UNIVERSITY OF NAIROBI: SCHOOL OF LAW

MASTER OF LAWS (LL.M)

AN ANALYSIS OF SECTION 41 OF THE INCOME TAX ACT, CAP 470, LAWS OF KENYA

BY:

ATIM JOAN APUUN

G62/12559/2018

NOVEMBER, 2019

Declaration

I hereby declare that this research project is my original work and has not been submitted for an award to any university or institution.

Name: Atim Joan Apuun

Registration no: G62/12559/2018

Signature: _____ date: _____

Supervisor Approval

This research project has been submitted to the school of law of the University of Nairobi with my approval as the supervisor.

Name: Professor Attiya Waris

Signature_____ Date_____

Abstract

The purpose of this dissertation is to analyze section 41 of the Income Tax Act (ITA), Chapter 470, Laws of Kenya with a special focus on the available reliefs' i.e., exemption, exclusion, reduction and any other methods of relief, like deduction and credit methods. It thus aims at presenting a simplified text for understanding double taxation and the reliefs used to cure instances of double taxation under the current act; even to non-tax persons. It argues that although the ITA provides for available reliefs under section 41, nevertheless instances of double taxation continue to occur and this affects taxpayers, investors and Foreign Direct Investment (FDI) in the country. To further unpack double taxation, reference must be given to growth of trade cross border and growth of Multinational Corporations (MNCs), in that, as more and more activities expanded and began operating cross-border, questions regarding the application of sovereign taxing powers of several countries on the same income developed; who had taxing rights in instances where a resident of another country (resident country) sourced income from another country (source country)? These questions led countries and international organizations to forge a way and come up with solutions to tackle double taxation. The current system of double taxation is thus based on bilateral tax treaties and Advance Pricing Agreements (APAs); mainly found in international conventions and double taxation agreements including domestic law.

The study uses two traditional schools of thought: that is, Hart's Soft Positivism and Sociological Jurisprudence as advanced by Roscoe Pound; which are all not fiscal theories but the arguments advanced in them give meaning to this study as they analyze the interactions between the law, institutions and the masses. The economic analysis of law was used to supplement the traditional theories and since it is used to analyze fiscal law it was relevant. This study is thus inevitable and

the recommendations made are based on the loopholes found in the existing section which can be geared towards having a better and comprehensive law and having a better understanding of double taxation. Further, since the area under study has not been explored in Kenya and what is available are commentaries and power presentations majorly on DTAs, this is a starting point; which are positive and a solid indicator of the situation, thus a call for further research in this area.

Dedication

This work is dedicated to my dear parents who have always been there for me and struggled to see me through school, my siblings and most especially to my daughter, Gum Arianna Precious Anero who has stood the test of time.

Acknowledgement

I am grateful to the Almighty God for giving me the motivation, passion, intelligence, resources and the ability to pursue and complete this LL.M studies.

I would like to express my gratitude to all those who gave me their time and assistance towards the completion of this work. Sincere gratitude and heartfelt appreciation go to my supervisor; Professor Attiya Waris, a lot can be said about this amazing professor; she inspired my hope, ignited my imagination and instilled in me a love for learning tax. I thank her especially for her constant push, professional guidance and admonishments. Many thanks to my reader Dr. Njaramba G. for his time and help, especially the last minute scrutiny of my work.

Special gratitude also goes to Dr Lam-Lagoro and Ms. Joyce K. Ngaiza for their immense professional guidance, counsel and support in the area of my career and study. My dear family members: parents, brothers; Brian, Paul and Lawrence, sisters; Patricia, Moureen and Daisy. Extended family: Dr. Mike Oyat and family: Salome, Juliet, Becky, Nancy, Amony and my dear friends whom I cannot mention all by name, however, J. Chebet, E. Onderi, E. Kyobika, H. Aquissa, I. Aarit, A. Kasande, J. Kirunga, P. Waga, J. Maritin, Ushindi SG, and my fellow supervisee Damaris Woki thank you; least to mention for all the support; moral, spiritual or otherwise.

My heartfelt appreciation also goes to Mr. Githinji Gathirwa, for his immense support, facilitation and help during my data collection at KRA and the entire KRA team; God bless and reward you all.

Table of Contents

List of Acronyms

APA	Advance Pricing Agreements
ATAF	African Tax Administration Forum
BEPS	Base Erosion and Profit Shifting
DTAs	Double Taxation Agreements
ECOWAS	Economic Community of West African States
EU	European Union
FDI	Foreign Direct Investment
ITA	Income Tax Act
KICD	Kenya Institute of Curriculum Development
KRA	Kenya Revenue Authority
LOB	Limitation of Benefit
NACOSTI	National Commission for Science and Technology
OECD	The Organisation for Economic Cooperation and Development
OECD Model Convention	The Organisation for Economic Cooperation and Development's Model Tax Convention on Income and on Capital
PE	Permanent Establishment
PPT	Principal Purpose Test
SADC	Southern African Development Community
TC	Tax Credit
TPA	Tax Procedures Act
UN	United Nations

UN Model Convention	United Nations Model Double Taxation Convention between Developed and Developing Countries
USA	United States of America
UK	United Kingdom

Table of statutes

The Constitution of Kenya, 2010, Laws of Kenya.

The Income Tax Act, Chapter 470, Laws of Kenya.

The Tax Procedures Act of 2015, Laws of Kenya.

The Income Tax Act, Chapter 470, Laws of Kenya.

The Finance Act of 2018, Laws of Kenya.

The Treating Making and Ratification Act of 2012, Laws of Kenya.

Bills

Income Tax Bill, 2018

Table of cases

De Beers Consolidated Mines V Howe (1906) AC 491

The Tax Justice Network- Africa V Cabinet Secretary for National Treasury and 2 Ors, Petition No.494 of 2014

Sumira Engineering Limited V Kenya Revenue Authority, Petition No. 54 of 2011

Table of conventions

OECD (2017), Model Tax Convention on Income and on Capital: condensed Version 2017, OECD Publishing, Paris.

United Nations (2017), Model Double Taxation Convention between Developed and Developing Countries.

United Nations (2019), Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing and Developing Countries, New York.

Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income between the U.S.A and Japan, March 8, 1971

ATAF (2012), Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.

EAC (2014), The Double Taxation Avoidance Agreement of the East African Community.

CHAPTER ONE

INTRODUCTION

1.0. Background

Growth and evolution of economic activity beyond the frontiers of one country brought about questions regarding the application of sovereign taxing powers of several countries on the same income.[1]It became obvious that double taxation would exist and would interfere with cross-border transactions and transnational activities.[2] Further, international economic growth and expansion spurred the growth of Multinational Companies (MNEs) hence more laws around the area had to be developed.

In Kenya, double taxation is provided for under section 41 of the ITA and the Double Taxation Agreements (DTAs). This study will specifically center on double taxation and the available reliefs while referring to and analyzing DTAs and international instruments. Thus the following sub-sections will discuss in detail the concept of double taxation and the reliefs there under.

1.1. Historical background to tax in Kenya

The struggles and evolution of tax, right from property to personal tax has marked the history of taxation in America, Europe, and Africa. This is even though taxation was one aspect of

[1]Zachee Pouga Tinhaga (2016), 'From Avoiding 'Double Taxation' Yesterday to Avoiding 'Double Non-Taxation' Today: The Urgent Need for an International Tax Regime Based on Unitary Tax Principles' (University of Michigan Law School) p.5.
[2]Michael J Graetzt and Michael M. O'Hear (1997), The "Original Intent" of U.S. International Taxation (Duke Law Journal, Vol.46, No. 5): URL: https://www.Jstor.Org/Stable/1372916.

colonialism that affected the lives of nearly all Africans.[3] In Africa, similar to other societies, a form of taxation always existed as a way of meeting common challenges and satisfying the needs of the entire community.[4] The history of taxation in Africa; Kenya can be analysed through lenses of the three main periods: first, the pre-colonial era; marked by unique models of societal organisation; second, the colonial era where payment of tax was imposed by requiring payment of cash as taxes were collected in form of goods like ivory, copper, slaves, salt, and labour; and finally, taxation in the post-colonial era which was a replica of the European taxation system.

Further, a major milestone in the legal framework for Kenya came with the promulgation of the 2010 constitution.[5] Kenya's constitution is considered as progressive and socialist; articles 209 and 210 particularly give the national government powers to impose taxes and further give parliament the powers to enact legislation to guide the collection of taxes respectively.[6] This was realised by the enactment of the Tax Procedures Act (TPA) 2015 hence securing better management of taxes and tax procedures by Kenya Revenue Authority (KRA). Any tax system, therefore, is a combination of history, the experience of the people, politics, economics and the law.[7] This is because it's more than just an expression of a country's sovereignty; as Ring puts it but a condition of each country's existence and ability to meet its most basic responsibilities to its people.

[3]Isaac Kipsang (2004), 'A History of the Direct Taxation of the African People of Kenya, 1895-1973' (Rhodes University), pp. 23-44.
[4]Eissa, N. O. and Jack, Jack W. (2009), T*ax Reform in Kenya:Policy and Administrative Issues*, Initiative for Policy Dialogue Working Paper Series, pp. 2-3.
[5]Constitution of Kenya (2010), Laws of Kenya 191.
[6]ibid.
[7]Attiya Waris (2007), 'Taxation without Principles: A Historical Analysis of the Kenyan Taxation System,' Kenya Law Review, p. 274.

1.1.1. Understanding double taxation and why countries wish to eliminate it

Double taxation is not a form or type of taxation per se but it is a situation that arises where income earned in one country (the source country) by a citizen or resident of another country, (the residence country) is taxed by both countries. Legally, both countries have legitimate claims to either tax or not tax the income.[8] This coupled with the fact that states have exclusive competence in the field of taxation under which it is unrestrained to establish and collect taxes, as such, the international tax rules had to resolve the competing claims of residence and source nations[9] to avoid double taxation resulting when both countries decide to fully exercise their taxing powers. The dilemma led the League of Nations to find a solution to double taxation as a way of promoting international economic cooperation by setting up a commission composing of four prominent economists,[10] who came up with a solution labelled *"the great compromise of the 20s."* This compromise has since shaped the present international tax regime.

[8]Martin Hearson and Jalia Kangave (2016), A Review of Uganda's Tax Treaties and Recommendations for Action. Working Paper Working Paper 50.

[9]The residence principle arises where a country claims taxes in income based on the residential status of the person deriving that income. This broad definition usually implies mere physical presence in the country for a minimum length of time. This has been widely followed and incorporated in a number oftreaties. Indicators of residence for individuals include physical presence; the existence of a place of aboard, family, financial ties while for legal entities: place of incorporation, location of the head office or a place of management; as determined in ***De Beers Consolidated Mines v Howe*** **(1906) AC 491**. Here the De beers company was incorporated in South Africa and carried on its major trading activities in South Africa i.e. diamond mining but its active board of directors implemented its powers in the United Kingdom (basically the main management functions were in England). The court in determining where tax liability was due held that, a company exists where its actual business is conducted and where the central management and control duly abides (Lord Loreburns). It can be noted that the concept of residence is crucial in determining the tax basis under the ITA However, tax scholars like Reuven have argued that when it comes to corporations, their residence is difficult to establish and is meaningless. That residence based on place of incorporation is formalistic and subject to the control of the Taxpayer and residence based on management and control can also be manipulated.

The concept of source, on the other hand, relates to income derived from a particular country. Rules for determining source vary but source taxation is generally applied where the income has a relevant connection with a country. For example, dividend or interest income from capital invested in a jurisdiction, wages paid to employees in respect of work performed in a country all end up being taxed at source.

[10]Royal Statistical Society, 'League of Nations Report on Double Taxation Submitted to the Financial Committee by Professors Bruins , Einaudi , Seligman , and Sir Josiah Stamp Author(s):W.H. Coates Source: Journal of the Royal Statistical Society, Vol. 87, No. 1 (2014) 87 99.

The burden of preventing double taxation has also since shifted to national tax authorities directly and unilaterally[11] as the current perception is that governments lose substantial corporate tax revenue because of corporate designs aimed at shifting profits in ways that erode the taxable base from alleged high tax jurisdictions to the so-called tax havens[12] with disregard that the economic activity is located in the former jurisdiction. For example, the use of tax havens may increase because of the facility provided by the internet to integrate functions/people located wherever business chooses.[13]

From the foregoing, the need to eliminate double taxation was eminent and most countries began negotiating tax treaties to attract investment. DTAs were negotiated in conjunction with investment protection, promotion of agreements and for pressing reasons of diplomacy; countries had to be seen to work towards the overall objective of elimination of double taxation.[14] On the other hand, some countries were also hesitant to negotiate treaties because of fear of reduced revenue as a result of limitations on source taxation imposed by the treaties.[15] Countries' also factored in several when making decisions on whether to negotiate treaties, for example, have a comprehensive tax treaty strategy, and have an understanding of the potential costs, benefits and ways in which treaties operate to achieve intended outcomes.[16]

[11]Tinhanga (n 1) p.9.
[12] A tax haven generally refers to a country or an independent territory where taxes are levied at a low to zero rates.
[13]OECD Tax Policy Studies (2005), *E-Commerce: Transfer Pricing and Business Profits Taxation*, OECD Publishing, No.10, pp.64-65.
[14] Committee on Fiscal Studies, Tax Talk 20: Tax Treaties: Getting it right. The talk was presented by Catherine N. Mutava at the University of Nairobi on the 15th February 2019. According to Catherine, pertinent to note is the fact that these agreements cannot be negotiated with Countries considered tax havens. This can explain and add to some of the many reasons why the DTA between Mauritius and Kenya was declared unconstitutional. (Emphasis mine)
[15]United Nations (2016), 'Manual for Negotiation of Bilateral Tax Treaties between Developed and Developing Countries', New York, p. 11<http://www.un.org/esa/ffd/tax/seventhsession/CRP11_Add6_Websites_2011.pdf>.
[16]Hearson and Kangave (n 8).

1.1.2. The law regulating double taxation; international tax conventions and domestic law

The current system of double taxation is largely based on a network of bilateral tax treaties and other Advance Pricing Agreements (APAs) thus, as far as practicable, countries should be guided by the international norms for tax treaties, and the same should be applied concerning structure and policy positions.[17] These norms are mainly found in the following conventions: the Organization for Economic Co-operation and Development Model Tax Convention on Income and on Capital (OECD Model Tax Convention); the United Nations Model Double Taxation Convention; Between Developed and Developing Countries (The UN Model Tax Convention); and the United Nations Manual for Negotiation of Bilateral Tax Treaties Between Developed and Developing Countries. The models within Africa include; the African Tax Administration Forum (ATAF),[18] Economic Community of West African States (ECOWAS), Southern African Development Community (SADC), and the East African Community (EAC) Model Tax Agreements.[19] Waris argues that there is a danger in having so many models as this means more complication compared to the capacity of developing countries that have little understanding of this area, little or no expertise and have implementation challenges.[20] Nonetheless, the above international instruments stress the important key roles tax treaties play in international cooperation on tax matters. They also act as a guide for countries in coming up with their treaties and by that, investment is encouraged by reducing tax barriers; eliminating double taxation, facilitating the transfer of technology, skills and reducing cross-border tax avoidance and the

[17] http://www.un.org/esa/ffd/tax/2013TMTTAN/Paper2N_Pickering.pdf accessed on the 11/3/2019
[18] ATAF (2012), Model Tax Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, ATAF Publications.
[19] EAC (2014), The Double Taxation Avoidance Agreement of the East African Community Tax, East African Community.
[20] Committee on Fiscal Studies, Tax Workshop-Curriculum Development held at the University of Nairobi on the 17th and 18th of July 2019.

evasion through exchange of tax information and mutual assistance in the collection of taxes. However, developing countries, especially the Least Developed Countries (LDCs), often lack adequate skills and experience to effectively negotiate and administer treaties that encourage international investments while protecting their tax base.[21] This was also noted by Mutava during the 20th tax talk at the University of Nairobi on the 15th day of February 2019.[22] Therefore, a general conceptualization of the above instruments reveals that these international instruments have attempted to solve some problems surrounding double taxation; however they still fall short.[23] It is thus advisable and beneficial for countries to develop a tax treaty policy framework and a model treaty before beginning negotiations in the area of DTA with another contracting state and in doing so, end up protecting their countries' interests. The framework should also be in line with what the country wishes to achieve and as such satisfy the legitimate concerns of LDCs while not estrange the developed world.

