



## 1 Introduction

Uganda has entered into several international treaties (“DTAs”), including one with the Netherlands. DTAs are aimed at preventing double taxation and evasion and cover various income streams, including dividends, interest, royalties, capital gains, and professional or technical fees for services like consulting, engineering, or legal work. They clearly outline which state party to the DTA is allocated the right of taxation of the respective income.

Compared to its other tax treaties, the DTA with the Netherlands lacks an article on professional or technical fees. This omission raises questions as to whether Uganda can demand for withholding tax (“WHT”) on payments for such services to non-resident persons covered by the DTA. This article examines this issue.

## 2. The contention

The treatment of professional or technical fees in cases where a tax treaty does not explicitly address them has been a topic of dispute in various jurisdictions.

In such situations, tax authorities and courts have often turned to the DTA articles or provisions covering business income and other income to determine the appropriate taxation of professional or technical fees. These articles are examined to establish whether the services provided fall within the scope of a business activity or if they qualify as other income not specifically covered by the treaty.

## 3. Business income article

Under the Uganda-Netherlands DTA, article 7 specifically addresses the taxation of business profits. This article establishes the guidelines and principles for determining taxable business income and the allocation of taxing rights between the two countries. This article provides that the profits of an enterprise of a Contracting State are only taxable in that State unless the enterprise carries on business in the other Contracting State through a Permanent Establishment (“PE”) situated therein.

To determine whether a non-resident person has a PE in Uganda, a careful examination of their activities is required. Mere presence of an agent or dependent agent in Uganda may not create a PE for the non-resident person. However, if the agent has the

authority to enter into contracts on behalf of the non-resident person or routinely plays a significant role in concluding contracts that are regularly finalized without substantial modifications by the non-resident person, then the agent's activities may give rise to a PE for the non-resident person.

With regard to matters involving professional or technical fees, different courts have adopted various interpretations of Article 7. Some courts have taken a narrower approach, considering the provision applicable only to income directly connected to the business activities of the enterprise. On the other hand, certain courts have taken a broader perspective, treating income from professional or technical services as business income if those services form an integral part of the enterprise's overall business activities.

It is crucial to consider the specific provisions of the Uganda-Netherlands DTA and any applicable case law to determine the precise application and interpretation of Article 7 in relation to professional or technical fees in a given context.

## 4. Other income article

Article 21 of the Uganda-Netherlands DTA serves as a catch-all provision applicable to income not specifically addressed in the other articles of the treaty. This provision allows a contracting state to levy taxes on income that would otherwise remain untaxed under the treaty.

The interpretation of Article 21 in other DTAs enumerated as Article 22 has been a contentious matter in numerous tax cases. Tax authorities often argue that professional or technical fees, not explicitly covered by other articles of the DTA, should fall within the scope of Article 22. Conversely, taxpayers assert that such fees are excluded from Article 22 because they are specifically addressed under Article 7 covering business income.

## 5. The applicable tax position

Based on our examination of the Uganda-Netherlands (“DTA”) and relevant case law, it is our opinion that Uganda does not have basis under the law to impose WHT on professional or technical fees disbursed to a non-resident enterprise in the Netherlands.

Before its modification in 2000, the Organization for Economic Co-operation and Development (“OECD”)

Model Tax Convention included a specific provision, Article 14, addressing the taxation of management or professional services. The deletion of this article 14 from the convention meant that professional services would only be subject to taxation under Article 7.

The decision of the High Court of India in *Bangkok Glass Industry Co. Ltd v Assistant Commissioner of Income Tax* [2013] 215 Taxman 116 (Mad) supports the view that professional services and similar services are taxable under Article 7 of the OECD Model Tax Convention as business profits.

As expressed in this article, it our view that professional or technical fees fall within the scope of Article 7 of the Uganda-Netherlands DTA and should not be classified as income under Article 21, which is a residual provision intended for incomes not specifically addressed in other articles of the DTA. Based on this

interpretation, we contend that professional fees paid to non-resident entities based in the Netherlands should not be subject to WHT in Uganda.

## 6. Conclusion

Although this matter has not yet been disputed in Uganda, it has been a subject of contention in neighboring states, particularly Kenya. In those jurisdictions, it has been established that domestic WHT does not apply in cases where a DTA does not explicitly address the taxation of technical or professional fees. Based on this precedent, it can be concluded that in the absence of specific provisions within the Uganda-Netherlands DTA regarding the taxation of professional or technical fees, domestic WHT should not apply in Uganda to payments made to non-resident entities based in the Netherlands.

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At Deloitte, he lived and worked in Uganda, Kenya, Tanzania and the United Kingdom for over 6 years and subsequently became the firm's chief of staff for the Energy and Resources Industry Group seeing him play a lead advisory role in Uganda, Kenya, Tanzania, Mozambique, South Sudan, Somalia and Ethiopia.

Denis is widely published and a regular commentator in the local, regional and international media and speaker at various forums regarding the taxation and financing of energy projects as well as the protection of large capital projects within the framework of international investment law.

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Bill is a Senior Advisor with Cristal Advocates. He has concentrated on working with energy companies with a particular focus on cross border transactions and M&A since 1989 and is a leading global energy and tax practitioner with wide international experience. Between 1986 and 1998, he worked in London with the UK tax authorities and Big Four accounting firms. From 1998 to 2004, he was based in Kazakhstan working across the Caspian region with Deloitte. He was in the region at the time it was developing its infrastructure for crude oil production with international investment following the collapse of the Soviet Union.

From 2004 to 2008, he worked in Russia where he led Deloitte's oil and gas industry group and established Deloitte's office in Sakhalin. He moved to East Africa in 2009 leading Deloitte's energy and resources industry group in Uganda, Kenya, Tanzania, Rwanda, Ethiopia and Mozambique. He was initially based in Kampala, Uganda later relocating to Dar es Salaam, Tanzania. Bill returned to the UK in 2014 supporting Deloitte UK teams working on outbound projects investing in Africa and was a key member of Deloitte UK's energy and resource practice until his retirement from the firm in September, 2018.

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Prior to joining Cristal Advocates, he had worked as a Private Secretary to the President of the Republic of Uganda. During this time, he participated in several public and private sector engagements that included advising and coordinating activities relating to oil and gas as well as infrastructural projects of national significance. John had earlier worked with the Post Bank Uganda Limited and Shonubi Musoke and Co. Advocates.

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Dickens leads the oil and gas practice at Cristal Advocates. He has an in depth appreciation of Uganda's oil and gas sector having served as the maiden Company Secretary of the Uganda National Oil Company (UNOC) and the Uganda Refinery Holding Company Limited (URHC). UNOC represents the Government of Uganda commercial interests in the oil and gas sector while URHC represents government interests in the refinery project as well as managing the petrol based industrial park.

Dickens was instrumental in UNOC's formation and initial period of operation and also served as its head of Contracts, Negotiations and Advisory until May 2018. Prior to joining UNOC, Dickens was Legal Counsel at the Petroleum Directorate of the Ministry of Energy playing key legal advisory roles on the negotiation and implementation of PSAs, Joint venture and other oil and gas agreements. He was also part of the team that shepherded the process of enacting the current Ugandan oil and gas Legislations and Regulations including the local content requirements.

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