resident of the United Kingdom by a resident of Kenya may be taxed in Kenya.

(b) Where a resident of Kenya is entitled to a tax credit in respect of such a dividend under paragraph (2) of this Article tax may also be charged in the United Kingdom and according to the laws of the United Kingdom, on the aggregate of the amount or value of that dividend and the amount of that tax credit at a rate not exceeding 15 per cent.

(c) Except as aforesaid dividends derived from a company which is a resident of the United Kingdom by a resident of Kenya who is subject to tax in Kenya on them shall be exempt from any tax in the United Kingdom which is chargeable on dividends.

(2) A resident of Kenya who receives dividends from a company which is a resident of the United Kingdom shall, subject to the provisions of paragraph (3) of this Article and provided he is subject to tax in Kenya on the dividends, be entitled to the tax credit in respect thereof to which an individual resident in the United Kingdom would have been entitled had he received those dividends, and to the payment of any excess of such credit over his liability to United Kingdom tax.

(3) Paragraph (2) of this Article shall not apply where the recipient of the dividend is a company which either alone or together with one or more associated companies controls directly or indirectly at least 10 per cent of the voting power in the company paying the dividend. For the purpose of this paragraph two companies shall be deemed to be associated if one is controlled directly or indirectly by the other, or both are controlled directly or indirectly by a third company.

(4) Dividends derived from a company which is a resident of Kenya by a resident of the United Kingdom may be taxed in the United Kingdom. Such dividends may also be taxed in Kenya but the tax so charged shall not exceed 15 per cent of the gross amount of the dividends if the recipient of the dividends is subject to tax on them in the United Kingdom.

(5) 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 by the taxation law of the State of which the company making the distribution is a resident and also includes any other item (other than interest or royalties relieved from tax under the provisions of Article 12 or Article 13 of this Agreement) which, under the law of the Contracting State of which the company paying the dividend is a resident, is treated as a dividend or distribution of a company.

(6) If the recipient of the dividends being a resident of a Contracting State owns 10 per cent or more of the class of shares in respect of which the dividends are paid then paragraphs (1) and (2) or as the case may be paragraph (4) of this Article shall not apply to the dividends to the extent that they can have been paid only out of profits which the company paying the dividends earned or other income which it received in a period ending 12 months or more before the relevant date. For the purposes of this paragraph the term "relevant date" means the date on which the recipient of the dividends became the owner of 10 per cent or more of the class of shares in question.

Provided that this paragraph shall apply only if the shares were acquired primarily for the purpose of securing the benefit of this Article and not for bona fide commercial reasons.

(7) The provisions of paragraphs (1) and (2), or as the case may be paragraph (4) of this Article shall not apply where a resident of a Contracting State has in the other Contracting State a permanent establishment and the holding by virtue of which the dividends are paid is effectively connected with the business carried on through such permanent establishment. In such a case the provisions of Article 8 shall apply.

(8) 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 to persons who are not residents of that other State or 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 that 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 where such interest is paid to a resident of the other Contracting State who is subject to tax there in respect thereof 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 a 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 in the first-mentioned Contracting State. The competent authorities of the Contracting States may determine by 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 State in which the income arises.

(5) The provisions of paragraphs (1) and (2) of this Article shall not apply if the recipient of the interest, being a resident of a Contracting State, has in the other Contracting State in which the interest arises a permanent establishment and the debt-claim from which the interest arises is effectively connected with a business carried on through that permanent establishment. In such a case, the provisions of Article 8 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 in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by that permanent establishment, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

(7) Any provision of the law of one of the Contracting States which relates only to interest paid to a non-resident company with or without any further requirement, shall not operate so as to require such interest paid to a company which is a resident of the other Contracting State to be left out of account as a deduction in computing the taxable profits of the company paying the interest as being a dividend or distribution. The preceding sentence shall not however apply to interest received by a company which is a resident of one of the Contracting States in which more than 50 per cent of the voting power is controlled, directly or indirectly by a person or persons resident in the other Contracting State.



(8) 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 Agreement.