In Kenya, the constitution[24] is the basis for all laws including tax laws and the ITA; wherein under section 41 double taxation and the available reliefs is provided for, and the section also forms the basis for the negotiations of DTAs.

1.1.3. Section 41 of the ITA and the requirements

Section 41 of the ITA[25] lists the different reliefs that are available to a person under a DTA. Peart argues that, "an exemption, exclusion or reduction in the rate of Kenyan tax under a DTA is not available to a person, who for the purposes of a DTA, is a resident of the other contracting state

[21]United Nations (n 16).
[22] Committee on Fiscal Studies (n 15)- She specifically talked about the fact that most of the people sent to negotiate these treaties either don't understand the gravity or weight of what they are negotiating or simply go there to sign for allowances.
[23]Tinhanga (n 1).
[24]Constitution of Kenya (n 5).
[25]Income Tax Act, Cap 470, Laws of Kenya .

unless: more than 50% of the underlying ownership of that person is held by an individual or individuals who are residents of that other contracting state, or the resident of the other contracting state is a company listed on a stock exchange in that other contracting state."[26] Thus, it is evident that section 41 limits any potential relief in terms of Kenya's DTA unless one of the two requirements above is met. Taxpayers investing in Kenya should therefore not automatically assume that they will qualify for a double taxation relief including reduction of the withholding tax rates for the various types of payments.[27]

In unpacking double taxation, section 3[28] is crucial since it is the starting point for the foisting of income tax in Kenya. The concepts of residence and source in double taxation are introduced; this has been discussed[29] and Kenya can tax its residents on their worldwide income- as per the wording, '*…upon all the income of a person'* and indeed, persons with cross border businesses or working cross border may easily suffer an instance of double taxation unless granted the available reliefs as provided for under the law.[30]

1.1.4. The available reliefs

Worldwide, the available reliefs include exemptions, tax credits and deductions. However, in Kenya, the available reliefs are as provided for under section 41 of the ITA to include; an exemption, exclusion or reduction and in line with the DTAs. The research will analyse each of

[26]Jackie Peart (2016), 'Kenyan Double Taxation Agreements' Tax Alert. Available at https://www.hoganlovells.com/en/publications/kenyan-double-taxation-agreements accessed on the 24th day of June 2019.
[27]ibid.
[28]470 (n 32)- which provides that income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.
[29]ibid- see section 2.
[30] The conclusion is drawn from the general nature of Double Taxation.

these available reliefs, their effectiveness and further seek to find out whether taxpayers benefit from the reliefs.

1.2. Statement of the problem

Although the ITA provides for relief from double taxation, nevertheless, incidences of double taxation continue to occur and this is because only one method of relief is employed i.e. the credit method of relief. This is limiting and may affect local businesses and Foreign Direct Investment (FDI). The research thus demonstrates that despite the available reliefs under section 41, not all the reliefs are available to the taxpayer and as such, this becomes a challenge to the taxpayers.

1.3. Justification of the study

Local and foreign businesses should have relief from double taxation; however, the situation on the ground reveals that only one method of relief is available as opposed to those provided for under section 41; that is, exemption, exclusion or reduction. An understanding of the implication of double taxation is very important in protecting businesses and FDI in Kenya. Further, the apparent scarcity of literature in the area of double taxation, specifically on the analysis of the available reliefs in Kenya, prompts this research and will donate to the body of literature in the area of study as such guide future researchers.

1.4. Statement of objective

The main objective of this study is to critically analyse section 41 of the ITA; while undertaking a case study on double taxation and the available reliefs.

1.4.1. Specific objectives

i. To critically analyse double taxation and its effects on the taxpayers

ii. To examine the available reliefs under section 41.

1.4.2. Specific research questions

The study focuses on two main questions:

i. How effective is section 41 of the ITA in handling instances of double taxation?

ii. Are the reliefs as set out in section 41 the reliefs used to relieve double taxation? (Law in the books versus the law in practice)

1.5. Hypothesis:

i. Section 41 is inadequate in addressing double taxation;

ii. The legal and regulatory framework dealing with double taxation in Kenya does not provide adequate guidelines;

iii. The Courts have not determined cases on double taxation or the reliefs and legal practitioners have not fully conceptualised double taxation and the available reliefs; and

iv. There is a need for reform in the legal and regulatory framework in the area of double taxation in Kenya.

1.6. Theoretical framework

1.6.1. Hart's soft positivism

Positivism arose at a time when science was making an impact, and the new scientific era was no longer satisfied with the natural law theory. It had proponents earlier than Jeremy Bentham and

John Austin[31] though Austin was one of the first methodological proponents of positivism.[32] Austin's theory resolves the problems he articulated about natural law theories by appealing to rules as a species of command.[33] In his *Province of Jurisprudence Determined*, "laws proper, or properly so-called, are commands; laws which are not commands are laws improper or improperly so-called." Accordingly, he states that "law is a kind of general command which imposes on those under its jurisdiction general obligations to act or refrain from acting as the law commands". Thus for Austin's purposes, a duty implies a command and a command implies a duty; given their function in his theory, both are inseparably connected to a sanction.[34] This research, however, focuses on soft positivism, a branch of legal thought advanced by H.L.A. Hart (Hart), who expressed a modern understanding of ancient ideal of "the rule of law and not of men", and provided a powerful and widely applicable rationalisation of the nature of legal authority in a pluralistic world.[35] He produced a theory which spoke to the social realities in a secular and democratic age. Bix argues that his approach can be seen as a reaction to the command theory.[36] Thus, from Hart's perspective, the problem with Austin's approach to law; and indeed, with most empirical approaches was that "such approaches are unable to distinguish pure power from institutions and rules accepted by the community, unable to distinguish the orders of terrorists from a legal system."[37] Further, Hart's theory, responds to the proposal that when analysing social institutions or social practices, a theory which takes into account, or helps

[31] Thomas Hobbes in Leviathan, published in 1651 before Hobbes was Jean Bodin (Six Books of the Republic) published in 1576.
[32]Diener Keith William (2006), 'A Defense of Soft Positivism : Justice and Principle Processes' Thesis, Georgia State University, p.6.
[33]ibid, p.6.
[34]ibid.
[35]Lacey Nicola (2007), H.L.A Hart's Rule of Law: The Limits of Philosophy in Historical Perspective. Quaderni Fiorentini, 36. pp 1203-1224.
[36]Brian H Bix (2015), *Jurisprudence: Theory and Context* (7th ed, Thomson Reuters (Professional) UK Limited), p. 37-43.
[37]ibid.

to explain, the way participants understand those institutions or practices is, by that fact alone significantly better than one that does not do so.[38] Bix further argues that Hart describes his work in his *concept of law* as "an essay in descriptive sociology." Hart's theory is thus more progressive and encompassing.

Therefore, in analysing the theory, the research will borrow arguments advanced and make links to social realities in double taxation, analyse KRA as an institution that implements section 41 and is mandated to collect taxes in Kenya.

1.6.2. Roscoe Pound's (Pound) theory

This branch of jurisprudence according to most scholars is concerned with sociology, which is the science of social order and progress. It aims at assessing the needs of society while looking at the unlike category in the people. While it had several proponents including Rudolf Von Jhering, Eegen Ehrlich, the major architect is Pound who through voluminous writings did the most to establish its legitimacy as a school of thought.[39] He identified three kinds of interests: individual, public, and social interest. According to Pound, *"law is social engineering which means a balance between the competing interests in society, in which applied sciences are used for resolving individual and social problems."*[40]

It must be stressed that while Pound emphasised the role of law in social engineering, that engineering was to take place within well-defined parameters.[41] *Well defined parameters in double taxation mean a well-functioning tax system, effective application and use of reliefs, favourable and working DTAs among others* (emphasis mine).

[38]ibid.
[39] Inhering (1818-1892), Law as an instrument of Social Balance
[40] Ibid
[41]Arlene Sheskin, 'A Critical Review and Assessment of the Sociology of Law' p. 115.

Sheskin argues however that the reality of law advanced by proponents of sociological jurisprudence is conservative in nature. She suggests alternatives; which encompasses the work of theorists and researchers who have engaged in critical analysis of law and society. She further suggests that one needs to be cognisant of the importance of power, economics and politics in the development of law.[42] To advance this, the research undertook an economics analysis of law to complement the two theories, which brings in the necessity of efficiency and cost implications in double taxation since its cross-border in nature. Thus while Hart's positivism propounds the position of law while taking into account social realities including an understanding of the institution mandated with matters tax, sociological theory advances the notion of using the law as a tool for balancing competing interests in society. Social realities are thus central to both schools of theories and this marries with the area under study.

1.7. Research methodology

An empirical methodology was employed with a mixed research design taking into account both qualitative and quantitative methods of data collection. Primary data was obtained from the legal fraternity and KRA as the institution mandated with matters taxes. The former were interviewed because of the interpretative element of laws and the latter because it implements section 41. Face to face interviews was carried out and questionnaires used. All the above helped in the situational analysis of double taxation. Library research and internet searches, on the other hand, provided the essential information on double taxation although not specific to Kenya or the reliefs in Kenya. The OECD, UN, ATAF, EAC model tax treaties were analysed and Kenya's domestic law analysed as well; to prove or disprove the hypothesis.

[42]ibid, p. 118.

1.8. Literature review

1.8.1. Development in the area of double taxation

Although a wealth of literature on double taxation exists, there is an apparent scarcity specific to the area under study in Kenya as there is no substantial literature on the same and if any, they do not cover the issues the research seeks to address. This research therefore, relies on the available literature with the aim of integration and also identifying gaps.

1.8.2. Historical development

The past of the earliest bilateral tax treaties can be traced to World War I and according to Sunita, currently there are over 3000 bilateral tax treaties in existence.[43] Thus their historical, political and economic contexts are important; particularly, to unpack why countries negotiate tax treaties as treaties address double taxation which if not addressed, continues to hinder the free movement of capital, technology and persons[44] yet their role in facilitating economic integration cannot be overlooked.

Munro in his book, *Tolley's double taxation relief* (8th ed) in taking a historical approach to the development of double taxation in the United Kingdom (UK)[45] breaks it down into juridical[46] and economic double taxation.[47] Double taxation can be of income, capital gains, gifts and inheritance in the UK. The UK legislative framework in covering double taxation relief (income tax and corporate tax) is broad, taking into account- relief by agreement with other countries and unilateral relief. Further the law in that area provides definitions of several of the main terms and lay down principal rules of computation. The available reliefs include, relief in the source

[43]Sunita Jogarajan (2011), 'Prelude to the International Tax Treaty Network: 1815-1914 Early Tax Treaties and the Conditions for Action' 31, Oxford Journal of Legal Studies 679, p. 1.
[44]ibid- She argues that tax treaties are a popular mechanism for avoiding double taxation.
[45] Which, Kenya largely borrows from due to the colonial past.
[46] This is where tax is levied in more than one jurisdiction on the same person.
[47] This occurs where more than one person is taxed in respect of the same income.

country under an agreement, relief by agreement in the recipient's country, comparison of relief by deduction and relief by credit with the requirements there under being residence, source of income and other considerations like the identification and quantification of income.

1.8.3. Tax treaties and international law

International tax rules exist and recline on bilateral tax treaty networks, and Rosenblom calls it "a triumph of international law."[48] Picciotto argues that tax treaties create particularly complex interactions between national and international law.[49] Furthermore the fact that thousands or more of bilateral tax treaties are largely the same in policy, and even language, they constitute an international tax regime, which has definable principles that underlie it and are common to treaties.[50]

From the above, it is worthy to note that in recent times, the international tax system has been undergoing an unprecedented re-examination for over five years since the launching in 2013 of the G20/OECD project on BEPS.[51] Thus as Picciotto puts it, this a complex process driven by economic and political considerations and is also mediated by legal and normative practices. They also involve interpretation and reinterpretation of legal texts, and formulation of arguments, opinions, proposals and drafts for new texts.[52]

There are some shortcomings of the international tax system and according to Tinhanga[53] who focused on developing countries, "…a unitary taxation system is the solution to the legitimate and multifaceted complaints about current international taxation of MNEs. Although the

[48]Reuven Avi-Yonah (2007), *Internation Tax as International Law: An Analysis of the International Tax Regime* (Cambridge University Press), pp. 5-12.
[49]Picciotto Sol (2019), 'The Interactions of National and International Tax Law and the Kenya- Mauritius Tax Treaty' 1 Financing for Development 1, p. 6.
[50]Avi-Yonah (n 48).
[51]Picciotto (n 51), pp.22-25.
[52]ibid, p. 1.
[53]Tinhanga (n 1), pp. 1-10.

international tax regime was created to avoid situations where the same income was subject to double taxation due to the exclusive fact that it had a cross border character,[54] sovereign tax laws and tax regimes have grown so different, and international economic activity has grown so large that the debate ought to shift from the exclusive legitimate need to avoid double taxation to the urgent imperative to prevent double non-taxation and other in due tax arbitrage schemes that are threatening the very existence and credibility of the international tax regime."[55]

Thus, the need to examine the international corporate tax system, DTAs and the double taxation relief methods[56] since there is a growing international concern over the abrasion of income tax bases; both personal and corporate income, and as Maarten and Arjan state, "actions to combat the evasion of the personal income tax system seem to amount to a crackdown on bank secrecy laws and aggressive tax practices of international corporations."[57] Further, they seem to argue that MNEs utilise the contrasts in national tax codes of jurisdictions, with practices as transfer pricing, thin capitalization, hybrid mismatches, and treaty shopping.[58] They thus modelled corporation taxation in host and home countries, double tax relief methods and the withholding tax on dividends for all pairs in a sample of 108 counties and the first results is that the direct effect of double tax relief and tax treaties lowers the world average rate of forty-one per cent to twelve per cent, given statutory income taxation in host countries. This is more of a statistical analysis of these issues and the available data but the same is not specific to this study and also touches several issues as already discussed.

[54]ibid, pp. 1-10.
[55]ibid, pp. 1-10.
[56]Maarten Van Riet and Arjan Lejour(2015), 'Profitable Detours : Network Analysis of Tax Treaty Shopping' 108 Proceedings of the Annual Conference on Taxation, p. 3.
[57]ibid, p. 1.
[58]ibid, p.1.

1.8.4. The concept of sovereignty, double taxation and DTAs

Tax sovereignty gives states exclusive competence in the field of taxation.[59] Much as there is international double taxation, the phenomenon occurs, due to the distinct concepts that underlie the imposition not the different structures of the tax systems.[60] Since double taxation affects the order and rivalry of exports of goods, international elimination of the same represents a necessity to secure the improvement of the economic relations internationally. It has already been shown that countries prefer negotiating tax treaties and there are approximately 3,000 DTAs; which, could be a fraction of the number of available bilateral tax relationships since the world has no complete, consolidated public database for these treaties.[61] Most DTAs are based largely on the model conventions; OECD and UN models.[62] While negotiating the same, it is recommended that developing countries make a cost-benefit analysis of the taxes foregone due to the tax treaties signed by breaking down annually tax expenditures and ensure that all tax treaties are subject to public participation before approval by the legislative arm in a bid to ratify the same. Further, future updates to provisions of model treaties or their commentaries and reservations/observations, are put in context to as per national models.

