

*Statutory Instrument No. 65 of 2020*

**INCOME TAX ACT**  
(Cap. 52:01)

**BOTSWANA – KENYA DOUBLE TAXATION AVOIDANCE  
AGREEMENT ORDER, 2020**  
(Published on 17th April, 2020)

**ARRANGEMENT OF PARAGRAPHS**

**PARAGRAPH**

1. Citation
2. Approval and effective date of commencement

**SCHEDULE**

WHEREAS in exercise of the powers conferred on him by section 53 (1) of the Income Tax Act, the Minister of Finance and Economic Development has, on behalf of the Government, entered an Agreement with the Government of Kenya for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income;

AND WHEREAS in accordance with the provisions of section 53 (2) of the Income Tax Act, the said Agreement shall be laid before the National Assembly, and shall not take effect unless approved by resolution of the National Assembly;

NOW THEREFORE, the following Order is hereby made –

Citation

1. This Order may be cited as Botswana – Kenya Double Taxation Avoidance Agreement Order, 2020.

Approval and  
effective date of  
commencement

2. The Double Taxation Avoidance Agreement set out in the Schedule hereto between the Government of the Republic of Botswana and the Government of Kenya is presented to the National Assembly for approval and shall, upon approval take effect from the date specified in the Agreement.

**SCHEDULE**  
**Preamble**

The Government of the Republic of Botswana and the Government of the Republic of Kenya;

**INTENDING** to conclude an Agreement for the avoidance or elimination of double taxation with respect to taxes on income without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Agreement;

**DESIRING** to further develop their economic relationship and to enhance their cooperation in tax matters;

**HAVE AGREED AS FOLLOWS:**

**Article 1**

**PERSONS COVERED**

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

**Article 2**

**TAXES COVERED**

1. This Agreement shall apply to taxes on income imposed on behalf of a Contracting State or of its local authorities or political subdivisions, irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of movable or immovable property.

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

- (a) in Botswana,
  - (i) the income tax; and
  - (ii) the capital gains tax;  
(hereinafter referred to as "Botswana tax");
- (b) in Kenya, the income tax chargeable in accordance with the provisions of the Income Tax Act;  
(hereinafter referred to as "Kenyan tax").

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

## Article 3

### GENERAL DEFINITIONS

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

- (a)
  - (i) the term "Botswana" means the Republic of Botswana including its territorial waters and air space;
  - (ii) the term "Kenya" means all territory of the Republic of Kenya in Contracting State boundaries, including internal territory and territorial waters and also the exclusive economic zone, maritime zones, and all installations erected thereon, as defined in its national law, in accordance with international law, over which Kenya exercises its sovereign rights with respect to exploration, exploitation, conservation and management of natural resources of the seabed, its subsoil and the superjacent waters;
- (b) the terms "a Contracting State" and "the other Contracting State" mean Botswana or Kenya as the context requires;
- (c) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;
- (d) the term "competent authority" means:
  - (i) in the case of Botswana, the Minister responsible for finance, represented by the Commissioner General of the Botswana Unified Revenue Service or an authorised representative of the Commissioner General; and
  - (ii) in the case of Kenya, the Cabinet Secretary responsible for finance or his authorised representative;
- (e) the term "enterprise" applies to the carrying on of any business;
- (f) 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;
- (g) the term "international traffic" means any transport by a ship, aircraft or rail or road transport vehicle operated by an enterprise that has its place of effective management in a Contracting State, except when the ship, aircraft or rail or road transport vehicle is operated solely between places in the other Contracting State;
- (h) the term "national" means:
  - (i) any individual possessing the nationality or citizenship of a Contracting State; or
  - (ii) any legal person, partnership or association deriving its status as such from the laws in force in a Contracting State;
- (i) the term "person" includes an individual, a partnership, an estate, a trust, a company and any other body of persons which is treated as an entity for tax purposes;
- (j) the term "business" includes the performance of professional services and of other activities of an independent character;
- (k) the term "place of effective management" means the place where the decision-making at the highest level on the important policies essential for the management of the company take place, the place that plays a leading part in the management of a company from an economic and functional point of view and, where strategic management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made; and
- (l) 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.

