



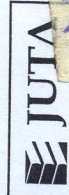
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The Memorandum of Understanding on Double Taxation between Nigeria and Kenya: An Appraisal

MK Adebayo* and SM Olokooba**

ABSTRACT

It is the practice in most States for income tax to be imposed both on worldwide income derived by residents of the country and on income derived by non-residents generated within the country. The effect of such a system is that income derived by a resident of one State from a source in another country is subjected to tax in both States. This position clearly discourages foreign investment, hence the conclusion of double taxation treaties between States. The focus of this article is, therefore, an appraisal of the memorandum of understanding (MoU) agreement on double-taxation recently entered into by Nigeria and Kenya. It argues that the MoU, if effectively implemented, will boost trade and economic development through increased revenue generation from taxation. The article elucidates on the jurisprudential basis of double taxation treaties by States and then proceeds to undertake a critical analysis of the MoU by Nigeria and Kenya.

1 INTRODUCTION

Double taxation is the imposition of two or more taxes on the same income, asset or transaction.¹ Double taxation has, over the years, been a serious problem and obstacle to cross-border trade and investment, in particular when it comes to the areas of deductibility, due to the complexity of the different national systems of taxation. The consequence of double taxation is the taxing of certain activities at a higher rate than similar activity that is located solely within the taxing jurisdiction. The mitigating arrangements against double liability are

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¹ DA Ariyoosu, *Taxation of Electronic Commerce in Nigeria*, 1st edn, (Stirling-Horden Publishers Ltd 2014) 25.

tax treaties between States, in the form of double taxation agreements.² Practically, in the case of double taxation, a person may be subjected to tax on the same income in one State on account of his or her personal status (residence, nationality, and domicile), and in another country because the source of his or her income is situated within its territory.³ When this occurs, the common solution for an individual is the relocation or re-arrangement of economic activity in order to lower the incidence of taxation through tax avoidance. Ordinarily, tax avoidance is generally considered as a way of identifying the loop-hole in the tax law and then taking advantage of such a lacuna to reduce the tax payable.⁴ Many taxpayers do take advantage of tax avoidance to manage their tax liability because, generally, individuals find it difficult and uneconomical to work abroad if all of their income is subject to taxation by two authorities, regardless of origin of income.

It is not unusual for an individual who is resident in one country to make taxable gains on earnings or profits in another country. This person may find that he or she is obliged, by domestic laws, to pay tax on that gain locally, while he or she is still taxed in the country in which the gain was made. Since this is inequitable, many States make bilateral double taxation agreements with each other. The term 'double taxation' is additionally used to refer to an instance where corporate profits are taxed and the shareholders of the corporation are subjected to personal taxation when they receive dividends or distributions of the profits. For instance, in the United States, the term 'double taxation' is also used to describe dividend taxation on income that was previously taxed at the corporate level.⁵ Double taxation is not restricted to inter-country transactions only. It is also possible to have double taxation within a single federal country, at the States level. Since double taxation can be in various modes, this article focuses on the form that involves charging of tax 'by two or more jurisdictions on the same declared income, asset or transaction'.⁶

Double liability is often mitigated by tax treaties between countries. A double taxation Treaty is a mechanism for reducing the burden of

² This was the type of agreement that Kenya and Nigeria signed. See Memorandum of Understanding between Nigeria and Kenya on Double Taxation Agreement (adopted 6 September 2013, entry into force 1 January 2014) <www.treatypro.com/treaties_by_country/kenya.asp> accessed on 1 March 2015.

³ IO Agbade, 'Double Taxation and the Problems of Foreign Income' in O Ikanle (ed), *Tax Law and Tax Administration in Nigeria*, 1st edn, (Nigerian Institute of Advanced Legal Studies 1991) 347.

⁴ O Seyi, *Fundamental Principles of Nigerian Tax*, 2nd edn, (Sagribra Tax Publication 2008) 41.

⁵ R Carroll, 'Double Taxation' <http://www.taxfoundation.org/publications/show/26384.html> accessed on 11 June 2014.

⁶ Overseas Development Institute, 'Tax Evasion: Ten Terms You Need to Know' <http://www.odi.org/comment/7520-ten-terms-tax-evasion-avoidance-g8> accessed on 21 February 2015.

having an income taxed twice.⁷ Such a Treaty is a bilateral agreement aimed at affording relief from double taxation, by exempting certain classes of income from tax in one, or other, of the territories which are parties to such agreement.⁸ This type of agreement is, however, different from a general Treaty on trade and commerce, which covers a much wider field than relief from double taxation.