1.8.5. The available reliefs

According to Radu, double taxation can be avoided both by "unilateral legislative action; by the conclusion of bilateral or multilateral agreements between different countries through total relief,

[59]Marius Eugen Radu(2012), 'International Double Taxation' 62 Procedia - Social and Behavioral Sciences 403, p. 403 <http://linkinghub.elsevier.com/retrieve/pii/S1877042812035069>.
[60]ibid, p. 403.
[61]Evert-jan Quak and Hannah Timmis (2018), 'Double Taxation Agreements and Developing Countries' (Helpdesk Report-Institute of Development Studies), p. 3.
[62]ibid, p.2- They argue that the key difference between the Models is that the UN Model preserves a greater share of taxing rights for the source country. It is also are advantageous for developing countries than the OECD Model.

exemption and crediting." International double taxation can also be dealt with nationally, as it has been in most countries, including the African states.[63]

Gutuza in her thesis,[64] giving a South African perspective argues that, although the methods of relief in the ITA and DTAs negotiated by South Africa reflect the credit system as the default method, the application and quantification of the relief differs. She notes that the default method of relief changed from exempting income with its source located outside South Africa to provide a foreign tax credit of the international double taxation where tax was imposed both in South Africa as well as in the source country. Accordingly, the method of relief chosen to eliminate or relieve international double taxation should also depend on the goals of the government; which policy goals depend on whose interests have been determined to be more important and who is to receive comparative treatment.[65] Gutuza thus argues for the principles of equity- both horizontal and vertical equity in a domestic economy and neutrality; the two main approaches here being capital import neutrality and capital export neutrality which should be applied equally to determine the local and cross border application of the tax system.[66]

In Kenya on the other hand, section 41 of the ITA provides, for the methods of relief in the rate of Kenyan tax under a DTA; which is available to a person, they meet the requirements under the law. Further, the relief is not automatic. According to Peart, however, every African jurisdiction has its particular quirks or challenges and advice should be sought before making investment decisions and deciding how best to extract profits from a particular jurisdiction.[67]

[63]Picciotto (n 51) pp. 6-10.
[64]Gutuza Tracy (2013), 'An Analysis of the Methods Used in the South African Domestic Legislation and in Double Taxation Treaties Entered into by South Africa for the Elimination of International Double Taxation' (University of Cape Town), pp. 2-3.
[65]ibid, pp. 2-3.
[66]ibid, pp 2-3.
[67]Peart (n 26).

From the foregoing, save for Munro's approach to double taxation; which, this study agrees with and borrows ideas from; for purposes of integration, the body of literature reviewed did not provide a definite answer to the problem under study as most were general in nature, the authors focused on one area, i.e., double taxation and left out the reliefs yet this study is keen on addressing reliefs. Most of the literature lacked specificity when it came to double taxation and the available reliefs, i.e., some authors discussed double taxation, double-non-taxation, MNEs and tax rules around their operation, the need to do business in a foreign country in the form of a permanent establishment (PE).

Further, the literature reviewed was not specific and for lack of a better word, "all over the place," there is no detailed explanation and analysis of the reliefs. There is also no link to the situation in developing countries and therein lies the gap this study undertakes to fill. For the literature specific to Kenya, they were more of commentaries and presentations than proper articles yet they were the closest pieces directly written on section 41 of Kenya's ITA, therefore, a lot is left to be desired. During the interviews, one of the senior officials at KRA was very excited and stated that this will be the first piece and actual analysis of the area under study. This research will therefore critically analyse double taxation in Kenya, the available reliefs and what the country and taxpayers stand to gain or lose and as such fill in the knowledge gap in this area.

1.9. Assumptions and limitations

1.9.1. Assumptions

It is assumed that actual data on double taxation will be difficult to get from KRA and also some senior officials at the KRA- international tax unit may be hard to get for purposes of the key informant interview.

1.9.2. Limitations

This paper limits its research to double taxation and the available reliefs in Kenya.

1.10. Chapter breakdown

Chapter 1 is the introductory chapter and contains the background information to the study including discussing double taxation and the legal framework, addresses the problem, justifies the study as well as lists out the overall objectives and specific objectives while highlighting the theories to be used and literature reviewed as well.

Chapter 2 addresses double taxation from a theoretical standpoint. Soft positivism as advanced by Hart and sociological jurisprudence expounded on by Pound are used and also alternatives advanced by sociologists to further complement Pound's assertions; in this case, economic analysis. The notions expressed in these theories are used in the entire study and further applied to double taxation.

Chapter 3 critically analyses section 41, taking into account the research questions and attempts to approve or disprove the hypothesis made. Data from the field will be analysed in this chapter as well.

Chapter 4 gives recommendations and chapter 5 concludes the research.

CHAPTER TWO

HART'S SOFT POSITIVISM AND POUND'S SOCIOLOGICAL JURISPRUDENCE AND THEIR APPLICATION TO DOUBLE TAXATION

2.0. Introduction

Chapter one has laid out the background for discussing double taxation and the available reliefs, this chapter expounds on the discussion by taking a theoretical point of view. Whereas there are numerous theories (tax theories) that underlie taxation and are used in explaining tax and taxation today, the research shall use Hart's soft positivism and Pound's sociological schools of thought and demonstrate how these two theories can be applied in Kenya and how such application may be used to inform policy in the light of section 41 of the ITA and inform the law itself. The economics analysis shall be used to further the arguments.

2.1. Hart's soft positivism

Hart deviated from the positivist school of thought in its strictest sense and came up with what is today known as legal positivism as already discussed in chapter one. Lacey argues that Hart expressed a modern understanding of the ancient ideal of 'the rule of law and not of men,' and provided a powerful and widely applicable rationalisation of the nature of legal authority in a pluralistic world[68] and produced a theory which spoke to the social realities in a secular and democratic age[69] and in this, he uses four concepts to explain his position that is: the concept of rule of recognition; the "internal aspects" of rules; open textures; and the minimum content of

[68]Lacey Nicola (2007), H.L.A Hart's Rule of Law: The Limits of Philosophy in Historical Perspective. Quaderni Fiorentini, 36. pp 1203-1224.
[69]ibid, pp. 1203-1224.

the law.[70] The research will use some of the concepts and demonstrate that they can be applied to section 41 of the ITA.

Diener asserts that it is quite evident that, Hart essentially renamed the command theory as, the coercive orders theory of positivism based on rules rather than commands[71]resulting in the theory being termed, soft positivism; which are based on rules rather than commands.[72] Diener in his analysis of this branch of law heavily borrows from *the concept of law*[73] and in so doing analyses Hart's discussion. According to him, Hart starts with the question of, what is law. Hart thus offered suggestions on the different aspects of law and he identifies three recurrent issues; the answers to which he believes provide a reply to the questions of law, what rules are there and the extent to which law is an affair to rules?[74] With that in mind, Hart concurrently developed his theory of positivism. Hart distinguished between two kinds of rules and claimed that their merger is, key to the science of jurisprudence,[75] i.e., "primary rules and secondary rules: the former guides human action through either telling one what to do or what not to do; they are duty imposing and concern actions of humans or changes and the latter clarify, expound and are parasitic on the primary rules; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type and in essence extinguish or modify old ones or in various ways determine their incidence or control their operation"[76] which are power conferring and give the policy for designing and varying obligations. Thus Diener asserts that "individuals in a society, social group, or similar entity that accept certain rules and use them to guide their conduct take an internal perspective on those rules, and observers not within the community have

[70]Herbert Lionel and Aldophus Hart (1961), 'The Concept of Law , p. 2..
[71]Diener (n 33), p. 1.
[72]ibid, p. 1.
[73]H.L.A Hart (1997), *The Concept of Law* (2nd ed, Oxford University Press).
[74]Diener (n 33), p. 20.
[75]ibid.
[76]ibid, pp. 20- 25.

an external perspective of those rules.[77] Both rules have past roots; what Hart calls "primitive societies" and the same has defects, to which he suggests remedies. Diener states that Hart believed that, "the rule of recognition unifies the system of primary and secondary rules into a system of law, i.e., the legal system.

The above is evident in the Kenyan system today, i.e. the Constitution and other laws.

Hart also suggests "rules of change" which identify how to change or eliminate existing primary rules and add new rules. The rules of adjudication on the other hand, empower individuals to decide when a primary rule has been breached or otherwise and the procedures to be followed in making the change. This Hart regards as the "elements of law and the heart of a legal system."[78] In the Kenyan context, one can argue that the rules of change go hand in hand with the rules of adjudication. Normally persons affected (in this case the aggrieved taxpayer may seek judicial interpretation of a given rule or text of the law). Once declarations/rulings or decisions are made by the court, this forms the basis for 'rules of change' which often lead to what we commonly term amendments. According to Diener the rules which are validated by the rule of recognition must be generally obeyed, and the rules of recognition that specify the other types of rules (those of change and adjudication) and provide a method for determining rule validity[79] "must be effectively accepted as common public standards of official behaviour by its officials," for a system to be considered a legal system.[80] In Kenya, it would be trite to state that acts of parliament must be obeyed because central to the Kenyan society is the fact that the constitution is the supreme law of land and binds all persons and all State organs at both levels of

[77]ibid, pp. 20-25.
[78]Diener (n 33), p. 20-30.
[79]ibid.
[80]ibid.

government[81] and also where the laws do not meet the threshold provided for and article 2 (4) provides that such laws are void to the extent of their inconsistency.

2.1.1. Hart's "open texture of legal propositions and rule of scepticism"

The use of precedent and legislation has long been established in Kenya. Diener argues that Hart first distinguishes between precedent and legislation as two devices for communicating law.[82] The former being some sort of judicial (in some cases administrative) decision making and the latter largely being a product of legislation and statutes and rules promulgated.[83] No matter the device used in the communication of the laws whether precedent or legislation, multiple common threads are running between them including the indeterminacy involved in their interpretation.[84] This indeterminacy is what Hart refers to as the open texture of language and laws. Diener thus recommends that "humans must deal with open texture of laws for certain instances on a case-by-case basis, striking a balance between the relative weights of the circumstances." Furthermore, the open-texture limits the amount of discretion used by judges in the interpretation and application of laws and may not deviate from the ordinary citizens' interpretation of language generally. Diener's recommendation would come in handy, as in matters taxation, it is preferable to determine matters on a case by case basis. It is also important to note from the readings and analysis that Hart's theory was never for tax i.e. he never analysed fiscal law and according to professor Waris of the University of Nairobi[85] this is problematic. However, a few aspects can be borrowed and implemented to enrich the law on double taxation.

[81]Constitution of Kenya (n 5)- Article 2 (1).
[82]Diener (n 33), p. 23.
[83]ibid.
[84]ibid.
[85] During supervisor-supervisee meetings held on the 24/7/2019 at the University of Nairobi

2.1.2. The institution: Kenya Revenue Authority (KRA)

The study while further employing Hart's theory, analyses KRA using tax administration as a concept as well as employ the principles of administrative law. According to Bix[86] Hart's theory is "responding to the idea that when analysing social institutions or social practices, a theory which takes into account, or helps to explain, the way participants understand those institutions or practices is, by that fact alone significantly better than one that does not do so thus, distinguishing pure power from institutions; and the rules accepted by the community at large.".

In Kenya, the body concerned with the administration of revenue is KRA; a body established to collect revenue and administer laws relating to revenue collection in Kenya. Per the objects clause of the KRA Act, it is established for the assessment and collection of revenue, for the administration and enforcement of laws related to revenue and to provide for connected purposes.[87] Its functions among others are to: administer and enforce all the provisions of the written laws set in part I of the first schedule, render advice the government on all matters relating to the administration of and collection of revenues under the written laws, and to perform such other functions in relation to revenue as the Minister may direct.[88] Under section 5A of the KRA Act, a board of directors is established with powers to govern the authority. ICPAK argues that "the formation of KRA, initially articulated in the TMP, through the KRA Act overhauled the legislative framework that existed since independence.[89] KRA was expected to improve tax administration and implement organisational reforms that would improve tax

[86]Bix (n 36).
[87]Kenya Revenue Authority Act (n 84).
[88]ibid Section 5.
[89]ICPAK (2015), 'Kenya's Revenue Analysis: A Historical Perspective to Revenue Performance in Kenya, 2010-2015', p. 3.

administration" and it is one of the ways through which an institution like KRA can be understood.

Njaramba uses tax administration to refer to the aspect of "how to do it" in respect of the various taxes.[90] It's a mechanism available for the achievement of "what to do" in respect of the various taxes.[91] Njaramba states that it is the means to actualise the tax laws and systems and as such important for the achievement of the wider taxation goals. To further cement his argument, he stated that tax administration reforms play "a key role in the general reform of the tax system."

Furthermore, Njaramba states that "Whereas tax laws create the potential for raising revenues, the actual amount collected depends to a large extent on the efficiency and effectiveness of the administration. The quality of the administration also influences the investment climate and private sector development in Kenya."[92]

Akech in his book[93] on the other hand examines how KRA makes and applies rules, and adjudicates disputes arising from the exercise of its powers relating to the administration of income tax and VAT. He had three overall concerns: first, whether and the extent to which KRA's administrative practices adhere to the principles of administrative law; second, sought to establish whether and the extent to which there is public participation in the decision-making process of the KRA; and finally the role and impact of judicial review on KRA's decision making.[94] Akech argues that the concern of administrative justice is to ensure fairness in administrative judicial-making as it entails adhering to the principles of administrative law, including legality, reasonableness, procedural fairness, and fulfilling legitimate expectations. He

[90]Evanson Njaramba Gichuki (2015), 'Tax Administration Reforms in Kenya; Identifying Lessons to Model a Strategy for Sustainable Administration of County Taxes' (University of Nairobi), p. 1.
[91]ibid- Tax administration has more to do with the framework that supports day to day management of revenue administration and covers systems, structures, management, leadership and organizational processes that enable a tax agency its mandate, p. 1-3.
[92]ibid, p. 2.
[93]Migai Akech (2016), *Administrative Law* (Strathmore University Press), pp. 5-33.
[94]ibid.

emphasises procedural fairness, particularly its importance in tax administration, in terms of rulemaking, rule application and the adjudication of disputes. He also argues that research has demonstrated that procedural fairness encourages voluntary self-reporting which enhances the efficiency of a tax system since it reduces the costs of tax collection.[95] He concedes to the fact that while it is accepted that there should be administrative justice in tax administration, realising this goal is often a daunting task for many jurisdictions. However, he insists that there is a need to balance the right of taxpayers to administer justice with the need for efficient tax collection. This research, however, shall not interrogate this angle because when it comes to disputes around double taxation, there is no much data on the same (emphasis mine). There are no court cases, no data on complaints to KRA (not given), during one of the interviews with 002-KRA, a mid-level official at the policy department,[96] she stated that she worked on one case, wherein the company got subjected to double taxation and could not be helped because of the requirements under section 41 (5), which according to her was unfair. The only way the institution is trying to cure this can be seen in the fact that they have proposed an amendment to that clause by adding the Principle Purpose Test (PPT). This will be discussed further in chapter three. On the issue of public participation in rule-making, Akech argues that the Cabinet Secretary (formerly Minister) is solely responsible for making the rules or regulations necessary for realising the purposes of all the tax laws and the directors of KRA have a limited rule-making role, in so far as they have the power to make regulations for implementing the provisions of the KRA Act.[97] He concludes that as such the applicable laws do not require public participation in these rule-making processes. However, the constitution provides that "there shall be transparency and

[95]ibid, pp. 5-33.
[96] Interview with 002-KRA, carried out on the 26/7/2019 at KRA offices at Times Towers, 23rd Floor.
[97]Akech (n 68)- Also see section 21 KRA Act.

accountability, including public participation in financial matters." This was confirmed in the Kenya- Mauritius DTA case discussed in chapter 3.

