International Tax
Kenya Highlights 2017

Investment basics:

Currency – Kenyan Shilling (KES)

Foreign exchange control – No, but banks must report significant foreign exchange transactions to the central bank (i.e. all transactions in excess of USD 10,000 must be reported).

Accounting principles/financial statements – IFRS. Financial statements must be prepared annually.

Principal business entities – These are the public/private limited liability company, company limited by guarantee, sole proprietorship, partnership, cooperative society and branch of a local or foreign company.

Corporate taxation:

Residence – A company or similar corporate entity is tax resident if it is incorporated under Kenyan law, if management and control of its affairs are exercised in Kenya or if the Cabinet Secretary of Finance declares the entity to be tax resident in a notice published in the *Kenya Gazette*.

Basis – Resident and nonresident corporate entities are subject to tax on all income accruing in or derived from Kenya.

Taxable income – Income tax is imposed on a company's gross income, less allowable deductions. In general, expenses must be incurred "wholly and exclusively" in the production of income and not be capital in nature to be deductible for tax purposes. Business income, investment income (other than for financial institutions, for which investment income is considered business income), rental income and income from agriculture are assessed separately.

Taxation of dividends – Dividends from a Kenyan company are not subject to additional tax other than what is deducted at source (see "Withholding tax," below). Dividends from a foreign company are not taxable in Kenya.

Capital gains – Capital gain tax (CGT), which had been suspended since 1985, was reintroduced as from 1 January 2015. The CGT rate is 5% of the net gain, which is a final tax. With effect from 1 January 2016, capital gains arising from the transfer of shares traded on any securities exchange licensed by the Capital Markets Authority are not subject to CGT.

CGT is levied on the profit or gain derived from the transfer of qualifying property or assets. The tax is chargeable on both companies and individuals. In the case of companies, qualifying property includes, among other things, money, goods, choses in action, land and movable and immovable property. For individuals, qualifying property comprises land and any right of interest over that land.

Certain transactions involving property dealings do not constitute a transfer for capital gains purposes. These include: (1) the transfer of property for the sole purpose of securing a debt or a loan; (2) the issuance by a company of its own shares or debentures; (3) the vesting of property in a personal representative of a deceased person by operation of law; and (4) the transfer of property by an individual to a spouse, to a former spouse as part of a divorce settlement or bona fide separation agreement, including a transfer to "immediate family" i.e. children of the spouses or former spouses; or (effective from 9 June 2016) to a company where spouses or a spouse and immediate family hold 100% shareholding.

Losses – Losses may be deducted in the year in which they arise and the 10 following years (extended from four years with effect from 1 January 2016). Where the losses are not utilized within this period, an extension may be granted upon application; however, no guidance has been issued to set forth the circumstances under which this approval would be granted. Losses may not be carried back, other than by oil and gas companies. Losses may be set off only against income from the same source, and capital losses are nondeductible.

Rate – The general corporate income tax rate is 30%, with branches of foreign companies taxed at 37.5%. Newly listed companies enjoy a reduced rate for three to five years from the year of income following the year of listing; the rate (20%-27%) and period depend on the percentage of capital listed (more than 20%). To further encourage listing of companies, with effect from 1 January 2016, the corporate tax rate for newly listed companies is reduced from the normal 30% rate to a 25% rate for a period of five years commencing from the year of income following the year of listing, regardless of the percentage of capital listed. In order to boost the housing development sector, with effect from 1 January 2017, the corporate tax rate for companies that construct at least 400 residential units annually is reduced from the normal 30% to 15%, subject to approval by the Cabinet Secretary responsible for housing. Where a company engages in other activities, the 15% rate will be restricted to the proportion of turnover relating to housing activity.

Surtax – No

Alternative minimum tax – No

Foreign tax credit – Foreign taxes paid are treated as an allowable expense, except where a tax treaty applies, in which case a tax credit is granted.

