

The Convention between the Government of the Republic of South Africa and the Government of the Republic of Malawi for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, was published in Government Gazette No. 1479 dated 13 August 1971 and entered into force on 2 September 1971.

CONVENTION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE REPUBLIC OF MALAWI FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

The Government of the Republic of South Africa and the Government of the Republic of Malawi,

Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income;

Have agreed as follows:

Article 1

1. The taxes which are the subject of this Convention are –

(a) in the Republic of South Africa –

- (i) the normal tax;
- (ii) the non-resident shareholders' tax;
- (iii) the undistributed profits tax;
- (iv) the non-residents tax on interest; and
- (v) the provincial income and personal taxes;

(hereinafter referred to as "South African tax");

(b) in Malawi –

the Income Tax on persons;

(hereinafter referred to as "Malawi tax").

2. This Convention shall also apply to any other taxes of a substantially similar character imposed by either Contracting State subsequent to the date of signature of this Convention.

Article 2

1. In this Convention, unless the context otherwise requires –

(a) the term "South Africa" means the Republic of South Africa;

(b) the term "Malawi" means the Republic of Malawi;

(c) the terms "one of the Contracting States" and "the other Contracting State" mean South Africa or Malawi, as the context requires;

- (d) the term “tax” means South African tax or Malawi 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)
 - (i) the terms “resident of South Africa” and “resident of Malawi” mean respectively any person who is ordinarily resident in South Africa for the purposes of South African tax and any person who is resident in Malawi for the purposes of Malawi tax; but
 - (ii) where by reason of the provisions of sub-paragraph (i) an individual is a resident of both Contracting States, then this case shall be solved in accordance with the following provisions:
 - (aa) He shall be deemed to be a resident 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 of the Contracting State with which his personal and economic relations are closest (hereinafter referred to as “his centre of vital interests”);
 - (bb) if the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;
 - (cc) if he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national;
 - (dd) if he is a national of both Contracting States or of neither of them, the taxation authorities of the Contracting States shall determine the question by mutual agreement;
 - (iii) where by reason of the provisions of sub-paragraph (i) a legal person is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated; the same provision shall apply to partnerships and associations which under the national laws by which they are governed are not legal persons;
- (h) the terms “company of one of the Contracting States” and “company of the other Contracting State” mean a company which is a resident of South Africa or a company which is a resident of Malawi, as the context requires;
- (i) the terms “South African enterprise” and “Malawi enterprise” mean respectively an industrial or commercial enterprise or undertaking carried on by a resident of South Africa and an industrial or commercial enterprise or undertaking carried on by a resident of Malawi; and the terms “enterprise of one of the Contracting States” and “enterprise of the other Contracting State” mean a South African enterprise or a Malawi enterprise, as the context requires;

- (j) the term “industrial or commercial enterprise or undertaking” includes an enterprise or undertaking engaged in mining, agricultural or pastoral activities or in the business of banking, insurance or dealing in investments, and the term “industrial or commercial profits” includes profits from such activities or business but does not include income in the form of –
 - (i) dividends;
 - (ii) interest;
 - (iii) rents or royalties, including rents or royalties of cinematograph or television films or any sound recording or advertising matter connected with such films, and any amount received or accrued for the imparting of or the undertaking to impart any knowledge directly or indirectly connected with the use of any such film, sound recording or advertising matter or of any patent, design, model, plan, trade mark, copyright, secret process, formula or other property of a similar nature;
 - (iv) management charges;
 - (v) remuneration for personal services;
 - (vi) profits from the operation of transport services;
- (k) (i) the term “permanent establishment” means a fixed place of business in which the business of the enterprise is wholly or partly carried on;
- (ii) a permanent establishment shall include especially -
 - (aa) a place of management;
 - (bb) a branch;
 - (cc) an office;
 - (dd) a factory;
 - (ee) a workshop;
 - (ff) a mine, quarry, or other place of extraction of natural resources;
 - (gg) a building site or construction or assembly project;
- (iii) the term “permanent establishment” shall not include –
 - (aa) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
 - (bb) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
 - (cc) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
 - (dd) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;