Akech analysed several cases and concluded that "it is clear that the public's right to participate directly in the making of tax laws and regulations is tenuous in practice, despite the constitution mandating it."[98] Finally, on the issue of rule and adjudication of disputes- tax assessment and dispute resolution procedures including practice, Akech acknowledging that KRA operates a self-assessment system asks the question, what administrative actions can the commissioner take once he or she received the taxpayer's return or where the taxpayer fails to submit a return? Either accept or uses the best judgment and determine the amount of income due, which he argues are considerably wide discretionary powers that are bound to impact on the taxpayer adversely (paraphrased).[99] He also asserts that, where KRA doubts the truthfulness of the returns how does it go about determining the income of taxpayers? Accordingly, KRA has many options: first, carry out compliance checks; second, carry out audits[100] and third, carry out investigations. The research will not further advance these arguments as the main purpose was to generally bring a touch of concepts of administrative law to tax administration and Akech with practical examples analyses this; arguments and analysis this research agrees with and also concludes that indeed tax administration entails balancing the need to collect taxes efficiently with fair treatment of taxpayers. He conclusively asserts that much as KRA has made considerable progress much remains to be done.

[98]ibid, pp. 5-33.
[99]ibid, pp. 5-33.
[100] During the interviews at KRA headquarters on the 26/7/2019, it was established that KRA no longer carries out audits. The officials did not provide further information but wished they could.

Having discussed and conceptualised tax administration, it is pertinent to note that double taxation is not a form of taxation per se or is it taxation in its strictest sense but it can amount to a form of revenue generation to the government in instances where a resident suffers instances of double taxation (emphasis mine). However, where relief is granted to persons, double taxation is avoided and in turn, the investment climate and private sector is influenced positively leading to the achievement of a balance of rights.[101] It is thus very important that the institutions concerned administer effectively and efficiently in the area of double taxation as it is sensitive and cross border in nature. The use of administrative law concepts further advances the efficiency and effectiveness of the system. Furthermore, for the reliefs to be granted under section 41 there must be a DTA signed between the two contracting states.[102] DTAs as earlier noted are important in alleviating double taxation, where a business is conducted in different tax jurisdictions thus preventing fiscal evasion.[103] This tied with the main purposes of taxation which according to Naramba are: "first, to raise government revenue, second, distribute wealth and third, policy formulation and application where it is intended to have an impact on the public's consumption habits. Taxation is also used to promote or protect industries within the broader industrialisation plan of a country. However, taxes become undesirable when they inhibit commerce and development."[104]

[101] Conclusions reached after carrying out interviews and also reading the materials available.
[102] Section 41 of the ITA is the basis for negotiating and signing of DTAs; as the Minister is given powers to do so by the said section.
[103] http://oldsite.KRA.go.ke/index.php/domestic-taxes/large-taxpayers-office/about-lto/double-taxation-agreement accessed on the 20/05/2019
[104] Njaramba Gichuki (n 97), p. 5.

2.2. Pound's sociological school of thought

Sociological jurisprudence is not in its strictest sense a legal philosophy. Rather according to Gardner, "it is a method which attempts to use the various social sciences to study the role of law as a living force in society and seeks to control the force of social betterment."[105] He further argues that law is an instrument of social control with backing from the State, and "the ends towards which it is directed and the methods for achieving these ends may be enlarged and improved through consciously deliberate effort."[106] Thus he asserts that the sanction of the law lies in social ends which law is designed to serve.[107] From the above, it can be said that sociological jurisprudence is concerned with sociology, which is "the science of social order and progress". Pound in *the need of a sociological jurisprudence (1907)* thus proposed a cry for reform through the study of law in action and became the main recognised proponent of the school. The practical objectives of sociological jurisprudence have been formulated by Pound as follows:

> *"…a study of the social effects of legal institutions, legal precepts and legal doctrines, of law in action as distinct from the law in books, a sociological study as an essential preliminary step in law-making, a study to ascertain the means by which legal rules can be made more effective in the existing conditions of life, including the limits of effective legal action, an attempt to understand the actual growth of law by the study of the judicial methods and modes of thought of the great judges and lawyers, a sociological legal history of the common law, for studying past relations of law to then existing social institutions, individualisation of the application of legal rules so as to take an account of*

[105]James A Gardner (1961), 'The Sociological Jurisprudence of Roscoe Pound (Part I)'(Villanova Law Review), p. 9.
[106]ibid, pp. 9-10.
[107]ibid.

the concrete circumstances of particular cases and the establishment of a "ministry of justice" by the States to participate in this program."

Pound also went a step further and compared sociological jurisprudence with other schools of legal thought and notes the following characteristics of adherence to the sociological school: "they pursue a comparative study of legal phenomena as social phenomena and criticise these for their relation to society. In particular they: consider the working of the law rather than its abstract content; regard law as a social institution which may be improved by human effort and endeavour to discover and effect such improvement; they lay stress upon the social ends of law rather than sanctions; urge that legal precepts be used as guides to socially desirable results rather than inflexible moulds; and their philosophical views are diverse, usually positivist of some branch of the social-philosophical school."[108] Further, in *his New Paths of the Law, 1950*, Pound frequently referred to law as "experience developed by reason and reason tested by experience." Pound's three senses of law therefore, are: "a highly specialised form of social control in a developed politically organised society obtained by the application of force of that society, a body of authoritative guides to decision; and a judicial and administrative process, in which the guides to decision are developed and applied by authoritative techniques, in the light of received authoritative ideals".

Therefore, the application of Pound's jurisprudence particularly to section 41 of the ITA can be traced from the constitution.[109] Right from article 1 on the sovereignty of the people of Kenya is demonstrated; under article 1 (3), state organs which include parliament, the judiciary and

[108]Roscoe Pound (1911), 'The Scope and Purpose of Sociological Jurisprudence: Harvard Law Review, Vol. 25, No . 2, pp . 140-168. Published by: The Harvard Law Review Association: https://www.Jstor.Org/Stable/1324392.
[109]Constitution of Kenya (n 5).

independent tribunals, national and county executive structures including the institution mandated with matters tax have been mandated to implement this sovereignty. This is evident in the elements of Pound's theory which espouses that, "the society is comprised of institutional organs and powers involved in the maintenance of that particular society." Further, under article 2 of the constitution emphasises the supremacy of the constitution and its binding effect on all persons and all State organs. Aspects of social justice are evident under article 10 (2) (b) which provides for the national values and principles of governance. In addressing law as social engineering, Pound is referring to private interests which should be protected. There are many provisions in the constitution that relate to private rights, for example, article 28 on human dignity, right to privacy among others. In answering the question whether the exercise of statutory powers of search and seizure by KRA violated the petitioner's rights and fundamental freedoms, court in *Sumira Engineering Limited V Kenya Revenue Authority,*[110] (although not a double taxation case) stated among others, that the obligation of the state through KRA to collect taxes by law must be balanced against that taxpayers' rights to privacy, dignity and in balancing the rights the state must justify its actions. In recognising that a society's culture and practices are not static, the law as a tool of social engineering must also change, chapter 16 of the constitution allows for the amendment of the constitution. Specifically looking to double taxation, it is the change in dynamics and the fact the globalisation and growth in cross-border transactions by both individuals and corporates have led to the need to establish an international legal framework against instances of double taxation; which international standards Kenya adheres to: first by being a member of the global community and second through the constitution- ratification process. Negotiating tax treaties is further adherence to international law. This process is subject to both parliament and public participation; which are critical in this

[110]Sumira Engineering Limited v Kenya Revenue Authority, Petition No. 54 of 2011.

theory. Section 41 of the ITA through, the available reliefs under DTAs gives relief to taxpayers hence eliminating double taxation and as such promoting a good investment climate. It's opined that such considerations affect the taxpayer in one way or another and speak volumes since there is a need for a balance of interests hence sociological aspects met.

Scholars like Sheskin in her analysis of the sociological school, however, concluded that the reality of law advanced by sociologists and sociological jurisprudence is conservative in nature and suggests alternatives, which encompasses the work of theorists and researchers who have engaged in critical analysis of law and society. She further suggests that one needs to be aware of the importance of power, economics and politics in the development of law.[111] To achieve this, an economic analysis is paramount.

2.3. Economic analysis of law

The research undertook an economic analysis of the law around double taxation as discussed below.

Economics and its earlier ideas can be traced to Plato and Aristotle who discussed economic matters only incidentally; their primary concern was the nature of an ideal society and the type of government that would go with it.[112] Yet we owe the modern term economics to their culture and language. However, according to modern scholars in the field of economic thought, very little was added to the economic ideas of the Greek philosophers by either the Romans or the early Christians.[113] Modern economic analysis of law is credited to Richard Posner. His writings in the 1960s up to 1971 are considered to have been within the law and economics movement.[114] The Truetts' define an economic system as, "a means by which decisions involving economic

[111]Sheskin (n 43), p. 118.
[112]Dale B Truett Lila J. Truett (1987), *Economics* (Times Mirror/Mosby College Publishing), pp. 1-30.
[113]ibid, pp. 1-10..
[114]Njaramba Gichuki (n 97), p. 68.

variables are made in a society".[115] Njaramba asserts that "the law and economics discourse thus involves the study of the influence of the legal system on the working of the economic system while the economic analysis of law involves economic analysis of the working of the legal system"[116] and this is what the study intends to advance. Taxes and regulation of matters taxes fall under the legal system thus a good theory to use and economic theories have often been used to analyse fiscal law.

Steven Shavell argues that "economic analysis of law seeks to answer this basic question about legal rules:[117] what are the effects of legal rules on the behaviour of relevant actors? In answering this positive and normative question, the approach employed in the economic analysis of law is that used in economic analysis generally: the behaviour of individuals and firms is described assuming that they are forward-looking and rational and the framework of welfare economics is adopted to assess the social desirability of outcomes."[118] As argued by Posner, "the use of economic analysis of law is to make the law simpler to understand and evaluate and to press for the defence of values". Njaramba admits that the theory is a useful analytical tool in an attempt to understand the political economy due to its multidisciplinary nature; an assertion this research agrees with. Njaramba argues using Kornhauser's two strands of thought within economic analysis of law, i.e., "policy analysis; which focuses on the analysis of the effects of legal rules and institutions on outcomes and tends to proceed legal rule by legal rule and political economy which investigates the operation of political institutions; assumes that public officials have the same motivation as private individuals of self-interest.[119] The policy analysis strand, in a manner,

[115]Lila J. Truett (n 119), pp. 1-130.
[116]Njaramba Gichuki (n 97), pp. 68-70.
[117]Louis Kaplow and Steven Shavell (2002), 'Economic Analysis of Law' Harvard Law School and National Bureau of Economic Research, p. 6.
[118]ibid, p. 6.
[119]Njaramba Gichuki (n 97), p. 70.

adopts some variant of legal positivism. The analysis of the behavioural effects of a legal rule begins with the assumption that the legal rule is clearly known and that public officials conscientiously apply the rule that ought to govern the event."

The economic analysis of law also makes attempts at improving the law by finding instances where existing or proposed laws have unintended or undesirable consequences, for example, in economic efficiency and income and wealth distribution, among other values. Further, as scholars argue, it consists of an endeavour to trace the consequences of assuming that people are more or less rational in their social interactions. The theory also tells us that the nature of the tax regime can harm or foster growth.[120] ICPAK argues that "analogously, if a tax regime is such that it leads to internalisation of externalities by private agents, it may induce efficiency in resource allocation and thus foster investment and growth of the economy."[121] The application of the theory of economic analysis of law in an attempt to solve problems in tax administration in Kenya is important because it avails economic tools to be used in the formulation and implementation of the requisite laws.[122] An assertion this research agrees with.

From the above and relevant to the law around double taxation is the fact that existing laws may either have intended, unintended or desirable or undesirable consequences in economic efficiency and income and wealth distribution since double taxation can either hinder or foster growth in the economy; a reliance is heavily placed on the taxpayer to provide the relevant information concerning their income worldwide (owing to the nature of assessment). On whether the taxpayer provides such information to help the taxman, will be addressed in chapter 3 of this research. This is in sync with Hart's legal theory and the sociological thought expounded by

[120]ICPAK (n 96), p.3.
[121]ibid, p.3.
[122]Njaramba Gichuki (n 97), p. 72.

Pound which takes into account social realities that are tied to economics; thus furthering their ideals.

2.4. Conclusion

The research takes a point of view that, the two theories complement each other and are very applicable to the legal framework around double taxation in Kenya. For instance, According to Diener, "Hart himself initially characterized his book *the concept of law* as an exercise in 'descriptive sociology' and central to that book is a concept of law as a system of social rules, a system built around a set of rules of recognition (standards that define what counts as valid law). As the existence of a rule of recognition, and so also of a legal system, depend on human practice (particularly the practice of officials), Hart argues that to understand a particular legal system and its rule of recognition one needs to understand (although, he would insist, not necessarily share) the 'internal attitude' or point of view of the relevant officials in that society." Further, authors like Perreau-Saussine argue that, "Hart 'may have been reluctant to claim sociological credentials which were unlikely to get much praise within the philosophical world which he inhabited' and suggests that in characterizing *the Concept of Law* as an 'essay in descriptive sociology,' Hart intended to 'signal his move away from the more rigidly conceptual theories of Austin and Hans Kelsen in favour of an approach revealing that 'within the very loose constraints imposed by the so-called "minimum content of natural law," the content of a legal system is entirely contingent, shaped by configurations of interests and other social, cultural, and political factors in its environment."

Thus it can be concluded in the words of Diener that, "Hart's most influential contributions to contemporary jurisprudential debates is, his insistence that a concept of law can be developed before a contextual study of social practice and legal doctrine." The fact that the proponents in

both schools of legal thought advance the concept of social realities makes the choice and applicability of the theories to this study very necessary as it ties in with the Kenyan context as well. The economics analysis on the other hand as Njaramba stated “gives an understanding and application of tools of microeconomic theory to the analysis of legal rules and institutions “and this was majorly used to further Pound’s theory.

In the chapter that follows, an analysis of section 41 of the ITA is discussed.

CHAPTER THREE

AN ANALYSIS OF SECTION 41 OF THE INCOME TAX ACT AND THE AVAILABLE RELIEFS

3.0. Introduction

Having discussed the theoretical underpinnings in the previous chapter, this chapter attempts to fulfil the overall research question i.e., "to critically analyse section 41 of the ITA with a view of assessing double taxation and the available reliefs." This chapter will further use the findings of the research undertaken through interviews, the questionnaires, and the available material in the area around double taxation in general, i.e. the international instruments and the DTA network in Kenya.

3.1. The powers of the Minister

Section 41 (1) begins with the phrase,

> *'the Minister may from time to time by notice declare that arrangements specified in the notice and being arrangements that have been made with the government of any other country to afford relief from double taxation in relation to income tax and other taxes of a similar character…'*

Even before delving further on the powers of the Minister, it is worthy to note that double taxation is not defined in this section and it cannot be assumes that everyone will understand the term thus there is need for amendment. Having stated this, Cary and Christopher argue that "to begin to understand how executive discretion is or how it should be bounded, it's helpful to

know what 'executive discretion' is."[123] They define discretion plainly to mean the "unconstrained exercise of governmental power."[124] Who is the executive? In Kenya, chapter 9 of the constitution provides for the executive arm.[125] Under Article 130 (2) the composition of the national executive is provided for to include: the president, the deputy president and the rest of the Cabinet.[126] Article 153 (4) further provides that, "Cabinet Secretaries shall- act per this constitution; and provide parliament with full and regular reports concerning matters under their control". Akech argues that this article facilitates accountability by requiring that decisions of the Cabinet be in writing.[127] In the context of section 41 (4), "the Minister shall cause a copy of every notice made under subsection (1) and every subsequent notice made under subsection (3) to be laid, without delay before the Parliament." Further, the Minister is given powers to declare arrangements between Kenya and other countries with a view of granting relief from double taxation in relation to income tax and any taxes of a similar character imposed by the laws of that country.[128] Turning to the powers of the Minister, the Act gives full powers to the Minister to declare arrangements. *This means the Minister has full discretion when it comes to making such declarations* (emphasis mine). A visit at the national treasury website[129] reveals that there are no published policy guidelines to guide the process of exercise of this discretion; *which accordingly can become a breeding ground for abuse* (emphasis mine). Njeru also argues that "in aligning the same with public finance provisions in the constitutions, regard has to be given to the fact

[123]Cary Coglianese and Christopher S Yoo (2006), ' The Bounds of Executive Discretion in the Regulatory State' Penn Law: Legal Scholarship Repository available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2717&context=faculty_scholarship accessed on the 21/6/2019, p. 6.
[124]ibid, p. 6.
[125]Constitution of Kenya (n 5)- Articles 129 and 130.
[126]ibid. Article 152 provides for the composition of the Cabinet; including not fewer than fourteen and not more than twenty-two Cabinet Secretaries.
[127]Migai Akech (2011), 'Abuse of Power and Corruption in Kenya : Will the New Constitution Enhance Government Accountability', p. 46. Available at https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1447&context=ijgls accessed on the 21/6/2019.
[128]470 (n 4) see section 41.
[129]http://www.treasury.go.ke/publications/guidelines.html accessed on 28/6/2019

that, these provisions were significantly influenced by the need to correct past executive excesses and abuses."[130] Kuloba quoting Davis (1980), a quote this study agrees with, states that *"where law ends discretion begins, and the exercise of discretion may mean beneficence or tyranny, justice or injustice, either reasonableness or arbitrariness."*[131] During the face to face interviews at KRA, the officials had concerns with this and they argued that the reason reforms were made and there is now an inter-agency team that handles DTAs; comprising of the treasury, KRA, Attorney General, Ministry of Foreign Affairs and Ministry of Trade. However, one particular interviewee; 003-KRA[132] a mid-level official at the transfer pricing unit- international department believes the Minister has a lot of powers; which powers are denying Kenyans revenue. 002-KRA and 004-KRA, on the contrary, believe that the presence of an inter-agency team coupled with the Treaty Making and Ratification Act work towards checking the Minister's powers.