Participation exemption – No

Holding company regime – No

Incentives – Kenya provides for a 100% investment deduction on hotel buildings and on buildings and machinery used in manufacturing. Manufacturing investment in buildings and machinery situated outside the municipalities of Nairobi, Mombasa or Kisumu attracts an investment allowance of 150%. Enterprises in export processing zones enjoy a 10-year tax holiday. With effect from 1 January 2016, the Income Tax Act provides that Special Economic Zone enterprises are subject to corporate tax at a reduced rate of 10% for the first 10 years and 15% for the next 10 years.

Withholding tax:

Dividends – No withholding tax is imposed if the recipient is a qualifying Kenyan financial institution or if the resident recipient company controls 12.5% or more of the capital of the payer. Otherwise, the rate is 5% for dividends paid to residents of Kenya and on listed shares for citizens of the East African Community; the rate is 10% for other nonresidents.

Interest – There are different categories for withholding tax on interest. Interest received from financial institutions is subject to a 15% tax, while the withholding tax on interest on bearer certificates is 25%. Withholding tax on interest from bearer bonds is 10%.These rates apply for payments to both residents and nonresidents.

Royalties – Royalties (and natural resource income) paid to a resident are subject to a 5% withholding tax; the rate is 20% if paid to a nonresident.

Technical service fees – A 5% withholding tax is levied on the payment of technical service fees (as well as professional and management fees) where the services are provided by a resident. The rate is 20% where the service provider is a nonresident, unless an applicable tax treaty provides otherwise.

Branch remittance tax – No

Other – For nonresidential rental income, a 12% withholding tax on gross proceeds applies effective 1 January 2016, but this tax will be withheld only by agents appointed by the government.

Other taxes on corporations:

Capital duty – See under "Stamp duty."

Payroll tax – No

Real property tax – Land rates are assessed by local authorities. (See also "Stamp duty.")

Social security – Prior to June 2014, an employer was required to contribute 5% of payroll to the National Social Security Fund (NSSF), up to an annual maximum of KES 2,400 per employee. From June 2014, the contribution is 6% of emoluments for employees, with the same amount contributed by employers, subject to an upper earnings limit. The 6% upper limit per month is KES 2,160 for employees earning more than KES 18,000 per month. However, an injunction currently is in place, pending the outcome of a High Court case rejecting the changes to the NSSF. Thus, the former rate temporarily continues to be applied.

Stamp duty – Stamp duty is charged at nominal or *ad valorem* rates on certain financial instruments and transactions. With effect from 11 April 2016, the 1% stamp duty upon the creation of share capital has been abolished; however, the 1% stamp duty is levied on any subsequent increase of authorized share capital. Stamp duty is levied at a rate of 4% on immovable property (2%

if levied outside the municipalities), and at a rate of 1% on the transfer of shares and other securities. An exemption applies if the shares/securities are listed on the Nairobi stock exchange.

Transfer tax – See under "Stamp duty."

Other – Compensating tax is imposed on dividends declared from untaxed profits. The tax is calculated as the cumulative tax paid since 1988 (including compensating tax and tax attributable to dividends received), less the cumulative tax attributable to dividends paid at the standard rate. Companies are required to keep a "dividend tax account"; corporate income tax and compensating tax paid during the year and 30/70 times the dividends received during the year are added to the account balance brought forward from the previous year. This amount is deducted from the sum of corporate income tax repayments received during the year and 30/70 times any dividends paid during the year. If the result is a negative balance, compensating tax sufficient to reduce the balance to zero must be paid.

Fringe benefits tax is chargeable on companies in respect of concessionary rate loans granted to employees. All other benefits are taxable to the employee.

Residential rental income tax applies from 1 January 2016. Under the new tax, the residential rental income of a person (an entity or an individual) in excess of KES 144,000 per annum but that does not exceed KES 10 million per annum is taxed at a rate of 10% of the gross proceeds. Taxpayers have the option to continue to be taxed on a net income basis, by filing a written election with the Commissioner of Domestic Taxes. Taxpayers earning residential rental income exceeding KES 10 million per annum continue to be taxed on a net income basis. The 10% rate will apply only to residential rental income. For other rental income, a withholding tax rate of 12% of gross proceeds has been introduced, effective 1 January 2016, but this tax will be withheld only by agents appointed by the government. Effective from 1 January 2017, the 12% rate has been reduced to 10%.

