Government Notice No. 14 of 2021

THE INCOME TAX ACT

Regulations made by the Minister under section 76 of the Income Tax Act

1. These regulations may be cited as the Double Taxation Agreement (Kingdom of Eswatini) (Amendment) Regulations 2021.

2. In these regulations –

"principal regulations" means the Double Taxation Agreement (Government of the Kingdom of Swaziland) Regulations 1994;

"Protocol" means the Protocol amending the Agreement between the Government of the Republic of Mauritius and the Government of Kingdom of Swaziland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed at Port Louis on 28 August 2020 and at Mbabane on 1 October 2020, and set out in the Schedule to these regulations.

3. The title of the principal regulations is amended by deleting the word "Swaziland" and replacing it by the word "Eswatini".

4. Regulation 2 of the principal regulations is amended, in the definition of "Agreement", by deleting the words "in the Schedule" and replacing them by the words "in the First Schedule as amended by the Protocol set out in the Second Schedule".

5. The principal regulations are amended–

(a) by renumbering the existing Schedule as the First Schedule;

(b) by adding, the Second Schedule set out in the Schedule to these regulations.

6. The Protocol shall come into operation on such date the Minister may specify in a notice to be published in the Gazette.

Made by the Minister on 18 January 2021.

SCHEDULE
[Regulation 2]

SECOND SCHEDULE
[Regulation 5]

PROTOCOL

AMENDING THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF MAURITIUS AND THE GOVERNMENT OF THE KINGDOM OF SWAZILAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

The Government of the Republic of Mauritius and the Government of the Kingdom of Eswatini, desiring to conclude a Protocol to amend the Agreement between the Government of the Republic of Mauritius and the Government of the Kingdom of Swaziland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed at Port Louis on the twenty ninth day of June of the year One Thousand Nine Hundred and Ninety Four (hereinafter referred to as "the Agreement"),

Have agreed as follows:

ARTICLE I

1. In the Agreement-

   (a) By replacing the title by the following "Agreement between the Government of the Kingdom of Eswatini and the Government of the Republic of Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income";

(b) By deleting the words "Kingdom of Swaziland" wherever they appear and replacing them by the words "Kingdom of Eswatini"; and

(c) By deleting the word "Swaziland" wherever it appears and replacing it by the word "Eswatini".

2. In Article 3 "GENERAL DEFINITIONS", by deleting subparagraph 1(e) and replacing it by the following subparagraph –

"(e) the term "competent authority" means:

(i) in Eswatini, the Commissioner-General, Eswatini Revenue Authority or his authorised representative; and

(ii) in Mauritius, the Director-General, Mauritius Revenue Authority or his authorised representative."

3. in Article 5 "PERMANENT ESTABLISHMENT",

(i) in paragraph 3, by adding a new subparagraph (c) after subparagraph (b) as follows –

"(c) the performing of services by an individual of a Contracting State, but only if the individual's stay in that State, for the purpose of performing those services, is for a period or periods aggregating more than 6 months within any twelve month period commencing or ending in the fiscal year concerned.";

(ii) in paragraph 4, by deleting subparagraph (e) and replacing it by the following subparagraph –

"(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";

(iii) by deleting paragraph 5 and replacing it by the following paragraph –

"5. Notwithstanding the provisions of paragraphs 1 and 2, a person acting in a Contracting State on behalf of an enterprise of the other Contracting State (other than an agent of an independent status to whom paragraph 6 applies), notwithstanding that he has no fixed place of business in the first-mentioned State, shall be deemed to be a permanent establishment in that State if he has and habitually exercises in that State an authority to conclude contracts in the name 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.";

(iv) by adding the following new paragraph after paragraph 7 –

"8. 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 other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 6 applies."

4. In Article 10 "DIVIDENDS", by deleting paragraph 4 and replacing it by the following paragraph –

"4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident through a permanent

establishment situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such a case, the provisions of Article 7 shall apply."