The study asserts that times are changing; international trade furthered by technology develops and changes daily so regardless of these opinions, there is an urgent need to publish the policy guidelines as this will iron out doubt and keep the Minister accountable to Kenyans.

3.2. DTAs in Kenya

Following the powers granted to the Minister and for one to fully comprehend and appreciate the law around double taxation, there is a need to briefly look at or analyse DTAs. Kenya has DTAs signed with several countries while others are signed but not ratified and as such not in force.[133]

[130]K. Njeru, *Public Finance under Kenya 's New Constitution,* Constitution Working and Paper Series No.5(Society for International Development), pp 13-16.
[131]Kuloba Isaac Simiyu (2011), 'Regulation of Discretion in Public Procurement in Kenya' (University of Nairobi), pp. 20-40.
[132] Interview with 003-KRA, carried out on the 26/7/2019 at KRA offices at Times Towers, 23rd Floor.
[133] These include DTAs between Kenya and Thailand as well as the Tripartite Treaty between and among Kenya, Tanzania and Uganda.

According to Waris, and Obel,[134] Kenya has concluded sixteen DTA's over the present and its tax treaty partners are; The UK, Seychelles, Zambia, Qatar, United-Arab-Emirates, Netherlands, and South Africa. Although DTAs worldwide are modelled either along the UN Model Conventions or OECD Model Convention, Kenya's tax agreements follow the OECD Model with a few deviations that are borrowed from the UN Model.[135] Interestingly, Kenya has no DTA with any of the countries in East Africa,[136] this is, even though Kenya signed and ratified the treaty establishing the EAC and some of the countries have entered into the common market protocol,[137] there is also the EAC DTA Model Agreement as earlier alluded to. 003-KRA believes that this is because they are trying to consider the regional block, in that, instead of a bilateral agreement, we have a tripartite agreement which caters for all the East African countries. However, 002-KRA opined that it's because not all countries have ratified the EAC treaty and that's where the challenge lies. Nonetheless, DTAs have been negotiated and signed,[138] others await ratification while one has been rejected and rendered unconstitutional by the courts; a case in point the one between Mauritius and Kenya.[139] In this case, TJNA in October 2014 sued the Cabinet Secretary- Treasury, KRA and the Attorney General challenging the constitutionality of the DTA; the case was recently decided and the court struck down the tax agreement for being unconstitutional; court termed it a double tax avoidance agreement.[140] This decision comes after TJNA had been calling upon African countries to "review all their tax

[134]Waris and Obel (Forthcoming 2020), 'Report on Kenya's Tax Agreements'.
[135]ibid- This is even though the UN Model was produced concerning the peculiar needs of developing countries and allows developing countries negotiating with developed countries to maintain stronger tax rights than those provided for under the OECD Model.
[136] A look at the treasury website reveals this fact.
[137]Nairobi Safari Club and Meridian Court Hotel, 'The East African Community Common Market Protocol for Movement of Labour' 1.
[138]Http://Taxsummaries.Pwc.Com/ID/Kenya-Individual-Foreign-Tax-Relief-and-Tax-Treaties accessed on the 29 day of April 2019.
[139]*The Tax Justice Network- Africa v Cabinet Secretary for National Treasury and 2 Others*- The research will not dwell much on this case or analyse it as the case majorly dealt with the issue of the constitutionality of the DTA and the fact that it lacked public participation.
[140]Picciotto (n 51), pp 1-25.

treaties, particularly those signed with tax havens as this would mean local companies and investors could potentially use the treaty to dodge Kenyan tax by round-tripping their investments illicitly." This is progress for Kenya in terms of ligation in the area of double taxation, and DTAs; and indeed Kenya should consider reviewing its DTAs.[141] The research further stresses that understanding that these agreements are important since they work as a basis for granting reliefs, a position furthered by 001-KRA during the face to face interview.

DTAs are essentially bilateral tax treaties, which as Rosenbloom states is "*a triumph of international law*."[142] DTAs are, therefore, important because they add to and further the law on double taxation.[143] However, some scholars have argued that even where there is no tax treaty, there are acceptable principles which will eventually aid the taxpayer and prevent double taxation.[144]

In investigating a few key articles in the DTAs Kenya has concluded, Waris and Obel (forthcoming)[145] consider several factors: one being the model based on- especially on the deviations; whether it was because Kenya is a developing country and the other contracting state developed nations. For instance, they argue that "Article 10 of the UN, OECD and ATAF Models provide for dividends. The general rule is that dividends paid by a company to a resident of another contracting state may be taxed in the latter state." They further argue that all the model conventions provide for limitations in these taxes. There are also deviations which arise where for example, the UN Model provides for a negotiable; say ten percentage of the gross amount of dividends, whereas, the OECD Model states that "it shall not exceed five per cent of

[141] https://taxjusticeafrica.net/wp-content/uploads/2019/04/press-release-court-declares-kenya-mauritius-double taxationa-unconstitutional-2.pdf
[142] Avi-Yonah (n 50), pp 20-30.
[143] Particular attention can be given to the fact that section 41 is a stand-alone section with very shallow details on Double Taxation. However, the same section is the basis for negotiations of DTAs which in turn elaborates on double taxation and the available reliefs (emphasis mine).
[144] Avi-Yonah (n 50) pp. 20-30.
[145] Attiya Waris (n 134).

the gross amount of dividends if the recipient is a company that owns at least twenty-five per cent of the other company, and applies a standard rate of fifteen per cent in all other cases." The ATAF Model, on the other hand, does not specify the percentage but it does provide for the twenty-five per cent requirements on capital ownership by the other company. They conclude that article 10 generally benefits the country where an investor resides. Sampling the DTA between Kenya and India,[146] article 10 of the said DTA states that "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 state" although under sub-article 2 provides that "the tax percentage shall not exceed 10 per cent of the gross amount of the dividends." Further, it provides that "the paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid." This is rather low and seems not to affect Kenya in one part and the other part, countries offer a wholesale increase in the percentages of gross dividends; case in point Denmark,[147] which offers the highest percentage of tax on gross dividends i.e. twenty per cent. Taking into account that there are more Danish corporations in Kenya than Kenyan corporations in Denmark, such a provision only serves to greatly benefit Denmark, while taking away from Kenya.[148]

Therefore, since lots of taxing rights are given away, it would be advantageous for countries to develop a tax treaty policy framework and a model treaty before entering into negotiations which must comprise of a country's wishes and also satisfy their concerns while not isolating the rights of the other contracting state.

[146]Government of Kenya (2017), 'Agreement between the Government of the Republic of Kenya and the Government of the Republic of India for the Avoidance of Double Taxation and the Preservation of Fiscal Evasion with Respect to Taxes on Income.' Legal Notice No. 147, Kenya Gazette Supplement no.115.
[147] Legal Notice No. 5/1973, Article 10
[148]Attiya Waris (n 134).

3.3. The available reliefs as provided for under section 41 of the ITA

The reliefs available according to section (41) are exemption, exclusion or reduction. These reliefs are limited and are only given under a DTA and upon one of the two requirements there under being met.[149] The limitation under clause 5 according to 002-KRA is very unfair in some instances. She gave an example of one of the cases she handled (stated earlier); the taxpayer company shareholding had changed, as new shares had been bought and the company was not able to benefit from the reliefs under the DTA as the shareholders were not residents of any of the contracting states. She opines that where there is a valid reason, relief should be given under the PPT as introduced by the OECD BEPS project.[150] (She could not give me further information as it was not public information). Further, article 24 (1) of the DTA between Kenya and India[151] provides that "the laws in force in either of the contracting states will continue to govern the taxation of income in the respective contracting states except where provisions to the contrary are made." Specific to the area under study, is Article 24 (3) which states that, "double taxation shall be eliminated in Kenya as follows: where a Kenyan derives income, in accordance with the provisions of the agreement and may be taxed in India, Kenya shall allow as a credit against the tax on the income of that resident, an amount equal to the tax paid in India. Such credit shall not, however, exceed that portion of the tax as computed before the credit is given, which is attributable, as the case may be, to the income which, may be taxed in India."[152] "Where income derived by a resident of Kenya is exempt from tax in India; Kenya may nevertheless, in calculating the amount of tax on the remaining income of such a resident, take into account the

[149]ICPAK Annual Tax Seminar, 'Double Taxation Agreements : The Way Forward' 1 presented by Jemimah Mugo.
[150] 002-KRA (n 103)
[151]Legal Notice No.147 (n 91).
[152]ibid.

exempted income."[153] Thus the relief method used is the credit method and the exemption method (per the DTA); these methods are available to persons only if they are in tune with the requirements under section 41. The methods provided for in the DTAs also leave a gap in terms of the reduction and exclusion methods. What are they and when do they apply to the taxpayer? These are some of the questions the research will attempt to answer; failure of which will point to the inadequacies in the law around double taxation. The section also has a negative connotation under clause 5, "*…the benefit of that exemption, exclusion, or reduction shall not be available to a person…"* how about starting the section with, *"…the reliefs shall be available for persons who…"*

3.3.1. Exemption method of relief

The bedrock of exemption is that the source states have better rights of taxation and that the exempting states, therefore, have to "give way." In other wards as Gutuza[154] asserts, "it's based on the right of the source state to tax income which arises within its territory per the benefit principle of equity. The resident state, therefore, has to exempt that income from tax and by this, the country of residence allows businesses or enterprises in the source state to be competitive because such a business will not be exposed to a higher tax burden than a competitor in the source state, which may well occur where a limited tax credit relief is applied and the tax rate in the residence state is higher than in the source state. Thus, under a pure source basis of taxation, the exemption method of relief for international double taxation is a consequence of using the source as a jurisdictional link; meaning, the form of exemption would be automatic, that is, the

[153]ibid Article 24 (3) (b).
[154]'Gutuza (n 66), p. 20-40.

full exemption method, as opposed to the exemption by progression, would apply."[155] Exemption with progression applies when the foreign-sourced income of a resident is not taxed in the resident state but taken into account to determine the rate to be applied to the resident's income.[156] Exemption with progression is, however, not provided for in Kenya and not used as such; the study will not further discuss it. (Emphasis mine from the readings and interviews). Further, despite the fact that Gutuza speaks to the automatic nature of relief via the exemption method, in Kenya the wording of section 41 however, reveals that all the reliefs do not accrue automatically to the taxpayer, i.e., *"Kenya may[157] take into account the exempted income."* That having been stated, the exemption method is fairly a good method of elimination and it is also simpler to implement. However, Kenya seldom uses this method.[158]

3.3.2. The exclusion or reduction method

The question that comes to mind is whether by, exclusion or reduction, the draftsman gave an alternative between the two and this begs the question are they the same thing? Noting that these two words are not synonymous, as exclusion means to bar, ban while a reduction simply means the action of making something less in amount, more like cutting back. Did the draftsman also use reduction to mean deduction? 003-KRA stated during the interview that this could have been a drafting problem, as an exclusion means exemption and reduction could go hand in hand with a deduction. The Act is thus not clear in this regard and does not expound on these methods as such a loophole for construction fanatics.

From the above, it's worthy to note that construction is very key when it comes to interpretation. Sunstein argues that "the meaning of a statute inevitably depends on the precepts with which

[155] ibid.
[156] ibid.
[157] The use of "may" connotes uncertainty in legal drafting and as such generally pegged on the fulfillment of certain conditions (emphasis mine)
[158] The conclusion is drawn from the interviews carried out at KRA on the 26/7/2019

interpreters approach its text and statutes do not have pre-interpretive meanings, and the process of interpretation requires courts to draw in background principles. These principles are usually not 'in' any authoritative enactment but instead are drawn from the particular context and, more generally, from the legal culture."[159] Thus they conclusively assert that "it is important to identify the prevailing principles and to subject it to scrutiny. In the conventional account the tools of statutory construction are language, structure and history as superficially clear statutory language may upon concentrated analysis prove ambiguous and in search for statutory meaning, context trumps literalism; in other words, there is no plain meaning without context."[160] The ITA uses the word **'or'** which is disjunctive. This again as authors put it, "is a function of conventional English usage and is widely followed in State and federal courts. In its elementary sense the word 'or' is a disjunctive particle that marks an alternative, generally corresponding to 'either,' as either this or that,' though not always the case however, in the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature."[161].

3.3.3. The deduction method

The ITA does not expressly talk about deduction as a method of relief however, a guide can be found in the Act, under section 16 (2) (c) where it is stated that, "no deduction shall be allowed in respect of, any income tax or tax of a similar nature paid on income: provided that, save in the case of foreign tax in respect of which a claim is made under section 41, *a deduction shall be allowed in respect of income tax or tax of a similar nature…"* The Black's Law dictionary defines deduction as, the act or process of subtracting or taking away.[162] This is a very basic

[159]Cass R Sunstein and others (2019), 'Interpreting Statutes in the Regulatory State Published by The Harvard Law Review Association | Harvard Lavv Review |', p. 8.
[160]Steven Wisotsky (2009), 'How to Interpret Statutes Or Not: Plain Meaning and Other Phantoms'.
[161]ibid- there are also some exceptions, situations "in which the conjunction 'or' is held equivalent in meaning to the copulative conjunction 'and'".
[162]'Black's Law Dictionary - 8th Edition.Pdf'.

definition and understandable, do they mean a reduction or exclusion? The research answers in the negative. Furthermore, most international law books and treaties speak of 'deduction' method of relief. Countries use this method where the foreign tax, is seen as an expense of the business. 001-KRA confirmed this although according to her, this is not a method of relief but expenses deducted for the taxes paid in another country whether there be a double DTA or not, the domestic legislation deals with this. Internationally, it is considered a relief which is granted by allowing deductions and taxing the net income of the foreign corporation.

Reuven[163] gives a very good example of how this works, although it's an example of the United States i.e. "where the taxpayer has a foreign income of 100 with a foreign tax of 30. In the case of a deduction, he would report US income of 70 and would have to pay 35 per cent on the 70. Thus, 35/100 * 70 = 24.5. The taxpayer will be left with only 45.5 to himself i.e. 70- 24.5 = 45.5. Notice here that the taxpayer ends up with much less under the deduction method, and pay much more in taxes; as the deduction is against the net income (the 70)." This Reuven argues is not the best method for relieving double taxation and has "fallen into disfavour as 'the total net tax bill of a taxpayer would result in a higher combined tax rate compared to any of the other method." Very central in the deduction method is the question of source and residence which helps in determining tax liability as earlier discussed. The question that follows would be why countries do still use this method of relief? The justification comes from, as Gutuza puts it "from a viewpoint of national self-interest through the extra tax collected, 'it, however, does not achieve equal treatment of residents and is not neutral in terms of allocation of resources between countries'. It is thus said to favour domestic investment as opposed to foreign investment and it needs to be checked".

