1952 No. 1214

The Double Taxation Relief (Taxes on Income) (Kenya) Order, 1952

Made - - - - 24th June, 1952

At the Court at Buckingham Palace, the 24th day of June, 1952

Present,

The Queen's Most Excellent Majesty in Council

Whereas it is provided by subsection (1) of section three hundred and forty-seven of the Income Tax Act, 1952(a), that if Her Majesty by Order in Council declares that arrangements specified in the Order have been made with the Government of any territory outside the United Kingdom with a view to affording relief from double taxation in relation to income tax or profits tax and any taxes of a similar character imposed by the laws of that territory, and that it is expedient that those arrangements should have effect, the arrangements shall have effect to the extent specified in that subsection:

And Whereas under certain other provisions of Part XIII of the said Act certain other consequences ensue on the making of any such Order:

And Whereas a draft of this Order was laid before the Commons House of Parliament in accordance with the provisions of subsection (6) of section three hundred and forty-seven of the said Act and an Address has been presented to Her Majesty by that House praying that an Order may be made in the terms of this Order:

Now, therefore, Her Majesty, in exercise of the powers conferred on Her by subsection (1) of the said section three hundred and forty-seven and of all other powers enabling Her in that behalf, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as the Double Taxation Relief (Taxes on Income) (Kenya) Order, 1952.

2. It is hereby declared—

(*a*) that the arrangements specified in the Arrangement set out in the Schedule to this Order have been made with the Government of Kenya with a view to affording relief from double taxation in relation to income tax or profits tax and taxes of a similar character imposed by the laws of Kenya; and

(*b*) that it is expedient that those arrangements should have effect.

F. J. Fernau.

(a) 15 & 16 Geo. 6 & 1 Eliz. 2. c. 10.

SCHEDULE

ARRANGEMENT BETWEEN HIS MAJESTY'S GOVERNMENT AND THE GOVERNMENT OF KENYA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

1.—(1) The taxes which are the subject of this Arrangement are:—

(*a*) In the United Kingdom:
The income tax (including surtax) and the profits tax (hereinafter referred to as "United Kingdom tax");

(*b*) In Kenya:
The income tax (including surtax) and the personal tax (hereinafter referred to as "Kenya tax").

(2) This Arrangement shall also apply to any other taxes of a substantially similar character imposed in the United Kingdom or Kenya after this Arrangement has come into force.

2.—(1) In this Arrangement, unless the context otherwise requires:

(*a*) the term "United Kingdom" means Great Britain and Northern Ireland, excluding the Channel Islands and the Isle of Man;

(*b*) the term "Kenya" means the Colony and Protectorate of Kenya;

(*c*) the terms "one of the territories" and "the other territory" mean the United Kingdom or Kenya, as the context requires;

(*d*) the term "tax" means United Kingdom tax or Kenya tax, as the context requires;

(*e*) the term "person" includes any body of persons, corporate or not corporate;

(*f*) the term "company" includes any body corporate;

(*g*) the terms "resident of the United Kingdom" and "resident of Kenya" mean respectively any person who is resident in the United Kingdom for the purposes of United Kingdom tax and not resident in Kenya for the purposes of Kenya tax and any person who is resident in Kenya for the purposes of Kenya tax and not resident in the United Kingdom for the purposes of United Kingdom tax; and a company shall be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom and as resident in Kenya if its business is managed and controlled in Kenya;

(*h*) the terms "resident of one of the territories" and "resident of the other territory" mean a person who is a resident of the United Kingdom or a person who is a resident of Kenya, as the context requires;

(*i*) the terms "United Kingdom enterprise" and "Kenya enterprise" mean respectively an industrial or commercial enterprise or undertaking carried on by a resident of the United Kingdom and an industrial or commercial enterprise or undertaking carried on by a resident of Kenya; and the terms "enterprise of one of the territories" and "enterprise of the other territory" mean a United Kingdom enterprise or a Kenya enterprise, as the context requires;

(*j*) the term "industrial or commercial profits" does not include income in the form of dividends, interest, rents or royalties (other than rents or royalties in respect of cinematograph films), management charges, or remuneration for personal services;

(*k*) the term "permanent establishment", when used with respect to an enterprise of one of the territories, means a branch, management or other fixed place of business, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of such enterprise or has a stock of merchandise from which he regularly fills orders on its behalf.

