



# **DANGERS OF DOUBLE TAXATION AGREEMENTS (DTAS) IN FINANCING DEVELOPMENT IN AFRICA: CASE STUDY OF GHANA**

**Ghana Integrity Initiative  
2019**

Established in 1999, Ghana Integrity Initiative (GII) is a non-partisan, non-profit civil organisation focused on addressing corruption. GII is the local Chapter of Transparency International (TI), the global, non-governmental, non-profit civil society organisation leading the fight against corruption through more than 90 chapters and over 30 individual members worldwide with its International Secretariat in Berlin, Germany.

The vision of GII is

“a corruption-free society where all people and institutions act accountably, transparently and with integrity”.

The mission of GII is

“to fight corruption and promote good governance in the daily lives of people and institutions by forging strong, trusting and effective partnership with government, business and civil society and engagement with the people”.

Produced by:  
Ghana Integrity Initiative (GII)  
Compiled by:  
Abdallah Ali-Nakyea

Edited by:  
Benedict Doh  
Linda Ofori-Kwafo  
Mary Awelana Addah

Every effort has been made to verify the accuracy of the information contained in this report. All information was believed to be correct as of November 2019. Nevertheless, Ghana Integrity Initiative cannot accept responsibility for the consequences of its use for other purposes or in other contexts.

© Ghana Integrity Initiative, November 2019. All rights reserved

## Table of Contents

<b>1.0</b>	<b>INTRODUCTION</b> .....	<b>3</b>
<b>1.1</b>	<b>BACKGROUND OF FINANCING DEVELOPMENT</b> .....	<b>3</b>
<b>1.2</b>	<b>METHODOLOGY</b> .....	<b>4</b>
<b>2.0</b>	<b>IMPORTANCE OF FINANCING FOR DEVELOPMENT</b> .....	<b>5</b>
<b>3.0</b>	<b>THE ROLE OF DTAs IN FINANCING DEVELOPMENT</b> .....	<b>10</b>
<b>3.1</b>	<b>PURPOSE OF DTAs</b> .....	<b>10</b>
<b>3.2</b>	<b>FOREIGN DIRECT INVESTMENT AND DTAs</b> .....	<b>12</b>
<b>TABLE 1:</b> .....		<b>16</b>
<b>4.0</b>	<b>CASE STUDIES OF GHANA</b> .....	<b>17</b>
<b>4.1</b>	<b>IMPACT OF DTAs BETWEEN THE UNITED KINGDOM AND GHANA AND THE REPUBLIC OF SOUTH AFRICA AND GHANA ON TAXING RIGHTS IN GHANA</b> .....	<b>17</b>
<b>4.1.1</b>	<b>IMPACT OF THE DTAs ON TAXATION OF PERMANENT ESTABLISHMENT</b>	<b>18</b>
<b>4.1.2</b>	<b>IMPACT OF THE DTAs ON TAXATION OF DIVIDENDS</b> .....	<b>23</b>
<b>4.1.3</b>	<b>IMPACT OF THE DTAs ON TAXATION OF INTEREST</b> .....	<b>25</b>
<b>4.1.4</b>	<b>IMPACT OF THE DTAs ON TAXATION OF ROYALTIES</b> .....	<b>28</b>
<b>4.1.5</b>	<b>IMPACT OF THE DTAs ON TAXATION OF MANAGEMENT FEES</b> .....	<b>31</b>
<b>5.0</b>	<b>FINDINGS AND CONCLUSION</b> .....	<b>33</b>
<b>6.0</b>	<b>POLICY RECOMMENDATIONS</b> .....	<b>37</b>
<b>6.1</b>	<b>REVIEW AND RE-NEGOTIATION OF EXISTING DTAs</b> .....	<b>37</b>
<b>6.2</b>	<b>IMPLEMENTATION OF THE DTA POLICY</b> .....	<b>38</b>
<b>6.3</b>	<b>BUILDING CAPACITY OF TREATY NEGOTIATORS</b> .....	<b>39</b>
<b>6.4</b>	<b>REVIEW OF GHANA’S MODEL DTA</b> .....	<b>39</b>
<b>6.4.1</b>	<b>Article 5: Permanent Establishment</b> .....	<b>39</b>
<b>6.4.2</b>	<b>Article 10: Dividends</b> .....	<b>40</b>
<b>6.4.3</b>	<b>Article 11: Interest</b> .....	<b>41</b>
<b>6.4.4</b>	<b>Article 12: Royalties</b> .....	<b>42</b>
<b>6.4.5</b>	<b>Article 13: Services Fees</b> .....	<b>42</b>
<b>6.4.6</b>	<b>Addressing BEPS</b> .....	<b>43</b>

## 1.0 INTRODUCTION

### 1.1 BACKGROUND OF FINANCING DEVELOPMENT

Agenda 2063 is anchored on the principle of self-reliance, with Africa financing its own development and it identifies domestic resource mobilization as a key component in financing development.

Financing development represents a collective effort at providing strategies for combating poverty, inequality, environmental degradation and climate change on a global scale. The essence of the Addis Ababa conference was to apportion roles and responsibilities to all stakeholders to achieve the above stated objective.

African countries settled on the Aspirations of Vision 2063 which envisions that Africa becomes a self-sufficient continent which can boast of systems of good governance and with an empowered citizenry.

To achieve this vision, a ten-year implementation plan which encompasses principles such as diversity, subsidiarity, inclusiveness and results orientation intended to guide all stakeholders in the implementation process was developed.<sup>1</sup>

The First Ten-Year Implementation plan seeks to achieve among others, a high standard of living with better quality of life for all citizens, transformed economies, establishment of functional continental financing and monetary institutions, infrastructural development and an Africa that takes full responsibility for financing her development<sup>2</sup>.

A key component of attaining the aspirations of Agenda 2063 is financing. Domestic resource mobilization (DRM) is supposed to contribute between 75% to 90% of the financing of Agenda 2063. To achieve this, tax policies and tax administration must be improved to facilitate efficient and effective resource mobilization.<sup>3</sup> It is therefore

---

<sup>1</sup> The African Union Commission, AGENDA 2063 The Africa We Want A Shared Strategic Framework for Inclusive Growth and Sustainable Development FIRST TEN-YEAR IMPLEMENTATION PLAN 2014 – 2023 September 2015 at 13.

<sup>2</sup> The African Union Commission, AGENDA 2063 The Africa We Want A Shared Strategic Framework for Inclusive Growth and Sustainable Development FIRST TEN-YEAR IMPLEMENTATION PLAN 2014 – 2023 September 2015 at 18.

<sup>3</sup> A Trepelkov, H Tonino & D Halka (eds) United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries 2<sup>nd</sup> Ed at 6.

necessary that the tax base be broadened and efforts intensified at curbing tax evasion and avoidance. To this end, the Financing for Development Office of the United Nations Department of Economic and Social Affairs has developed programs aimed at strengthening the capacity of developing countries to increase the potential for domestic revenue mobilization through enhancing their ability to effectively protect and broaden the tax base.<sup>4</sup>

Revenue sustainability can only be achieved if developing nations take steps to protect the domestic tax base.<sup>5</sup> This protection can be achieved by limiting the deduction of interest and other financing expenses, preventing the avoidance of permanent establishment (PE) status, protecting the tax base in the digital economy, preventing tax treaty abuse, preserving the taxation of capital gains by source countries and tax incentives among others.<sup>6</sup>

## 1.2 METHODOLOGY

The study was conducted using a qualitative approach which basically involved a review of the key aspects of Ghana's Double Taxation Agreement (DTA) with the United Kingdom and South Africa to determine the impact of these DTAs on the tax base of Ghana and the threat they pose to Ghana's efforts to raise domestic revenue to finance its development.

The study uses data for the period 2010 to 2015 when the income tax law in force in Ghana was the Internal Revenue Act, 2000 (Act 592). The study does not contain an estimate of the actual revenue sacrificed as a result of the DTAs since data on remittances made to persons resident in the United Kingdom and South Africa could not be obtained.

The critical review of the provisions of the two DTAs contained in this study are limited to Permanent Establishment, Dividend, Interest, Royalties and Management Fees which are

---

<sup>4</sup> A Trepelkov, H Tonino & D Halka (eds) United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries 2<sup>nd</sup> Ed at 6.

<sup>5</sup> A Trepelkov, H Tonino & D Halka (eds) United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries 2<sup>nd</sup> Ed at 5.

<sup>6</sup> A Trepelkov, H Tonino & D Halka (eds) United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries 2<sup>nd</sup> Ed at 7.

the key components which have a direct impact on the domestic tax base of the treaty partners.

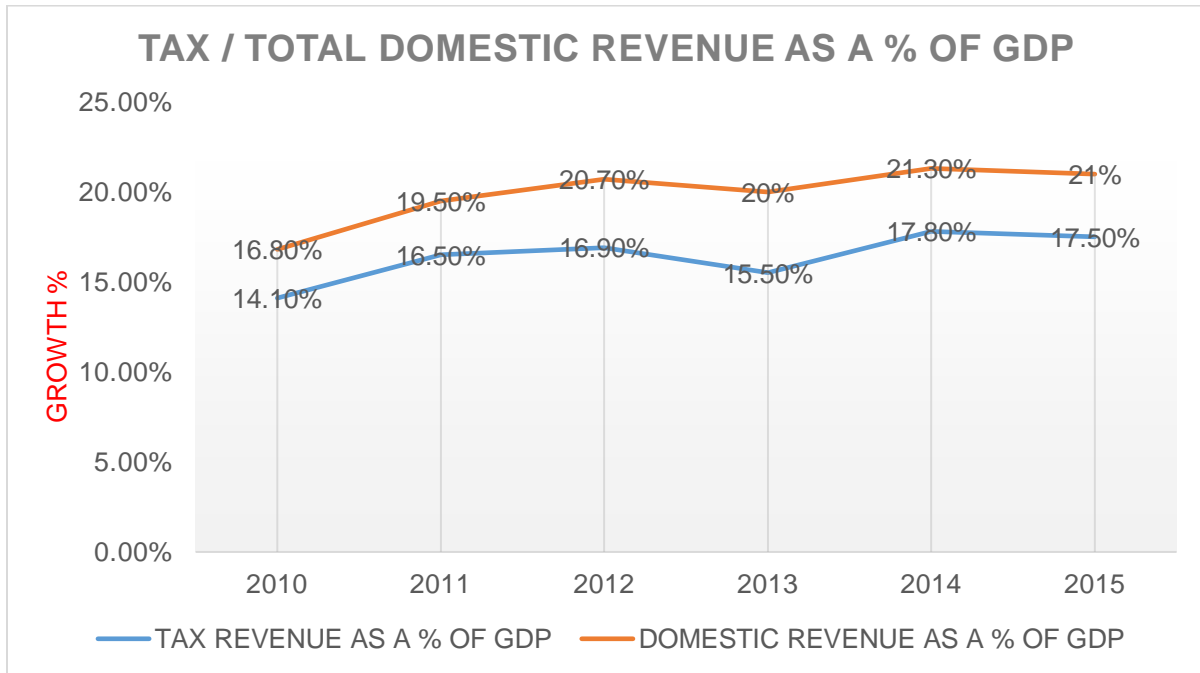
The study is structured in six parts. The first part deals with Introduction and Background to the study. The second part addresses the need for financing development, drawing on the options adopted by Ghana in financing its development and the challenges associated with financing development through domestic resource mobilization. The third part focuses on DTAs and their role in financing development. The fourth part critically examines the DTAs and their impact on the taxing rights of Ghana. Part five of this study summarises the findings and conclusion and part six discusses the policy recommendations.