#### 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 where such royalties are paid to a resident of the other Contracting State who is subject to tax there in respect thereof the tax so charged in the Contracting State in which the royalties arise shall not exceed 15 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 paragraphs (1) and (2) of this Article shall not apply if the recipient of the royalties, being a resident of a Contracting State, has in the other Contracting State a permanent establishment and the right or property giving rise to the royalties is effectively connected with a business carried on through that permanent establishment. In such a case, the provisions of Article 8 shall apply.

(5) Royalties 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 royalties, 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 royalties was incurred, and such royalties are borne by that permanent establishment, then such royalties 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 recipient or between both of them and some other person, the amount of the 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 Agreement.

#### ARTICLE 14

##### **Management fees**

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

(2) Notwithstanding Article 8, management fees may also be taxed in the State in which they arise and according to the law of that State; but where such management fees are paid to a resident of the other Contracting State who is subject to tax there in respect thereof the tax so charged in the Contracting State in which the management fees arise shall not exceed 15 per cent of the gross amount of the management fees arising there.

(3) The term "management 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 or consultancy nature.

(4) The provisions of paragraphs (1) and (2) of this Article shall not apply if the recipient of the management fees, being a resident of a Contracting State, has in the other Contracting State in which the management fees arise a permanent establishment with which the management fees are effectively connected. In such a case the provisions of Article 8 shall apply.

(5) If a resident of one of the Contracting States who receives management fees which arise in the other Contracting State and who is subject to tax in respect thereof in the first-mentioned Contracting State so elects for any year of assessment, financial year or year of income, the tax chargeable in respect of those management fees in the Contracting State in which they arise shall be calculated as if he had a permanent establishment in the last-mentioned Contracting State and as if those management fees were taxable in accordance with Article 8 as profits attributable to that permanent establishment.

(6) Management fees shall be deemed to arise in a Contracting State when the payer is the government of that State or a political subdivision thereof, a local authority or a resident of that State, and to the extent that they are attributable to services rendered in that State. Where, however, the person paying the management 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 fees was incurred and the management fees are borne by that permanent establishment, then the management fees shall be deemed to arise in that Contracting State to the extent that they are attributable to services rendered in that State.

## ARTICLE 15

### Capital gains

(1) Capital gains from the alienation of immovable property, as defined in paragraph (2) of Article 7, may be taxed in the Contracting State in which such property is situated.

(2) Capital 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 the other State.

(3) Notwithstanding the provisions of paragraph (2) of this Article, capital gains derived by a resident of a Contracting State from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft shall be taxable only in that Contracting State.

(4) Capital gains from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3) of this Article shall be taxable only in the Contracting State of which the alienator is a resident.

(5) The provisions of paragraph (4) of this Article shall not affect the right of a Contracting State to levy according to its own law a tax on capital gains from the alienation of any property derived by a person who is a resident of the other Contracting State and has been a resident of the first-mentioned Contracting State at any time during the ten years immediately preceding the alienation of the property.

## 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 other than management fees as defined in paragraph (3) of Article 14 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 purpose of performing his activities, in which case so much of the income may be taxed in that other Contracting State as is attributable to that fixed base; or
- (b) he is present in that other Contracting State for a period or periods exceeding in the aggregate 183 days in the fiscal year concerned, in which case so much of the income may be taxed in that other Contracting State as is attributable to the activities performed in that other Contracting State.

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

## ARTICLE 17

**Employments**

(1) Subject to the provisions of Articles 18, 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 that other State.

(2) Notwithstanding the provisions of paragraph (1) of this Article, 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 in the Contracting State of which the person deriving the profits from the operation of the ship or aircraft is a resident.

## 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**

Notwithstanding the provisions of Articles 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. Provided that this Article shall not apply to public entertainers and athletes whose visit to a Contracting State is supported wholly or substantially from the public funds of the other Contracting State.

**ARTICLE 20****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 the tax so charged in the first-mentioned Contracting State shall not exceed the lower of

(a) 5 per cent of the pension, or

(b) the amount of the tax chargeable on the pension 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 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 21****Governmental functions**

(1) Remuneration 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 shall be exempt from tax in the other Contracting State if the individual is not a resident of that other Contracting State or is resident there solely for the purpose of rendering those services.

(2) The provisions of this Article shall not apply to payments in respect of services rendered in connection with any trade or business carried on by either of the Contracting States for purposes of profit.