An enterprise of one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on business dealings in that other territory through a *bona fide* broker or general commission agent acting in the ordinary course of his business as such.

The fact that an enterprise of one of the territories maintains in the other territory a fixed place of business exclusively for the mere purchase of goods or merchandise shall not of itself constitute that fixed place of business a permanent establishment of the enterprise.

The fact that a company which is a resident of one of the territories has a subsidiary company which is a resident of the other territory or which is engaged in trade or business in that other territory (whether through a permanent establishment or otherwise) shall not of itself constitute that subsidiary company a permanent establishment of its parent company.

(2) The terms "United Kingdom tax" and "Kenya tax", as used in this Arrangement, do not include any tax payable in the United Kingdom or Kenya which is payable in respect of any default or omission in relation to the taxes which are the subject of this Arrangement or which represents a penalty imposed under the law of the United Kingdom or Kenya relating to those taxes.

(3) Where under this Arrangement any income is exempt from tax in one of the territories if (with or without other conditions) it is subject to tax in the other territory, and that income is subject to tax in that other territory by reference to the amount thereof which is remitted to or received in that other territory, the exemption to be allowed under this Arrangement in the first-mentioned territory shall be determined by reference to the amount so remitted or received.

(4) In the application of the provisions of this Arrangement by the United Kingdom or Kenya, any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of the United Kingdom, or, as the case may be, Kenya, relating to the taxes which are the subject of this Arrangement.

3.—(1) The industrial or commercial profits of a United Kingdom enterprise shall not be subject to Kenya tax unless the enterprise is engaged in trade or business in Kenya through a permanent establishment situated therein. If it is so engaged, tax may be imposed on those profits by Kenya, but only on so much of them as is attributable to that permanent establishment: Provided that nothing in this paragraph shall affect any provisions of the law of Kenya regarding the taxation of income from the business of insurance.

(2) The industrial or commercial profits of a Kenya enterprise shall not be subject to United Kingdom tax unless the enterprise is engaged in trade or business in the United Kingdom through a permanent establishment situated therein. If it is so engaged, tax may be imposed on those profits by the United Kingdom, but only on so much of them as is attributable to that permanent establishment.

(3) Where an enterprise of one of the territories is engaged in trade or business in the other territory through a permanent establishment situated therein, there shall be attributed to that permanent establishment the industrial or commercial profits which it might be expected to derive in that other territory if it were an independent enterprise engaged in the same or similar activities under the same or similar conditions and its dealings with the enterprise of which it is a permanent establishment were dealings at arm's length with that enterprise, and the profits so attributed shall be deemed to be income derived from sources in that other territory.

(4) No portion of any profits arising from the sale of goods or merchandise by an enterprise of one of the territories shall be attributed to a permanent establishment situated in the other territory by reason of the mere purchase of the goods or merchandise within that other territory.

4. Where—

(*a*) an enterprise of one of the territories participates directly or indirectly in the management, control or capital of an enterprise of the other territory, or

(*b*) the same persons participate directly or indirectly in the management, control or capital of an enterprise of one of the territories and an enterprise of the other territory, and

(*c*) 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.

5. Notwithstanding the provisions of paragraphs 3 and 4, profits which a resident of one of the territories derives from operating ships or aircraft shall be exempt from tax in the other territory.

6.—(1) Any dividend paid by a company resident in the United Kingdom to an individual who—

(*a*) is a resident of Kenya, and

(*b*) is subject to Kenya tax in respect thereof, and

(*c*) is not engaged in trade or business in the United Kingdom through a permanent establishment situated therein,

shall be exempt from United Kingdom surtax.

(2) Any dividend paid by a company resident in Kenya to an individual who—

(*a*) is a resident of the United Kingdom, and

(*b*) is subject to United Kingdom tax in respect thereof, and

(*c*) is not engaged in trade or business in Kenya through a permanent establishment situated therein,

shall be exempt from Kenya surtax.

(3) Where a company which is a resident of one of the territories derives profits or income from sources within the other territory, the Government of that other territory shall not impose any form of taxation on dividends paid by the company to persons not resident in that other territory, or any tax in the nature of an undistributed profits tax on undistributed profits of the company, by reason of the fact that those dividends or undistributed profits represent, in whole or in part, profits or income so derived.