## **2.0 IMPORTANCE OF FINANCING FOR DEVELOPMENT**

African countries finance their developmental activities through a mixture of domestic revenue, grants and borrowing. The experience over the years has shown that tax revenue in Ghana has been insufficient to meet the financing needs of the country.

Tax revenue as a percentage of Ghana's GDP at market prices for the period 2010 to 2015 as well as total domestic revenue as a percentage of GDP at market prices for the same period is presented in Fig. 1 below:

Fig. 1



From the graph above, it is clear that tax revenue as a percentage of GDP ratio at market prices increased from 14.1% in 2010 to 16.5% in 2011 and to 16.9% in 2012. The rate declined from 16.9% in 2012 to 15.5% in 2013. In 2014, there was an increase in the rate from 15.5% to 17.3% and a slight increase to 17.5% in 2015.<sup>7</sup>

Total domestic revenue as percentage of GDP which stood at 16.8% in 2010 increased to 21% in 2015.<sup>8</sup>

Total expenditure in Ghana as a percentage of GDP at market prices declined from 25% in 2010 to 22.5% in 2011 but increased from 22.5% in 2011 to 27.9% in 2012. In 2013, total expenditure as a percentage of GDP increased from 28.1% to 28.4% but declined to 26.7% in 2015.<sup>9</sup>

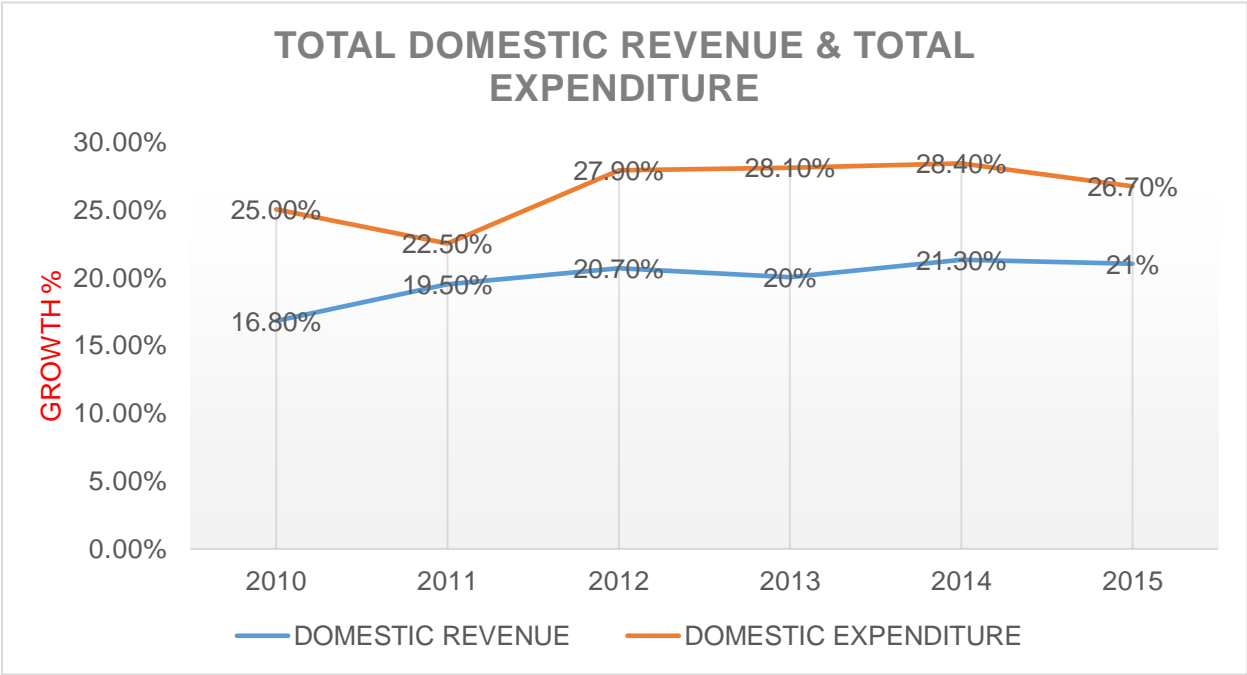
<sup>7</sup> West African Monetary Institute Annual Report and Statement of Accounts for Year Ended 31<sup>st</sup> December 2015 at 64.

<sup>8</sup> West African Monetary Institute Annual Report and Statement of Accounts for Year Ended 31<sup>st</sup> December 2015 at 64.

<sup>9</sup> West African Monetary Institute Annual Report and Statement of Accounts for Year Ended 31<sup>st</sup> December 2015 at 64

A comparison of the total domestic revenue for the period 2010 to 2015 to the total expenditure for the same period shows that Ghana's expenditure exceeded its total domestic revenue for the period and this resulted in deficits for every year within the period as shown in Fig 2 below:

Fig. 2



The overall deficit on commitment basis excluding grants as a percentage of GDP declined from 8.3% in 2010 to 2.9% in 2011. However, the deficit spiked from 2.9% in 2011 to 7.3% in 2012 and increased further to 8.1% in 2013. In 2014, there was slight decline to 7.1% and a further decline to 5.7% in 2015.<sup>10</sup>

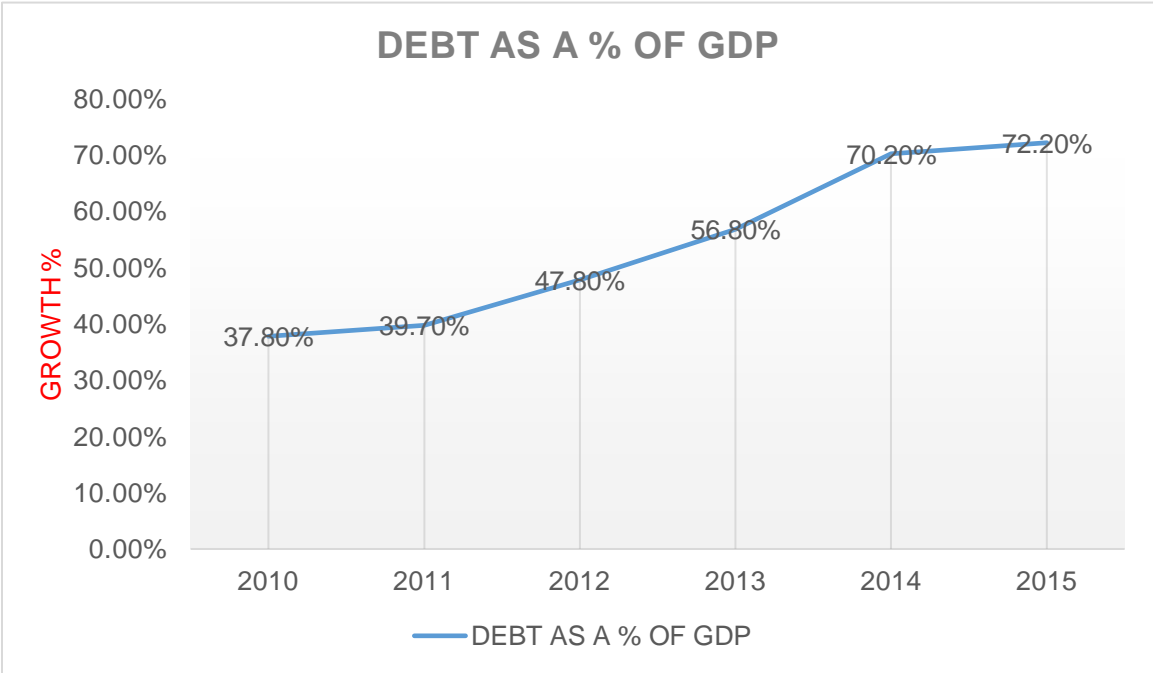
Due to inadequate domestic revenue and the unreliable nature of foreign aids or grants as a component of the financing structure of most African countries, most African countries including Ghana have resorted to borrowing as a means of development

<sup>10</sup> West African Monetary Institute Annual Report and Statement of Accounts for Year Ended 31<sup>st</sup> December 2015 at 64



financing and this has resulted in high debt to GDP ratios with debt reaching unsustainable levels as shown in Fig 3 below.

Fig. 3



Ghana’s debt as a percentage of GDP increased from 37.8%<sup>11</sup> in 2010 to 39.7%<sup>12</sup> in 2011 and to 47.8%<sup>13</sup> in 2012. In 2013, debt as a percentage of GDP was 56.8%<sup>14</sup> which represents an increase of 9% from the debt level in 2012. In 2014, the debt increased by 13.4% from the 2013 levels to reach 70.2%<sup>15</sup> of GDP. There was a further increase to 72.2%<sup>16</sup> in 2015.