**ARTICLE 22****Students**

(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 that first-mentioned Contracting State on:

(a) payments made to him by persons residing outside that first-mentioned Contracting State for the purposes of his maintenance, education or training; and

(b) remuneration from employment in that first-mentioned Contracting State, provided that the remuneration constitutes earnings reasonably necessary for his maintenance and education.

(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****Teachers**

A professor or teacher who visits a Contracting State for a period not exceeding two years for the purpose of teaching at a university, college, school or other educational institution in that Contracting State and who is, or was immediately before that 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 in respect of which he is subject to tax in the other Contracting State.

## ARTICLE 24

**Income not expressly mentioned**

Items of income of a resident of a Contracting State being income of a class or from sources not expressly mentioned in the foregoing Articles of this Agreement in respect of which he is subject to tax in that State shall be taxable only in that State. Provided that this Article shall not be construed as affecting the taxation of income attributable to a permanent establishment which a resident of one Contracting State has in the other Contracting State.

## ARTICLE 25

**Capital**

(1) Capital represented by immovable property, as defined in paragraph (2) of Article 7, may be taxed in the Contracting State in which such property is situated.

(2) Capital represented by movable property forming part of the business property of a permanent establishment of an enterprise, or by movable property pertaining to a fixed base used for the performance of professional services, may be taxed in the Contracting State in which the permanent establishment or fixed base is situated.

(3) Notwithstanding the provisions of paragraph (2) of this Article, ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft shall be taxable only in the Contracting State of which the operator is a resident.

(4) All other elements of capital of a resident of a Contracting State shall be taxable only in that State.

## ARTICLE 26

**Elimination of double taxation**

(1) Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom (which shall not affect the general principle hereof), Kenya tax payable under the laws of Kenya and in accordance with this Agreement, whether directly or by deduction, on profits, income or chargeable gains from sources within Kenya shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the Kenya tax is computed. Provided that in the case of a dividend the credit shall take into account only such tax in respect thereof as is additional to any tax payable by the company on the profits out of which the dividend is paid and is ultimately borne by the recipient without reference to any tax so payable.

(2) For the purpose of paragraph (1) of this Article, the term "Kenya tax payable" shall be deemed to include any amount which would have been payable as Kenya tax for any year but for—

- (a) a reduction of tax granted for that year or any part thereof under paragraph (2)(b) of the Second Schedule to the Income Tax (Allowances and Rates) (No. 2) Act 1971, so far as it was in force on, and has not been modified since, the date when this Agreement was signed, or has been modified only in minor respects so as not to affect its general character; or
- (b) any other provision which may subsequently be made granting an exemption or reduction of tax which is agreed by the competent authorities of the United Kingdom and Kenya to be of a substantially similar character, if it has not been modified thereafter or has been modified only in minor respects so as not to affect its general character.

Provided that relief from United Kingdom tax shall not be given by virtue of this paragraph in respect of income from any source if the income arises in a period starting more than ten years after the exemption from, or reduction of, Kenya tax was first granted in respect of that source.

(3) Where a resident of Kenya:

(a) derives income from sources within the United Kingdom which, in accordance with the provisions of this Agreement, is exempt from Kenya tax but may be taxed in the United Kingdom, then Kenya may, in calculating the tax on the remaining income of that person, apply the rate of tax which would have been applicable if the income derived from sources within the United Kingdom had not been exempted;

(b) derives income from sources within the United Kingdom which may be taxed in both Contracting States, then Kenya shall allow as a deduction from the tax on the income of that person an amount equal to the tax paid in the United Kingdom. Such deduction, however, shall not exceed that part of the Kenya tax as computed before the deduction is given, which is appropriate to the income derived from the United Kingdom.

(4) For the purposes of paragraphs (1) and (3) of this Article income, profits and capital gains owned by a resident of a Contracting State which may be taxed in the other Contracting State in accordance with this Agreement shall be deemed to arise from sources in that other Contracting State.

#### ARTICLE 27

##### **Personal allowances**

(1) Subject to the provisions of paragraph (3) of this Article, individuals who are residents of Kenya shall be entitled to the same personal allowances, reliefs and reductions for the purpose of United Kingdom tax as British subjects not resident in the United Kingdom.