The main objective of a tax Treaty is to reduce taxes of one State for residents of the other Treaty country in order to reduce double taxation of the same income.⁹ The substance of the Treaty may include: income from movable property; business profits not arising through a permanent establishment; profits or gains arising from the operation of ships and aircrafts; dividends from a company which is based in one country by the resident of the other country; interest arising in a country and paid to a resident of the other country; royalties arising in a country and paid to a resident of the other country; income derived by a resident of a country in respect of professional services or other independent activities of a similar character; and income derived by artists and athletes.¹⁰

Double taxation can also occur when a taxpayer is forced to pay tax on the same income in two or more jurisdictions.¹¹ To avoid this, it is, in some cases, required that tax be paid in the country of residence and be exempt in the country in which it arises. In other cases, the country where the gain arises deducts taxation at source and the taxpayer receives a compensating foreign tax credit in the country of residence to reflect the fact that tax has already been paid. To benefit from such an arrangement, the taxpayer must declare himself in the foreign country in order to be regarded as a non-resident there. After this declaration, the two taxation authorities will exchange information about the information, and investigate any anomalies that might indicate tax evasion.¹² In Nigeria, virtually all statutes imposing personal or property taxes contain provisions for reduced rate of tax, or giving credit for tax paid on the same income in countries that afford reciprocal measures for taxes charged by Nigerian tax authorities.¹³ Understandably, there is no provision for unilateral tax relief in Nigeria without reciprocal measures.

⁷ C. Ola, *Income Tax Law for Incorporated and Unincorporated Bodies in Nigeria* (Heinemann Education Books 1999) 489.

⁸ Ibid.

⁹ Ariyoosu (n 1) 26.

¹⁰ JA Ariwodola, *Companies Taxation in Nigeria*, 3rd edn, (JAA Nigeria Ltd 1995) 117.

¹¹ H Abdali, 'International Double Taxation: A serious Problem within the EU' (30 January 2014) <http://www.Svenskarningsliv.se/english/international-double-taxation-a-serious-problem-within-the-eu_578988.html> accessed on 12 June 2014.

¹² D Rykers, *A Critical Analysis of How Double Tax Agreements Can Facilitate Fiscal Avoidance and Evasion* (The Taxpayer and the Lotus 2009) 45.

¹³ Companies Income Tax Act of 1979, ss 32 and 33.

Double taxation relief may be available under both national legislation and international agreements between the Governments of the countries concerned. The relief may also be conditional or reciprocal, depending on the intentions of the countries concerned. This relief may be achieved through either bilateral or multilateral agreements, for instance: on an income, which may be exempted in one or another country; by charging taxes at a reduced rate in one of the countries; or by ensuring that tax levied in one country is allowed as credit against the tax to be charged in the other country on the same income.¹⁴ Basically, the essence of double taxation Treaty between States is to further strengthen intercontinental trade relationship so that the tax burden will not constitute a bilateral trade clog.

This article is structured into five sections, with part two focusing on the jurisprudential basis of entering into a double taxation Treaty. In the third section, the article examines the historical background of the Nigerian and Kenyan Memorandum of Understanding on Double Taxation. The fourth section critiques the provisions of the MoU on double taxation between Nigeria and Kenya. Section five is essentially on concluding remarks and recommendation.

2 JURISPRUDENTIAL BASIS OF DOUBLE TAXATION TREATIES BETWEEN STATES

The basis of imposing taxes include habitual residence, nationality, domicile, location of property, head office of corporation, place of business activities, country of derivation of income, and so on.¹⁵ However, the enforcement of payment, actualisation and derivation of revenue from all these sources, in case of refusal or evasion, depends on the jurisdictional competency of a national court. Unfortunately, due to domestic law constraints, most national courts find it uncomfortable or difficult to punish tax criminality, to wit, evasion by foreigners, thereby making the collection of taxes from foreign income problematic.

