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Kenya: Law & Practice

Ombo Malumbe, Jack Ong’anya, Allan Mukuki and Cindy Ajumbo
Ong’anya Ombo Advocates LLP

KENYA

Law and Practice

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Ong'anya Ombo Advocates LLP is a full-service law firm rendering dedicated and curated legal services to mostly non-state entities in and outside Kenya to advance their business interests. The law firm's keen interest in legal, socio-economic and political factors when guiding its clients sets it apart as a full-service business law firm. The services on tax matters are classified under two general umbrellas: tax controversy and tax non-controversy. These services include litigation and ADR, tax structuring, transactional tax structuring, tax restructuring, tax management through estate planning, transfer pricing, double tax agreements, stakeholder engagement, tax policy development, and tax management for start-ups. The firm is a member of ALFA International headquartered in Chicago, USA, with over 10,000 lawyers spread across 60 key countries around the globe. The firm's membership of ALFA International gives its clients the benefit of access to any talent in the key markets.

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1. Types of Business Entities, Their Residence and Basic Tax Treatment

1.1 Corporate Structures and Tax Treatment

Types of Business Forms

The corporate form a business takes is influenced by various factors, which may include promoters' operational interests, statutory compliance issues, or budget factors. Generally, the laws in place provide for business forms such as sole proprietorship, limited partnership (LP), limited liability partnership (LLP), limited liability company (LTD), public limited company (PLC), and foreign company (FC), among other forms.

Key Differences Concerning Business Forms

The primary differences among these structures are tax, sector-specific statutory requirements, and liability towards the promoters of the entity.

Whether entities are taxed as separate entities

In general, there are entities that are tax pass-through and those where tax is applied to the entity. For instance, for a sole proprietor, LP and LLP, tax applies to the founder(s) or partners, while for an LTD, PLC and FC, tax applies to the corporate structure. However, there can be a further distinction between the tax applied to an FC and a subsidiary of a foreign company (LTD).

Tax liability post-dissolution of a limited liability entity

If an entity such as an LLP, LTD or PLC is struck off the Companies Register, the closure of the entity does not obliterate any tax liability that the entity has to the relevant government agencies. This means that the tax liability linked to the personal identification number (Tax PIN) of the entity remains active post-closure and the Tax PIN can only be closed upon addressing such liabilities.

1.2 Transparent Entities

The three key transparent entities are sole proprietor, limited partnership, and limited liability partnership. Private equity firms may take the form of an LLP due to the near replication of an LTD in terms of limiting the founders' liability. With regard to venture capital firms and for the purposes of enjoying certain tax benefits, there is no option to opt in for transparent entities, since the Income Tax (Venture Capital Enterprises) Rules require the venture capital firm to be a corporate structure as per the Companies Act.

1.3 Determining Residence of Incorporated Businesses

An entity's residence, other than its incorporation in Kenya, is determined through various operational factors. A business is considered to be resident in Kenya if its management and control of its activities take place in Kenya or the Cabinet Secretary declares a given entity to be a resident entity through a Gazette Notice. Therefore, there are instances where a non-resident entity may be considered to have a permanent establishment (PE) in Kenya. Some of the key factors that are used to determine a PE include the following.

Fixed Place of Business

A fixed place of business wholly or partly serves as a place of management, branch, workshop, office, mine, factory, oil/gas well, quarry, place of extraction/exploitation, warehouse (providing storage facilities), farm, plantation or place for related activities and a sale outlet.

Timeline-Based Activities

183 days

Activities under this category include work on a building site, a construction, assembly or installation project, or any supervisory activity linked to the site or project. There are, however, other factors such as aggregated timelines and related entities, that would be factored in to determine whether an entity is a PE.

91 days

The provision of services or consultancies by a person through employees or other personnel in Kenya where such an activity continues for a period (including an aggregated period) exceeding 91 days within a 12-month period, commencing or ending in the year of income, is also a factor used to determine whether an entity is a PE.

An installation or structure used in the exploration of natural resources for a period exceeding 91 days will also be considered to be a PE.

Dependent Agent

A person that has a dependent agent in Kenya who assumes any role, including concluding contracts and playing the principal role in a business entity with no serious supervision, will be deemed to have a PE in Kenya. However, there are some limitations on applying the dependent agent provision, when the activities are what could be defined by law as those of a preparatory or auxiliary nature.