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

#### Article 4

#### **RESIDENT**

1. For the purposes of this Agreement, the term “resident of a Contracting State” means any person who, under the laws of that Contracting State, is liable to tax therein by reason of his domicile, residence, place of effective management, place of incorporation or any other criterion of a similar nature, and also includes that Contracting State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in respect only of income from sources in that Contracting State.

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

- (a) he shall be deemed to be a resident only of the 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 only of the Contracting State with which his personal and economic relations are closer (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 no permanent home available to him in either Contracting State, he shall be deemed to be a resident only 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 only of the Contracting State of which he is a national; and
- (d) if he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only 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 through which the business of an enterprise is wholly or partly carried on.

2. The term “permanent establishment” includes especially:

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop;

- (f) a mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources; and
  - (g) an installation or structure used for the exploration of natural resources.
3. The term "permanent establishment" likewise encompasses:
- (a) a building site, a construction, assembly or installation project or any supervisory activity in connection with such site or project, but only where such site, project or activity continues for a period of more than six months within any twelve-month period;
  - (b) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by an enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the Contracting State for a period or periods aggregating more than six months within any twelve-month period; and
  - (c) the performance of professional services or other activities of an independent character by an individual, but only where those services or activities continue within a Contracting State for a period or periods amounting to or exceeding in the aggregate one hundred and eighty three days in any twelve-month period commencing or ending in the fiscal year concerned.
4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:
- (a) the use of facilities solely for the purpose of storage, 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 processing by another enterprise;
  - (c) the maintenance of stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
  - (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;
  - (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character; and
  - (f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
5. Notwithstanding the provisions of paragraphs 1 and 2, where a person – other than an agent of an independent status to whom paragraph 6 applies – is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such person:
- (a) has, and habitually exercises in that Contracting State an authority to conclude contracts in the name of the enterprise;
  - (b) has no such authority, but habitually maintains in the first-mentioned Contracting State a stock of goods or merchandise belonging to the enterprise from which he regularly fills orders or makes deliveries on behalf of the enterprise;
- unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.
6. An enterprise shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other Contracting State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

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

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 Contracting State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

#### Article 6

### **INCOME FROM IMMOVABLE PROPERTY**

1. Income derived by a resident of a Contracting State from immovable property, (including income from agriculture or forestry), situated in the other Contracting State may be taxed in that other Contracting State.

2. The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. Ships, boats, aircraft, rail and road transport vehicles shall not be regarded as immovable property.

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

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

#### Article 7

### **BUSINESS PROFITS**

1. The profits of an enterprise of a Contracting State shall be taxable only in that Contracting 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 Contracting State but only so much of them as are attributed to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the Contracting State in which the permanent establishment is situated or elsewhere. However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for use of patents or other rights, or by way of commission for specific services performed or for management, or except in the case of a banking enterprise by way of interest on moneys lent to the head office of the enterprise or any of its other offices.

4. In so far as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary. The method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

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

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

## Article 8

### INTERNATIONAL TRANSPORT

1. Profits of an enterprise of a Contracting State from the operation of ships, aircraft or rail or road transport vehicles in international traffic shall be taxable in the Contracting State in which the place of effective management of the enterprise is situated.

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

3. For the purposes of this Article, profits from the operation of ships, aircraft or rail or road transport vehicles in international traffic shall include:

- (a) in the case of ships or aircraft, profits derived from the rental on a bare boat basis of ships or aircraft used in international traffic; and
- (b) in the case of rail or road transport vehicles, profits derived from the rental of rail or road transport vehicles used in international traffic,

if such profits are incidental to the profits to which the provisions of paragraph 1 apply.

4. Profits of an enterprise of a Contracting State from the use or rental of containers (including trailers, barges, and related equipment for the transport of containers) used for the transport in international traffic of goods or merchandise shall be taxable only in that Contracting State.

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

## Article 9

### ASSOCIATED ENTERPRISES

1. Where:

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

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

2. Where a Contracting State includes in the profits of an enterprise of that Contracting State – and taxes accordingly – profits on which an enterprise of the other Contracting State has been charged to tax in that other Contracting State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned Contracting State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other Contracting State may make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Agreement and the competent authorities of the Contracting States shall if necessary consult each other.

3. The provisions of paragraph 2 shall not apply where judicial, administrative or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under paragraph 1, one of the enterprises concerned is liable to penalty with respect to fraud, gross negligent or willful default.