It is not surprising, therefore, that any conceivable device employed to levy and collect taxes on foreign income, may include the pay as you earn (PAYE) scheme, garnishee proceedings, in addition to Treaty arrangements between countries. This has also led to the development of regulations on the international double taxation practice.¹⁶ Double tax treaties are applied by tax authorities, courts and taxpayers in the

¹⁴ 'Double Taxation Agreements' (2012) *ACCA Technical Journal* <http://www.accaglobal.com/content/dam/acca/global/PDF/students/2012/sa_april2_p6_dta_2.pdf> accessed on 3 June 2014.

¹⁵ 'Double Taxation Agreements' *West's Encyclopedia of American Law* <<http://www.encyclopedia.com/doc/1G2-3437701504.html>> accessed on 13 June 2014.

¹⁶ Ibid 347.

domestic law context, i.e. within the framework of the legal system of a particular State. Elimination of double taxation, therefore, has the objective of achieving tax neutrality. Tax neutrality is deemed to be achieved if the taxation of income relating to a cross-border transaction is within the range set by both the capital export neutrality (CEN) and the capital import neutrality (CIN). In short, tax neutrality is an effort towards tax equity, which is open to negotiations. If two or more States enter into a Treaty or an agreement through a MoU, for purposes of eliminating double taxation, what they are essentially working at is the achievement of tax equity. In order to prevent or address disputes that may ensue between countries, tax treaties provide a procedural framework for enforcement and dispute resolution.¹⁷

A person may be simultaneously liable to personal tax in various countries. This may arise when different countries apply different criteria of personal liability for taxation. For instance, one State may impose personal tax on account of nationality, while another may base its personal tax on the residence of the person concerned within its borders. Furthermore, taxes may be claimed on the same criteria, which may be defined differently by concerned States. For example, a person may be deemed as domiciled or resident in different countries, in each of which he fulfils the legal conditions for such a status.¹⁸

In addition, various countries may apply different tests of impersonal tax liability. For instance, taxes on salaries and remunerations for professional activities may be demanded by the country where the act is performed, where it is paid for, or where the employee or professional man resides or belongs by nationality or domicile.

For some years now, most revenue authorities, especially in common law jurisdictions, were indifferent to the problem of double taxation. The best they could do was to merely reduce the taxable income from abroad by the amount of tax paid on it before being brought into the forum State.¹⁹

However, with effect from 1 January 1988, investment incomes such as dividends, interests, royalties, and rents, derived from outside Nigeria, began to be exempted from Nigerian tax provided that such incomes were brought into Nigeria through Government-approved channels. In such situations, there would not be any double taxation and, therefore, there would be no need to grant any relief in form of tax credit.²⁰

In order to ensure alleviation of payment of tax in two or more countries, double taxation relief is granted, provided there is a double taxation agreement between the two countries. For example, the

¹⁷ Ariyoosu (n 1) 26.

¹⁸ 'Double Taxation Agreements' (n 15).

¹⁹ Ibid.

²⁰ Ariwodola (n 10) 117.

Companies Income Tax Management Act empowers the Minister of Finance to extend the exemptions contained in the third schedule from tax, interest accruing to Commonwealth development corporations, and salaries of technical assistants.²¹ Also, under Article 3 of the Double Taxation Agreement between Nigeria and the United Kingdom, the remuneration of a professor or teacher who is resident for not more than two years in the other country, for the purpose of teaching, is exempt from Nigerian taxation, in addition to exemptions for shipping and aircraft profits.²² Government pensions are also not taxable.²³

Under a double taxation agreement, there are usually clauses dealing with specific issues, such as provisions on activities or categories for which tax relief is granted; for instance personal, enterprise, industrial or commercial profit. In addition, a double taxation agreement may require a wide range of policy decisions. In Nigeria, negotiations for a double taxation agreement are usually initiated through the Ministry of External Affairs, which in turn brings the Federal Ministry of Finance into the picture. The Ministry of Finance then consults with the Board of Inland Revenue, and other Ministries whose interests are likely to be affected. This process of consultation continues until a final decision is reached by the Federal Executive Council as to the desirability of the agreement or not.