7.—(1) Any royalty derived from sources within one of the territories by a resident of the other territory who is subject to tax in that other territory in respect thereof and is not engaged in trade or business in the first-mentioned territory through a permanent establishment situated therein, shall be exempt from tax in that first-mentioned territory; but no exemption shall be allowed under this paragraph in respect of so much of any royalty as exceeds an amount which represents a fair and reasonable consideration for the rights for which the royalty is paid.

(2) In this paragraph the term "royalty" means any royalty or other amount paid as consideration for the use of, or for the privilege of using, any copyright, patent, design, secret process or formula, trade-mark, or other like property, but does not include a royalty or other amount paid in respect of the operation of a mine or quarry or of other extraction of natural resources.

8.—(1) Remuneration, including pensions, paid by the Government of one of the territories to any individual for services rendered to that Government in the discharge of governmental functions shall be exempt from tax in the other territory if the individual is not ordinarily resident in that other territory or (where the remuneration is not a pension) is ordinarily resident in that other territory solely for the purpose of rendering those services.

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

9.—(1) An individual who is a resident of the United Kingdom shall be exempt from Kenya tax on profits or remuneration in respect of personal (including professional) services performed within Kenya in any year of assessment if—

(*a*) he is present within Kenya for a period or periods not exceeding in the aggregate 183 days during that year, and

(*b*) the services are performed for or on behalf of a person resident in the United Kingdom, and

(*c*) the profits or remuneration are subject to United Kingdom tax.

(2) An individual who is a resident of Kenya shall be exempt from United Kingdom tax on profits or remuneration in respect of personal (including professional) services performed within the United Kingdom in any year of assessment if—

(*a*) he is present within the United Kingdom for a period or periods not exceeding in the aggregate 183 days during that year, and

(*b*) the services are performed for or on behalf of a person resident in Kenya, and

(*c*) the profits or remuneration are subject to Kenya tax.

(3) The provisions of this paragraph shall not apply to the profits or remuneration of public entertainers such as stage, motion picture or radio artists, musicians and athletes.

10.—(1) Any pension (other than a pension paid by the Government of Kenya for services rendered to it in the discharge of governmental functions) and any annuity, derived from sources within Kenya by an individual who is a resident of the United Kingdom and subject to United Kingdom tax in respect thereof, shall be exempt from Kenya tax.

(2) Any pension (other than a pension paid by the Government of the United Kingdom for services rendered to it in the discharge of governmental functions) and any annuity, derived from sources within the United Kingdom by an individual who is a resident of Kenya and subject to Kenya tax in respect thereof, shall be exempt from United Kingdom tax.

(3) The term "annuity" means a stated sum payable periodically at stated times, during life or during a specified or ascertainable period of time, under an obligation to make the payments in consideration of money paid.

11. A student or business apprentice from one of the territories who is receiving full-time education or training in the other territory shall be exempt from tax in that other territory on payments made to him by persons in the first-mentioned territory for the purposes of his maintenance, education or training.

12.—(1) Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom, Kenya tax payable, whether directly or by deduction, in respect of income from sources within Kenya shall be allowed as a credit against any United Kingdom tax payable in respect of that income. In the case of a person who is resident in both the United Kingdom and Kenya, the credit shall extend to the Kenya tax payable in respect of income from sources within the Tanganyika Territory, the Uganda Protectorate and the Zanzibar Protectorate.

(2) Subject to the provisions of the law of Kenya regarding the allowance as a credit against Kenya tax of tax payable in a territory outside Kenya, United Kingdom tax payable, whether directly or by deduction, in respect of income from sources within the United Kingdom shall be allowed as a credit against any Kenya tax payable in respect of that income. Where such income is an ordinary dividend paid by a company resident in the United Kingdom the credit shall take into account (in addition to any United Kingdom income tax appropriate to the dividend) the United Kingdom profits tax payable by the company in respect of its profits, and where it is a dividend paid on participating preference shares and representing both a dividend at the fixed rate to

which the shares are entitled and an additional participation in profits, the profits tax so payable by the company shall likewise be taken into account in so far as the dividend exceeds that fixed rate.

(3) For the purposes of this paragraph profits or remuneration for personal (including professional) services performed in one of the territories shall be deemed to be income from sources within that territory, and the services of an individual whose services are wholly or mainly performed in ships or aircraft operated by a resident of one of the territories shall be deemed to be performed in that territory.