4. A Contracting State shall not make adjustments to the profits of an enterprise in the circumstances referred to in paragraph 1 of this Article after the expiry of the time limits provided in its national laws.

5. The provisions of paragraph 4 of this Article shall not apply in the case of fraud, willful default or neglect.

## Article 10

### DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other Contracting State.
2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that Contracting State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed 7.5 percent of the gross amount of the dividends.  
This paragraph shall not affect taxation of the company in respect of the profits out of which the dividends were distributed.
3. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights (not being debt-claims) participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the Contracting State of which the company making the distribution is a resident.
4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply.
5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other Contracting State may not impose any tax on the dividends paid by the company, except in so far as such dividends are paid to a resident of that other Contracting State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment situated in that other Contracting State, nor subject the company's undistributed profits to a tax on the undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other Contracting State.

## Article 11

### INTEREST

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State.
2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the interest, the tax so charged shall not exceed 12.5 per cent of the gross amount of the interest.
3.
  - a) Notwithstanding the provisions of paragraph 2, interest mentioned in paragraph 1 shall not be taxable in the Contracting State where the interest arises if:
    - i) the recipient thereof is the government of the other Contracting State; and
    - ii) the interest is paid in respect of a loan granted or guaranteed by a financial institution wholly owned or controlled by the Government with the objective of promoting exports and development, if the credit granted or guaranteed contains an element of subsidy.

b) For the purpose of sub-paragraph (a), the term "Government" means the Government of either Contracting State and shall include: a local authority, a political subdivision, a Central Bank, a statutory body; and any institution wholly owned or controlled by the Government of either Contracting State as may be agreed from time to time between the competent authorities of the Contracting States.

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

5. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply.

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

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

## Article 12

### ROYALTIES

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

2. However, such royalties may also be taxed in the Contracting State in which they arise, and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the royalties, the tax so charged shall not exceed 12.5 percent of the gross amount of the royalties.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematography films and films, tapes or discs 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 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is a resident of that Contracting 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 right or property in respect of which the royalties are paid is effectively connected, and such royalties are borne by such permanent establishment, then such royalties shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

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

### Article 13

#### **TECHNICAL FEES**

1. Technical fees arising in a Contracting State which are derived by a resident of the other Contracting State may be taxed in that other Contracting State.

2. However, such technical fees may also be taxed in the Contracting State in which they arise, and according to the law of that Contracting State; but where such technical fees are derived by a resident of the other Contracting State who is subject to tax in that Contracting State in respect thereof, the tax charged in the Contracting State in which the technical fees arise shall not exceed 10 percent of the gross amount of such fees.

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

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

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

6. Where by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the technical fees paid exceeds, for whatever reason, the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Agreement.

## Article 14

### CAPITAL GAINS

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State, may be taxed in that other Contracting State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other Contracting State.
3. Gains of an enterprise of a Contracting State from the alienation of ships, aircraft or rail or road transport vehicles operated in international traffic or movable property pertaining to the operation of such ships, aircraft or rail or road transport vehicles shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.
4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 percent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other Contracting State.
5. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4, shall be taxable only in the Contracting State of which the alienator is a resident.

## Article 15

### DEPENDENT PERSONAL SERVICES

1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that Contracting 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 Contracting State.
2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned Contracting State if —
  - (a) the recipient is present in the other Contracting State for a period or periods not exceeding in the aggregate one hundred and eighty three days in any twelve-month period commencing or ending in the fiscal year concerned;
  - (b) the remuneration is paid by or on behalf of an employer who is not a resident of the other Contracting State; and
  - (c) the remuneration is not borne by a permanent establishment which the employer has in the other Contracting State.
3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship, aircraft or rail or road transport vehicle operated in international traffic by an enterprise of a Contracting State may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.

## Article 16

### **DIRECTORS' FEES**

Directors' fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other Contracting State.

## Article 17

### **ENTERTAINERS AND SPORTSPERSONS**

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

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

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

## Article 18

### **PENSIONS AND ANNUITIES**

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

2. 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.

3. Notwithstanding the provisions of paragraph 1, pensions paid and other similar payments made under a public scheme which is part of the social security system of a Contracting State, a political subdivision or a local authority thereof shall be taxable only in that Contracting State.