<sup>11</sup> Para 111 (Fig 7) of the Budget Statement and Economic Policy of the Government of Ghana for the 2015 Financial Year.  
<sup>12</sup> Para 111 (Fig 7) of the Budget Statement and Economic Policy of the Government of Ghana for the 2015 Financial Year  
<sup>13</sup> Para 124 (Fig 3) of the Budget Statement and Economic Policy of the Government of Ghana for the 2017 Financial Year  
<sup>14</sup> Para 124 (Fig 3) of the Budget Statement and Economic Policy of the Government of Ghana for the 2017 Financial Year  
<sup>15</sup> Para 124 (Fig 3) of the Budget Statement and Economic Policy of the Government of Ghana for the 2017 Financial Year  
<sup>16</sup> Para 124 (Fig 3) of the Budget Statement and Economic Policy of the Government of Ghana for the 2017 Financial Year

The external component of Ghana's public debt as a percentage of GDP increased from 19.9% in 2010 to 42.8% in 2015.<sup>17</sup> The external debt service payments as a percentage of GDP which stood at 1% in 2010, increased to 32% in 2015.<sup>18</sup>

From the tax revenue raised by Ghana in 2010, 8.9% was used to pay wages and salaries however in 2015, 49.6% of tax revenue was used to pay wages and salaries.<sup>19</sup> Due the huge wage bill and the high debt servicing payments, the percentage of tax revenue committed to domestic investment expenditure dropped from 14.7% in 2010 to 3.8% in 2015.<sup>20</sup> Given the declining levels of resources allocated to domestic investment expenditure, real GDP growth which stood at 7.9% in 2010 declined to 3.9% in 2015.<sup>21</sup>

The challenges of raising enough revenue to finance developmental activities in most African countries including Ghana can be attributed to two main issues - identifying the taxpayer and tracking the income of taxpayers. On the issue of taxpayer identification, the recent attempts by the Ghana Revenue Authority to enforce the use of a Taxpayer Identification Number (TIN) before a taxpayer can access services from state institutions is aimed at addressing the issues associated with identifying people for tax purposes in order to improve as well as ensure tax compliance. Under the First Schedule to the Revenue Administration Act, 2016 (Act 915) unless a person quotes a Taxpayer Identification Number issued to that person, a person shall not be permitted:

- a. To clear any goods from any port or factory;
- b. To register any title to land, interest in land or any document affecting land;
- c. To obtain any Tax Clearance Certificate from the Ghana Revenue Authority;
- d. To obtain a certificate to commence business or a business permit issued by the Registrar-General or local authority;

---

<sup>17</sup> West African Monetary Institute Annual Report and Statement of Accounts for Year Ended 31<sup>st</sup> December 2015 at 68.

<sup>18</sup> West African Monetary Institute Annual Report and Statement of Accounts for Year Ended 31<sup>st</sup> December 2015 at 68

<sup>19</sup> West African Monetary Institute Annual Report and Statement of Accounts for Year Ended 31<sup>st</sup> December 2015 at 64

<sup>20</sup> West African Monetary Institute Annual Report and Statement of Accounts for Year Ended 31<sup>st</sup> December 2015 at 64

<sup>21</sup> Para 65 (Fig 1) of the Budget Statement and Economic Policy of the Government of Ghana for the 2017 Financial Year

- e. To register a co-operative;
- f. To receive payment from the Controller and Accountant-General or Local Government Authority in respect of a contract for the supply of any goods, works or provision of any services;
- g. To receive a payment subject to withholding under the Income Tax Act, 2015 (Act 896)
- h. To file a case with the Courts; or
- i. To conduct any official business with the institutions and persons specified in paragraph 1 of Part I of the First Schedule to the Revenue Administration Act, 2016 (Act 915)<sup>22</sup>.

Tax administrators of most African countries are unable to track income of taxpayers due to the fact that most of the transactions are paid for in cash with few taxpayers demanding and obtaining receipts for payments made. Cash transactions are difficult to track because such transactions do not leave a trail which can be audited especially when receipts are not issued to cover such payments and this makes it difficult to determine whether the taxpayer is declaring the appropriate income for tax purposes.

### **3.0 THE ROLE OF DTAs IN FINANCING DEVELOPMENT**

#### **3.1 PURPOSE OF DTAs**

DTAs were developed to address the issue of double taxation of income.<sup>23</sup> To prevent double taxation, DTAs essentially modify the domestic tax laws of the contracting parties by eliminating the factors that give rise to double taxation.<sup>24</sup> The modification is achieved

---

<sup>22</sup> The Ghana Revenue Authority; the Controller and Accountant General's Department; the Registrar General's Department; the Registrar of C-operatives; the Lands Commission; the Immigration Service; the Passport Office; the Driver and Vehicle Licensing Authority; the Courts; Ministries, Departments and Agencies; Government, Sub-divisions of Government and Public Institutions not listed above; Persons required to withhold tax under the Income Tax Act, 2015 (Act 896); Banks, Insurance Companies and other Financial Institutions; Manufacturing companies; and Any other institution or person which the Minister may by Regulations prescribe.

<sup>23</sup> DT Smith "The Functions of Tax Treaties" (1959) Vol 12 No 4 *National Tax Journal* at 317.

<sup>24</sup> K Vogel "The Domestic Law Perspective" in Maisto G (ed) *Tax Treaties and Domestic Law* (2006) Vol 2 at 3.

by allocating the taxing rights between the two states so that income earned by a person who is entitled to benefits under the DTA is not taxed more than once.

Also, DTAs provide a mechanism for addressing tax avoidance and evasion.<sup>25</sup> The 2003 updated commentary to Article 1 of the OECD Model specifically stated that “*the principal purpose of double taxation conventions is to promote, by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons. It is also a purpose of tax conventions to prevent tax avoidance and evasion.*”<sup>26</sup>

Tax avoidance has been described as “*the act of dodging tax without breaking the law*”.<sup>27</sup> In other words, tax avoidance refers to any arrangement or mechanism adopted by a taxpayer aimed at reducing the liability of the taxpayer without offending the letter of the law.<sup>28</sup>

In contrast, tax evasion involves the use of illegal arrangements and or structures to reduce the tax liability of a person.<sup>29</sup> To prevent tax avoidance and evasion, DTAs contain exchange of information provisions which offer the tax administrators of the two contracting countries the opportunity to request for information on a taxpayer and also assist each other in the collection of taxes.

Apart from eliminating double taxation and preventing tax avoidance and evasion, DTAs are also noted to provide certainty on how multinational enterprises (MNEs) will be taxed.<sup>30</sup> Since tax legislations differ from one country to another, a DTA attempts to harmonize these two different tax laws and provides some common criteria for determining issues such as residence, source of income and tax rates. Thus, MNEs can structure their business activities with a clear understanding of where, how and when the income generated will be subjected to tax.

---

<sup>25</sup> Easson *Do we still Need Tax Treaties* at 622.

<sup>26</sup> OECD *Model Tax Convention on Income and on Capital para 7 of Commentary on art 1*

<sup>27</sup> GSA Wheatcroft “The Attitude of the Legislature and the Courts to Tax Avoidance” (1955) 18 *Modern Law Review* at 209.

<sup>28</sup> Rogers-Glabush *International Tax Glossary* at 34.

<sup>29</sup> Rogers-Glabush *International Tax Glossary* at 185.

<sup>54</sup> YI Hadari “Tax Treaties and Their Role in the Financial Planning of the Multinational Enterprise” (1972) Vol 20 No 1 *The American Journal of Comparative Law* at 119.

### 3.2 FOREIGN DIRECT INVESTMENT AND DTAs

Foreign direct investment (FDI) is regarded as a major driver of growth in developing countries because it provides financial resources which are most often in short supply in the developing countries.<sup>31</sup> Given the appropriate host country policies, FDI often triggers technology spillovers, assists human capital formation, contributes to international trade integration, helps create a more competitive business environment and enhances enterprise development.<sup>32</sup>

The factors which influence FDI in Ghana has generated numerous studies with emphasis on the causal link between FDI and the development of Ghana.<sup>33</sup> The significance of FDI in the global economy cannot be understated and be it positive or negative, FDI has a huge influence on state economies, especially developing economies.<sup>34</sup>

While DTAs are generally adopted by countries as a means to avoid or mitigate double taxation, there is the need to determine whether or not DTAs influence FDI in host countries generally and in Ghana in particular. The question, whether a DTA is a critical factor in attracting FDI has agitated the minds of scholars for a long time and the empirical studies conducted on the subject has produced competing but seemingly conflicting results.<sup>35</sup>

---

<sup>31</sup> I Abdulai "Sectoral Analysis of Foreign Direct Investment in Ghana" (2005) available at [https://www.bog.gov.gh/privatecontent/Publications/Staff\\_Working\\_Papers/2005/wp-15.pdf](https://www.bog.gov.gh/privatecontent/Publications/Staff_Working_Papers/2005/wp-15.pdf) accessed on 15<sup>th</sup> September, 2017.

<sup>32</sup> OECD *Foreign Direct Investment for Development; Maximising Benefits, Minimising Cost* (2002) at 5.

<sup>33</sup> S Antwi and X Zhao "Impact of Foreign Direct Investment and Economic Growth in Ghana: An Cointegration Analysis" available at <http://thejournalofbusiness.org/index.php/site/article/view/89> accessed on 13<sup>th</sup> September, 2017. B Insah "Foreign Direct Investment Flows and Economic Growth in Ghana" available at [http://www.ijept.org/index.php/ijept/article/download/Foreign\\_Direct\\_Investment\\_Inflows\\_and\\_Economic\\_Growth\\_in\\_Ghana/pdf](http://www.ijept.org/index.php/ijept/article/download/Foreign_Direct_Investment_Inflows_and_Economic_Growth_in_Ghana/pdf) accessed on 13<sup>th</sup> September, 2017. OECD "The Role of Foreign Direct Investment (FDI) in the Mining Sector of Ghana and the Environment" available at <http://www.oecd.org/countries/ghana/1819492.pdf> accessed on 13<sup>th</sup> September, 2017. JM Frimpong and EF Oteng-Abayie "Bivariate Causality Analysis Between FDI Inflows and Economic Growth in Ghana" available at <https://mpa.ub.uni-muenchen.de/351/> accessed on 13<sup>th</sup> September, 2017. J Asafu-Adjaye "What has been the Impact of Foreign Direct Investment in Ghana?" available at <http://ieagh.org/wp-content/uploads/2014/07/pol-ana-v1-n10.pdf> accessed on 13<sup>th</sup> September, 2017.