1.4 Tax Rates

The tax rates in Kenya vary depending on the structure of the entity and certain regulatory factors, such as entities being in the Export Processing Zone (EPZ), Special Economic Zone (SEZ), shipping, or motor vehicle assembly, among others, where there is a special arrangement with the government.

General Tax Rates for Incorporated Businesses

The general applicable rate is 30% for a resident entity and 37.5% for a non-resident entity.

Some Sector-Specific Tax for Incorporated Businesses

- EPZ entities are exempt from paying any corporation tax for a period of ten years from the commencement date, which will be revised to 25% upon the lapse of the exemption period.
- SEZ entities are exempt from paying any corporation tax for the first ten years, after which, 15% tax will apply.
- An entity engaging in the local assembly of motor vehicles will pay 15% corporate tax for the first five years from commencement of operations. This period will be extended for a further five years should the entity meet the local content requirements.
- If an entity has entered into an agreement with the government for a preferential tax rate, such tax rate will apply.
- An entity engaged in shipping business will pay 15% corporate tax for the first ten years from commencement of operations.
- An entity engaged in operating a carbon market exchange or emission trading system that is certified by the Nairobi International Financial Centre Authority will pay 15% corporate tax for the first ten years from the year of commencement.

Sole Proprietor/LP/LLP

An individual-owned business or pass-through entity's tax rates are applied on an individual level rather than as a "trading as" or pass-through entity. The rates are applied in bands or scales ranging from 10% to a maximum of 35%, as follows (the figures refer to yearly income computation):

- first KES288,000 – 10%;
- next KES100,000 – 25%;
- next KES5.612 million – 30%;
- next KES3.6 million – 32.5%;
- all above KES9.6 million – 35%.

2. Key General Features of the Tax Regime Applicable to Incorporated Businesses

2.1 Calculation for Taxable Profits

Allowable Deductions and Exemptions

There are allowable deductions that a person may apply to their gross profit for the purpose of establishing their net profit, which will be taxable. The Kenya Revenue Authority (KRA) is implementing measures to bring taxpayers into the system and there is a requirement that for allowable deductions to be accepted, all tax receipts must be generated from KRA's electronic tax invoice management systems (eTIMs), save where there are exemptions. Allowable deductions include business-related expenditure, bad debts, expenditure on scientific research, certain expenditures arising prior to commencement of the business, certain investment costs, certain costs under extractive industries, etc, and a person may consider income that is exempt from tax when determining taxable profits.

2.2 Special Incentives for Technology Investments

Scientific Research Incentive

A business that has expenses of a capital nature or not of a capital nature concerning scientific research will have the right to deduct the expense as an allowable deduction, and this equally applies to funds paid to a scientific research association that has been approved by the Commissioner.

Qualifying Intellectual Property

There is a clearer approach on how to qualify intellectual property (IP) income that is subject to determining preferential tax rates. The IP income subject to tax benefits is determined through the division of the taxpayer's research and development (R&D) costs by the taxpayer's R&D costs plus acquisition costs and related party sourcing costs, and the outcome is multiplied by IP income (including royalties, capital gains, any income from the sale of IP assets, and embedded IP income per transfer pricing principles).

2.3 Other Special Incentives

Carbon Market Exchange or Emission Trading System

An entity certified by the Nairobi International Financial Centre Authority (NIFCA) to operate a carbon market exchange or emission trading system will be taxed at the rate of 15% for the first ten years from commencement of its operation.

Economic and Processing Zones

There are various tax benefits on corporate tax for entities that embrace the use of the EPZ or SEZ. The former is more focused on export from Kenya while the latter provides room to transact with the local market and export while still experiencing tax incentives.

Manufacture of Human Vaccines

An entity engaged in the manufacture of human vaccines is exempt from tax for income accrued in, derived from, or received in Kenya. These exemptions apply to payments made to a non-resident service provider without a PE in Kenya, the income of the entity, compensating tax, and dividends paid to a non-resident person.

Motor Vehicle Assembly

An entity engaged in local assembly of motor vehicles will pay 15% corporate tax for the first five years from the commencement of operations. This period will be extended for a further five years should the entity meet the local content requirements.