(2) Subject to the provisions of paragraph (3) of this Article, individuals who are residents of the United Kingdom shall be entitled to the same personal allowances, reliefs and reductions for the purposes of Kenya tax as Kenya citizens not resident in Kenya.

(3) Nothing in this Agreement shall entitle an individual who is a resident of a Contracting State and whose income from the other Contracting State consists solely of dividends, interest or royalties (or solely of a combination thereof) to the personal allowances, reliefs and reductions of the kind referred to in this Article for the purpose of taxation in that other Contracting State.

#### ARTICLE 28

##### **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) 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 Contracting 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) Nothing contained in this Article shall be construed as obliging either Contracting State to grant to individuals not resident in that State any of the personal allowances, reliefs and reductions for tax purposes which are granted to individuals so resident.

(5) In this Article the term "taxation" means taxes of every kind and description.

#### ARTICLE 29

##### **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 Agreement, he may, notwithstanding the remedies provided by the national laws of those States, present his case to the competent authority of the Contracting State of which he is a resident.

(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 the Agreement.

(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 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.

#### ARTICLE 30

##### **Exchange of information**

The competent authorities of the Contracting States shall exchange such information (being information which is at their disposal under their respective taxation laws in the normal course of administration) as is necessary for carrying out the provisions of this Agreement or for the prevention of fraud or the administration of statutory provisions against legal avoidance in relation to the taxes which are the subject of this Agreement. Any information so exchanged shall be treated as secret but may be disclosed to persons (including a court or administrative body) concerned with assessment, collection, enforcement or prosecution in respect of taxes which are the subject of this Agreement. No information shall be exchanged which would disclose any trade, business, industrial or professional secret or any trade process.

#### ARTICLE 31

##### **Territorial extension**

(1) This Agreement may be extended, either in its entirety or with modifications, to any territory for whose international relations the United Kingdom is responsible and which imposes taxes substantially similar in character to those to which this Agreement applies. Any such extension shall take effect from such date and subject to such modifications and conditions, including conditions as to termination, as may be specified and agreed between the Contracting States in notes to be exchanged for this purpose.

(2) Unless otherwise agreed by both Contracting States, the termination of this Agreement shall terminate the application of this Agreement to any territory to which it has been extended under the provisions of this Article.

## ARTICLE 32

**Entry into force**

This Agreement shall come into force on the date when the last of all such things shall have been done in the United Kingdom and Kenya as are necessary to give the Agreement the force of law in the United Kingdom and Kenya respectively, and shall thereupon have effect:

- (a) in the United Kingdom:
  - (i) as respects income tax and capital gains tax, for any year of assessment beginning on or after 6 April 1973;
  - (ii) as respects corporation tax, for any financial year beginning on or after 1 April 1973;
- (b) in Kenya:
  - as respects income arising for the year of income 1973 and subsequent years.

## ARTICLE 33

**Termination**

This Agreement shall continue in effect indefinitely but either of the Contracting Governments may, on or before the thirtieth day of June in any calendar year after the year 1978, give notice of termination to the other Contracting Government and, in such event, the Agreement shall cease to be effective:

- (a) in the United Kingdom:
  - (i) as respects income tax, surtax and capital gains tax, for any year of assessment beginning on or after 6 April in the calendar year next following that in which the notice is given;
  - (ii) as respects corporation tax, for any financial year beginning on or after 1 April in the calendar year next following that in which the notice is given;
- (b) In Kenya:
  - as respects income arising for the year of income next following that in which the notice is given and subsequent years.

In witness whereof the undersigned, duly authorised thereto, have signed this Agreement.

Done in duplicate at Nairobi this Thirty First day of July one thousand nine hundred and seventy three.

FOR THE GOVERNMENT OF  
THE UNITED KINGDOM OF GREAT  
BRITAIN AND NORTHERN  
IRELAND:

ANTONY DUFF.

FOR THE GOVERNMENT OF  
THE REPUBLIC OF KENYA:

MWAI KIBAKI.