(4) Where Kenya tax is payable for a year for which this Arrangement has effect in respect of any income in respect of which United Kingdom income tax is payable for a year prior to the year beginning on the 6th April, 1950, then—

(*a*) in the case of a person resident in Kenya, the Kenya tax shall, for the purposes of sub-paragraph (2) of this paragraph, be deemed to be reduced by the amount of any relief allowable in respect thereof under the provisions of Section 27 of the United Kingdom Finance Act, 1920(a); and

(*b*) in the case of a person resident in the United Kingdom the provisions of Section 32 of the Kenya Income Tax Ordinance, 1940, shall apply for the purposes of the allowance of relief from the Kenya tax.

13.—(1) The taxation authorities of the United Kingdom and Kenya shall exchange such information (being information available under their respective taxation laws) as is necessary for carrying out the provisions of this Arrangement or for the prevention of fraud or the administration of statutory provisions against legal avoidance in relation to the taxes which are the subject of this Arrangement. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons other than persons (including a Court) concerned with the assessment and collection of, or the determination of appeals in relation to, the taxes which are the subject of this Arrangement. No information shall be exchanged which would disclose any trade secret or trade process.

(2) As used in this paragraph, the term "taxation authorities" means the Commissioners of Inland Revenue or their authorised representative in the case of the United Kingdom and the Commissioner of Income Tax or his authorised representative in the case of Kenya.

14. This Arrangement shall come into force on the date on which the last of all such things shall have been done in the United Kingdom and Kenya as are necessary to give the Arrangement the force of law in the United Kingdom and Kenya respectively, and shall thereupon have effect—

(*a*) in the United Kingdom:

as respects income tax for any year of assessment beginning on or after the 6th April, 1950,

as respects surtax for any year of assessment beginning on or after the 6th April, 1949; and

as respects profits tax, in respect of the following profits—

(i) profits arising in any chargeable accounting period beginning on or after the 1st April, 1950;

(ii) profits attributable to so much of any chargeable accounting period falling partly before and partly after that date as falls after that date;

(iii) profits not so arising or attributable by reference to which income tax is, or but for the present Arrangement would be, chargeable for any year of assessment beginning on or after the 6th April, 1950.

(a) 10 & 11 Geo. 5. c. 18.

(*b*) in Kenya:

as respects income tax (including surtax) for the year of assessment beginning on the first day of January, 1950, and subsequent years, and as respects personal tax for the year beginning on the first day of January, 1950, and subsequent years.

15. This Arrangement shall continue in effect indefinitely but either of the Governments may, on or before the thirtieth day of June in any calendar year after the year 1951, give notice of termination to the other Government and, in such event, this Arrangement shall cease to be effective—

(*a*) In the United Kingdom:

as respects income tax for any year of assessment beginning on or after the 6th April in the calendar year next following that in which the notice is given;

as respects surtax for any year of assessment beginning on or after the 6th April in the calendar year in which the notice is given; and

as respects profits tax in respect of the following profits—

(i) profits arising in any chargeable accounting period beginning on or after the 1st April in the calendar year next following that in which the notice is given;

(ii) profits attributable to so much of any chargeable accounting period falling partly before and partly after that date as falls after that date;

(iii) profits not so arising or attributable by reference to which income tax is chargeable for any year of assessment beginning on or after the 6th April in that next following calendar year;

(*b*) In Kenya:

as respects income tax (including surtax) for any year of assessment beginning on or after the first day of January in the calendar year next following that in which such notice is given, and as respects personal tax for any year beginning on or after the first day of January in such next following calendar year.

EXPLANATORY NOTE

(This Note is not part of the Order, but is intended to indicate its general purport.)

Under the Arrangement with Kenya which is scheduled to this Order, certain classes of income derived from one country by a resident of the other country are (subject to certain conditions) to be exempt from tax in the former country; these classes are shipping and air transport profits, certain trading profits not arising through a "permanent establishment", patent and copyright royalties, pensions other than Government pensions, purchased annuities and earnings of temporary business visitors. Government salaries are normally to be taxed by the paying Government only.

Dividends are to be exempt from any tax which is additional to the tax charged on the profits represented by the dividend.

Where income continues to be taxable in both countries, full credit is to be given by the country of the taxpayer's residence for the tax payable in the country of origin of the income.

Provision is included for the exchange of information between the taxation authorities of the two countries.

The Arrangement is expressed to take effect for the fiscal year 1950-51.