<sup>34</sup> F Barthel et al "The Relationship between Double Taxation Treaties and Foreign Direct Investment" in M Lang et al (eds) *Tax Treaties: Building Bridges between Law and Economics* (2010) at 3.

<sup>35</sup> BA Blonigen and RB Davies "Do Tax Treaties Promote Foreign Direct Investment?" in KP Sauvart

The role DTAs play in attracting FDI is of major importance to tax policy makers because DTAs (which mostly allocate the taxing rights to residence States) invariably affect the revenue that the source State can derive from taxes and thus from a revenue generating perspective, a DTA will make economic sense if the revenue sacrificed under the DTA will be compensated for by the positive economic effects from an increase in FDI as a result of the DTA.<sup>36</sup>

A study conducted to determine the FDI flows in some European countries shows that the influence of tax incentives on the level of investments in different sectors is heavily dependent on the sector of the economy receiving the investment.<sup>37</sup>

Again, a study conducted by a group of scholars concludes that if DTAs are able to reduce the tax barriers to FDI, then an increase in FDI activity after enforcement of a DTA can be expected.<sup>38</sup>

Furthermore, in instances where the DTA results in a shift of the taxing rights of the developing nation to the developed nation there is the tendency for reallocation of resources to the developing country due to lower tax cost and there is the belief that, by

---

and LE Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009) at 461.

<sup>36</sup> F Barthel et al “The Relationship between Double Taxation Treaties and Foreign Direct Investment” in M Lang et al (eds) *Tax Treaties: Building Bridges between Law and Economics* at 3.

<sup>37</sup> A Huafler and S Stowhase “Taxes as Determinants for Foreign Direct Investment in Europe” available at

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.500.7802&rep=rep1&type=pdf> accessed on 29<sup>th</sup> October, 2017. The results of the study show that investments in the primary sector such as agriculture, fishing, mining and quarrying is not influenced by tax incentives.

However, investments in the secondary sector such as manufacturing and tertiary sector such as transport and communication services are affected negatively when the tax imposed on income generated is increased.

<sup>38</sup> BA Blonigen and RB Davies “Do Tax Treaties Promote Foreign Direct Investment?” in KP Sauvart and LE Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* at 463. They find that tax treaties reduce the barriers to FDI in two ways. Firstly, through the harmonisation of the tax definitions and tax jurisdictions of treaty partners and secondly, through the influence of tax treaties on the actual statutory taxation of multinationals by providing double taxation reliefs and reducing the maximum withholding taxes levied on repatriations by FDI.

virtue of DTAs investors are encouraged by the idea of stability of their investments to invest because municipal laws will not be able to override the provisions of the treaty.<sup>39</sup>

Despite the above findings, an equal number of researchers are of the view that DTAs have little or no effect on FDI. Brooks and Krever describe DTAs as a “poisoned chalice” for developing countries, because the treaties transfer tax revenue from developing countries to developed countries without necessarily increasing FDI in the host country.<sup>40</sup> Dagan also considers mythical and misguided, the idea that treaties have an impact on FDI because if one accepts the premise that double taxation is a barrier to FDI, then countries can adopt unilateral measures to alleviate double taxation without signing a DTA.<sup>41</sup>

Blonigen and Davies denounce the idea that DTAs influence FDI by asserting “[t]here is no credible evidence in the data that tax treaties have significant positive effects on FDI activity.”<sup>42</sup>

In another research conducted by Blonigen and Davies on the effects of bilateral DTAs on United States FDI activity, the researchers conclude that “we find no systematic evidence that bilateral tax treaties affect FDI activity, despite statements by the OECD and other sources that such agreements are meant to increase the efficiency of world capital flows. Instead, our results suggest that either the provisions of a treaty have no effect, or the positive and negative aspects of treaty formation largely cancel one another.”<sup>43</sup>

---

<sup>39</sup> M Hearson “Do Tax Treaties Increase Foreign Direct Investment in Developing Countries” available at <https://martinhearsen.wordpress.com/2012/11/27/do-tax-treaties-increase-foreign-investment-in-developing-countries/> accessed on 13<sup>th</sup> October, 2017.

<sup>40</sup> K Brooks and R Krever “The Troubling Role of Tax Treaties” in GMM Michielse & V Thuronyi (eds) *Tax Design Issues Worldwide* (2015) at 160.

<sup>41</sup> T Dagan “The Tax Treaties Myth” (2000) *New York University Journal of International Law and Politics* Vol. 32 at 941.

<sup>42</sup> BA Blonigen and RB Davies “Do Tax Treaties Promote Foreign Direct Investment?” in KP Sauvnt and LE Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* at 481.

<sup>43</sup> BA Blonigen and RB Davies “The Effects of Bilateral Tax Treaties on U.S. FDI Activity” in KP Sauvnt and LE Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* at 506.

Egger et al in their empirical research found that there is no significant impact of DTAs on FDI, rather, they found that new implementation of DTAs often leads to a reduction in FDI.<sup>44</sup> No empirical studies have been conducted in Ghana to determine whether Ghana's DTAs have played a critical role in attracting FDI. Information obtained from the Ghana Investment Promotion Centre on FDI inflows into Ghana from the period September 1994 to September 2017 is contained in the Table 1.<sup>45</sup>

---

<sup>44</sup> P Egger, M Larch, M Pfaffermayr and H Winner "The Impact of Endogenous Tax Treaties on Foreign Direct Investment: Theory and Empirical Evidence" in KP Sauvart and LE Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* at 539.

<sup>45</sup> GIPC is a body established by the Ghana Investment Promotion Centre Act of 2013 (Act 865) to create an enhanced, transparent and responsive environment for investment and the development of the Ghanaian economy through investment and encourage, promote and facilitate investment in Ghana.



**TABLE 1:**

		Values in US\$ Million				
	COUNTRY	TOTAL FDI	AGRIC	MFG	SERVICE	OTHERS
1	BRITAIN	5,738.63	28.11	5,081.74	170.88	457.90
2	KOREA	5,045.50	15.24	17.98	24.05	4,988.24
3	USA	4,360.68	57.35	2,321.67	950.92	1,030.75
4	NETHERLANDS	3,775.71	25.88	2,555.44	993.49	200.90
5	CHINA	2,838.00	13.07	1,727.99	584.74	512.20
6	UNITED ARAB EMIRATES	2,128.70	0.55	20.19	23.25	2,084.72
7	LEBANON	1,806.47	1.32	1,590.46	12.94	201.76
8	BRITISH VIRGIN ISLANDS	1,742.50	14.93	23.74	81.08	1,622.75
9	NIGERIA	1,629.79	2.97	8.76	702.56	915.49
10	MAURITIUS	1,563.74	100.00	18.44	137.27	1,308.03
11	OTHERS	17,585.62	1,251.46	1,381.37	5,004.47	2,919.19
	<b>TOTAL</b>	<b>48,215.33</b>	<b>1,510.87</b>	<b>14,747.78</b>	<b>8,685.65</b>	<b>16,241.91</b>

The table above shows the total registered country investments for twenty-three years, that is from September 2004 to September 2017. The table also classifies the sectors by which the investments are made such as agriculture, manufacturing, services and others.

The top ten countries listed in the table have a total FDI stock of US\$30,629.71 million in Ghana. Out of the top ten investor countries, Ghana has DTAs with only the United

Kingdom<sup>46</sup> and Netherlands.<sup>47</sup> The United Kingdom brings in the highest inflow of US\$5,738.63 million and Netherlands has the fourth highest FDI stock in Ghana of US\$3,775.71 million. The combined investments by the United Kingdom and the Netherlands is US\$9,514.34 million which represents 31.06% of the total investments made by the top ten investor countries in Ghana.

The value of investments made by the remaining eight of the top ten investor countries which Ghana does not have a DTA with is US\$ 21,115.38 million. The figure quoted in the preceding paragraph represents 68.94% of the total value of investments made by the top ten investor countries.

It is therefore arguable that in the case of Ghana, DTAs alone cannot be regarded as a critical factor influencing FDI since over 68.94% of investments made by the top ten investor countries were made without the existence of a DTA between Ghana and those investor countries.

#### **4.0 CASE STUDIES OF GHANA**

##### **4.1 IMPACT OF DTAs BETWEEN THE UNITED KINGDOM AND GHANA AND THE REPUBLIC OF SOUTH AFRICA AND GHANA ON TAXING RIGHTS IN GHANA**

As indicated earlier, the scope of this report is limited to the impact of the DTAs between Ghana and the United Kingdom as well as that between Ghana and South Africa on the taxing rights of Ghana for the period 2010 to 2015 as far as permanent establishment, dividends, interests, royalties and management fees are concerned. The DTA between

---

<sup>46</sup> *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains* entered into force on 10th August 1994.

<sup>47</sup> *Convention Between the Kingdom of Netherlands and the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains* entered into force on 12<sup>th</sup> November, 2008.

the United Kingdom and Ghana<sup>48</sup> entered into force on 10<sup>th</sup> August 1994. However, Ghana's DTA with South Africa<sup>49</sup> entered into force on 23<sup>rd</sup> April 2007.

For the period 2010 to 2015, the applicable law for determining the tax rights of Ghana was the Internal Revenue Act, 2000 (Act 592).<sup>50</sup> Section 1 of the Internal Revenue Act, 2000 (Act 592) imposed a tax on the *chargeable income* of every person which is computed in accordance with the Act. Thus, irrespective of the nationality or resident status of the person, so long as the person has chargeable income, the income will be subject to tax in Ghana.

Chargeable income is defined under section 5 of Act 592 to mean a person's *assessable income* less permitted deductions. *Assessable income* as defined in section 6 of Act 592 depends on the tax residence status of the person. If the person is resident for tax purposes in Ghana, the assessable income of the person will be the total income from business, employment or investment accruing in, derived from, brought in or received in Ghana during any basis period ending within the year of assessment but this excludes any exempt income.