## PART II

PROTOCOL AMENDING THE AGREEMENT SIGNED AT NAIROBI ON 31 JULY 1973 BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF KENYA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL GAINS, SIGNED AT LONDON ON 20 JANUARY 1976, AS AMENDED BY NOTES EXCHANGED AT NAIROBI ON 8 FEBRUARY 1977

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya;



Desiring to conclude a Protocol to amend the Agreement between the Contracting Governments for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains, signed at Nairobi on 31 July 1973 (hereinafter referred to as "the Agreement");

Have agreed as follows:

#### ARTICLE I

Paragraph (3) of Article 12 of the Agreement shall be deleted and replaced by the following:

"(3) Notwithstanding the provisions of paragraph (2):

- (a) interest arising in a Contracting State, and paid to the Government of the other Contracting State or a 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 in the first-mentioned Contracting State. The competent authorities of the Contracting States may determine by mutual agreement any other governmental institution to which this paragraph shall apply;
- (b) interest arising in Kenya which is paid to a resident of the United Kingdom, other than to a person mentioned in sub-paragraph (a) of this paragraph, may be exempt from Kenya tax at the discretion of the competent authority of Kenya."

#### ARTICLE II

Paragraph (2) of Article 14 of the Agreement shall be deleted and replaced by the following:

"(2) Notwithstanding Article 8, management fees may also be taxed in the State in which they arise and according to the law of that State; but where such management fees are paid to a resident of the other Contracting State who is subject to tax there in respect thereof the tax so charged in the Contracting State in which the management fees arise shall not exceed 12½ per cent of the gross amount of the management fees arising there."

#### ARTICLE III

Paragraph (5) of Article 14 of the Agreement shall be deleted and replaced by the following:

"(5) If a resident of one of the Contracting States who receives management fees which arise in the other Contracting State and who is subject to tax in respect thereof in the first-mentioned Contracting State so elects for any year of assessment, financial year or year of income, the tax chargeable in respect of those management fees in the Contracting State in which they arise shall be calculated as if he had a permanent establishment in the last-mentioned Contracting State and as if those management fees were taxable in accordance with Article 8 as profits attributable to that permanent establishment. Provided that in no such case shall the expenses deductible in calculating the tax chargeable in respect of those management fees exceed 75 per cent of the gross amount of those management fees arising in the last-mentioned Contracting State."

#### ARTICLE IV

Paragraph (1) of Article 20 of the Agreement shall be deleted and replaced by the following:

"(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.”

#### ARTICLE V

Paragraph (1) of Article 26 of the Agreement shall be deleted and replaced by the following:

“(1) Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom (which shall not affect the general principle hereof):

- (a) Kenya tax payable under the laws of Kenya and in accordance with this Agreement, whether directly or by deduction, on profits, income or chargeable gains from sources within Kenya shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the Kenya tax is computed. Provided that in the case of a dividend the credit shall take into account only such tax in respect thereof as is additional to any tax payable by the company on the profits out of which the dividend is paid and is ultimately borne by the recipient without reference to any tax so payable.
- (b) In the case of a dividend paid by a company which is a resident of Kenya to a company which is a resident of the United Kingdom and which controls directly or indirectly at least 10 per cent of the voting power in the company paying the dividend the credit shall take into account (in addition to any Kenya tax for which credit may be allowed under the provisions of subparagraph (a) of this paragraph) the Kenya tax payable by the company in respect of the profits out of which such dividend is paid.”

#### ARTICLE VI

Paragraph (2) of Article 28 of the Agreement shall be deleted and replaced by the following:

“(2) The taxation on a permanent establishment which an enterprise of one of the Contracting States has in the other Contracting State shall not be less favourably levied in that other Contracting State than the taxation levied on an enterprise of that other Contracting State carrying on the same activities. Provided that this paragraph shall not prevent the Government of one of the Contracting States from imposing on the profits attributable to a permanent establishment in that Contracting State of a company which is a resident of the other Contracting State a tax not exceeding 7½ per cent of those profits in addition to the tax which would be chargeable on those profits if they were the profits of a company which was a resident of that Contracting State.”