5. In Article 11 "INTEREST",

(i) in paragraph 2, by deleting the words "5 per cent" and replacing it by the words "7.5 per cent";

(ii) by deleting paragraphs 5 and 6 and replacing them by the following paragraphs –

"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 a case, the provisions of Article 7 shall apply.";

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

6. In Article 12 "ROYALTIES", by deleting paragraphs 4 and 5 and replacing them by the following paragraphs –

"4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such a case, the provisions of Article 7 shall apply.";

"5. Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a local authority, or a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment with which the right or property in respect of which the royalties are paid is effectively connected, and such royalties are borne by such permanent establishment, then such royalties shall be deemed to arise in the State in which the permanent establishment is situated."

7. By deleting Article 14 "INDEPENDENT PERSONAL SERVICES" and replacing it by the following new Article 14 "MANAGEMENT OR PROFESSIONAL FEES" –

"ARTICLE 14

MANAGEMENT OR PROFESSIONAL FEES

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

2. However, such management or professional fees may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner is subject to tax in respect of the management or

professional fees in the other Contracting State, the tax so charged shall not exceed five (5) per cent of the gross amount of such management or professional fees.

3. The term "management or professional fees" as used in this Article means payments of any kind to any person, other than to an employee of the person making the payments, in consideration for any services of a managerial, professional, technical or consultancy nature unless the payment is the reimbursement of actual expenses incurred by that person with respect to the service.

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

5. Management or professional fees shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the management or professional fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the obligation to pay the management or professional fees was incurred, and such management or professional fees are borne by that permanent establishment, then such management or professional 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 management or professional fees paid exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such a case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement."

8. In Article 15 "DEPENDENT PERSONAL SERVICES",

(i) by deleting the title and replacing it by the following "INCOME FROM EMPLOYMENT";

(ii) in paragraph 1, by deleting the words ",19 and 20" and replacing them by the words " and 19";

(iii) in paragraph 2(a), by deleting the words "in the calendar year concerned" and replacing them by the words "in any twelve month period commencing or ending in the fiscal year concerned";

(iv) in paragraph 2(c), by deleting the words "or a fixed base".

9. By deleting Article 26 "EXCHANGE OF INFORMATION" and replacing by the following Article -

"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 or administrative subdivisions or local authorities insofar as the taxation thereunder is not contrary to the Agreement as well as to prevent fiscal evasion and tax avoidance. 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 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 a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying 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;

(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 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 fiduciary capacity or because it relates to ownership interests in a person."

10. By adding the following new Article 26A after Article 26 -

"ARTICLE 26A

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 State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that 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 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 State.

4. When a revenue claim of a Contracting State is a claim in respect of which that 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 State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other 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 State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first-mentioned 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 State, be subject to the time limits or accorded any priority applicable to a revenue claim under the laws of that 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 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 not be brought before the courts or administrative bodies 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 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 State that is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that 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 State shall promptly notify the competent authority of the other State of that fact and, at the option of the other State, the first-mentioned 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;

(d) to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State."

ARTICLE II

1. Each of the Contracting States shall notify to the other in writing, through the diplomatic channel, of the completion of the procedures required by its law for the bringing into force of this Protocol. This Protocol shall enter into force on the date of receipt of the later of these notifications.

2. The provisions of the Protocol shall apply in respect of any taxable year beginning on or after the first day of January next following the date on which the Protocol enters into force.

In Witness thereof the undersigned, being duly authorised thereto by their respective Governments, have signed this Protocol.

Done in two originals at Port Louis this 28th day of August two thousand and twenty and at Mbabane this 1st day of October two thousand and twenty in the English language.

Dr the Honourable Renganaden Padayachy
Minister of Finance, Economic Planning and Development

For the Government of
the Republic of Mauritius

Honourable Neal Rijkenberg
Minister of Finance

For the Government of
the Kingdom of Eswatini

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