- (ee) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise;
- (iv) an enterprise of one of the Contracting States shall be deemed to have a permanent establishment in the other Contracting State if it carries on the activity of providing the services of public entertainers or of athletes referred to in Article 9, in that other Contracting State;
- (v) a person acting in one of the Contracting States on behalf of an enterprise of the other Contracting State other than an agent of an independent status to whom sub-paragraph (vi) applies, shall be deemed to be a permanent establishment in the first-mentioned Contracting State if he has, and habitually exercises in that Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise;
- (vi) an enterprise of one of the Contracting States 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, where such persons are acting in the ordinary course of their business;
- (vii) the fact that a company which is a resident of one of the Contracting States 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;
- (viii) the fact that an enterprise of one of the Contracting States is erecting plant or machinery in the other Contracting State shall not of itself constitute a permanent establishment of such enterprise in the other Contracting State, if the erection is an integral part of the contract for the supply of such plant and machinery;
- (l) the term "profits" means taxable income;
- (m) the term "taxation authorities" means the Secretary for Inland Revenue or his authorised representative in the case of South Africa and the Commissioner of Taxes or his authorised representative in the case of Malawi.

2. The terms "South African tax" and "Malawi tax" do not include any sum payable in respect of any default or omission in relation to the taxes which are the subject of this Convention or which represents a penalty imposed under the laws of either Contracting State relating to those taxes.

3. In the application of the provisions of this Convention by one of the Contracting States any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of this Convention.

Article 3

1. The industrial and commercial profits of an enterprise of one of the Contracting States shall not be subject to tax in the other Contracting State unless the enterprise is engaged in trade or business in the other Contracting State through a permanent establishment in that other Contracting State. If it is so engaged tax may be imposed on those profits by the other Contracting State but only on so much of them as is attributable to that permanent establishment.

2. Where an enterprise of one of the Contracting States is engaged in trade or business in the other Contracting State through a permanent establishment situated therein –

- (a) there shall be attributed to that permanent establishment the industrial or commercial profits which it might be expected to derive in that other Contracting State if it were an independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing at arm's length with the enterprise of which it is a permanent establishment;
- (b) subject to the provisions of sub-paragraph (a), no profits derived from sources outside that other Contracting State shall be attributed to that permanent establishment.

3. No portion of any profits arising from the sale of goods or merchandise by an enterprise of one of the Contracting States shall be attributed to a permanent establishment situated in the other Contracting State by reason of the mere purchase of the goods or merchandise within that other Contracting State.

4. In determining the industrial or commercial profits of a permanent establishment there shall be allowed as deductions all expenses which would be deductible if the permanent establishment were an independent enterprise in so far as they are reasonably allocable to the permanent establishment, including executive and general administrative expenses so deductible and allocable, whether incurred in the Contracting State in which the permanent establishment is situated or elsewhere.

5. This Article shall not apply in any case in which its application would have the result that income, which but for such application would be subject to tax in one of the Contracting States, would not be subject to tax in either Contracting State.

Article 4

Where -

- (a) an enterprise of one of the Contracting States 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 one of the Contracting States 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.

Article 5

Notwithstanding the provisions of Articles 3 and 4, profits derived by the Government of or by a resident of one of the Contracting States from operating transport services between the Contracting States shall be exempt from tax in the other Contracting State.

Article 6

1. Any royalty or rent including royalty or rent in respect of cinematograph or television films, or any sound recording or advertising matter connected with such films, or any other consideration received by or accrued to a resident of one of the Contracting States by virtue of the use in the other Contracting State of, or the grant of permission to use in that other Contracting State any patent, design, model, plan, trade mark, copyright, secret process, formula or other property of a similar nature, including any amount received or accrued for the imparting of or the undertaking to impart any knowledge directly or indirectly connected with the use of any such films, sound recording, advertising matter, patent, design, model, plan, trade mark, copyright, secret process, formula or other property of a similar nature, shall be exempt from tax in that first-mentioned Contracting State if such royalty, rent or other consideration is subject to tax in the other Contracting State.

2. In this Article, the term "royalty" includes, inter alia, a payment of any kind received as consideration for the use of or the right to use industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience, but does not include any amount paid in respect of the operation of a mine, oil well or quarry or of any other extraction of natural resources.

Article 7

1. Remuneration (other than pensions) paid by one of the Contracting States to any individual for services rendered to that Contracting State in the discharge of governmental functions shall be exempt from tax in the other Contracting State if the individual is not ordinarily resident in that State or is ordinarily resident in that State solely for the purpose of rendering those services.

2. Any pension paid by one of the Contracting States to any individual for services rendered to that Contracting State in the discharge of governmental functions shall be exempt from tax in the other Contracting State if, immediately prior to the cessation of those services, the remuneration therefor was exempt from tax in that State, whether under paragraph (1) of this Article or otherwise, or would have been exempt under that paragraph if this Convention had been in force at the time the remuneration was paid.