Special Arrangements

The government offers a special tax rate if an entity enters a special operating framework with the government, an entity is incorporated for manufacturing human vaccines or other manufacturing activities including mining, and the capital investment is about KES10 billion.

2.4 Basic Rules on Loss Relief

Where a loss is in line with the regulations on allowable deductions, the law allows a deduction to be carried forward for a maximum period of ten years. However, a person may apply to the Commissioner for an extension due to its inability to extinguish the deficit deduction.

2.5 Imposed Limits on Deduction of Interest

There are parameters when deducting interest as one of the allowable deductions under the relevant law. The interest should arise from funds borrowed with a view to advancing a particular investment income (excluding qualifying dividends and interests) for a particular taxable income. If the amount deductible exceeds the income with tax obligation, the same excess will be carried forward to the following income year.

2.6 Basic Rules on Consolidated Tax Grouping

Consolidated Tax Group

The Commissioner requires an entity with Kenyan residence that is an ultimate parent or constituent of a multinational enterprise to file its financial activities concerning Kenya and other jurisdictions in which it has a tax presence. An entity that qualifies for this category is one with a gross turnover of KES95 billion. This qualifying entity will file country-by-country (CBC) reports through a master file and local file. The master file will include the consolidated financial statements of the group.

Exemptions

Resident surrogate parent entity

There are exemptions on CBC reporting based on the fact that the ultimate parent entity has a reporting obligation at its jurisdiction, its jurisdiction has an international agreement coupled with the competent authority, and there is no arising systemic failure notification by the Commissioner.

Resident constituent entity

There are exemptions on CBC reporting if the non-resident surrogate entity files the CBC, the jurisdiction of the non-resident surrogate requires CBC reporting, no notification is made to Kenya for systemic failure, or the non-resident parent entity has issued a notification to a competent authority that it is the designated surrogate parent entity of the group.

2.7 Capital Gains Taxation

Capital Gains Tax (CGT) in Kenya is currently at the rate of 15%, which is applicable to gains made upon selling of shares. An entity can determine what amounts to gains, subject to CGT, by calculating the difference between the transfer value and the adjusted cost. The former being the consideration paid, while the latter refers to the various costs incurred that can be deducted from the transfer value.

In the event there is a different tax applicable to what would be classified as CGT, then CGT will not be applied because of the other applicable tax. In addition, one is limited from deducting costs for any securities transacted on and listed on any security exchange approved under the Capital Markets Act.

The CGT applicable when transferring a property will not apply when the title of the property is being transferred to a family trust.

2.8 Other Taxes Payable by an Incorporated Business

The type or sector specific to a transaction will influence the type of tax that will be applied in a particular transaction. In this regard, the following are some of the taxes included.

Value Added Tax (VAT)

This is applicable on various goods and services rendered to an entity or when rendering the same to another entity if the goods or services are not exempted or zero-rated.

Excise Duty

This is commonly applicable in various transactions, such as bank transactions, gains in the gaming industry, and for certain products/goods per a given Harmonised System (HS) Code, among others.

Withholding Tax (WHT)

This is applicable to various classes of transaction and an incorporated business ought to know when to apply for the same. Some instances where WHT is applicable include consultancy fees, royalties, and gaming-related winnings, among others.

Gambling Industry-Based Tax

This is applicable to winnings. The taxes, which are rated at 15% of the gaming revenue (gross turnover less the amount paid out to customers as winnings), are known as betting tax, lottery tax, gaming tax, and prize competition tax. The taxes are paid to the Sports, Arts and Social Development Fund.

2.9 Incorporated Businesses and Notable Taxes

Other Notable Taxes

There are several tax classifications that apply to various businesses based on the sector that a particular business ventures into during that tax period. Some of the notable taxes other than VAT and WHT, among others, are as follows.

Affordable housing levy (currently declared unconstitutional)

According to the Finance Act, 2023, the Affordable Housing Levy (AHL) was applicable at a rate of 1.5% of the gross salary of the employee, whereby the employee and employer both contributed 1.5% per month. This levy was, however, declared unconstitutional. As a result, the government passed the Affordable Housing Act, which was accepted into law on 18 March 2024. Currently, there are no regulations to make the Affordable Housing Act operational.

Compensating tax

This tax is applicable to any untaxed dividend that is being distributed. A corporate entity will have an obligation to apply Compensation Tax at the rate of corporate tax, which is 30%.