If the person is non-resident for tax purposes, the assessable income will be the total income from business, employment or investment accruing in, or derived from Ghana during any basis period ending within the year of assessment but excluding exempt income.

#### **4.1.1 IMPACT OF THE DTAS ON TAXATION OF PERMANENT ESTABLISHMENT**

Section 65 of Act 592 which governed the taxation of permanent establishment (PE) in Ghana provided that the gains or profits attributable to a permanent establishment of a

---

<sup>48</sup> *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains.*

<sup>49</sup> *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains.*

<sup>50</sup> The Internal Revenue Act, 2000 (Act 592) has been repealed by the Income Tax Act, 2015 (Act 896)

non-resident person in Ghana shall be calculated as those which the permanent establishment might be expected to make if it were a distinct and separate person engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with that person of which it is a permanent establishment. The principles for determination of the gain or profits of a PE under Act 592 are substantially the same principles contained in the DTA between Ghana and the United Kingdom for the taxation of the PE in Ghana of a United Kingdom resident.<sup>51</sup> Also, the principles for the determination of the income attributable to a PE in Ghana under Act 592 are similar to the principles found in the DTA between Ghana and South Africa.<sup>52</sup>

A permanent establishment is defined in section 167 of Act 592 to include a place where a person carries on business, and —

(a) a place where a person carries on business through an agent, other than a general agent of independent status acting in the ordinary course of business;

(b) a place where a person has, is using, or is installing substantial equipment or machinery; or

(c) a place where a person is engaged in a construction, assembly, or installation project for ninety days or more, including a place where a person is conducting supervisory activities in relation to such project.

The definition of PE in the DTAs between Ghana and the United Kingdom and Ghana and South Africa differ from the definition contained in Act 592.

Whereas Act 592 made a place where a person carries on a business through an agent other than an agent of independent status a PE in Ghana, the two DTAs introduce an additional requirement that the activities of an agent will only constitute a PE if the agent “has and habitually exercises, in a Contracting State an authority to conclude contracts”.<sup>53</sup>

---

<sup>51</sup> *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains* art. 7(2).

<sup>52</sup> *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains* art. 7(2).

<sup>53</sup> *Convention Between the Government of the United Kingdom of Great Britain and Northern*

Thus, if an agent in Ghana carries out any activities on behalf of a person resident for tax purposes in the United Kingdom or South Africa, the activities of the agent in Ghana will not create a PE for the resident of the United Kingdom or South Africa if the agent in Ghana does not have the right to conclude contracts on behalf of the United Kingdom or South African resident.

Although the additional requirement for creating a PE under Article 5 of Ghana's DTA with the United Kingdom and South Africa reflects the language of the OECD Model, it constitutes a limitation on the ability of Ghana to tax the profits of a resident of the United Kingdom or South Africa carrying on activities in Ghana through a dependent agent if the dependent has no authority to conclude contracts on behalf of the resident of the United Kingdom or South Africa.

Again, the definition PE under Act 592 includes *a place where a person has, is using, or is installing substantial equipment or machinery* without qualification. However, under Ghana's DTA with the United Kingdom, installation or the provision of supervisory activities which are incidental to the sale of machinery or equipment will only constitute a PE if the charges payable for the activities exceed 10% of the free on board (FOB) sale price of the machinery or equipment.<sup>54</sup>

The definition of PE described in the preceding sentence completely discards the idea that installing substantial equipment or machinery can constitute a PE in Ghana as provided for in Act 592. Also, the definition in Article 5 of Ghana's DTA with the United Kingdom introduces an additional requirement that installation or provision of supervisory activities will only constitute a PE if that installation or supervisory activity is incidental to the sale of machinery or equipment and if this is established, the charges for the activity

---

*Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains art. 5(4).  
Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains art. 5(5)(a).*

<sup>54</sup> *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains art. 5(2)(i).*

must exceed 10% of the FOB value of the machinery or equipment before the installation or supervisory activities will constitute a PE in Ghana.

From the discussion above, it is clear that unlike the definition of PE in Act 592, merely providing installation or supervisory activities which are not incidental to the sale of machinery or equipment will not constitute a PE under Article 5(2)(i) of Ghana's DTA with the United Kingdom. Again, if the installation or supervisory activity is incidental to the sale of machinery or equipment, the charges must exceed 10% of the FOB price of the items before it can constitute a PE in Ghana.

On the issue of the duration required before a building site or construction or installation project becomes a PE, Act 592 provided that the period should be ninety days or more. However, the text of the DTA between Ghana and the United Kingdom and South Africa provides that such a project will only become a PE if it is carried on for a period exceeding six months which is in line with the provisions of the UN Model.<sup>55</sup> The increase in the duration that a project can constitute a PE from the ninety day period in Act 592 to a six months period in the two DTAs means that a lot of building, construction and installation projects can be carried out in Ghana by persons resident in the United Kingdom and South Africa without triggering the tax consequences of a PE in Ghana.

Furthermore, Act 592 provided that the provision of supervisory activities in relation to a building, construction or installation project will constitute a PE in Ghana if it is carried out for a period of at least ninety days. The DTA between Ghana and the United Kingdom however provides that the provision of supervisory activities for a building site or construction or installation project will constitute a PE if it is carried on for more than three months.<sup>56</sup>

---

<sup>55</sup> *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains* art. 5(2)(g). *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains* art. 5(3).

<sup>56</sup> *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains* art. art. 5(2)(h).

As far as Ghana's DTA with South Africa is concerned, supervisory activities carried out in relation to a building, construction or installation project will only constitute a PE in Ghana if the supervisory activity is carried on for a period of more than six months.<sup>57</sup>

The exclusion of activities deemed to be of "preparatory or auxiliary character" in Article 5(4) of Ghana's DTA with the United Kingdom and South Africa represents another limitation on the definition of PE under Act 592. The Article provides that a PE does not include:

- a. The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise.
- b. The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;
- c. The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- d. The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
- e. The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character.
- f. The maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

Although the excluded activities in the two treaties reflect the text of the OECD Model, the exclusion provides enormous opportunity for persons resident in the United Kingdom and South Africa to plan in order to escape creating a PE in Ghana.

For example, assume that a supplier of goods that is resident in either the United Kingdom or South Africa maintains a place in Ghana where products are displayed to potential customers. When the customers visit the showroom, employees of the non-resident

---

<sup>57</sup> *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains* art. 5(3).

inform the potential customers to contact the supplier directly to arrange for the purchase and supply of the goods.

In the above example, since the supplier maintains a place in Ghana for the display of goods, the mere display of the goods in a place in Ghana will not constitute a PE in Ghana under Article 5(4) of both treaties. The activities of the employees of the supplier in Ghana will also not constitute an agency PE under Ghana's DTA with the United Kingdom and South Africa because the employees do not have the authority to conclude contracts on behalf of the supplier who is resident of South Africa or the United Kingdom.

#### **4.1.2 IMPACT OF THE DTAS ON TAXATION OF DIVIDENDS**

Under the provisions of Act 592, dividend was taxable in Ghana if it is paid by a resident company.<sup>58</sup> The tax rate applicable to dividend received by a non-resident person for the period 2010 to 2015 was 8%.<sup>59</sup>

In the DTA between Ghana and South Africa, dividend arising in one Contracting State which is paid to the resident of the other Contracting State is taxable in the state in which the person receiving the dividends is resident for tax purposes.<sup>60</sup> Thus, if dividend arises in Ghana but it is paid to a person who is resident in South Africa, the dividend is only taxable in South Africa.

Despite the above, the Contracting State in which the dividend arises may rely on domestic law provisions and impose a tax on the dividend but the tax imposed cannot exceed 5% of the gross amount if the beneficial owner is a company which holds not less than 10% of the capital of the company paying the dividend.<sup>61</sup> Where the beneficial owner

---

<sup>58</sup> Section 63(5) of the Internal Revenue Act, 2000 (Act 592)

<sup>59</sup> Paragraph (a) of Part V of the First Schedule to the Internal Revenue Act, 2000 (Act 592) as amended by the Income Tax Rates Regulation, 2007 (L.I. 1829).

<sup>60</sup> Article 10(1) of the *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*.

<sup>61</sup> Article 10(2)(a) of the *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*.



receiving the dividend does not meet the conditions described in the preceding sentence, the tax imposed cannot exceed 15% of the gross amount.<sup>62</sup>

The claw-back provision gives Ghana the right to tax dividend paid by a company resident in Ghana to a person who is resident for tax purposes in South Africa. However, the tax rate that is applicable to the dividend cannot exceed 5% if the recipient is a company that is the beneficial owner of the dividend paid and the recipient holds at least 10% of the capital in the company paying the dividend.

Thus, South African companies who held at least 10% capital in a Ghanaian company were only liable to pay tax of 5% on the dividend they received from such companies within the period 2010 to 2015 instead of the 8% tax rate found in Act 592.

Apart of the persons described in the preceding paragraph, all other persons who were resident for tax purposes in South Africa and received dividend from companies in Ghana were liable to pay tax on dividend received at the rate of 8% as stipulated in Act 592.

Ghana's DTA with the United Kingdom also provides that dividend arising in one Contracting State which is paid to the resident of the other Contracting State is taxable in the state in which the person receiving the dividend is resident for tax purposes.<sup>63</sup> This means whenever a person who is resident for tax purposes receives dividend from a company resident for tax purposes in Ghana, the dividend received can only be subjected to tax in the United Kingdom.

Despite the above, the Contracting State in which the dividend arises may rely on domestic law provisions and impose a tax on the dividend but the tax imposed cannot exceed 7.5% of the gross amount if the beneficial owner is a company which controls

---

<sup>62</sup> Article 10(2)(b) of the *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*.

<sup>63</sup> Article 10(1) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.

directly or indirectly at least 10% of the voting power of the company paying the dividend.<sup>64</sup>

The reduced tax rate of 7.5% is only applicable where the company which is the recipient of the dividend is the beneficial owner of the dividend and the recipient is subject to tax in respect of the dividend in the United Kingdom. Where the beneficial owner receiving the dividends does not meet the conditions described in the preceding sentence, the tax imposed cannot exceed 15% of the gross amount.<sup>65</sup> This means that the maximum tax rate Ghana could have applied on dividend received by persons who were resident for tax purposes in the United Kingdom for the period 2010 to 2015 but did not meet the conditions for the reduced tax rate on dividend received from Ghana was 8%.