3. The provisions of this Article shall not apply to payments in respect of services rendered in connection with any trade or business carried on by either of the Contracting States for purposes of profit.

4. For the purposes of this Article the term "Contracting State" in the case of South Africa, includes the Administrations of the Provinces of South Africa.

Article 8

1. An individual who is a resident of South Africa shall be exempt from Malawi tax on profits or remuneration in respect of personal, including professional, services performed within Malawi in any year of assessment if –

- (a) he is present within Malawi 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 South Africa; and
- (c) the profits or remuneration are subject to South African tax.

2. An individual who is a resident of Malawi shall be exempt from South African tax on profits or remuneration in respect of personal, including professional, services performed within South Africa in any year of assessment if –

- (a) he is present within South Africa 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 Malawi; and
- (c) the profits or remuneration are subject to Malawi tax.

Article 9

Notwithstanding anything contained in this Convention, income derived by public entertainers, such as theatre, motion picture, radio or television artistes and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised.

Article 10

The remuneration derived by a professor or teacher who is a resident of one of the Contracting States, for teaching, during a period of temporary residence not exceeding two years, at a university, college, school or other educational institution in the other Contracting State, shall be exempt from tax in that other Contracting State if such remuneration is subject to tax in such first-mentioned Contracting State.

Article 11

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

Article 12

1. Subject to the provisions of the law in Malawi regarding the allowance of a credit against Malawi tax of tax payable in South Africa, South African tax payable in respect of profits from sources within South Africa shall be allowed as a credit against any Malawi tax payable in respect of such profits.

2. Where Malawi tax is payable in respect of profits derived from sources within Malawi by a resident of South Africa, South Africa shall either impose no tax on such profits or, subject to such provisions, which shall not affect the general principle hereof, as may be enacted in South Africa, shall allow the Malawi tax as a credit against any South African tax payable in respect of such profits.

3. Where the non-residents tax on interest imposed in South Africa is payable in respect of interest accrued from a source in Malawi, Malawi shall allow such non-residents tax on interest as a credit against any Malawi tax payable in respect of the interest so accrued, but not exceeding so much of the tax as may be attributable to the inclusion of such interest in the taxable income: Provided that the rate of such non-residents tax on such interest shall not exceed ten per cent.

4. For the purposes of this Article profits or remuneration for personal, including professional, services performed in one of the Contracting States shall be deemed to be profits from sources within that Contracting State, and the services of an individual whose services are wholly or mainly performed in aircraft or other transport vehicles operated by a resident of one of the Contracting States shall be deemed to be performed in that Contracting State.

Article 13

The taxation authorities of the Contracting States shall exchange such information, being information available under the respective taxation laws of the Contracting States, as is necessary for carrying out the provisions of the present Convention 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 Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons other than those concerned with the assessment and collection of the taxes which are the subject of this Convention. No information shall be exchanged which would disclose any trade secret or trade process.

Article 14

1. This Convention shall be ratified and the instruments of ratification shall be exchanged in Malawi as soon as possible.

2. This Convention shall enter into force after the expiration of 30 days following the date on which the instruments of ratification are exchanged and shall thereupon have effect -

(a) in South Africa -

(i) as respects taxes on income, for any year of assessment ending after 30th June, 1968;

(ii) as respects non-resident shareholders' tax, on dividends declared on or after 1st July, 1968; and

(iii) as respects non-residents' tax on interest, on interest payable on or after 1st July, 1968.

(b) in Malawi -

as respects income tax, for any year of assessment ending after 31st March, 1968.

Article 15

This Convention shall continue in effect indefinitely, but either of the Contracting States may, on or before the thirtieth day of September in any calendar year after the year 1970, give notice of termination to the other Contracting State and, in such event, this Convention shall cease to be effective -

(a) in South Africa, in respect of any year of assessment beginning on or after the first day of March in the calendar year next following that in which such notice is given;

(b) in Malawi, in respect of any year of assessment beginning on or after the first day of April in the calendar year next following that in which such notice is given.

In witness whereof the undersigned plenipotentiaries, being duly authorised thereto by their respective Governments, have signed this Convention and have affixed thereto their seals.

DONE in duplicate in the Afrikaans and English languages, at Cape Town this third day of May, One Thousand Nine Hundred and Seventy-one, both texts being equally authoritative.

For the Government of the Republic of South Africa:
(Sgd.) H. MULLER

For the Government of the Republic of Malawi:
(Sgd.) P. A. RICHARDSON