In reality, a double taxation Treaty tends to favour industrialised countries to the disadvantage of developing States like Nigeria, especially in the areas of income exempt from tax, which deprive the developing States of a sizeable source of income. In addition, most of the developing countries are an asylum for tax defaulters and haven for smuggled goods.²⁴

Most double taxation agreements are in the form of conventions, and may be amended through Protocols, though there is no rule on form or contents. However, there is the general rule that no country is required to take notice of the revenue laws of another country. This rule, however, may have far-reaching consequences if applied indiscriminately.²⁵

In practice, what double taxation treaties achieve is similar to the principle of exemption, credit and limitation of tax rates by excluding certain items of income from the tax base, thereby reducing the tax liability or burden. Typically, the exemption method is applied regardless of the taxation in the State of non-residence, in contrast to the principle of a pre-credit tax in the State of residence. In essence, the tax rate is guided by the principle of tax limitation rate under internal

²¹ Companies Income Tax Management Act of 1961, s 16.

²² Double Taxation Agreement (Nigeria-United Kingdom) (adopted 9 June 1987, entry into force 27 December 1987).

²³ Ibid arts 5 and 8.

²⁴ Agbade (n 3) 346.

²⁵ Ibid.

law. The meaning of this is that, the rate that will be charged must not be higher than the rate paid on the specific items in the residence country. And in doing this, the relevant law that has to do with double taxation treaties must be put to zenith use both in the State of residence as well as the country of the taxpayer.

When a double taxation Treaty is mooted, the two concerned States will start off with a model convention, which is a template containing the standard articles and clauses.²⁶ Each country will come to the negotiating table with its list of conditions. The Treaty that is ultimately signed is, therefore, the culmination of rounds of negotiation, compromises and trade-offs.

3 HISTORICAL BACKGROUND OF THE DOUBLE TAXATION MEMORANDUM BETWEEN NIGERIA AND KENYA

During the Nigerian President's State visit to Kenya from 5-7 September 2013, it was agreed, with his Kenya counterpart, that a bilateral Treaty that would eliminate double taxation between the two States, as part of their efforts to boost intra-African trade and investment, be signed.²⁷ During the signing of the MoU, the Kenyan President, Uhuru Kenyatta, urged African countries to work together to move the continent forward, adding that African countries must go beyond primary production and servicing of industries abroad with their raw material such as forest produce and mineral resources.²⁸ He noted that administrative constraints, in terms of visa restrictions, and consular and immigration issues, were among factors inhibiting trade and free movement of goods and services within the continent.²⁹

The Kenyan and Nigerian leaders advocated for a common economic bloc for Africa, which would permit free movement of people in a manner similar to the European Union arrangement, which was identified as the way forward to creating wealth for Africans.³⁰ Both leaders directed the relevant authorities in their countries to identify measures that would facilitate tariff and non-tariff barriers to trade, and expediting action on the conclusion of an agreement on immigration

²⁶ 'Double Taxation Agreements' (n 15).

²⁷ Memorandum of Understanding between Nigeria and Kenya on Double Taxation Agreement (n 2).

²⁸ See 'Kenya Offers 46 Oil Blocs to Nigerian Investors' *Vanguard* (Nigeria, 8 September 2013) 1 <<http://www.vanguardngr.com/2013/09/kenya-offers-46-oil-blocs-to-nigerian-investors/>> accessed on 6 January 2015.

²⁹ Presidential Strategic Communications Unit and Peterson Thiong'o, 'Kenya, Nigeria in MoU to stop Double Taxation' <www.theeastafrican.co.ke/nes/-/2558/1982988/-/jns4p4z/-/index.html> accessed on 9 January 2015.

³⁰ 'Nigeria: Kenya and Nigeria sign Agreement to Promote Trade' <<http://www.allafrica.com/stories/201405080211.html>> accessed on 9 January 2015.

matters. Both leaders re-dedicated themselves to fighting trans-border crimes, human trafficking, maritime insecurity and piracy.³¹

The agreements on visa exemption for holders of diplomatic passport, and MOUs on the conclusion of treaties on double taxation, promotion and protection of investments, agriculture, livestock and fisheries co-operations, tourism, and oil and gas cooperation, were signed. The conclusion of the treaties was compelled by a call by the two African leaders for States to do away with policies that could obstruct intra-African trade and unity. The leaders observed that while trade amongst European Union and Asian countries was 70% and 50% respectively, trade between African countries had regrettably dropped to as low as 11%.³²

4 AN ANALYSIS OF THE DOUBLE TAXATION MEMORANDUM BETWEEN NIGERIA AND KENYA

The preamble to the Double Taxation MoU between Nigeria and Kenya points out that the object of the Treaty is to avoid double taxation and fiscal evasion with respect to taxes on income applicable to persons who are resident in one or both of the contracting States. This implies that a citizen of one of the States who is resident in a third State will not enjoy the benefits of the Treaty.³³