Digital service tax

A Digital Service Tax (DST) at a rate of 1.5% is applicable as a final tax on a non-resident entity without a PE that offers digital services.

National industrial training authority levy

This levy is paid at a rate of KES50 per employee monthly. This amount is a contribution by the employer; therefore, it is not deducted from the staff payroll.

Turnover tax

Turnover tax is applicable to all resident entities (including pass-through entities) at a rate of 3% of the gross receipts paid monthly. There are entities that are exempt, and an entity may apply for an exemption.

3. Division of Tax Base Between Corporations and Non-corporate Businesses

3.1 Closely Held Local Businesses

The 2023 report by the Business Registration Service (BRS) indicates that 46,399 sole proprietorships were registered in Kenya, compared to 34,330 LTDs. It is common practice for founders to prefer to start with a sole proprietorship due to its low costs and simple structures, and later to convert, mostly to an LTD. However, some founders opt for a corporate form from the beginning.

3.2 Individual Rates and Corporate Rates

Individual Tax Rates

The current income tax on an individual basis is on a scale from 10–35% depending on the individual's annual income. This means that the rate is equally applicable to a sole proprietorship, LP or LLP due to the open nature of income tax.

Corporate Tax Rates

There are various tax rates ranging from 0–37.5% of the income of a corporate entity in a given year. However, there are various ways to achieve tax benefits, such as, in the manufacture of human vaccines, being in the SEZ or EPZ, or by being involved in the motor industry, among others.

Other Options

While lawyers are limited to sole proprietorship, LP and LLP due to the ideology that having shareholders will lead to diversion from public interest to shareholders' interests, many other professionals prefer to adopt LTD structures.

3.3 Accumulating Earnings for Investment Purposes

There are no regulatory measures that limit a closely held corporation in the accumulation of funds for investment purposes. However, where an amount that would have been distributed as dividends, upon other deductions such as investments, has not been distributed within 12 months of the accounting period, the Commissioner will deem the amount as having been paid, thereby resulting in the applicable tax being effected.

3.4 Sales of Shares by Individuals in Closely Held Corporations

CGT is the applicable tax, at a rate of 15%. There are exemptions, depending on whether there is a gain or a loss, which could result in the CGT not being applied to a particular transaction.

3.5 Sales of Shares by Individuals in Publicly Traded Corporations

The traded shares are subject to WHT that is applied by the relevant stockbroker trading the shares on behalf of the individual. The WHT must be remitted to KRA on or before the 20th day of the following month. The WHT rate applicable to a resident person is 5% (this extends to a citizen of East African Community partner states) and for a non-resident person the WHT rate is 15%. There are limited exemptions on such dividends.

4. Key Features of Taxation of Inbound Investments

4.1 Withholding Taxes

The rates for WHT vary according to the transaction activity, for instance, interest, dividends and royalties will attract WHT at a rate of 15%, 5% (voting rights matter) and 5% respectively for a resident person, while a non-resident person will pay a WHT of 0%, 15% and 20% for interests (qualifying interest), dividends and royalties respectively. These examples are not conclusive as there are various types of royalties and interests, which an investor should be familiar with prior to any dealings.

4.2 Primary Tax Treaty Countries

Kenya has about 14 active double tax agreements (DTAs), some of which are in the process of being negotiated or signed by the relevant states. These DTAs are essentially meant to manage the possible taxes applied on cross-border transactions. Which country will receive the tax is influenced by myriad factors, which can include IP structuring for licensing, accessibility to investors, and socio-political factors, among others. Therefore, an entity is advised to assess its commercial interest before exploring the structures under DTAs.

4.3 Use of Treaty Country Entities by Non-treaty Country Residents

A DTA's use is limited to the parties to that DTA. A person needing any consensus with the Commissioner on an item where a DTA does not apply, will have to reach out directly to the Commissioner. This is even more important where there is a grey area and the use of a DTA, or international agreement, will help in providing a solution.

4.4 Transfer Pricing Issues

The Kenyan government is keen to update its Transfer Pricing Rules due to the challenges arising when implementing the Transfer Pricing Rules 2006, which are not in line with other market players or current events. To curb the challenges the Commissioner faces when interacting with inbound investors, transfer pricing principles have been adopted which will give the inbound investor a sense of direction when tabulating the relevant charges on an arm's length principle.