## Article 19

### GOVERNMENT SERVICE

1.
  - (a) Salaries, wages and other similar remuneration, other than pension, paid by a Contracting State, a political subdivision or a local authority thereof to an individual in respect of services rendered to that Contracting State or authority shall be taxable only in that Contracting State.
  - (b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that Contracting State and the individual is a resident of that Contracting State who:
    - (i) is a national of that Contracting State; or
    - (ii) did not become a resident of that Contracting State solely for the purpose of rendering the services.
2.
  - (a) Any pension paid by, or out of funds created by, a Contracting State or a local authority thereof to an individual in respect of services rendered to that Contracting State or authority shall be taxable only in that Contracting State.
  - (b) However, such pension shall be taxable only in the other Contracting State if the individual is a resident of, and a national of, that Contracting State.
3. The provisions of Articles 15, 16, 17 and 18 shall apply to salaries, wages, and other similar remuneration, and to pensions, in respect of services rendered in connection with a business carried on by a Contracting State or a local authority.

## Article 20

### STUDENTS, APPRENTICES AND BUSINESS TRAINEES

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

## Article 21

### PROFESSORS AND TEACHERS

An individual who visits a Contracting State for the purpose of teaching or carrying out research at a university, college, school, or other similar educational institution recognised as non-profit organisation by the Government of that Contracting State and who is or was immediately before that visit a resident of the other Contracting State shall be exempted from taxation in the first-mentioned Contracting State on any remuneration for such teaching or research for a period not exceeding 2 years from the date of his first visit for that purpose, provided that such remuneration is derived by him from outside that Contracting State and such remuneration is subject to tax in the other Contracting State.

## Article 22

### **OTHER INCOME**

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that Contracting State.
2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply.
3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Agreement and arising in the other Contracting State may also be taxed in that other Contracting State.

## Article 23

### **ELIMINATION OF DOUBLE TAXATION**

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

## Article 24

### **NON-DISCRIMINATION**

1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other Contracting State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.
2. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other Contracting State than the taxation levied on enterprises of that other Contracting State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.
3. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned 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 Contracting State are or may be subjected.

4. Except where the provisions of paragraph 1 of Article 9, paragraph 7 of Article 11, paragraph 6 of Article 12 and paragraph 6 of Article 13 apply, interest, royalties, technical fees and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned Contracting State.

5. The provisions of this Article shall not be construed as preventing a Contracting State from charging the profits of a permanent establishment which a company of the other Contracting State has in the first mentioned Contracting State at a rate of tax which is higher than that imposed on the profits of a similar company of the first mentioned Contracting State, nor as being in conflict with the provisions of paragraph 3 of Article 7.

#### Article 25

### MUTUAL AGREEMENT PROCEDURE

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

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

3. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this 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 26

### EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions in particular for the prevention of fraud or evasion of such taxes, in so far as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that Contracting State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for

such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by Contracting States may be used for other purposes when such information may be used for such other purposes under the laws of both Contracting States and the competent authority of the supplying Contracting State authorises such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

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

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

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

#### Article 27

### ASSISTANCE IN THE COLLECTION OF TAXES

1. The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Articles 1 and 2. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

2. The term "revenue claim" as used in this Article means an amount owed in respect of taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to this Agreement or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

3. When a revenue claim of a Contracting State is enforceable under the laws of that Contracting State and is owed by a person who, at that time, cannot, under the laws of that Contracting State, prevent its collection, that revenue claim shall, at the request of the competent authority of that Contracting State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other Contracting State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other Contracting State.

4. When a revenue claim of a Contracting State is a claim in respect of which that Contracting State may, under its law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that Contracting State, be accepted for purposes of taking measures of conservancy by the competent authority of the

other Contracting State. That other Contracting State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other Contracting State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first-mentioned Contracting State or is owed by a person who has a right to prevent its collection.

5. Notwithstanding the provisions of paragraphs 3 and 4, a revenue claim accepted by a Contracting State for purposes of paragraph 3 or 4 shall not, in that Contracting State, be subject to the time limits or accorded any priority applicable to a revenue claim under the laws of that Contracting State by reason of its nature as such. In addition, a revenue claim accepted by a Contracting State for the purposes of paragraph 3 or 4 shall not, in that Contracting State, have any priority applicable to that revenue claim under the laws of the other Contracting State.

6. Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall only be brought before the courts or administrative bodies of that Contracting State. Nothing in this Article shall be construed as creating or providing any right to such proceedings before any court or administrative body of the other Contracting State.

7. Where, at any time after a request has been made by a Contracting State under paragraph 3 or 4 and before the other Contracting State has collected and remitted the relevant revenue claim to the first-mentioned Contracting State, the relevant revenue claim ceases to be:

- (a) in the case of a request under paragraph 3, a revenue claim of the first-mentioned Contracting State that is enforceable under the laws of that Contracting State and is owed by a person who, at that time, cannot, under the laws of that Contracting State, prevent its collection, or
- (b) in the case of a request under paragraph 4, a revenue claim of the first-mentioned State in respect of which that State may, under its laws, take measures of conservancy with a view to ensure its collection, the competent authority of the first-mentioned Contracting State shall promptly notify the competent authority of the other Contracting State of that fact and, at the option of the other Contracting State, the first-mentioned Contracting State shall either suspend or withdraw its request.

8. In no case shall the provisions of this Article be construed so as to impose on a Contracting State the obligation:

- (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- (b) to carry out measures which would be contrary to public policy (*ordre public*);
- (c) to provide assistance if the other Contracting State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice; and
- (d) to provide assistance in those cases where the administrative burden for that Contracting State is clearly disproportionate to the benefit to be derived by the other Contracting State.

#### Article 28

#### **MEMBERS OF DIPLOMATIC MISSIONS AND CONSULAR POSTS**

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

## Article 29

### LIMITATION OF BENEFITS

1. In respect of Articles 10, 11, 12, 13, 14 and 22 a resident of a Contracting State shall not be entitled to benefits otherwise accorded to residents of a Contracting State by this Agreement, if:

- (a) the resident is controlled directly or indirectly by one or more persons who are not residents of that Contracting State; and
- (b) the main purpose or one of the main purposes of any person concerned with the creation or assignment of a share, a debt claim, or a right in respect of which the income is paid is to take advantage of these articles by means of that creation or assignment.

2. Nothing in this Article shall be construed as restricting, in any manner, the application of any provisions of the law of a Contracting State, which are designed to prevent the avoidance or evasion of taxes.

## Article 30

### ENTRY INTO FORCE

1. Each of the Contracting States shall notify to the other the completion of the procedures required by its laws for the bringing into force of this Agreement. This Agreement shall enter into force on the date of receipt of the latter of these notifications.

2. The provisions of the Agreement shall apply:

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

## Article 31

### TERMINATION

1. This Agreement shall remain in force indefinitely until terminated by a Contracting State. A Contracting State may terminate the Agreement, after the expiration of five years from the date of entry into force of the Agreement, through diplomatic channels, by giving notice of termination at least six months before the end of any:

- (a) tax year, in the case of termination by Botswana; or
- (b) year of income, in the case of termination by Kenya.

2. In such event, the Agreement shall cease to apply:
- (a) in Botswana;
    - (i) with regard to taxes withheld at source, in respect to amounts paid or credited on or after the first day of July of the year next following that in which the notice is given; and
    - (ii) with regard to other taxes, on taxable income derived on or after the first day of July of the year next following that in which the notice is given,
  - (b) in Kenya;
    - (i) with regard to taxes withheld at source, in respect of amounts paid or credited after the end of year of income in which such notice is given; and
    - (ii) with regard to other taxes, in respect of taxable years beginning after the end of year of income in which such notice is given,

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Agreement.

Done at Nairobi, Kenya this 23rd day of July, 2019 in duplicate, in the English language.

For the Government of the  
Republic of Botswana.

For the Government of the  
Republic of Kenya.

\_\_\_\_\_  
DR. UNITY DOW,  
*Minister of International  
Affairs and Cooperation.*

\_\_\_\_\_  
AMB. MONICA JUMA, DPHIL, CBS,  
*Cabinet Secretary for  
Foreign Affairs.*

MADE this 27th day of March, 2020.

DR. THAPELO MATSHEKA,  
*Minister of Finance and Economic Development.*