The MoU further provides that the Treaty will apply to all taxes on income imposed by the two States irrespective of the manner in which they are levied. One of the objectives of the clause is to clarify the right of a contracting State to tax the business profits of an enterprise of the other contracting State which arise through a permanent establishment. For instance, income from immovable property may be taxed in the State in which the property is situated. Income from agriculture and forestry is also specifically included, in addition to

³¹ *Ibid.*

³² *Ibid.*

³³ Art 1 of the Memorandum of Understanding between Nigeria and Kenya on Double Taxation Agreement (n 2). In most double taxation agreements, art 1 mainly identifies the parties that are qualified to benefit from such a Treaty. This is what is contained in art 1 of the MoU between Nigeria and Kenya on Double Taxation Agreement. Similarly, in the double taxation agreements signed between Kenya and other countries, the content of art 1 of most of them is on the identification of the parties that are qualified to benefit from the treaties. See Double Taxation Relief (Kenya/Norway) <www.revenue.go.ke/ito/dta/DOUBLE_TAXATION_RELIEF_KENYA_NORWAY.pdf> accessed on 1 March 2015; Double Taxation Relief (Kenya/Denmark) <www.revenue.go.ke/ito/dta/DOUBLE_TAXATION_RELIEF_KENYA_DENMARK.pdf> accessed on 1 March 2015. See also, the explanation note on the Double Taxation Agreement between the Republic of South Africa and the Republic of Kenya <<http://pmg-assets.s3-website-us-west-1.amazonaws.com/docs/110309kenya.pdf>> accessed on 1 March 2015. In these agreements, art 1 provides that a citizen of one of the States who is resident in a third State will not enjoy the benefits of the Treaty.

usufructs and payments for the right to extract minerals and other natural resources, irrespective of the manner in which the resources are exploited. The same applies to income derived from fixed property owned by an enterprise, or which is used for the performance of independent personal services. However, what constitute immovable or fixed property will be decided under the law of the State in which the property is situated.³⁴

The profit of an enterprise which is based in a contracting State is taxable only in that State, unless it carries on business in the other contracting State through a permanent establishment, situated in that other State. In that case, that other State may tax the profits which are attributable to, first, the stated permanent establishment. Second, it may tax profits for the sale of goods or merchandise which are the same or similar to that sold through the permanent establishment. Third, it may tax profits for other business activities carried on which are of the same kind as those effected through the permanent establishment, except if the enterprise can demonstrate that there was a bona-fide reason for such sales other than obtaining a benefit under the Treaty.³⁵

However, Article 7 of the MoU recognises the fact that in calculating the profits of a permanent establishment, allowances must be made for certain expenses, wherever incurred, which were sustained for the purposes of the permanent establishment. For example, if the head office incurs general administrative expenses, it is most likely that a portion of those expenses were in fact incurred on behalf of the permanent establishment, and it will, therefore, be necessary to allocate that portion of the expenses in determining its profits.³⁶

The emphasis, in the provision, is on the fact that the expenses must have actually been incurred. Payment by the permanent establishment to the head office of the enterprise or any of its other offices, which are notionally in the nature such as royalties, fee or other similar payment, in return for use of patents or rights, or by way of commission, for specific services performed, and management fee, or except in the case of banking enterprise, interests on loans, are prohibited.

Also notable is the exemption granted in respect of shipping and air-transport. Article 8 of the MoU provides that profits derived by an enterprise of a contracting State from the operation of aircraft, in international traffic, are taxable only in that State.³⁷ Thus, for example, profits derived by Nigeria Airways, from its flights into and out of airports in Kenya, are taxable only in Nigeria. Paragraph 2 of the Article provides that profits derived by an enterprise of a contracting State, from the operation of ships in international traffic, may also be

³⁴ Arts 5 and 6, Memorandum of Understanding between Nigeria and Kenya on Double Taxation Agreement (n 2).

³⁵ Ibid art 7.

³⁶ Ibid.

³⁷ Ibid.

taxed in the source State. However, the source State has an obligation to reduce the tax so imposed by 50%.