#### **4.1.3 IMPACT OF THE DTAS ON TAXATION OF INTEREST**

Section 63 of Act 592 provided that interest was taxable in Ghana if the debt obligation giving rise to the interest is secured by real property located in Ghana or the interest was paid by a resident person in Ghana. In addition, where the interest paid is borne by a PE of a non-resident in Ghana, the interest was taxable in Ghana. The tax rate applicable to interest paid to non-resident persons for the period 2010 to 2015 was 8%.<sup>66</sup>

Under the provisions of the DTA between Ghana and South Africa, interest arising in one Contracting State which is paid to the resident of the other Contracting State is taxable in the state in which the person receiving the interest is resident for tax purposes.<sup>67</sup> Thus, if

---

<sup>64</sup> Article 10(2)(a) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.

<sup>65</sup> Article 10(2)(b) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.

<sup>66</sup> Paragraph a of Part V of the First Schedule to the Internal Revenue Act, 2000 (Act 592) as amended by the Income Tax Rates Regulation, 2007 (L.I. 1829).

<sup>67</sup> Article 11(1) of the *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*.

a South African resident derives interest from Ghana, South Africa and not Ghana will have the right to tax the interest income.

Despite the above, the DTA provides that if a South African derives interest from Ghana, the tax authorities in Ghana can rely on domestic law provisions and impose a tax on the interest but the tax imposed cannot exceed 5% of the gross amount if the beneficial owner is a bank which is resident in South Africa and in any other case the tax imposed cannot exceed 10% of the gross amount.<sup>68</sup> Thus, South African banks that offered loans to persons in Ghana received a reduced tax rate of 5% as opposed to 8% contained in Act 592 whenever they received payments of interest from Ghana from 2010 to 2015.

Notwithstanding the provisions above, interest arising in a Contracting State is exempt from tax in that State if it is derived and beneficially owned by the Government of the other Contracting State or a political subdivision or a local authority thereof, the Bank of Ghana, the South African Reserve Bank or any wholly owned institution of that Government or subdivision or authority.<sup>69</sup>

From the Ghanaian perspective, the above provision means that any interest derived by the Government of South Africa or a political subdivision or local authority thereof or any institution wholly owned by the Government, subdivision or authority of South Africa cannot be subjected to tax in Ghana. Given the nature and size of the South African economy as compared to Ghana, it is more probable that loan facilities will be offered by South Africa to persons in Ghana rather than by Ghana to persons in South Africa. Thus, in reality, the provision which prevents Ghana from taxing interest income depending on the status of the recipient effectively narrows the tax base in Ghana.

Generally, the DTA between Ghana and the United Kingdom provides that interest arising in one Contracting State which is paid to the resident of the other Contracting State is

---

<sup>68</sup> Article 11(2) of the *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*.

<sup>69</sup> Article 11(3) of the *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*.

taxable in the state in which the person receiving the interest is resident for tax purposes.<sup>70</sup>

Despite the above, the Contracting State in which the interest arises may rely on domestic law provisions and impose a tax on the interest but the tax imposed cannot exceed 12.5% of the gross amount if the beneficial owner is subject to tax in the other Contracting State.<sup>71</sup> Since the limitation of 12.5% exceeds the maximum 8% that could be applied to the interest under Act 592, the above provision does not affect the ability of Ghana to tax the full amount of interest income derived by a resident of United Kingdom from Ghana.

Notwithstanding the above provisions, interest arising in a Contracting State is exempt from tax in that State if it is derived and beneficially owned by the Government of the other Contracting State or a local authority thereof or any agency or instrumentality of that Government or local authority or by the Commonwealth Development Corporation.<sup>72</sup>

Again, given the economic power of the United Kingdom and Ghana, the tendency that this provision will inure to the benefit of the United Kingdom rather than Ghana is high since most of the loan facilities which will generate interest is likely to be provided by the United Kingdom Government or its local authority to persons in Ghana rather than by Ghana to persons in the United Kingdom.

The DTA between Ghana and the United Kingdom also contains a provision which states that interest arising in Ghana which is paid to and beneficially owned by a resident of the United Kingdom shall be exempt from tax in Ghana if is paid in respect of a loan, made,

---

<sup>70</sup> Article 11(1) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.

<sup>71</sup> Article 11(2) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.

<sup>72</sup> Article 11(10) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.

guaranteed or insured, or any other debt-claim or credit guaranteed or insured by the United Kingdom Export Credits Guarantee Department.<sup>73</sup>

Thus, the mere act of the United Kingdom Export Credits Guarantee Department providing a guarantee or insuring a loan is enough to prevent Ghana from taxing the interest received by a person resident for tax purposes in the United Kingdom. This provision constitutes a serious fetter on the ability of Ghana to tax interest received by exporters resident in the United Kingdom who advance loans to persons in Ghana as part of their export activities. All that an exporter in the United Kingdom who provides a loan to a person in Ghana needs to do to escape paying taxes on interest received from Ghana, is to obtain a guarantee or insurance on the loan from the United Kingdom Export Credits Guarantee Department.

The worst aspect is that unlike other provisions on interest which applies to both countries, the provision above was drafted to confer the benefit solely on persons resident for tax purposes in the United Kingdom. Thus, assuming a person resident in Ghana advances a loan to a person resident in the United Kingdom and the loan is guaranteed or insured by any agency of the state such as the Ghana Export Promotion Council or Ghana EXIM Bank, the guarantee or insurance provided by the state agency will not exempt the interest from being liable to tax in the United Kingdom.

#### **4.1.4 IMPACT OF THE DTAs ON TAXATION OF ROYALTIES**

Section 63(8) of Act 592 provides that royalty is taxable in Ghana where the royalty arises from:

---

<sup>73</sup> Article 11(11) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.

- (a) the use of or right to use a copyright of literary, artistic or scientific work, including cinematograph films, or video or audio tapes, patent, trade mark, design or model, plan or secret formula or process in Ghana; or
- (b) the use of or the right to use an industrial, a commercial or a scientific equipment in Ghana; or
- (c) the use of or the right to use information concerning industrial, commercial, or scientific experience in Ghana; or
- (d) the rendering of, or the undertaking to render, assistance ancillary to a matter referred to in paragraph (a), (b) or (c); or
- (e) a total or partial forbearance with respect to a matter referred to in paragraph (a), (b), (c) or (d).

For the period 2010 to 2013, the applicable tax rate on royalties received by a non-resident person was 10%.<sup>74</sup> However, the tax rate for the period 2014 and 2015 was 15%.<sup>75</sup>

The general rule provided in the DTA between Ghana and South Africa in relation to royalties is to the effect that royalties arising in one Contracting State which is paid to the resident of the other Contracting State is taxable in the state in which the person receiving the royalties is resident for tax purposes.<sup>76</sup>

The Contracting State in which the royalties arise may rely on domestic law provisions and impose a tax on the royalties but the tax imposed cannot exceed 10% of the gross amount if the beneficial owner is a resident in the other Contracting State.<sup>77</sup>

---

<sup>74</sup> Paragraph b of Part V of the First Schedule to the Internal Revenue Act, 2000 (Act 592) as amended by the Income Tax Rates Regulation, 2007 (L.I. 1829).

<sup>75</sup> Paragraph b of Part V of the First Schedule to the Internal Revenue Act, 2000 (Act 592) as amended by the Internal Revenue (Amendment) (No.2) Act, 2013 (Act 871).

<sup>76</sup> Article 12(1) of the *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*.

<sup>77</sup> Article 12(2) of the *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*.

For the period 2010 to 2013, since the limitation on the tax rate applicable to a recipient who is the beneficial owner did not differ from the applicable tax rate under Act 592, this provision had no effect on the tax base of Ghana. However, for 2014 and 2015 when the tax rate on royalties was 15% under Act 592, Ghana sacrificed tax revenue of about one-third of the taxes it could have levied whenever a South African who was the beneficial owner of royalties derived royalties from Ghana.

The DTA between Ghana and the United Kingdom also contains a provision to the effect that royalties arising in one Contracting State which is paid to the resident of the other Contracting State are taxable in the state in which the person receiving the royalties is resident for tax purposes.<sup>78</sup>

Despite the above, the Contracting State in which the royalties arise can rely on domestic law provisions and impose a tax on the royalties but the tax imposed cannot exceed 12.5% of the gross amount if the beneficial owner is subject to tax in the other Contracting State.<sup>79</sup>

Again, for the period 2010 to 2013, since the maximum tax rate of 12.5% in the treaty was higher than the 10% applicable under Act 592 within that period, the limitation had no bearing on tax revenue for Ghana. However, for 2014 and 2015 when the tax rate on royalties was 15% under Act 592, Ghana sacrificed tax revenue of 2.5% of the taxes it could have levied whenever a person resident in the United Kingdom who was the beneficial owner of royalties, derived royalties from Ghana.

In addition, the provisions dealing with royalties in the DTA between Ghana and the United Kingdom<sup>80</sup> also state that the benefits conferred by the DTA will not apply if the

---

<sup>78</sup> Article 12(1) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.

<sup>79</sup> Article 12(2) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.

<sup>80</sup> Article 12(7) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.

right giving rise to the royalty was created or assigned mainly for the purpose of taking advantage of the treaty. The existence of this principal purpose test seeks to protect Ghana's tax base from being further eroded by tax avoidance schemes and this is commendable.