4.5 Related-Party Limited Risk Distribution Arrangements

Related entities are required, as a matter of policy, to have policies that govern their respective relationships or arrangements. This is a bare minimum requirement in a transfer pricing realm; however, the same ought to be structured within the best international practices, which will help in easing tension between the entity and the Commissioner.

4.6 Comparing Local Transfer Pricing Rules and/or Enforcement and OECD Standards

Kenya, being a member of the OECD, is required to revamp its regulatory framework to match the OECD standards; however, while there are limiting factors due to the current regulatory framework having been in use since 2006, the courts have embraced the OECD guiding principles for the purposes of better application or interpretation of the tax laws.

4.7 International Transfer Pricing Disputes

Kenya's interest in revamping its Transfer Pricing Rules gives a clear impression that the relevant regulator is experiencing a series of challenges. Even the adoption of certain OECD standards may not have had much impact due to the need to translate the same into local law. Hence the appearance of the new proposed Transfer Pricing Rules, 2023, which are more detailed.

There have been instances where differences of opinion on the application of the Transfer Pricing Rules, 2006, have escalated between the regulator and corporate entities at the domestic level, which still tends to be fairly manageable. However, there have been instances where the DTAs have also come into play, which requires diplomacy and mutual respect. In such cases, where there is a DTA and a taxpayer feels aggrieved by a tax regulator over the possibility of double taxation, the taxpayer can adopt a MAP process to resolve the dispute.

5. Key Features of Taxation of Non-local Corporations

5.1 Compensating Adjustments When Transfer Pricing Claims Are Settled

Compensating tax is applicable at a rate of 30% when a corporate entity wishes to distribute its dividends out of gains or profits, and no tax is paid against such dividends.

5.2 Taxation Differences Between Local Branches and Local Subsidiaries of Non-local Corporations

Local branches and local subsidiaries are subject to corporate tax of 37.5% and 30% respectively for the declared net profits in a particular year of income. Furthermore, the allowable deductions for a local branch and local subsidiary are equally different based on various transactional factors.

5.3 Capital Gains of Non-residents

CGT is applicable to non-residents at a rate of 15% and is applied on any property, which includes shares held in Kenya that are transacted on by any person, including a non-local holding entity that holds shares in a local entity directly. There is room to explore the provisions of the DTA, which boils down to the place where the alienator of the shares is resident.

5.4 Change of Control Provisions

What Amounts to Change of Control?

There are provisions addressing what amounts to change of control, which include factors such as shares held, guarantees, financial facilities, ownership of know-how, and authority to appoint more than half of the board members, among others. Any activity touching on the mentioned factors may show an aspect of change of control.

Liability of a Company

There are instances where the senior officers of the company, including a controlling member, will take full responsibility for the company's tax if it can be established that the senior officers or controlling member put in place measures that made the company fail, or intended to have it fail, to comply with the tax laws.

5.5 Formulas Used to Determine Income of Foreign-Owned Local Affiliates

There are no unique formulas other than the applicable regulatory framework, and accounting standards that are fronted by the Institute of Certified Public Accountants of Kenya (ICPAK) as favourable international practice.

5.6 Deductions for Payments by Local Affiliates

The bare minimum condition is that for a deduction to be allowed, the same ought to have been spent wholly and exclusively by the business for the purposes of generating the income. There are limitations on the application of the same, based on various factors, including branch of a non-local entity and a local subsidiary of a non-local entity.

5.7 Constraints on Related-Party Borrowing

The regulatory framework in place provides that all transactions ought to be conducted at arm's length for the purposes of enhancing compliance with the Transfer Pricing Rules, 2006. Generally, in an attempt to comply with the Transfer Pricing Rules, risks arise, such as currency stability and interest rates meant for the actual loan and interest rates meant to cover the possible unpredictable fluctuation between the Kenya shilling (KES) and other favourably stable currencies that are stronger than the KES.

All in all, there are limitations on deductions should the payable interest to a related entity, including third parties, be in excess of 30% of the earnings before interest, taxes, depreciation and amortisation (EBIDTA) in any financial year of the borrower. There are however some exemptions that an entity may use where the purpose of the limitation is not applicable.