Article 10 of the Memorandum further provides for the common international tax treatment of cross-border dividends, in terms of which the source State, in which the dividends are declared, may impose a limited withholding tax on the non-resident shareholders, and the State of residence of the shareholders in which the dividends are received has unlimited taxing right.³⁸ The limitation on withholding tax rates in the source State is 10% of the gross amount of the dividends if the recipients are the beneficial owners of the dividends, implying that the limitation does not apply to nominee shareholders. The mode of application of these limitations is to be settled by the competent authorities of Nigeria and Kenya.

Interests and royalties are covered by Articles 11 and 12.³⁹ Royalties and interests which arise in a contracting State and are paid to a resident of the other contracting State may be taxed in the State of residence. The Articles provide a right of taxation to the source State, but limits the amount of tax to 10% of the gross amount of the royalties and interest, provided that their beneficial owner is a resident of the other State. The competent authorities of the contracting States are required to formulate the mode of application of this limitation by mutual agreement.

Royalties, under the provisions, include earnings from patents, copyrights, trademarks and so on. However, payments will not apply if the beneficial owner of the royalties carries on business or performs independent personal services in the State in which the royalties arise through a permanent establishment or fixed base. These royalties are in effect regarded as part of the business profits of the permanent establishment of fixed base and may be taxed by the source State. For example, where a Nigerian company with a permanent office in Kenya, through which it sold franchise rights for the use of its product brand, Kenya would in such a case be entitled to tax the franchise payments received by the Nigerian company.

Article 14 provides the general rule that income from independent personal services derived by a resident of a State may be taxed only in that State.⁴⁰ The source State is entitled to impose tax only if the individual performing the services has a fixed base regularly available to the individual in that other State, and then it may tax only the income attributable to that fixed base. The other option is where the individual is present in that other State for more than an aggregate of 183 days in a twelve-month period, commencing or ending in the

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

fiscal year concerned. In that case, the income attributable to those services in that State may be taxed in that State.

Salaries, wages and other similar remuneration in respect of an employment is taxable only in the State of residence of the employee unless such services are rendered in the other contracting State, in which case the remuneration arising from the services rendered in the other State may also be taxed in that other State.⁴¹ However, remuneration for services rendered in the State of residence is only taxable if the following conditions are all met: the employee is present in the source State for a period not exceeding 183 days in any twelve-month period commencing or ending in the fiscal year concerned, and the employer who pays the remuneration, or on whose behalf the remuneration is paid, is not a resident of the source State, and the relevant remuneration is not borne by a permanent establishment or fixed base which the employer has in the source State.⁴²

Note also that income derived by entertainers and sportspersons may be taxed in the contracting State in which their activities are exercised.⁴³ This covers situations in which a professional sportsperson forms a company and competes in a sporting event in another State not in a personal capacity, but rather as an employee of that company. As the sportsperson's activities in the State continue for a very short period and do not constitute a permanent establishment, neither the sportsperson nor the company would under the normal provisions of the Treaty be taxed in that country.

Article 18 deals with pensions and annuities.⁴⁴ It provides that pensions and other similar remuneration as well as annuities may be taxed in the State in which they arise. The State of residence may also tax, but must then give credit for the source State tax. However, the source State has the sole taxing right under a public scheme which is part of its social security system.

Furthermore, salaries, wages and other similar remuneration paid by a contracting State to an individual for services rendered are taxable only in that State. Note that such salaries, wages, and other similar remuneration are also taxable in the contracting State if the services are rendered in that other State by a resident who is also a national of that other State and did not become resident of the other State with the express purpose of rendering the services.⁴⁵ An example is where a Nigerian national, normally resident in Nigeria, is employed by the Kenyan High Commission in Nigeria. Such a person would be taxable only in Nigeria, even though his or her salary is paid by Kenya.

⁴¹ Ibid art 15.

⁴² Ibid.

⁴³ Ibid art 17.

⁴⁴ Ibid.

⁴⁵ Ibid.

In respect of professors, teachers, and researchers who are resident of a contracting State and engage in teaching or research activities at educational institutions in the other contracting State during a visit not exceeding an aggregate of two years from the date of first arrival in that other State, they shall be exempt from tax in that other State in respect of remuneration for such activities, provided that such remuneration is derived from outside that other State.⁴⁶ However, this exemption does not apply in respect of research which is wholly or mainly undertaken for the private benefit of the person.