#### **4.1.5 IMPACT OF THE DTAs ON TAXATION OF MANAGEMENT FEES**

For the period 2010 to 2013, the applicable tax rate on management fees received by a non-resident person was 15%.<sup>81</sup> However, the tax rate for the period 2014 and 2015 was 20%.<sup>82</sup>

The DTAs between Ghana and the United Kingdom as well as between Ghana and South Africa contain a provision to the effect that management and technical fees arising in one Contracting State which is paid to the resident of the other Contracting State is taxable in the state in which the person receiving the fees is resident for tax purposes.<sup>83</sup>

Despite the above, the Contracting State in which the management and technical fees arise may rely on domestic law provisions and impose a tax on the fees but the tax imposed cannot exceed 10% of the gross amount if the beneficial owner is a resident of the other Contracting State.<sup>84</sup>

---

<sup>81</sup> Paragraph c of Part V of the First Schedule to the Internal Revenue Act, 2000 (Act 592) as amended by the Income Tax Rates Regulation, 2007 (L.I. 1829).

<sup>82</sup> Paragraph c of Part V of the First Schedule to the Internal Revenue Act, 2000 (Act 592) as amended by the Internal Revenue (Amendment) (No.2) Act, 2013 (Act 871).

Article 17(1) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.  
Article 20(1) of the *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*.

Article 17(2) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.  
Article 20(2) of the *Convention Between the Government of the Republic of South Africa and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*.



The limitation of 10% provided in the DTAs whenever a person resident in the United Kingdom or South Africa derives management fees from Ghana amounts to a limitation on the ability of Ghana to levy taxes on the full amount of the income.

For the period 2010 to 2013 when the tax rate applicable under Act 592 was 15%, Ghana invariably sacrificed tax revenue of about one-third of the taxes it could have levied whenever a person who was resident in the United Kingdom or South Africa and who was the beneficial owner of fees, derived such income from Ghana.

For 2014 and 2015 when the tax rate applicable under Act 592 was 20%, Ghana effectively waived 50% of the tax revenue it could have collected whenever a person who was resident in the United Kingdom or South Africa and who was the beneficial owner of fees derived such income from Ghana.

The DTA between Ghana and the United Kingdom gave the beneficial owner of the management fees the option to elect to treat the management fees as income derived by a PE or fixed base the person maintained in the country where the fees were derived from.<sup>85</sup> Given the fact that a PE is taxable at the rate of 25% which is the same rate as a resident company in Ghana, it is unlikely that a person resident for tax purposes in the United Kingdom will elect to pay tax at the rate of 25% in Ghana when the maximum tax rate applicable to management fees under the DTA is 10%.

To prevent treaty shopping, the DTA between Ghana and the United Kingdom provides that the benefits provided in the DTA<sup>86</sup> on management fees will not apply if it is established that the right giving rise to the management fees was created or assigned mainly for the purpose of taking advantage of the treaty. Since this provision is aimed at defeating artificial tax planning schemes it offers very little solution to the burning issue of the reduced tax rate for persons who have a legitimate claim to benefits under the DTA.

---

<sup>85</sup> Article 17(5) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*.

<sup>86</sup> Article 17(8) of the *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*

In addition, given the nature and size of the economies of the United Kingdom and South Africa compared to that of Ghana, it is more likely that services which will generate management and technical services fees will be provided by persons who are resident in the United Kingdom and South Africa to persons in Ghana rather than by Ghanaians to persons resident in the United Kingdom and South Africa. Thus, so long as Ghana remains a capital importing state, the limitation placed by the DTAs on the maximum tax rate Ghana can apply on management and technical service fees generated within its territory affects Ghana's tax revenue.

## **5.0 FINDINGS AND CONCLUSION**

From the discussions above, we make the following findings and conclusion:

1. Ghana's experience over the years has shown that tax revenue in particular and domestic revenue in general has been insufficient to meet the financing needs of the country.
2. Empirical studies which have been conducted to determine whether DTAs are critical factors in attracting FDI have produced competing but seemingly conflicting results.
3. Available data showing the top ten countries with registered investments in Ghana from September 2004 to September 2017 reveals that Ghana has DTAs with only the United Kingdom and the Netherlands with the United Kingdom bringing in the highest inflow of US\$5,738.63 million and the Netherlands with the fourth highest FDI stock in Ghana of US\$3,775.71 million. The combined investments by the United Kingdom and the Netherlands is US\$9,514.34 million which represents 31.06% of the total investments made by the top ten investor countries in Ghana. The value of investments made by the remaining eight of the top ten investor countries which Ghana does not have a DTA with is US\$ 21,115.38 million which represents 68.94% of the total value of investments made by the top ten investor countries.

It is therefore arguable that in the case of Ghana, DTAs alone cannot be regarded as the most critical factor influencing FDI since over 68.94% of investments made by the

top ten investor countries were made without the existence of a DTA between Ghana and those investor countries.

4. A critical review of the provisions on PE in the DTA between Ghana and South Africa as well as Ghana and United Kingdom shows that the DTAs were negotiated mainly based on the OECD Model.

On the issue of the duration required before a building site or construction or installation project becomes a PE, Act 592 provided that the period should be ninety days or more. However, the text of the DTA between Ghana and the United Kingdom and that between Ghana and South Africa provides that such a project will only become a PE if it is carried for a period exceeding six months which is in line with the provisions of the UN Model. The exclusion of activities deemed to be of “preparatory or auxiliary character” in Article 5(4) of Ghana’s DTA with the United Kingdom and South Africa represents a clear limitation on the definition of PE under Act 592 and these exclusions provide enormous opportunities for persons resident in the United Kingdom and South Africa to plan in order to escape creating a PE in Ghana.

5. In accordance with the provisions on dividend in the DTA between Ghana and South Africa, South African companies who held at least 10% capital in a Ghanaian company were only liable to pay tax of 5% on the dividend they received from such companies within the period 2010 to 2015 instead of the 8% tax rate found in Act 592.
6. In Ghana’s DTA with the United Kingdom, where a United Kingdom company is the beneficial owner of dividend and that UK company controls directly or indirectly at least 10% of the voting power of the Ghanaian company paying the dividend and the UK company is subject to tax in respect of the dividend in the United Kingdom, the tax Ghana could have imposed of the dividend within the period 2010 to 2015 could not have exceeded 7.5% of the gross amount instead of the 8% tax rate found in Act 592.
7. The DTA between Ghana and South Africa provides that if a South African derives interest from Ghana, the tax authorities in Ghana can rely on domestic law provisions and impose a tax on the interest but the tax imposed cannot exceed 5% of the gross

amount if the beneficial owner is a bank which is resident in South Africa and in any other case the tax imposed cannot exceed 10% of the gross amount. Thus, South African banks that offered loans to persons in Ghana received a reduced tax rate of 5% as opposed to 8% contained in Act 592 whenever they received payments of interest from Ghana from 2010 to 2015.

8. However, interest arising in a Contracting State was exempt from tax in that State if it is derived and beneficially owned by the Government of the other Contracting State or a political subdivision or a local authority thereof, the Bank of Ghana, the South African Reserve Bank or any wholly owned institution of that Government or subdivision or authority.
9. Given the nature and size of the South African economy compared to Ghana, it is more probable that loan facilities will be offered by South Africa to persons in Ghana rather than by Ghana to persons in South Africa. Thus, in reality, the provision which prevents Ghana from taxing interest income depending on the status of the recipient effectively narrows the tax base in Ghana.
10. Ghana's DTA with the United Kingdom provides that the Contracting State in which the interest arises may rely on domestic law provisions and impose a tax on the interest but the tax imposed cannot exceed 12.5% of the gross amount if the beneficial owner is subject to tax in the other Contracting State. Since the limitation of 12.5% exceeded the maximum 8% that could be applied to the interest under Act 592, the above provision did not affect the ability of Ghana to tax the full amount of interest income derived by a resident of United Kingdom from Ghana.
11. Despite the above, interest arising in a Contracting State is exempt from tax in that State if it is derived and beneficially owned by the Government of the other Contracting State or a local authority thereof or any agency or instrumentality of that Government or local authority or by the Commonwealth Development Corporation.

12. Again, given the economic power of the United Kingdom and Ghana, the tendency that this provision will inure to the benefit of the United Kingdom rather than Ghana is high since most of the loan facilities which will generate interest is likely to be provided by the United Kingdom Government or its local authority to persons in Ghana rather than by Ghana to persons in the United Kingdom.
13. The DTA between Ghana and South Africa provides that royalties which arise in a Contracting State may be taxable in the State where it arises but the tax imposed cannot exceed 10% of the gross amount if the beneficial owner is a resident of the other Contracting State. For the period 2010 to 2013, since the limitation on the tax rate applicable to a recipient who is the beneficial owner did not differ from the applicable tax rate under Act 592, this provision had no effect on the tax base of Ghana. However, for 2014 and 2015 when the tax rate on royalties was 15% under Act 592, Ghana sacrificed tax revenue of about one-third of the taxes it could have levied whenever a South African who was the beneficial owner of royalties derived royalties from Ghana.
14. In the DTA between Ghana and the United Kingdom a Contracting State in which the royalties arise may rely on domestic law provisions and impose a tax on the royalties but the tax imposed cannot exceed 12.5% of the gross amount if the beneficial owner is subject to tax in the other Contracting State.
15. For the period 2010 to 2013, since the maximum tax rate of 12.5% in the treaty was higher than the 10% applicable under Act 592 within that period, the limitation had no bearing on tax revenue for Ghana. However, for 2014 and 2015 when the tax rate on royalties was 15% under Act 592, Ghana sacrificed tax revenue of 2.5% of the taxes it could have levied whenever a person resident in the United Kingdom who was the beneficial owner of royalties, derived royalties from Ghana.
16. The DTA between Ghana and the United Kingdom provides that a Contracting State in which the management and technical fees arise may rely on domestic law provisions

and impose a tax on the fees but the tax imposed cannot exceed 10% of the gross amount if the recipient is the beneficial owner.

17. For the period 2010 to 2013 when the tax rate applicable under Act 592 was 15%, Ghana invariably sacrificed tax revenue of about one-third of the taxes it could have levied whenever a person who was resident in the United Kingdom and who was the beneficial owner of fees, derived such income from Ghana. For 2014 and 2015 when the tax rate applicable under Act 592 was 20%, Ghana effectively waived 50% of the tax revenue it could have collected whenever a person who was resident in the United Kingdom and who was the beneficial owner of fees derived such income from Ghana.

18. Ghana's DTA with South Africa provides that the Contracting State in which the management fees arise may rely on domestic law provisions and impose a tax on the fees but the tax imposed cannot exceed 10% of the gross amount if the beneficial owner is a resident in the other Contracting State.