Anti-avoidance rules:

Transfer pricing – Kenyan law requires arm's length pricing between related enterprises. Compliance with the OECD guidelines generally ensures compliance with Kenyan law, although domestic transfer pricing rules also are in place.

Thin capitalization – Interest expenses are proportionately restricted for foreign controlled companies (other than licensed financial institutions) when the ratio of all liabilities on which interest is charged exceeds three times the payer's issued and paid-up capital and revenue reserves/accumulated losses. The debt-to-equity ratio for thin capitalization purposes for companies in the extractive industry (i.e. mining, geothermal, petroleum) is 2:1, as opposed to the ratio of 3:1 prescribed for other companies.

Control, for these purposes, includes participations of at least 25%.

Deemed interest is imposed on thinly capitalized companies that receive interest-free loans from nonresident related companies. The tax authorities prescribe the deemed interest rate each quarter, based on the average 91-day treasury bill rate. This rate is applied to the interest-free loan balance during the quarter. The deemed interest amount is not deductible for tax purposes and it is subject to a 15% withholding tax.

Controlled foreign companies – No

Disclosure requirements – The tax authorities have the statutory right to require information from a taxpayer concerning its own tax affairs, and also may require information from banks about payments of interest.

Compliance for corporations:

Tax year – The tax year is the calendar year, although a company (other than a financial institution) may adopt any year end. All taxable income is assessed in the fiscal year in which the company's accounting year ends.

Consolidated returns – Consolidated returns are not permitted; each company must file a separate return.

Filing requirements – The self-assessment and compensating tax returns must be filed within six months of the end of a company's accounting period. It is now mandatory to file the returns using the online system (iTax). Tax installments are due within 20 days of the end of each quarter (except the first installment, which is due in the fourth month of the period), based on the relevant proportion of the estimated current tax or 110% of the tax for the previous year, less previous installments paid and withholding tax deducted at source; the balance of tax, if any, is due four months after the company's year end. Agricultural companies make their first installment payment 20 days after the end of the third quarter.

An employer is required to submit quarterly Pay As You Earn (PAYE) returns before the 10th day of the month following the end of each quarter, in respect of emoluments earned in each of the three months and the tax deducted. Alternatively, an employer may file monthly returns electronically, which alleviates the need for the quarterly returns.

Penalties – Late payments of self-assessed tax are subject to a 20% penalty, plus a 1% penalty per month. A late-filing penalty of 25% of the tax due (subject to a minimum of KES 10,000) applies to a return required to

be submitted on account of employment income. Otherwise, a 5% penalty (subject to a minimum of KES 20,000) applies on any amount still owed four months after the year end.

Rulings – A taxpayer may request a nonbinding interpretation by the Kenya Revenue Authority of the tax legislation as it applies in general, or to specific situations.

Personal taxation:

Basis – All income accruing in, or derived from, Kenya is subject to tax in Kenya. A Kenyan resident is taxable on his/her worldwide employment income; a nonresident is taxable only on Kenyan-source employment income. Only Kenyan citizens may offset tax on foreign employment income against the tax charged in Kenya on such income. Noncitizen residents must include their after-tax foreign-source employment income in their Kenya taxable income.

Residence – An individual is resident in Kenya if he/she has a permanent home in Kenya and is present in Kenya for any time during the year. An individual present in Kenya for at least 183 days in the tax year is resident, as is any person who has averaged 122 days in the country in the tax year and the previous two tax years.

Filing status – A married couple living together may elect to file separate returns. Otherwise (unless they are living apart, when separate returns are filed), the tax on their combined income is assessed on them proportionately, with the tax on the wife's earned and investment income calculated as if it were the sole source of joint income.

Taxable income – Income tax is imposed on all income accruing in, or derived from, Kenya. Employment income is broadly defined and includes amounts paid outside Kenya. Fringe benefits are taxable to the employee, at either actual or deemed cost.

Capital gains – See under "Corporate taxation."