In terms of this provision, a student who is a resident of one State, but is present in the other State solely for the purpose of undergoing education or training in that other State, will not be taxed in that other State on payments received for the purposes of the student's maintenance, education, or training, if those payments are received from outside the State.⁴⁷

Article 22 of the MoU has provisions dealing with income which is not addressed in other provisions of the Treaty, and specifies that such items of income will be taxable only in the State of residence.⁴⁸ Article 23 of the MoU establishes the actual mechanism for the elimination of double taxation in the two countries.⁴⁹

Another sweeping provision is contained in Article 24 of the MoU, which deals with cases of non-discrimination.⁵⁰ It provides that a State may not impose, upon a national of the other State, any tax or requirement connected therewith that is higher or more burdensome than that which it imposes on its own nationals in the same circumstances.

In case any dispute, misunderstanding or disagreement arises as to the implementation or application the MoU, Article 25 effectively provides for the institution of a mutual agreement procedure to resolve the issues. If due to the action of one or both of the contracting States, a resident of one of the contracting States considers that a taxation which is not in accordance with the provisions of this Treaty has been imposed, such resident of a contracting State may present a case to the competent authority of that State. This may be done irrespective of remedies provided by domestic legislation. The tax payer must, however, notify the competent authority within three years of the notification of the action which results in such incorrect taxation.

The competent authority, considering the objection to be justified and unable to arrive at a satisfactory solution shall, in an endeavour to avoid incorrect taxation, consult with the competent authority of the other contracting State. The implementation of any agreement reached,

⁴⁶ Ibid art 20.

⁴⁷ Ibid art 21.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

however, is not subject to any time constraint in the domestic law of the contracting State. In addition, the competent authorities of the two States are authorised to resolve, by mutual agreement, any problems relating to the implementation, interpretation and application of the Treaty, and, furthermore, to consult together for the elimination of double taxation in cases not provided for in the Treaty.

Article 25 of the MoU also authorises the competent authorities to develop bilateral procedures for implementing the mutual agreement reached. It further provides that the competent authorities may devise unilateral procedures, conditions, methods, and techniques to facilitate bilateral action and implementation of the mutual agreement procedure.

On the exchange of information, Article 26 of the MoU provides that the States shall exchange such information as is relevant both for carrying out the provisions of the MoU, and for applying the domestic taxation laws concerning any tax imposed on behalf of the contracting State, or of their political subdivisions or local authorities, and in particular the prevention of fraud or evasion of tax.⁵¹ Information obtained by a State under this provision must be treated with the same degree of secrecy as applies to information obtained under the domestic laws of that State. In addition, such information may be disclosed only to persons or authorities involved in the administration of the taxes imposed on behalf of a contracting State or its political subdivisions or local authorities. However, the general stipulation on secrecy does not impose on a State the obligation to do anything which is contrary to the laws and administrative practice of either State. In addition, no duty is imposed to supply information which is not obtainable under the laws of either State, or in the normal course of the administration of either State. Further, it does not imply a responsibility to supply information which discloses any business secret or information which is contrary to public policy.

On assistance in collection of taxes, Article 27 of the MoU provides that the contracting State will lend each other assistance in the collection of revenue claims and the mode of application may be settled by the competent authorities of the contracting States.⁵² It also provides for the competent authorities of a contracting State to arrange for a revenue claim, proved to be payable in that contracting State, to be collected by that other state in terms of its domestic laws. The provision ensures that members of diplomatic missions and consular posts are not deprived of any right which is accorded to them under international law or special agreements between contracting States. In effect, this implies that the remuneration which they receive from

⁵¹ Ibid.

⁵² Ibid.

their State of residence while they are stationed in the contracting State is not subject to tax in that other State.⁵³

The Memorandum of Understanding specifies the date on which the provisions will begin to operate in both States, with regards to taxes withheld at source and in respect to all other taxes, as being on after the first day of January after the date of entry into force of the MoU. It shall remain in force for a minimum period of five years, after which it may be terminated by giving written notice prior to 30 June of any calendar year. It will then cease to operate from 1 January in the calendar year following such notice of termination.⁵⁴