6. Key Features of Taxation of Foreign Income of Local Corporations

6.1 Foreign Income of Local Corporations

As Kenya has adopted the territorial tax-based system, this means that from a general perspective, foreign income will not be subject to tax, save where there are certain requirements that the local corporation fails to meet. Therefore, where the Commissioner determines that to generate a certain income, the local corporation must partly conduct business inside and outside Kenya, then the whole income will be subject to tax per the classification of that tax.

6.2 Non-deductible Local Expenses

If the income is exempt, there will be no applicable deductions. However, as previously indicated, there are instances when a foreign income will be classified as taxable income, which will result in the application of allowable deductions, while observing the non-deductible expenses per the applicable regulatory framework.

6.3 Taxation on Dividends From Foreign Subsidiaries

Generally, dividends received by a local corporation from a foreign subsidiary, as a result of which, the local corporation holds more than 12.5% of the shares, is tax exempt and, as such, there is no allowable deduction on expenses linked to that tax-exempt income.

6.4 Use of Intangibles by Non-local Subsidiaries

The intangible assets, while considering the arm's length principle, will be licensed to the non-local subsidiary, which translates to income received in Kenya by the local corporation. The income will be subject to the applicable regulations such as the Income Tax Act, Transfer Pricing Rules and DTA (if any).

6.5 Taxation of Income of Non-local Subsidiaries Under Controlled Foreign Corporation-Type Rules

There are BEPS-influenced laws focusing on country-by-country reporting and common reporting standards, which will disclose more information concerning entities' activities for better taxation. However, while in general the status is that there is no defined framework for a controlled foreign corporation (CFC), an entity controlling a foreign entity still has a defined position in Kenya for tax purposes.

6.6 Rules Related to the Substance of Non-local Affiliates

There are no economic substance regulations in place; however, the approach by the Commissioner is limited to the activities of the entity as compared to a mere description. Therefore, the regulatory framework on what amounts to a resident, non-resident or PE entity will influence how the Commissioner defines an entity's tax obligation.

6.7 Taxation on Gain on the Sale of Shares in Non-local Affiliates

Generally, alienation of shares in a non-local entity attracts no tax, save for where within 365 days before the alienation, 20% of the value of the share was derived from an immovable property in Kenya.

7. Anti-avoidance

7.1 Overarching Anti-avoidance Provisions

There are anti-avoidance provisions that are structured to operate both prospectively and retrospectively. The provision focuses on transactions designed to avoid a person's liability to pay tax. Also, there is a provision focusing on private companies that may opt to delay the distribution of dividends that would ordinarily have been disbursed to the shareholders.

8. Audit Cycles

8.1 Regular Routine Audit Cycle

The Commissioner does not have a specific timeline according to which it can initiate an audit; however, there are certain statutory limitations with exemptions to limitations towards the Commissioner. By law, the Commissioner may effect an assessment based on the information it has, limited to a period not exceeding five years from the date of the last report. However, the five-year statutory limitation will not apply in the event the taxpayer engages in what can be classified as gross or wilful neglect, evasion, or fraud.

9. BEPS

9.1 Recommended Changes

Kenya is making a remarkable effort to achieve the BEPS recommended changes. As it stands, there is interest to provide new Transfer Pricing Rules and country-by-country reporting laws are already in place, not to mention provision of penalties for non-compliance.

Kenya is equally implementing the Common Reporting Standards (CRS), which will require defined financial institutions to disclose their customers' information to the Commissioner. This is a process that will lead to the realisation of the automatic exchange between relevant countries.

9.2 Government Attitudes

The Kenyan government is keen on implementing BEPS to align with its national interests, while also factoring in the interests of its international partners. There are significant practices of what could be considered as steps towards the implementation of Pillars One and Two, since the Cabinet Secretary for the National Treasury and Economic Planning released a draft Transfer Pricing Rules, 2023, that is meant to replace Transfer Pricing Rules, 2006. There is also a regulatory framework in place requiring country-by-country reporting for entities that have revenues of at least KES95 billion, and common reporting standards.

9.3 Profile of International Tax

Kenya is progressively finding its place in the international tax sphere by enhancing its interest in taxing what could reasonably be considered as income accrued in, derived from, or received in Kenya. Recent taxes such as the digital services tax, content creator tax, and the digital assets tax; the intention to revamp the Transfer Pricing Rules; the introduction of country-by-country reporting; and the implementation of common reporting standards, give the impression that Kenya is keen to give international tax a high public profile.