19. Similarly, for the period 2010 to 2013 when the tax rate applicable under Act 592 was 15%, Ghana invariably sacrificed tax revenue of about one-third of the taxes it could have levied whenever a person who was resident in South Africa and who was the beneficial owner of fees, derived such income from Ghana. For 2014 and 2015 when the tax rate applicable under Act 592 was 20%, Ghana effectively waived 50% of the tax revenue it could have collected whenever a person who was resident in South Africa and who was the beneficial owner of fees derived such fees from Ghana.

## **6.0 POLICY RECOMMENDATIONS**

### **6.1 REVIEW AND RE-NEGOTIATION OF EXISTING DTAs**

There is a need for Ghana to conduct an extensive review and re-negotiate the DTAs it currently has in force. The review is necessary to determine whether Ghana is actually benefitting from the existence of these bilateral DTAs. The fundamental assumption which

inform the conclusion of DTAs is that there will be a corresponding flow of capital between the treaty partners such that the tax revenue sacrificed by each state will even out.

However, where the economic power of treaty partners is not equal, the treaty tends to benefit only the capital exporting nation. This is because persons who are resident in the capital exporting nation will be those who will have the capital to invest in the capital importing nation and obtain benefits under the DTA. Since Ghana is a capital importing nation, with a few of its residents possessing the capital to make investments in the economy of the other treaty partners, there is a real likelihood that Ghana is sacrificing its tax revenue based on a flawed assumption that the other treaty partner is also sacrificing its tax revenue in favour of Ghana.

In addition to the above, there is a need to re-negotiate all of the treaties Ghana has in force due to the fact that some provisions in the DTAs as discussed above, are skewed in favour of Ghana's treaty partners, instead of the intended mutually beneficial tax revenue sharing relationship.

## **6.2 IMPLEMENTATION OF THE DTA POLICY**

The DTA policy of Ghana is contained in a document titled "Policy Guidelines for Negotiating Double Taxation Agreements" prepared by the Tax Policy Unit of the Ministry of Finance in 2016. A review of the document shows that Ghana's DTA policy is anchored on four main pillars. These pillars are:

1. Political and Socio-Economic Relations
2. Trade and Investment
3. Economic Benefit
4. Tax Revenue

Each pillar or thematic area has been assigned a weight or score such that the total weight or score adds up to 100. Ghana will only take a decision to negotiate a DTA with a country if the evaluation report generated based on the above pillars produce a minimum score of 60.

As a matter of utmost importance, Ghana must abide by the principles contained in the Policy Guidelines for Negotiating Double Taxation Agreements in arriving at the decision as to whether to negotiate and conclude a DTA with a country.

### **6.3 BUILDING CAPACITY OF TREATY NEGOTIATORS**

As a matter of urgency, Ghana must develop a comprehensive plan to build the capacity of persons who negotiate tax treaties on behalf of the country. The criteria for selecting persons to join the team of negotiators should be transparent and as far as practicable, the team should be made up of experts representing stakeholders from both the public and private sector. Having a well-resourced and well-trained team of negotiators who are experts drawn from various sectors will ensure that the negotiated and concluded DTA addresses the needs and concerns of the country.

### **6.4 REVIEW OF GHANA'S MODEL DTA**

Ghana developed a Model DTA to serve as a blueprint for negotiating DTAs with other countries. Ghana's Model was developed to advance the social and economic agenda of the country. The Model is an amalgam of the OECD and UN Models and also contains unique provisions which reflect the treaty negotiating policy of Ghana. Analysis of the relevant aspects contained in Ghana's Model DTA is provided below.

#### **6.4.1 Article 5: Permanent Establishment**

Paragraph 1 of Article 5 of Ghana's Model adopts the language of the OECD Model. However, Paragraph 2 of Article 5 broadens the scope of what constitutes a permanent establishment to cover "an installation or structure used for the exploration of natural resources".<sup>87</sup>

In addition, an activity carried on in a Contracting State will only become a PE under Ghana's Model if the activity lasts more than 6 months within any 12-month period. The language of Ghana's Model is a slight modification of the wording in the UN Model which

---

<sup>87</sup> *Ghana's Draft Model Tax Agreement* art. 5(2)(h).



says the activity must last for more than 6 months without the modifying words “within any 12-month period.”<sup>88</sup>

Although Paragraph 4 of Article 5 of Ghana’s Model reflects the OECD Model, Paragraph 5 of Article 5 of the Model adopts the language of the UN Model. The wording of Paragraph 4 of Article 5 does not address the challenges of the digital economy where an online retailer can sell goods without having a physical presence in a country thereby avoiding PE status. The Model must be modified to provide that if the online retailer has a warehouse in the country which it uses for storage and delivery of items placed online, then the warehouse is an essential part of the activities of the online retailer and should constitute a PE of the online retailer in the country where the warehouse is located.

Paragraph 6 of Article 5 of Ghana’s Model which deals with an agent of independent status adopts the language of the UN Model which includes an additional sentence that when the activities of an agent are devoted wholly or almost wholly on behalf of an enterprise, the agent shall not be considered an agent of an independent status within the meaning of the paragraph.<sup>89</sup>

The language of Paragraph 7 of Article 5 of Ghana’s Model which provides that the fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, does not make the controlled entity a PE reflects the OECD Model.

#### **6.4.2 Article 10: Dividends**

Paragraph 1 of Article 10 of Ghana’s Model reflects the language of the OECD Model. Paragraph 2 of Article 10 in Ghana’s Model departs from the language of both the OECD Model and the UN Model. Unlike the OECD and UN Models, Ghana’s Model does not link the rate of tax that can be applied on the dividends to the quantum of shares the person receiving the dividends owns. The Contracting Parties are thus free to negotiate the rate

---

<sup>88</sup> *Ghana’s Draft Model Tax Agreement* art. 5(3).

<sup>89</sup> *Ghana’s Draft Model Tax Agreement* art. 5(6).

of tax to impose on dividends paid by a company resident in a Contracting State to a beneficial owner who is a resident of the other Contracting State.<sup>90</sup>

Paragraph 3 of Article 10 of Ghana's Model adopts the wording of the last sentence in Paragraph 2 of the OECD and UN Models.

The definition of the term "dividends" in Article 10 of Ghana's Model largely reflects the language used in the OECD Model.<sup>91</sup>

The language of Paragraph 5 in Ghana's Model reflects the words used in Paragraph 4 of Article 10 in the UN Model. Paragraph 6 of Article 10 in Ghana's Model is a reflection of Paragraph 5 of Article 10 in the OECD Model.

### **6.4.3 Article 11: Interest**

The majority of the provisions in Article 11 of Ghana's Model adopts the language of the UN Model.

However, Article 11 of Ghana's Model contains a unique provision which exists to exempt interest from tax where "*the payer or the recipient of the interest is the Government of the Contracting State itself, a public body, a political subdivision or local authority thereof or the central bank of a Contracting State*" or "*the interest is paid in connection with a loan granted, approved, guaranteed or insured by the Government of a Contracting State, the central bank of a Contracting State, or any agency or instrumentality (including a financial institution) owned or controlled by the Government of a Contracting State*".<sup>92</sup>

As discussed earlier, depending on the structure of the economy of Ghana's treaty partner, this provision excluding interest derived by financial institutions which are wholly owned by the government could prove detrimental to Ghana's effort to protect its tax base.

---

<sup>90</sup> Ghana's Draft Model Tax Agreement art. 10(2) provides that "*However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State the tax so charged shall not exceed (-) per cent of the gross amount of the dividends.*"

<sup>91</sup> Ghana's Draft Model Tax Agreement art. 10(4).

<sup>92</sup> Ghana's Draft Model Tax Agreement art. 11(3).

#### **6.4.4 Article 12: Royalties**

The provisions on royalties found in Ghana's Model adopts the language of the UN Model. These provisions give the source state the right to tax royalties arising from its territory and since Ghana's Model does not provide a maximum rate of tax that can be imposed on royalties, there is room for the Contracting States to negotiate and agree on the maximum rate of tax that can be imposed on the amount.

#### **6.4.5 Article 13: Services Fees**

The taxation of "Services Fees" in Article 13 of Ghana's Model is unique since there is no Article in either the OECD or the UN Model dedicated exclusively to the taxation of Services Fees. Services Fees is defined to mean *payment of any kind to any person, other than to an employee of the person making the payment, in consideration for any services of a managerial, technical or consultancy nature rendered in a contracting state.*<sup>93</sup>

However, the term excludes *any payments in consideration of supervisory activities in connection with a building site or construction, assembly or installation project or for supervisory activities in connection with installation incidental to the sale of machinery or parts thereof.*<sup>94</sup>

Generally, services fees are deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority or another resident of that State. However, where the person paying the services fees, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the Services fees was incurred, and where such Services fees are borne by such permanent establishment or fixed base, then such Services fees shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.<sup>95</sup>

---

<sup>93</sup> Ghana's Draft Model Tax Agreement art. 13(3).

<sup>94</sup> Ghana's Draft Model Tax Agreement art. 13(3).

<sup>95</sup> Ghana's Draft Model Tax Agreement art. 13(5).

#### **6.4.6 Addressing BEPS**

Since Ghana's Model DTA was developed before the Final Reports on OECD's Base Erosion and Profit (BEPS) were released, the Model does not address the recommendations provided in the Final Report on Preventing Treaty Abuse. The recommendation provides that:

1. There must be present in all treaties, a clear and unequivocal statement to the effect that the contracting states do not intend to create avenues for either non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements.
2. There must be included in DTAs, a Limitation-On-Benefits (LOB) rule which makes treaty benefits available to only entities that meet certain conditions. These conditions are intended to ensure that there is a sufficient link between the entity in question and its State of residence.
3. A principal purposes test (PPT) must be included in DTAs which will ensure that if one of the principal purposes of transactions or arrangements entered into by the entity is to obtain treaty benefits, these benefits would be denied unless it is established that granting of these benefits would be in accordance with the object and purpose of the provisions of the treaty.

There is the need to update Ghana's Model to reflect the recommendations in the Final Reports on BEPS.