[163]Avi-Yonah (n 50), pp, 20-30.

3.3.4. The credit method of relief

The reading of section 41 reveals that the credit method is not listed among the available reliefs, however, section 42 of the ITA provides for computation of credits under special arrangements further DTAs provide that a Kenyan taxpayer is allowed a credit against their Kenya income tax liability only on foreign-sourced income. It was confirmed during the interviews at KRA that Kenya uses this method of relief to avoid double taxation. This as many tax scholars argue is a default method of relief and fully eliminates double taxation even in the absence of a DTA but in Kenya a DTA is crucial. Gutuza quoting Vogel states that "all that the credit method is designed to do is mitigate an excessive burden considered unfair or economically harmful by reducing the level of the taxation of the State giving the credit."[164] The credit method is implemented by either a full tax credit[165] or a limited credit[166] normally used where the amount of tax paid in the country of source is greater than the amount of tax paid in the country of residence- and there is a 'reimbursement' element. This limit works in such a way that the taxpayer cannot credit more from the foreign tax to the actual tax due in the country of residence; and also the country of residence will not owe the taxpayer any refund in case the foreign tax paid is more. The research confirmed during interviews at KRA that indeed Kenya uses the limited credit method in that a taxpayer is only allowed credit up to the rate paid in the other country and a taxpayer can't claim refunds.

Reuven[167] explains how the credit method works: "where a resident taxpayer has foreign-sourced income equal to say, 100 and it is subject to foreign tax of 30. That income will appear on the person's income tax return in the resident country. The person reports the entire foreign income

[164]'Gutuza (n 66), p. 121.
[165]ibid- The full tax credit allows the resident taxpayer to credit the full amount of the foreign tax against his resident country tax.
[166]ibid- this limits the tax credit to the amount of tax that would have been paid in the country of residence.
[167]Avi-Yonah (n 50), pp. 20-30.

(70) including the amount paid in tax (30) and calculates the resident country tax before the credit. Say the tax due in the resident country for such income is 35; the person will take the foreign tax credit of 30 and remains with a net tax liability in the resident country of only 5 (paraphrased). He argues that today this is the major mechanism for the prevention of international double taxation." However, Gutuza argues that there are some disadvantages of the credit system and they include: the complexity of its administration, the requirements that need to be met before a tax credit is granted, whether the tax credit would apply to group company taxation and whether it would also provide relief for economic double taxation.

Findings from the primary data collected revealed that the relief available to a taxpayer under a DTA is the credit method. When asked about the other methods, KRA's answer was credit method; meaning no income is exempt. As for reduction or exclusion, the argument is- a drafting issue. The research also found that the iTAX system provides for this, in that, a person can give detail and request a credit online. Actual statistics of how many taxpayers have been granted relief so far out of the 2.5 or 2.7 million registered taxpayers proved futile and one wonders whether the data exists in the first place.

3.3.5. The available reliefs under the UN Model Convention and OECD Model Convention

As earlier stated, both international model conventions are followed by most countries when it comes to tax treaties. Specific to reliefs from double taxation, the model agreements provide two alternative methods of relief for the elimination of double taxation: namely, article 23A on exemption method and article 23B on the credit method. According to the East African model, "each of the methods of relief plays an important role, the exemption method promotes capital

import neutrality where, the overall burden of taxation on capital income earned within a given country is the same, regardless of the investor's country of residence while the credit method promotes capital export neutrality where the overall burden of taxation on capital owned by a resident of a given country is the same whether that capital is invested abroad or at home."[168] However, the 2011 update to the UN model provides that, "the method by which a country gives relief from double taxation depends primarily on its general tax policy and the structure of its tax system. Owing to the difference which exists in the various tax systems, bilateral tax treaties provide the most flexible instrument for reconciling conflicting tax systems and for avoiding and mitigating double taxation. For instance, the exemption method was considered eminently suitable where exclusive tax jurisdiction over certain income was allotted to the country of source under a treaty; it might take the form of exemption with progression and it also casts a responsibility on the country of residence to eliminate double taxation."[169] Thus the commentaries on the model and scholars conclude that "effectiveness of the tax incentive measures introduced by most developing countries thus depends on the interrelationship between the tax systems of the developing countries and those of the capital-exporting countries from which investment originates."

From the above, a discussion is made on the realities on ground when it comes to the relief granted to taxpayers while also discussing all the other reliefs; to which KRA gave no justification for not using them. The theories advanced in chapter two stress that understanding institutions; especially in aspects of administration, captures society's needs and as such advance laws however, in absence of this, a missing link is created.

[168]'The Double Taxation Avoidance Agreement of the East African Community TAX' (n 19).
[169]United Nations (2011 update), 'Model Double Taxation Convention between Developed and Developing Countries'- Commentaries.

3.4. The requirements to be fulfilled under clause 5

For purposes of double taxation in Kenya, section 41 of the ITA states that, "exemption, exclusion or reduction in the rate of Kenya tax under a DTA is not available to a person, who, for purposes of a DTA is: a resident in the other contracting state unless: more than 50% of the underlying ownership of that person is held by an individual or individuals who are residents of that other contracting state, or the resident of the other contracting state is a company listed on the stock exchange in that other contracting state." This means that relief is limited to companies. What then is the plight of individuals? 002-KRA argued that generally there is a problem with this particular clause five (5) and stated that it is unfair and as the policy department, they made some suggestions for amendment especially to incorporate the PPT rule proposed by the OECD BEPS project. The proposal was submitted to the treasury and awaits implementation.

According to the OECD, "it is inefficacy in tax treaties that have triggered double non-taxation in a number of situations.[170] Vikram states that "the 2003 OECD commentary on article 1 raised two questions concerning the improper use of tax treaties. The first question was whether tax treaty benefits must be granted when transactions entered into by the taxpayers' abuse the provisions of tax treaties and second, whether domestic anti-abuse measures that are intended to prevent abuse, conflict with tax treaties?"[171] with respect to question one, the OECD commentary provides that, "states consider that taxes are levied through domestic law as restricted by tax treaties, thus an abuse of a tax treaty can be considered as an abuse of domestic law and with regard to the second question, states tackle treaty abuse by a proper construction of tax treaties, which results from the object and purpose of tax treaties as well as the duty to

[170] https://www.pwc.com/gx/en/services/tax/tax-policy-administration/beps/treaty-abuse.html
[171] Vikram Chand (2015), 'The Guiding Principle and the Principal Purpose Test' 12 484.

interpret in good faith as per the Vienna convention". The commentary concludes that "irrespective of the approach followed, the benefit of tax treaties should not be granted to arrangements that constitute abuse."[172] In February 2013, the OECD released its report on addressing BEPS and subsequently in July 2013, the OECD released its 15-point action plan to address BEPS. In this plan, treaty abuse, in particular, treaty shopping was considered to be one of the most important sources of BEPS concern.[173] According to Alejandro, "action 6 was dedicated to preventing treaty abuse and which has the aim of developing 'model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances. It is also one of the minimum standards countries participating in the BEPS inclusive framework are to implement. It came with a choice for either the PPT or the without detailed or simplified Limitation of Benefits (LOB) and other treaty abuse recommendations within the action 6; with countries preferring the PPT over the LOB. The PPT is applied if 'it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction'- thus the two elements of reasonableness and the main purpose test is introduced."[174] The latter is to the effect that treaty benefits will be denied under the PPT if it is proved that *"a main purpose"* or *"one of the principal purposes"* for entering into a transaction/arrangement was to obtain a tax benefit. There is also the objective element under

[172]ibid.

[173]ibid- Thereafter, in March 2014, the OECD released its discussion draft action on Action 6 and with respect to treaty measures, the 2014 TTA Report suggests a three-prong approach to counter treaty shopping. Firstly, the title and preamble of tax treaties are modified to clearly include statements that when States enter into tax treaties their intention is not to create the opportunity for tax avoidance or evasion including treaty-shopping arrangements. secondly, a treaty targeted anti-avoidance rule (TAAR) in line with the US style limitation of benefits (LOB) clause is proposed in tax treaties. Thirdly, a treaty general anti-avoidance rule (GAAR) in the form of a principal purpose test (PPT), which resembles the guiding principle, is proposed.

[174] Alejandro Theodosopoulos (2018), The Principal Purpose Test of the OECD Multilateral Agreement and the General Anti-Avoidance Rule of The Anti-Avoidance Directive. Effectiveness of the Principle Purpose Test and comparison with General Anti-Avoidance Rule of the European Union, Tilburg University, pp, 20-35.

PPT rule which provides that it needs to be checked if the favourable tax position defeats the *"object and purpose of the relevant"* tax treaty provisions. And concerning burden of proof, the 2003/2014 OECD commentary does not discuss as a party is required to fulfil the two elements; probably tax authorities assume the burden of prove that the impugned transaction undertaken by the taxpayer satisfies both elements. Therefore, takes an objective analysis of the transactions as well as reasonably conclude that the subject element is satisfied.[175] Further, the OECD provides for a low threshold to uphold the abuse of a tax treaty.[176] In Kenya, there is the introduction of the 183 days rule per the income tax bill 2018[177] which strengthens the section further and the addition of the active participation of the person in the activities of the company.[178]The interviewees indeed confirmed that when it comes to companies, the requirements under section 41 (5) are not automatic though some felt it is very limited and unfair and have made suggestions to include the PPT as already discussed to widen the requirements and not cut companies out. Concerning individuals, there are no requirements as such one could argue that the relief (credit) applies automatically.

3.5. Approaches to income tax assessment in Kenya

3.5.1. Administrative assessment system

Okello states that "income tax has traditionally been assessed by the tax departments."[179] He argues that, under an administrative assessment system, the onus is on the tax administration to examine tax returns and financial statements, calculate the amount payable, and notify the

[175]Chand (n 171).
[176]ibid.
[177]Income Tax Bill (n 169) section 46 (4) (b).
[178]ibid- section 46 (4) (c).
[179]Andrew Okello (2014), 'Managing Income Tax Compliance Through Self-Assessment' IMF Working Paper WP/14/41.

taxpayers of the tax liability.[180] Okello advances the argument that the administrative assessment systems are resource-intensive and tend to be ineffective.[181] This will not be the focus of this research as much emphasis will be put on self-assessment, a model used in Kenya today and its bearing on double taxation.

1.5.2. Self-assessment

Okello states that "the self-assessment system accepts the reality that no tax administration has, or ever will have, sufficient resources to determine the correct liability of every taxpayer. It recognises that taxpayers themselves- with appropriate assistance from the tax department are in the best position to determine their tax liabilities, given that they have first-hand knowledge of their business affairs and financial transactions, and have ready access to underlying accounting records and because self-assessment is based on the idea of voluntary compliance and it requires far less information and supporting documents from taxpayers when returns are filed."[182]

Further he states that "under self-assessment, the role of the tax administration is to assist the taxpayer to understand their rights and obligations; given that more responsibility is placed on taxpayers to correctly interpret the law and as such, greater attention is given by the authority to educating and assisting taxpayers in understanding the law's requirements, ease and make the process less costly as possible. Meaning, the tax administration adopts a service-oriented attitude

[180]ibid. Okello provides the following as the features of the administrative assessment system: Taxpayers report on their activities on an annual basis, reporting consists of completion of a tax return and filing financial statements, and other supporting information to the tax administration, tax returns and the supporting financial statements are reviewed and verified by the tax officials, the tax administration makes the decision on the tax liability and informs the Taxpayer of what to pay, typically through a notice of assessment, Taxpayers then pay the tax due or object to the assessment and finally, the tax administration reconciles assessment notices and payments.

[181]ibid.

[182]ibid. Okello argues that the Taxpayer however must keep records for purposes of explaining all transactions relevant for tax purposes.

towards taxpayers. The emphasis under a self-assessment system shifts the verification process from pre to a post filling basis."[183]

Self-assessment can only flourish with the right tax culture. According to Mumford, "a culture of taxation can be found in the mechanisms which are deployed to collect taxes, and in the responses to them among public and media."[184] In assessing self-assessment in the UK and whether the UK would be successful in her efforts to create a parallel culture of self-assessment, Mumford had to several questions; including, why taxpayers of these countries self-assess when they could demand that the taxman performs the task for them.[185] According to her, self-assessment experienced a significant number of teething problems, especially because of the overload of work burdening tax inspectors. She argues that critical cultural studies of tax may also assist studies of compliance, as they may challenge the idea that compliance is a product of 'normative consent,' and 'can instead inhere in more practical, action-oriented systems of thought, feeling, and speech, the pre-reflective disposition and discursive performances, the inarticulate, spontaneous practices and emotions that suffuse everyday experience.' For instance, she argues that to a large extent in legal literature; taxes are collected from pay cheques and sales, but this action she argues is seldom construed as contributing to culture. In-fact cultures of collection and acceptance are pivotal to functioning tax systems. Quoting McCaffery, "tax has replaced constitutional laws, the most prominent set of public political issues in late twentieth-century America'- discussing why tax matters in American culture." Thus she proceeded on the assumption that in the study of tax collection in the countries she looked at, i.e. US and UK, there are important human histories, emerging tax ideologies- modern culture and legislation

[183]ibid.
[184]Mumford Ann (2002), *Taxing Culture: Towards a Theory of Tax Collection Law* (Routledge).
[185]ibid.

about taxation.[186] This is not alien to Kenya and no better way to put it than in the words of Waris that, "any tax system, therefore, is a combination of history, the experience of the people, politics, economics and the law."[187] Every country has a history, a culture and customs (societal aspects) its people follow as affirmed in the theories used in chapter two. These coupled with the rationality of persons play a critical role in trying to understand the taxing culture.

This begs the question, what is the people's taxing culture in Kenya? With a population of 47,564.3 million; out of which 23,548.1 million are male and 24,014.7 are female,[188] about 19 million are registered voters,[189] there are only about 7 million registered taxpayers[190] out of the 19 million registered voters which translate to about 36.8 per cent; meaning a small percentage of the registered voters in Kenya pay income tax. What then is the probability that one in every 20 individual taxpayers declare foreign-sourced income? Further, as at January 2019, only about 3.5 million taxpayers had filed returns; out of that, we are not sure who the natural persons, artificial persons or foreigners companies are; as KRA does not disaggregate its data.[191] The reality then starts to sink in. However, TJNA stated that "citizens' willingness to pay tax may be low for historical reasons, and may also reflect the perception that governments consistently misuse public funds."[192] Further, during the interviews, KRA confirmed that when it comes to declarations of income, it is difficult to verify the truth as the authority relies on the honesty of the taxpayer since KRA pulled out from audits.[193] The research found that there are issues with

[186]ibid.
[187]Waris- (n 7), p, 274.
[188]Kenya National Bureau of Statistics (2019), '2019 Kenya Population and Housing Census: Population by County and Sub-County', vol I.
[189] The argument is that every Kenyan over 18 years is expected to register as a voter and the same is true for registration as a Taxpayer
[190]https://cfs.uonbi.ac.ke/revenue_expenditure.html accessed on the 17/09/2019
[191] Committee on Fiscal Studies, Financing Africa, a short course taught by Professor Attiya Waris between 30th September to 4th October. University of Nairobi
[192]Tax Justice Network- Africa (2010), Quarterly Newsletter, Attiya Waris (ed), Vol 1'..
[193] 002-KRA unfortunately, could not give reasons why as it was confidential information.

the iTAX system as taxpayers go and lump and such not efficient. The iTAX system in itself is problematic. Further, KRA only works with those who declare their incomes; this is furthered by the motto at the moment, "*facilitation of taxpayers*." A lot, however, is being done by KRA, there are weekly sensitization classes at times towers on 5th floor on the use of iTAX system open to all taxpayers. There is also a tax base expansion initiative, for instance, intensified use of third party data; like the power Company, telecommunication companies, and professional bodies among others. The presumptive tax that was earlier introduced in the year is also a further initiative to widen the tax base.

