

Commentary on the articles:

THE ATAF MODEL TAX AGREEMENT

**for the avoidance of double taxation and the prevention
of fiscal evasion with respect to taxes on income**

An ATAF Publication



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OVERVIEW

The ATAF Model Tax Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (“the Agreement”) generally follows the United Nations Model Double Taxation Convention between Developed and Developing Countries and the OECD Model Tax Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital (“the UN MDTC or OECD MTC”). It should be noted that the Commentary to the UN MDTC quotes extensively from the Commentary to the OECD MTC. In view of this fact, the Commentary to this Agreement will refer mainly to the condensed OECD MTC Commentary (“OECD Commentary”) as it read on 15 July 2014, when the Articles are, in the main, identical. With regard to Articles which are mainly identical to the UN MDTC published in 2011, reference to that Commentary (“UN Commentary”) will be used.

It is important to note that references to taxes on capital have been omitted from this Model as no Member State currently imposes taxes of this nature. This issue would need to be addressed in bilateral negotiations if one of the parties does impose a tax on capital.

The entire text has been made gender neutral which results in some differences in language but not in principal.

The term “Agreement” has been used in the Agreement but Members are at liberty to use the term “Convention” if they so wish. Both the OECD and UN Models and Commentaries use the term “Convention”.

Where reference is made to the OECD Commentary, the reference is to the 2014 edition thereof. Reference

to the UN Commentary, refers to the 2011 edition. These references in this Commentary indicate agreement with the interpretation set out therein. This is of considerable importance in ensuring that interpretation of the provisions of the Agreement are consistent with the international approach and result in general consensus in this regard.

Finally, it is not the aim of this document to provide a comprehensive commentary on the provisions of the ATAF Model. This would result in mostly repeating the text of the OECD and UN Commentaries in order to ensure consistent interpretation. Consequently this document intends only to give a brief overview of the various Articles and to provide a cross-reference to the relevant paragraphs in either the OECD or UN Commentary which provide extensive guidance and will ensure consensus in application.

General

Firstly, in cases where the treaty is in conflict with domestic law, it is the general principle and intention that the treaty should override domestic law. This is in accordance with international law.

Secondly, with regard to the allocation of taxing rights, where the taxing right of the State of source is unlimited or limited, it has the prior right of taxation. Consequently it is the State of residence which is obliged to eliminate any double taxation.

The Agreement is a Model which is intended to provide an African approach to tax treaties for Members. It will be revised from time to time and is not a legal instrument as such.



COMMENTARY ON ARTICLE 1

PERSONS COVERED BY THE AGREEMENT

Paragraph 1

Paragraph 1 of this Article follows the OECD MTC, and specifies that the provisions of the Agreement will apply to persons who are residents of one or both of the Contracting States. The term “resident”, is defined in Article 4.

Paragraph 2

Paragraph 2 of this Article is derived from the Base Erosion and Profit Shifting Project (BEPS Project) and deals with income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent. It is considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State.

The OECD Commentary should, therefore, be followed and also provides extensive guidance which covers the following important aspects in particular issues related to the improper use of treaties:

- Application of the Agreement to partnerships;
- Cross-Border issues relating to Collective Investment Vehicles (CIVs);

Complications frequently arise when the investors, the CIV and the investment are all located in different countries. In order to address these issues, a section pertaining thereto was introduced into the OECD Commentary in the July 2010 edition. For purposes of the Commentary, the term “CIV” is limited to funds that are widely-held, hold a diversified portfolio of securities and are subject to investor-protection regulation in the country in which they are established:

- o Application of the Convention to CIVs:

In order to qualify for the benefits of a treaty, a CIV would have to qualify as a “person” that is a “resident” of a Contracting State and, as regards the application of Articles 10 and 11, that it is the “beneficial owner” of the income that it receives. Paragraphs 6.10 to 6.16 provide a full discussion on these factors.

- o Policy issues raised by current treatment of collective investment vehicles:

In the negotiation of treaties, a specific provision for treaty entitlement of CIVs is suggested at paragraph 6.17. At paragraph 6.18 measures of reaching an equitable solution are discussed. Mention is also made of the fact that the goal is to achieve neutrality between a direct investment and an investment through a CIV in the international context. Potential treaty abuse is discussed at paragraphs 6.19 and 6.20;

- o Possible provisions modifying the treatment of CIVs:

In order to address the specific concerns described in paragraphs 6.18 through 6.20, paragraph 6.21 provides the text of a suggested provision.

Mention is also made of the fact that the suggested provisions are intended to deal with source taxation of the CIVs income and not the taxation in the State of residence of its investors. Furthermore, it is pointed out that all aspects of beneficial ownership which relate to a CIV are identical to those relating to an individual;