4.1 *A Critique of the Double Taxation MoU*

The signing of the MoU on double taxation was principally based on the long and friendly bilateral relations between Kenya and Nigeria. This warm relationship was exemplified by the attendance of President Goodluck Jonathan of Nigeria to the swearing in ceremony of President Uhuru Kenyatta in April 2013, and the subsequent visit to Nigeria by President Kenyatta in July 2013 to attend the Abuja +2 Summit.⁵⁵ As observed by the two leaders, the signing of the MoU would '...enhance and further deepen the warm and friendly relations existing between the two countries with concrete, sustainable and mutually rewarding legal instruments activities that would increase trade, investment and job creation'.⁵⁶

The adoption of the MoU on Double Taxation was a progressive economic and trade development initiative that has a high probability of survival and effectiveness. Unfortunately, however, the absence of a clear provision on the enforcement mechanism for the MoU is a minus. In addition, taxation is a technical area, and therefore, simplicity of language is significant to its effectiveness, appreciation and understanding of tax regulations.⁵⁷ Therefore, the use of open-ended statements in the MoU can be a source of ambiguity. In relation to issues of ambiguities, this article argues that the mere requirement that the 'competent authorities' of the two States 'resolve by mutual agreement any problems relating to the implementation, interpretation and application of the treaty'⁵⁸ cannot guarantee effective enforcement. The reference to 'competent authorities' itself leads to uncertainty, as it is not clear which institutions are referred to. For instance, there is the

⁵³ Ibid art 28.

⁵⁴ Ibid arts 29 and 30.

⁵⁵ See Open Society Foundation for South Africa, 'Nigeria-Kenya State Visit: Joint Communiqué' <<http://www.safpi.org/news/article/2013/nigeria-kenya-state-visit-joint-communication>> accessed on 6 January 2015.

⁵⁶ Ibid.

⁵⁷ OS Muhammed, K Adedokun and L Zakariya, 'Ambiguities in the Nigerian Tax Laws (2014) 3 *Ife Juris Review* 717.

⁵⁸ Art 25.

question whether the phrase refers to tax officers, police, or officers in charge of financially related crimes. Such lacunas and ambiguities may reduce the efficiency of the MoU.

International double taxation relief can only be effective and meaningful if the legal and technical difficulties of the conflict of international tax law with domestic law are clearly recognised, and the means to resolve any inconsistency between the two, in their domestic application, provided for through clear provisions. Ironically, the MoU between Kenya and Nigeria fails to address the issue. In a nutshell, the MoU seems to place very little attention to the effect of the conflict of laws with regard to the process of domestication of a bilateral Treaty in relation to international law. This may have a negative implication on the effectiveness of the Treaty.

Despite the stated shortcomings, if the MoU is practically and effectively implemented by Kenya and Nigeria, especially Article 27 of the agreement, which provides that the contracting States will lend each other assistance in the collection of revenue claims, there will be positive improvements in revenue generation which will also boost economic activities in and between the two States. Aggressive implementation of Article 27 is also likely to reduce tax evasion, which will make the investment and trade relations between the States witness rapid growth.

5 CONCLUSION

The purpose of double taxation treaties is the avoidance of double taxation on income earned by a citizen of one country while on a commercial sojourn in another country. Once two States enter into a double taxation agreement, a credit is allowed against the tax levied by the country in which the taxpayer resides for taxes imposed in the other country, and as a result the person pays no more than the higher of the two rates. As rightly observed by the Presidents of Nigeria and Kenya, double taxation agreements are one of the mechanisms through which Africa will eliminate policies that obstruct intra-African trade, while enhancing economic co-operation in the continent.⁵⁹ More specifically, the MoU on Double Taxation between Nigeria and Kenya is likely to enhance co-operation between the two States, in addition to creating a sustainable legal and policy framework for increased trade, investment and job creation activities.⁶⁰ Further, practical and effective implementation of the MoU is likely to reduce tax evasion, which will provide additional revenue for economic progress within the two States.

⁵⁹ See, 'Nigeria: Kenya and Nigeria sign Agreement to Promote Trade' (n 30).

⁶⁰ See Open Society Foundation for South Africa (n 55).

However, in order to enhance the effectiveness of the MoU, this article recommends its amendment in order to include comprehensive and clear provisions on the enforcement and implementation procedure of the agreement. This will make the MoU acquire a compliance force of a legal nature, which will facilitate the implementation of its various provisions. In addition, there is need for amendments to the municipal tax laws of both Kenya and Nigeria in order to eliminate any inconsistencies with the MoU on Double Taxation.