1.5.3. Double taxation and information sharing

Closely linked, is information-sharing. This area was particularly interesting because the research had not captured it, but stumbled upon it during the interviews and found it very useful; looking at double taxation from an information sharing perspective. 004-KRA a mid-level official from the exchange of information unit; a unit started in 2015 was particularly excited about the research because for the first time there is a study that squarely talks double taxation and analyses section 41. For further understanding of this area, she suggested that it be thought of in terms of how Interpol works and referred to the unit as an *"Interpol for tax purposes"* that gets its legal backing from section 41, especially under a DTA. For instance, under the Kenya-India DTA agreement, article 27 provides for information sharing between the Contracting States. Under this, taxpayer information is shared; whatever is necessary for the authorities to carry out their mandate. Although, in the case of Kenya, other countries have been asking for information and KRA has shared such information and when asked about Kenya receiving taxpayer information, the official stated that KRA has only got information from one country; the UK. On being asked about the costs implication, considering confidentiality, and privacy

rights of taxpayers, she argued that they have an exchange of information manual thus very regulated and also use the TPA. Because of the confidentiality aspects of the information shared, she could not share the same for this research. Future researchers can explore the same, especially on how information exchange affects double taxation.

CHAPTER 4

RECOMMENDATIONS

4.0. Introduction

From the onset, this study was justified on the ground that there is an apparent scarcity of literature in the area of double taxation; that there is need for understanding double taxation and the available reliefs as it is important for protecting local businesses and FDI in Kenya. Further, the overall contribution it would make to the literature in this area and also guide future researchers. The analysis of section 41 of the ITA was thus centered on double taxation and the available reliefs, the legal and institutional framework discussed; with loophole and inadequacies found to exist.

4.1. Recommendations

The following recommendations may be taken up by the institutions, law and policy makers:

4.1.1. Amendment of the ITA

The research proposes an amendment to section 41 of the ITA, as the said section as is, is inadequate to address the area in question. The Income Tax Bill 2019 is yet to be tabled before parliament for discussion and public participation, and it's hoped that these proposals made are part and parcel.

First, the act should provide a definition of double taxation or provide explanatory notes on the same; second, the exclusion or reduction as reliefs should be deleted since they are not used; third, the study proposes for the inclusion of the 183 days and also the taking into account, active

participation of persons in the activities of the company while also taking into considerations the proposal for incorporating the BEPS project action 6- PPT and this should be made priority and added as adding the same will further strengthen clause 5 and finally, section 41 should be in tandem with the constitution.

The beginning subsection could read as follows:

i. "*Relief from double taxation is available to*…" This starts the provision on a positive note.

Additional clause to supplement clause 5 already discussed:

ii. *" subject to clause 5, a benefit under a DTA shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of a DTA."*

Definition/explanatory

iii. In this act/part, "*double taxation means a situation where income earned in the source state by a citizen or resident of another state is taxed by both states*."

4.1.2. Tax administration

4.1.2.1. Law in the books verses law in practice.

As already discussed, tax administrators are the implementers of laws and the implementation ought to be as in the law. Thus when implementing a tax system, the tax administration must have thoroughly understood; the what, who, why, where, when and how it will work before implementing a law.

Since tax returns are made on the iTAX system, which according to KRA is simple, swift and sure, the reality on ground speaks otherwise. Most taxpayers do not know how to use the iTAX system and end up engaging tax consultants who may not even give the correct position. Thus the tax administration should consider both the iTAX system and use the manual system as well, where companies can also file in documents and this will help with audits as well.

KRA should also exhaust the methods provided for by law.

4.1.2.2. KRA should reconsider conducting audits again

During the interviews, it was established that KRA has stopped auditing and the reason for the same was not given. KRA should consider going back to auditing because it is very important in the area of double taxation since this involves taxing the same income cross-border. Considering that the method of assessment is self-assessment, it becomes important that audits are done to establish the actual taxes due.

4.1.2.3. KRA should work towards data disaggregation

It was evident during the interviews at KRA that tax data is not disaggregated meaning everything is one pool. They tax administrator does not know the number of taxpayers who declare foreign sourced income, who the individuals or companies are. All declared taxes are clamped on the iTAX system. The study thus proposes that KRA works towards having a system that disaggregates data for easy management, efficiency and having organised records for accountability purposes.

4.1.3. Need for further research

Various research and studies have shown that the area of double taxation and DTAs still have challenges; as no proper and concrete solutions lie in place. For instance, scholars have often argued that the OECD model tax convention favours the residence principle; DTAs were found to shift taxing rights from the source state to the residence state. Further, research reveals that, between two economies with largely reciprocal FDI positions; with an asymmetric investment position (and has a DTA signed), the capital-importing country is at a risk of forfeiting tax revenues. This is the case for developing countries, which have to balance the costs for example of revenue losses with benefits like increase of FDI. Thus understanding double taxation and DTAs is very critical for the tax environment in Kenya. The study therefore, recommends further research in the area of double taxation; specific attention can be given to tax laws which have to be applied in context, for instance, this study has focused on an analysis of section 41 and the available reliefs, the other studies could focus on aspects of double taxation and FDI, how to strengthen the law around double taxation, the effectiveness of say the credit method, monitoring

and enforcement of double taxation, a case study of KRA and how exchange of information will affect double taxation.

4.1.4. Tracking system of the benefits of the treaties

Kenya should take a cost benefit analysis of having these treaties. Have like a gauge system; especially on the taxes the country lost under the agreement so as to confirm whether the treaty is beneficial for the country.

4.1.5. The need for sensitization in the area of double taxation

Taking a budgetary angle, it is pertinent to know that KRA spends on tax education. As at the end of 2016, Kenya shillings 110,131,000.00 was spent on taxpayer education; how much goes to double taxation and DTAs is unknown. The research revealed that a number of legal practitioners had no clue or did not understand double taxation. The research thus proposes that awareness programmes be intensified in all matters tax- this should be part and parcel of our society right from schools, work places hence taking in the human element. A positive step by KRA in 2018 was the partnership between KRA and the Kenya Institute of Curriculum Development (KICD); the partnership is for purposes of mainstreaming tax education in the education curriculum. Further, KRA can take up the initiative and partnership with other agencies to offer trainings to professionals like lawyers, accountants and auditors who normally deal with matters tax. Whatever mode of sensitization is used, the same should have both medium and long term goals. There is an urgency of educating the young- the next generation of taxpayers. Use of social media, TV, radio platforms helps the population appreciate the civic responsibility of paying taxes; even if foreign sourced. The research also found that universities through their different departments can be a major contributor in this angle; for example, the

Committee on Fiscal Studies of the University of Nairobi under the leadership of Waris together with the different sponsors have taken a step towards the right direction, developing curriculum and running short courses in matters tax which shall be offered to all those who want to enhance their knowledge; tax treaties and double taxation are part of the curriculum being developed.

4.1.6. The use of technology

In their book *the second machine age*, Eric Brynjolfsson and Andrew Mcafee argue that "humanity is on the brink of massive technological breakthrough". This is eminent because of the nature of digital information and the digital space now. Thus increase in the role and importance of technology in the delivery of services is growing. KRA as a tax administrator should embrace technology in its full glare as technological advancements is seen as an important aspect of tax administration; however, it should be embraced in a manner that will harness its positive aspects. This coupled with the fact that the mode of assessment of tax is self-assessment, an effective and working technological/ ICT system would come in handy; especially when it comes to double taxation and filing of these returns.

CHAPTER 5

CONCLUSIONS

5.0. Overall conclusion

Two research questions guided this study i.e. How effective is section 41 of the ITA in handling instances of double taxation? And whether the reliefs available as set out in section 41 are utilised? The research has answered all the questions. The study also put forward the following hypothesis, that: section 41 is inadequate in addressing double taxation; the legal and regulatory framework dealing with double taxation in Kenya does not provide adequate guidelines; courts have not determined cases on double taxation or the reliefs and legal practitioners have not fully conceptualised double taxation and the available reliefs; and there is a need for reform in the legal and regulatory framework in the area of double taxation in Kenya. The findings of this research proved the above five hypothesis as discussed in chapter three; that is, section 41 is inadequate in addressing matters double taxation, for a corporate taxpayer to get relief, the requirements under section 41 (5) have to be fulfilled, there is no much information or guidelines, lawyers and legal practitioners interviewed were clueless in matters double taxation and DTAs yet; and as Sol Picciotto puts it, the techniques of lawyer, particularly in interpretation of laws is very paramount; and this study therefore reached the conclusion that the law on double taxation needs to be reformed including approving and publishing the policies currently awaiting approval to guide the process especially of negotiating DTAs, pending bills of the ITA need to be assented to so as to keep the tax laws in line with the constitutional provisions. All these guided the recommendations made in chapter four.

5.1. Chapter conclusions

5.1.1. Chapter one: introduction and background to the study

This chapter laid the basis for the entire research. It discussed double taxation at both the international and national contexts while providing a justification for the study, its main objectives were clearly stated, the two research questions majorly guided the study alongside the five hypothesis. Hart's soft positivism and Pound's sociological jurisprudence furthered by the economics analysis of law were highlighted in this chapter. The theories used all complemented each other as they were geared towards analysing laws; taking into account social realities and analysing institutions concerned with implementation. The literatures reviewed in the area of double taxation were general so an integrative approach was taken and for the literature specific to double taxation gaps were identified and filled. The research methodology adopted by the study was also in this chapter.

5.1.2. Chapter 2: theoretical framework

This chapter discussed the theoretical underpinnings guiding the study which fit in so perfectly considering the area under study- double taxation being an area that is cross border or transnational in nature, affects both individuals and corporations, especially MNCs whose transactions are beyond a single country facilitated by international trade and technology transfer. The research concluded that in both schools of legal thought, social realities are core thus making the choice and applicability of the schools of thought to this study very necessary. The economics analysis of law brought into play an understanding of the concept of rationality; especially when it comes to information dissemination by the taxpayer to the tax man.

5.1.3. Chapter 3: case study: analysis of section 41 of the ITA and the available reliefs

This chapter answered the research questions and further proved the hypothesis developed as elaborately dealt with under the chapter. Double taxation and the available reliefs were analysed in depth, with examples and findings from the field and conclusions made.

5.1.4. Chapter 4: recommendations

This chapter provided both general and specific recommendations; specifically on the role of the tax man and stake holders in matters tax; since they are all separate parts that play different but important roles. This done with collective effort and oneness, would lead to efficient administration matters double taxation.

Bibliography

Books

Akech M (2016), *Administrative Law*, (Strathmore University Press).

Mumford A (2002), *Taxing Culture: Towards a Theory of Tax Collection*, (Routledge).

Bix BH (2015), *Jurisprudence: Theory and Context*, (7th ed Thompson Reuters- Professional) UK Limited .

Lila J. Truett (1987), *Economics* (Times Mirror/Mosby College Publishing)

Reuven Avi-Yonah (2007), *Internation Tax as International Law: An Analysis of the International Tax Regime* (Cambridge University Press)

Alastair Munro (2005), *Tolley's Double Taxation Relief,* (Tolley 8th ed)

Hart HL (1997)., *The Concept of Law* (2nd edn, Oxford University Press)

The Black's Law Dictionary, 8th Edition, Pdf

Journal Articles

Akech M (2011), Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability.

https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1447&context=ijgls

Attiya Waris and Obel, 'Tax Treaties 2019' (Forthcoming)

Chand V (2015), 'The Guiding Principle and the Principal Purpose Test.' 12 484, available at

https://serval.unil.ch/resource/serval:BIB_24D4177A176A.P001/REF

The East African Community Common Market Protocol for Movement of Labour: Achievements and Challenges of Implementation of the Protocol, Report for Conference held at Nairobi Safari Club, Kenya. available at:
http://www.knqa.go.ke/wp-content/uploads/2019/05/East-AQfrican-comon-market-protocol.pdf

Coglianese, Cary and Yoo, Christopher S (2016), "The Bounds of Executive Discretion in the Regulatory State." Faculty Scholarship at Penn Law. 1715. Available at:
https://scholarship.law.upenn.edu/faculty_scholarship/1715/

Theodosopoulos A (2018), The Principal Purpose Test of the OECD Multilateral Agreement and the General Anti-Avoidance Rule of the Anti-Avoidance Directive. Available at
http://arno.uvt.nl/show.cgi?fid=146991

Diener W. Keith, A Defense of Soft Positivism:Justice and Principle Processes. Available at
https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1006&context=philosophy_theses

Gardner JA (1961), 'The Sociological Jurisprudence of Roscoe Pound (Part I): Available of
https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1522&context=vlr

Riet M Van and Lejour A (2015), 'Profitable Detours : Network Analysis of Tax Treaty Shopping' Proceedings of the Annual Conference on Taxation.
https://www.ntanet.org/wp-content/uploads/proceedings/2015/003-riet-lejour-profitable-detours-network-analysis-treaty.pdf

Sheskin A, A Critical Review and Assessment of the Socialogy of Law. (Social Thought and Research). Available at: https://www.jstor.org/stable/23252535

ICPAK (2015), 'Kenya's Revenue Analysis: A Historical Perspective to Revenue Performance in Kenya, 2010-2015.' Available at: https://www.icpak.com/wp-content/uploads/2016/10/ICPAK-FISCAL-ANALYSIS-2010-2015.pdf

Jogarajan S (2011), 'Prelude to the International Tax Treaty Network: 1815-1914 Early Tax Treaties and the Conditions for Action.' 31 Oxford Journal of Legal Studies 679. Available at: https://doi.org/10.1093/ojls/gqr021

Government of Kenya, 'Agreement Between the Government of the Republic of Kenya and the Government of the Republic India for the Avoidance of Double Taxation and the Preservation of Fiscal Evasion with Respect to Taxes on Income'

Mugo J, Double Taxation Agreements: the Way Forward. Available at: https://www.icpak.com/wp-content/uploads/2016/09/Double-taxation-agreements-the-way-forward-by-Jemimah-Mugo.pdf

Lacey N (2007), H.L.A Hart's Rule of Law: The Limits of Philosophy in Historical Perspective. Available at: http://www.centropgm.unifi.it/quaderni/index.htm

Law D, Graetzt MJ and Heartt MMO (2019), 'The " Original Intent " of U . S . International Taxation Author (s): Michael J. Graetz and Michael M . O' Hear Stable URL : Https://Www.Jstor.Org/Stable/1372916U.S.InternationalTaxationSpecificSourceRules.1054

Okello A (2014), Managing Income Tax Compliance Through Self Assessement. Available at: https://www.imf.org/external/pubs/ft/wp/2014/wp1441.pdf

Peart J (2016), 'Kenya Double Taxation Agreements' PWC, Http://Taxsummaries.Pwc.Com/ID/Kenya-Individual-Foreign-Tax-Relief-and-Tax-Treaties

Waris A (2007), 'Taxation without Principles: A Historical Analysis of the Kenyan Taxation System' (Kenya Law Review)

Wisotsky S (2009), 'How to Interpret Statutes - Or Not : Plain Meaning and Other Phantoms' 10 Working C and Series P, Public Finance under Kenya ' s New Constitution Public Finance under Kenya ' s New Constitution

Society RS, 'League of Nations Report on Double Taxation Submitted to the Financial Committee by Professors Bruins , Einaudi , Seligman , and Sir Josiah Stamp Author (s): W . H . Coates Source : Journal of the Royal Statistical Society , Vol . 87 , No . 1 (Jan ., 1' (2014) 87 99

Sol P, 'The Interactions of National and International Tax Law and the Kenya- Mauritius Tax

Treaty' (2019) 1 Financing for Development 1

Studies TP, *E-Commerce: Transfer Pricing and Business Profits Taxation*

Sunstein CR and others (2019), 'Interpreting Statutes in the Regulatory State Published by : The Harvard Law Review Association | Harvard Law Review |' 103 405. Available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12320&context=journal_articles

Quak E and Timmis H, 'Double Taxation Agreements and Developing Countries' https://assets.publishing.service.gov.uk/media/5b3b610040f0b645fd592202/Double-Taxation-Treaties_and_Developing_Countries.pdf

Radu ME (2012), 'International Double Taxation' 62 Procedia - Social and Behavioral Sciences 403. Available at: http://linkinghub.elsevier.com/retrieve/pii/S1877042812035069

Reviews

Harvard Law Review (1911), 'The Scope and Purpose of Sociological Jurisprudence [Continued]' Vol. 25, No, 2, pp. 140-168. URL: Https://Www.Jstor.Org/Stable/1324392

Hearson M and Kangave J (2016), A Review of Uganda ' s Tax Treaties and Recommendations for Action Working Paper Working Paper 50 A Review of Uganda ' s Tax Treaties and Recommendations for Action.Available at:

https://www.ictd.ac/publication/a-review-of-uganda-s-tax-treaties-and-recommendations-for-action/

Thesis

Gutuza Tracy (2013), 'An Analysis of the Methods Used in the South African Domestic Legislation and in Double Taxation Treaties Enetered into by South Africa for the Elimination of International Double Taxation' (University of Cape Town).

