



LEGAL AND POLICY DIVISION

**INTERNATIONAL TREATY
DEVELOPMENT UNIT (ITD)**

**INTERNAL GUIDE ON THE TAXATION OF
TECHNICAL FEES AS PROVIDED UNDER ARTICLE 13
OF THE LESOTHO-SOUTH AFRICA RENEGOTIATED
DTA**

Objective

The purpose of this guide is to provide a definition of what constitutes technical fees which will be taxable under Article 13 of Lesotho-South Africa Double Taxation Agreement (DTA).

Lesotho and South Africa have a renegotiated DTA which has changed the previous rate of withholding tax (WHT) from 10% to 7.5%. This means that effective from the 27th June 2016, the WHT rate that applies on all services of a technical nature provided by residents of South Africa to Lesotho is 7.5%.

Definitions

Income Tax Act defines technical services contract as:

“...a contract under which accounting, auditing, economic, financial, legal, management, engineering, architectural, surveying, or other similar professional service is performed.”

The Act further goes on to clarify Lesotho source services contract as a contract under which the primary purpose is the performance of services whether or not goods are provided.

These services are taxable under section 107 for non-residents of Lesotho, at the rate of 10% on the gross amount of payment.

Lesotho-SA DTA on the other hand defines technical fees in Article 13, as:

“...payments of any kind to any person, other than to an employee of the person making the payments, in consideration for any service of a technical, managerial or consultancy nature.”

Further definition and practical application

Lesotho follows international practice and standards in defining technical services, since these are not clearly defined in the Act. Where taxation of technical fees applies, Lesotho follows the UN Model which provides the following descriptions;

- **Service of a managerial nature**

The ordinary meaning of the term “**management**” involves the application of knowledge, skill or expertise in the control or administration of a commercial enterprise or organization. Thus, if the management of all or a significant part of an enterprise is contracted out to persons other than the directors, officers or employees of the enterprise, payments made by the enterprise for those management services would be fees for technical services.

- **Service of a technical nature**

The ordinary meaning of the term “**technical**” involves the application of specialized knowledge, skill or expertise with respect to a particular art, science, profession or occupation. Therefore, fees received for services provided by regulated professions such as law, accounting, architecture, medicine, engineering and dentistry would be fees for technical services. Services performed by other professionals, such as pharmacists, and other occupations, such as scientists, academics, etc., may also constitute technical services if those services involve the provision of specialized knowledge, skill and expertise.

- **Service of a technical nature**

The ordinary meaning of "**consultancy**" involves the provision of advice or services of a specialized nature. Professionals usually provide advice or services that fit within the general meaning of consultancy services although; they may also constitute management or technical services.

The list of technical services in the Income Tax Act complements the examples provided above. When these services are provided on a contractual basis by a resident of South Africa to a resident of Lesotho, Article 13 of the DTA will apply. This is different from when such a professional sets up a place of business in Lesotho to perform such services on a routine basis. In that instance, the professional will have to be registered and taxable as a resident of Lesotho for tax purposes.

Application of Article 13

For proper application of this article, factors that come into play will be as follows:

- Is the service provider a resident of South Africa?
- Are services being performed under a service contract with a resident of Lesotho?
- Do the contracted services require special knowledge and skills to be performed?

Where these factors are not applicable, the services will be taxable under other articles of the DTA according to their terms. This will depend on whether the non-resident professional has a place of business (permanent establishment) in Lesotho, under which it would otherwise be taxable.

It also advisable that where there is uncertainty in the application of Article 13, a copy of the services contract should be studied to provide further guidance on the approach and kind of services that are going to be performed.