9.4 Competitive Tax Policy Objective

Kenya has been advancing its tax models (introducing new taxes and bringing taxpayers into the system) by making various amendments and adopting various OECD-related guidelines or principles. However, as a developing country with low labour costs and with local and international loan facilities that need to be serviced, not to mention that Africa is considered to be the next big business frontier, Kenya will need to achieve balance in how to remain attractive to serious investors while still trying to keep up with certain international compliances.

9.5 Features of the Competitive Tax System

The Kenyan government's urge to develop a tax policy that is investor friendly, which as per the current regulatory framework includes tax benefits for entities engaged in manufacturing human vaccines, assembling motor vehicles, certain classifications of manufacturers and mining entities, and SEZ and EPZ companies, among others, has created a better chance for investors to interact with Kenya. However, there are grey areas that need to be factored in, which include operational taxes such as VAT and payroll-related taxes, which, if well balanced, will make the tax system in Kenya more competitive.

9.6 Proposals for Dealing With Hybrid Instruments

Kenya has taken a step to ratify the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. Regardless of reservations in place, there is an initiative towards implementing measures on how to deal with hybrid instruments.

9.7 Territorial Tax Regime

Kenya has adopted the territorial tax regime and there are certain parts of the tax requirements that extend to cover foreign income. In instances where income from a foreign jurisdiction is deemed taxable, and the same income has already been taxed in a foreign country, the taxpayer must notify the Commissioner of its intention to claim the tax paid in the foreign country as deductible.

9.8 Controlled Foreign Corporation Proposals

There is no defined framework on Controlled Foreign Corporation (CFC) proposals. However, an entity controlling a foreign entity still has a defined position in Kenya for tax purposes.

9.9 Anti-avoidance Rules

Kenya has a limited number of active DTAs, which, in general, seem to mirror each other on standard provisions, while certain areas come with favourable terms that may enhance the possibility of improving inbound and outbound investment, not to mention that a DTA with certain suitable markets encourages multinationals to establish headquarters in Kenya, thereby enhancing the viability of the country.

The DTAs, while in place to curb double taxation, provide room for taxation to take effect at reasonable rates, or factoring in what would be described as territorial tax as compared to a generalised worldwide tax model.

9.10 Transfer Pricing Changes

Kenya recently amended its laws to provide for qualifying elements on determining intellectual property value for the purposes of applying preferential tax. This may be a need considering the recent exemptions issued towards manufacturing and mining entities, and those interested in the manufacture of human vaccines. Furthermore, the Cabinet Secretary of the National Treasury and Economic Planning has proposed new Transfer Pricing Rules, 2023, that should replace the current Transfer Pricing Rules, 2006.

9.11 Transparency and Country-by-Country Reporting

Kenya is in favour of country-by-country reporting and there are some exemptions applicable based on the corporate structure, jurisdictional factors, availability of international agreements, and competent authority in place, among others. An entity may opt to assess the favourable structure per the relevant laws for the purpose of managing its country-by-country reporting.

9.12 Taxation of Digital Economy Businesses

Content Creators

The government has advanced its interests towards digital content creators. In recent amendments, the government introduced a tax applicable to content creators at a rate of 20% of the gross amount.

Digital Assets

The government has finally expressed interest in digital assets by introducing a Digital Assets Tax at a rate of 3% of the transfer or exchange value.

9.13 Digital Taxation

There is a tax-focused regulation on digital solutions with various exemptions or exclusions. The DST, at a rate of 1.5%, is applicable to a non-resident digital service provider as the final tax, and a tax on digital content monetisation and digital assets has been introduced. The introduction of a tax on digital assets will open windows to other regulatory framework that will focus on digital assets.

9.14 Taxation of Offshore IP

The Kenyan government has expressed interest in determining the value of IP for the purposes of better taxation. One solution is a preferential tax to be applied on IP (currently law: see **2.2 Special Incentives for Technology Investments**). On the other hand, the Cabinet Secretary of the National Treasury and Economic Planning recently proposed new Transfer Pricing Rules, 2023, that should replace the Transfer Pricing Rules, 2006 (see **9.10 Transfer Pricing Changes**).

CHAMBERS GLOBAL PRACTICE GUIDES