Deductions and allowances – Personal relief is KES 13,944 per annum (effective 1 January 2017 this is KES 15,360 per annum). The following may be deducted from taxable income: up to KES 150,000 annually in mortgage interest for owner-occupied property (effective 1 January 2017 this is increased to KES 300,000 per annum); contributions to a registered pension or provident fund up to KES 240,000 annually (the deduction may not exceed 30% of employment income); and 15% of health or life insurance premium payments (up to KES 60,000 annually). The daily subsistence allowance up to KES 2,000 paid when working away from the normal place of duty is not taxable.

Rates – Progressive rates of 10%, 15%, 20% and 25% are levied on the first KES 466,705 in approximately equal bands; the rate is 30% on the amount exceeding KES 466,704. With effect from 1 January 2017, the 10%, 15%, 20% and 25% rates are levied on the first KES 513,373 in approximately equal bands; the rate is 30% on the amount exceeding KES 513,373.

Other taxes on individuals:

Capital duty – No

Stamp duty – Stamp duty is charged at nominal or *ad valorem* rates on certain financial instruments and transactions.

Capital acquisitions tax – No

Real property tax – Yes, at a percentage of the land held value.

Inheritance/estate tax – No

Net wealth/net worth tax – No

Social security – An employee must contribute to the NSSF and the National Hospital Insurance Fund (NHIF); an employer contributes to only the NSSF. An employee is required to contribute on a graduated scale at KES 150 on KES 5,999 salary per month up to a maximum of KES 1,700 for salaries of KES 100,000 and above. New higher rates legislated of approximately 1% of payroll, up to an annual maximum of KES 3,840, are still subject to the outcome of a High Court case. Prior to June 2014, an employee was required to contribute 5% of payroll to the NSSF, up to an annual maximum of KES 2,400. From June 2014, the NSSF contribution is 6% of emoluments for employees, with the same amount contributed by employers, subject to an upper earnings limit. The 6% upper limit per month is KES 2,160 for employees earning more than KES 18,000 per month. However, an injunction currently is in place, pending the outcome of a High Court case rejecting the changes to the NSSF. Thus, the former rate temporarily continues to be applied.

Other – See "Other," under "Other taxes on corporations," above, for tax on rental income

Compliance for individuals:

Tax year – Calendar year

Filing and payment – Personal income tax returns are due by 30 June following the end of the tax year (even where the individual has only a single employment and the tax payable on that emolument has been deducted under the PAYE system by the employer), with any balance of tax due by 30 April. As in the case for corporate entities, it is now mandatory to file personal returns using the online system (iTax).

Penalties – See under "Corporate taxation."

Amnesty – The Finance Act 2016 introduced an amnesty on all taxes, penalties and interest for years of income ending on or before 31 December 2016 for taxpayers with foreign-earned taxable income, under the conditions that (i) the income is declared by the taxpayer in the tax return for the year ending 31 December 2016 and (ii) the taxpayer submits the accounts and returns for the year 2016 before 31 December 2017.

Value added tax:

Taxable transactions – VAT is imposed on the supply of taxable goods and services made or provided in Kenya by a taxable person in the course of, or in furtherance of, any business carried on by that person and on the importation of goods and services into Kenya.

Rates – The standard rate is 16%, although certain supplies are exempt or zero-rated. According to the VAT Act that became effective in 2013, certain categories of oil and fuels will continue to be exempt for three years, after which they will become zero-rated (unless the exemption is revoked earlier). This exemption has now been extended for another 2 years under the Finance Act 2016.

Registration – Registration is compulsory where the turnover of taxable supplies is, or is expected to be, KES 5 million or more in a 12-month period.

Filing and payment – VAT returns and any related payments are due by the 20th day of the following month.

Late payment of VAT results in a penalty of 1%, compounded monthly. Failure to submit VAT returns results in a penalty of 5% of the tax due (minimum penalty of KES 10,000), while failure to apply for VAT registration results in a fine of KES 100,000.

Source of tax law: Income Tax Act and Value Added Tax Act

Tax treaties: Kenya has eleven tax treaties in force that have been officially gazetted. Several other treaties are expected to enter into force in the foreseeable future.

Tax authorities: Kenya Revenue Authority

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