#### ARTICLE VII

Article 32 of the Agreement shall be deleted and replaced by the following:

#### “ARTICLE 32

#### Entry into force

This Agreement shall come into force on the date when the last of all such things shall have been done in the United Kingdom and Kenya as are necessary to give the Agreement the force of law in the United Kingdom and Kenya respectively, and shall thereupon have effect:

- (a) in the United Kingdom:
  - (i) in respect of income tax and capital gains tax, for any year of assessment beginning on or after 6 April 1976;
  - (ii) in respect of corporation tax, for any financial year beginning on or after 1 April 1976;
- (b) in Kenya:
  - in respect of income arising for the year of income 1976 and subsequent years."

## ARTICLE VIII

This Protocol, which shall form an integral part of the Agreement, shall come into force when the last of all such things shall have been done in the United Kingdom and Kenya as are necessary to give the Protocol the force of law in the United Kingdom and Kenya respectively, and shall thereupon have effect:

- (a) in the United Kingdom:
  - (i) in respect of income tax and capital gains tax, for any year of assessment beginning on or after 6 April 1976;
  - (ii) in respect of corporation tax, for any financial year beginning on or after 1 April 1976;
- (b) in Kenya:
  - in respect of income arising for the year of income 1976 and subsequent years.

In witness whereof the undersigned, duly authorised thereto, have signed this Protocol.

Done in duplicate at London this 20th day of January 1976.

FOR THE GOVERNMENT  
OF THE UNITED KINGDOM  
OF GREAT BRITAIN AND  
NORTHERN IRELAND:

FOR THE GOVERNMENT  
OF THE REPUBLIC OF  
KENYA:

D. ENNALS.

NG'ETHE NJOROGE.

## EXPLANATORY NOTE

*(This Note is not part of the Order.)*

The Agreement (as amended by the Protocol) with Kenya scheduled to this Order contains a number of provisions similar to those included in the previous Arrangement which was made in 1952 and terminated by Kenya with effect from 6 April 1973. The most important are those relating to the taxation of shipping and air transport profits, certain trading profits not arising through a permanent establishment and earnings from employment. Where income continues to be taxable in both countries credit will, as in the earlier Arrangement, be given by the country of the taxpayer's residence for the tax payable in the country of origin of the income. Under the new Agreement the United Kingdom will also give credit for tax spared under certain provisions of Kenyan law.

There are significant changes in the treatment provided for dividends, interest, royalties, management fees and pensions.

The treatment of dividends takes account of the introduction of the imputation system of company taxation in the United Kingdom. Where a United Kingdom company pays a dividend to a resident of Kenya (other than to a company which controls 10 per cent or more of the voting power in the paying company), the recipient will, subject to certain conditions, receive the tax credit to which an individual resident in the United Kingdom and in receipt of such a dividend would be entitled, less a deduction at a rate not exceeding 15 per cent on the aggregate of the dividend and the tax credit. Dividends paid by Kenyan companies to residents of the United Kingdom will, in general, be subject to tax in Kenya at a rate not exceeding 15 per cent.

The rate of tax in the country of source on interest and royalties flowing to the other country will, in general, not exceed 15 per cent; interest received by the Government (or a governmental institution) will be exempt from tax in the country of source.

The rate of tax in the country of source on management fees flowing to the other country will, subject to certain conditions, not exceed 12½ per cent of the fees.

The tax chargeable by the country of source on pensions (other than Government service pensions) is limited to the lower of 5 per cent of the pension or the amount of tax chargeable on the pension in the country of the pensioner's residence.

Governmental remuneration will normally be taxed by the paying Government only. The remuneration of visiting teachers and certain payments made to students will (subject to certain conditions) be exempt in the country visited.

There is provision for the taxation of capital gains on immovable property by the country in which the property is situated. Capital gains arising from the disposal of movable property will normally be taxed only in the country of the taxpayer's residence unless they arise from the disposal of assets of a permanent establishment or fixed base which the taxpayer has in the other country.

There are also provisions for the exchange of information, for consultation between the taxation authorities of the two countries and for the safeguarding of nationals and enterprises of one country against discriminatory taxation in the other country; an additional tax—not exceeding 7½ per cent—may however be charged on profits earned in one country by a permanent establishment of a company which is a resident of the other.

The Agreement is to take effect in the United Kingdom as respects income tax and capital gains tax for the tax year 1976-77 and subsequent years and as respects corporation tax for the financial year commencing on 1 April 1976 and subsequent years.

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