Kipsang I (2004), 'A History of the Direct Taxation of the African People of Kenya, 1895-1973' (Rhodes University)

Njaramba Gichuki E (2015), 'Tax Administration Reforms in Kenya; Identifying Lessons to Model a Strategy for Sustainable Administration of County Taxes' (University of Nairobi).

Simiyu KI (2012), 'Regulation of Discretion in Public Procument in Kenya, (University of Nairobi)

Zachée P. Tinhanga (2016), From Avoiding 'Double Taxation' Yesterday to Avoiding 'Double Non-Taxation' Today : The Urgent Need for an International Tax Regime Based on Unitary Tax Principles' (University of Michigan Law School)
https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1005&context=sjd

http://hdl.handle.net/11427/4628

Websites

www.kra.go.ke

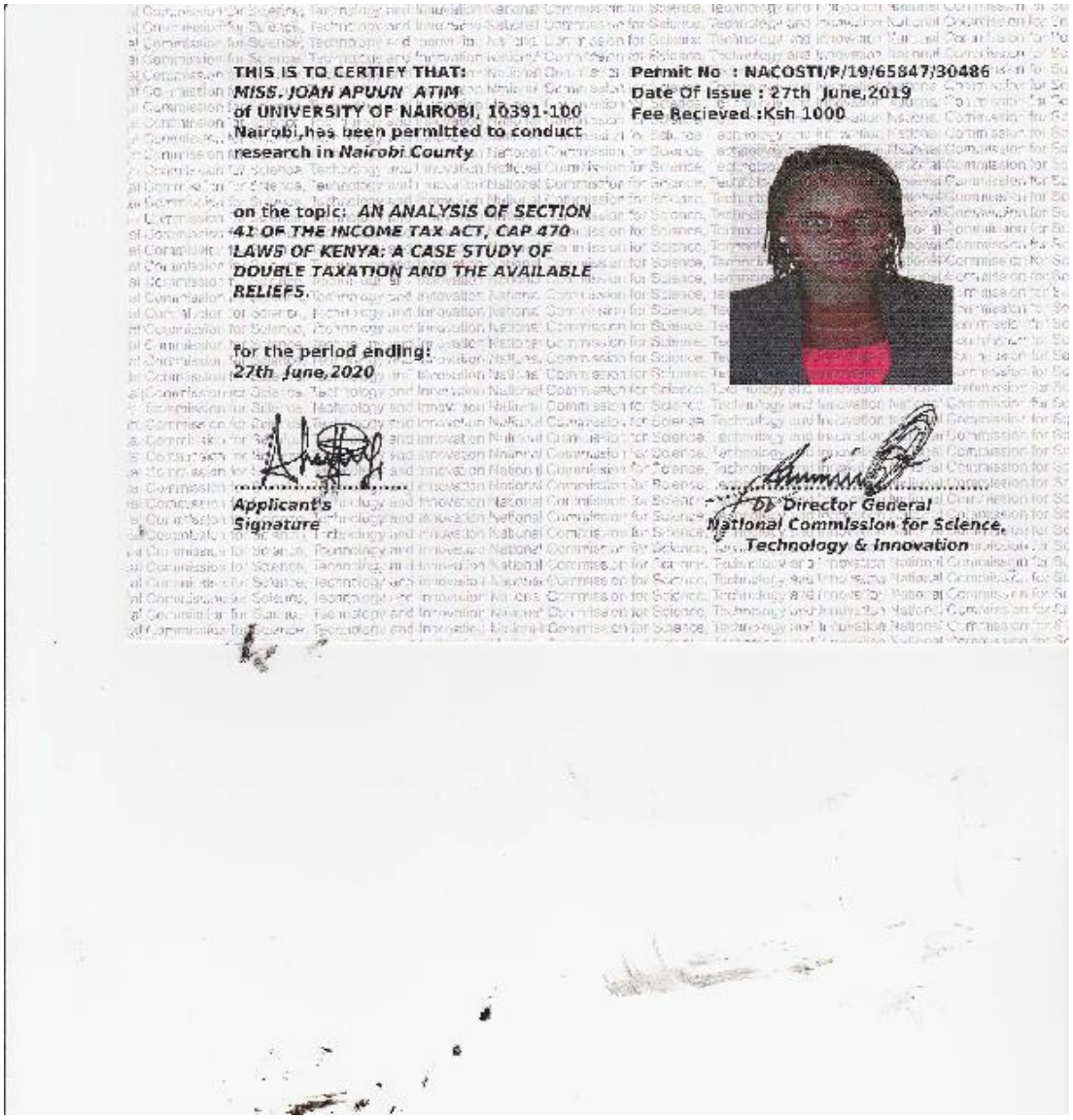
www.treasury.go.com

http://www.treasury.go.ke/publications/guidelines.html

https://www.worldometers.info/world-population/Kenya-population/

https://cfs.uonbi.ac.ke/revenue_expenditure.html

NACOSTI PERMIT



THIS IS TO CERTIFY THAT:
MISS. JOAN APUUN ATIM
of UNIVERSITY OF NAIROBI, 10391-100
Nairobi,has been permitted to conduct
research in *Nairobi County*

on the topic: *AN ANALYSIS OF SECTION 41 OF THE INCOME TAX ACT, CAP 470 LAWS OF KENYA: A CASE STUDY OF DOUBLE TAXATION AND THE AVAILABLE RELIEFS.*

for the period ending:
27th June,2020

Permit No : NACOSTI/P/19/65847/30486
Date Of Issue : 27th June,2019
Fee Recieved :Ksh 1000

Applicant's Signature

Director General
National Commission for Science, Technology & Innovation

Republic of Kenya

MINISTRY OF EDUCATION
STATE DEPARTMENT OF EARLY LEARNING AND BASIC EDUCATION

Telegrams: "SCHOOLING", Nairobi
Telephone; Nairobi 020 2453699
Email: rcenairobi@gmail.com
cdenairobi@gmail.com

When replying please quote

REGIONAL DIRECTOR OF EDUCATION
NAIROBI REGION
NYAYO HOUSE
P.O. Box 74629 – 00200
NAIROBI

Ref: RCE/NRB/GEN/VOL.1

DATE: 16th July, 2018

Joan Apuun Atim
University of Nairobi
P. O. Box 30197-00100
NAIROBI.

RE: RESEARCH AUTHORIZATION

We are in receipt of a letter from the National Commission for Science, Technology and Innovation regarding research authorization in Nairobi County on "***An analysis of section 41 of the Income Tax Act, Cap 470 laws of Kenya: A case study of double taxation and the available reliefs.***"

This office has no objection and authority is hereby granted for a period ending **27th June, 2020** as indicated in the request letter.

Kindly inform the Sub County Director of Education of the Sub County you intend to visit.

REGIONAL DIRECTOR OF EDUCATION
16 JUL 2019
MINISTRY OF EDUCATION
P.O. Box 74629 - 00200 NAIROBI

DRUSCILLA MOSIORI
FOR: REGIONAL DIRECTOR OF EDUCATION
NAIROBI

Copy to: Director General/CEO
National Commission for Science, Technology and Innovation
NAIROBI

APPENDIX 2 (A)

QUESTIONNAIRES FOR STATE AND NON-STATE ACTORS

Section 1: identification

a. Questionnaire number_____

b. Residence_____

c. Occupation_____

d. Date of filling questionnaire_____

Section 2: background information

1. Age (tick the appropriate age bracket)
    a. 18 to 25 years_____
    b. 26 to 35 years_____
    c. 36 to 45 years_____
    d. 46 and above years_____
2. What is your level of education?
    a. Primary_____
    b. Secondary_____
    c. Tertiary institution_____
    f. Nil_____

3. What is your religion?
    a. Christian_____

b. Muslim_____

c. Others (specify) _____

4. What is your main source of income?

a. Employment_____

b. Business_____

c. Agriculture_____

d. Others (specify) _____

Section 3 taxation in Kenya

5. Are you are registered Taxpayer? If, answered in affirmative proceed, kindly proceed to answer under what category by ticking the appropriate column.

Type of Taxpayer	Company/business	Individual
Resident Taxpayer		
Non-resident Taxpayer		

6. Do you file annual returns?

_____

a. In filing your returns, do you declare your foreign sourced income?

i. Yes. ☐ ii. No. ☐

b. If the answer in 6 above is no, proceed to explain why?

_____

_____

_____

Section 4: double taxation

7. Have you ever heard or come across the term double taxation (double taxation)? (Tick the appropriate answer)

a. Yes. ☐ b. No. ☐

8. If answer in 7 above is in affirmative, kindly define or explain double taxation.

_____

_____

_____

9. Do you know of any types of double taxation?

a. yes. ☐ b. no. ☐

10. If, the answer to 9 above is yes, what are the types of double taxation?

_____

_____

_____

11. What law provides for double taxation in Kenya?

_____

12. What type of taxpayers' suffers double taxation? (Tick the answers you deem right)

a. Companies ☐ b. Individuals ☐

c. Governments ☐ c. County governments ☐

13. Why do you think double taxation occurs?

_____

_____

_____

14. Have you suffered an instance of double taxation?

a. Yes. ☐ b. No. ☐

Section 5: double taxation agreements (double taxations)

15. Do you know what DTAs are?

a. Yes. ☐ b. No. ☐

16. Who is responsible for DTAs in Kenya?

_____

1. Why are DTAs made?

_____

_____

2. List any four (4) DTAs that you know about in Kenya.

_____

_____

_____

_____

Section 6: available reliefs

3. Are there ways double taxation is being addressed in Kenya? Name them?

_____

_____

_____

_____

20. Do you know of any reliefs used as a method for eliminating or reducing double taxation in Kenya and elsewhere? (Tick the appropriate answer)

a. Yes. ☐ b. No. ☐

21. If yes, list the reliefs.

_____

_____

_____

_____

22. Are the reliefs mentioned above automatically available to the Taxpayer?

a. Yes. ☐ b. No. ☐

23. Give reasons for your answer above.

_____

_____

_____

24. Do you think these reliefs are effective in addressing instances of double taxation? And which is the best method in your opinion?

_____

_____

_____

_____

Section 7: recommendations

25. How should the regulatory and policy frame work around double taxation be improved in Kenya?

_____

_____

_____

26. What recommendations do you have regarding the subject under study?

_____

_____

_____

_____

-The end-

Thank you!

Appendix (B)

Interview guide for KRA officials

The researcher will use an interview guide to elicit information from the key informants.

1. **Setting the scene (2 minutes)**
    a. Welcome the interviewee (respondent) and introduce yourself
    b. Explain the purpose of the interview (show the NACOSTI permit)
    c. Get the respondent's informed consent
    d. Explain to the respondent that confidentiality will be observed

2. **Data collection (30 minutes)**
    a. Title (senior/junior officer at KRA)
    b. Sex
    c. What is your take on section 41 of the income tax act?
    d. Do you belief that it sufficiently addresses the issue of double taxation? Why?
    e. What type of double taxation is predominant in Kenya and why?
    f. Which categories of Taxpayers suffer double taxation most?
    g. Tell me more about the method of assessment and has it proved efficient vv the number of registered Taxpayers?
    h. Do you have Taxpayers who actually declare their foreign sourced income?
    i. Tax/taxing culture and what is KRA doing about it?
    j. How efficient is the system in handling matters double taxation basing on the fact that KRA relies on the Taxpayer for information.

k. What is the revenue KRA gets from persons who suffer double taxation and is the same part of revenue collection?

l. What are the available reliefs and how do they work?

m. Credit (which is almost a default method) and exemption methods are predominant why so? How about exemption, exclusion and reduction as provided for under section 41? How do they work?

n. Has KRA enforced any form of double taxation relief so far? How? Is it beneficial?

o. Has KRA likewise granted any relief? Which type of relief is predominant and why?

p. Can you explain how the reliefs work? Give an example two forms of relief?

q. How easy or otherwise is/was administration of the reliefs?

r. What do you have to say about the minister's powers when it comes to section 41?

s. What is your take on the influence of politics on the negotiations of DTAs?

t. How should the law around double taxation in Kenya be improved?

u. What recommendations do you have for the researcher's area under study

Appendix (C)

Interview guide for advocates in practice

The researcher will use an interview guide to elicit information from the key informants.

1. **Setting the scene (2 minutes)**
    e. Welcome the interviewee (respondent) and introduce yourself
    f. Explain the purpose of the interview (show the NACOSTI permit)
    g. Get the respondent's informed consent
    h. Explain to the respondent that confidentiality will be observed

2. **Data collection (20 minutes)**
    a. Title (private practice/in-house)
    b. Sex
    c. What is your take on section 41 of the income tax act?
    d. What is your understanding of double taxation?
    e. What types of double taxation? And what is type is common in Kenya?
    f. Have you come across any cases and or litigated on double taxation in your practice of law at whatever capacity? What was particularly eye catching for you?
    g. Do you belief that it's sufficiently addresses the issues of double taxation? Why?
    h. Is KRA efficient in its administration in this area of the tax?
    i. What is your understanding of double taxation agreements and how do they eliminate instances of double taxation?

j. Are you aware of the tax justice network case against the DTA signed between Kenya and Mauritius and what were the pronouncements made by the court? Of what value is it to the Kenya taxpayer?

k. What are the available reliefs in instances of double taxation and how does it work?

l. How should the law around double taxation in Kenya be improved?

m. What recommendations do you have for the researcher's area under study?

Appendix (D)

Interview guide for business entities/individuals working outside Kenya

(This may even be sent online via email)

The researcher will use an interview guide to elicit information from the key informants.

1. **Setting the scene (2 minutes)**
    i. Welcome the interviewee (respondent) and introduce yourself
    j. Explain the purpose of the interview (show NACOSTI permit)
    k. Get the respondent's informed consent
    l. Explain to the respondent that confidentiality will be observed
2. **Data collection (20 minutes)**
    a. Title in the company
    b. Have you suffered any instance of double taxation?
    c. What type of double taxation did you suffer? Kindly explain.
    d. Why did you suffer double taxation?
    e. In paying the tax, did KRA give you any reliefs and why?
    f. What is your take on section 41 of the income tax act?
    g. Do you belief that it's sufficiently addresses the issues of double taxation? Why?
    h. Is KRA efficient in its administration in this area of the tax? Give reasons for your answer.
    i. Is there a DTA between Kenya and the country you are in?
    j. What is your understanding of double taxation agreements and how do they eliminate instances of double taxation?
    k. How should the law around double taxation in Kenya be improved?

l. What recommendations do you have for the researcher's area under study

-The end-

Thank you!