The Legal 500 Country Comparative Guides

Kenya: Tax

This country-specific Q&A provides an overview of tax laws and regulations applicable in Kenya.

For a full list of jurisdictional Q&As visit here
1. How often is tax law amended and what are the processes for such amendments?

Kenyan tax laws are usually amended once a year through the Finance Bill presented during the National Budget presentation. The tax proposals contained in the Finance Bill are initiated by the National Treasury and presented to Parliament which considers the proposals through a committee. The committee invites submissions from stakeholders for consideration and reports back to Parliament with a report for adoption. Once adopted, with or without changes, the Bill is presented to the President for assent after which it becomes law (The Finance Act). Amendments may also be contained in a Tax Laws Amendment Act or if they are not too significant introduced through the Statute Law (Miscellaneous Amendments) Act.

2. What are the principal procedural obligations of a taxpayer, that is, the maintenance of records over what period and how regularly must it file a return or accounts?

The principal procedural obligations were previously provided in various tax legislation such as the Income Tax Act and the Value Added Tax Act. However, through the enactment of the Tax Procedures Act No. 29 of 2015, all the procedural rules for administration of tax laws in Kenya were consolidated into this Act. The purpose of the Tax Procedures Act is to provide for uniform procedures for consistency and efficiency in the administration of tax laws, facilitate tax compliance by taxpayers and to ensure effective and efficient collection of taxes. The procedures under the Act are applicable to the administration of taxes in Kenya unless there is specific procedure under a tax law that is unique to the administration of taxes under it. Record keeping is an obligation under section 23 of the Tax Procedures Act which mandates the taxpayer to maintain any document(s) required under any tax law so as to enable the person’s tax liability to be readily ascertained. A taxpayer is required to maintain records and documents relating to all taxable transactions for a period of five years (and for longer periods where proceedings are commenced before the end of five year period until the proceedings have completed or if the documents relates to an amendment assessment, it may be retained for the specified period). Returns are filed either monthly for transaction taxes such as Value Added Tax and Withholding Tax or annually for corporate and personal income tax or at other specified times for various taxes, e.g. at the time of importation for import declarations. For corporate and personal income tax, the returns are accompanied by accounts where appropriate.

3. Who are the key regulatory authorities? How easy is it to deal with them and how long does it take to resolve standard issues?

Key tax regulators are the National Treasury (established under the Public Finance Management Act pursuant to Article 225 of the Constitution) and the Kenya Revenue Authority (KRA) which was established in 1995 through the Kenya Revenue Authority Act Cap 469 of the Laws of Kenya. KRA is mandated with the obligation of collection of revenue on behalf of the Government of Kenya. The functions of the Authority under the Act include; assessment, collection and accounting for all revenues in accordance with the tax laws, offering advisories to the government on matters relating to the administration of and
collection of revenue and performing such other functions in relation to revenue as the Cabinet Secretary of Finance may direct. It is relatively easy to deal with the regulators on routine and non-disputed matters. However, where contentious matters arise, it can be difficult to reach a resolution.

4. Are tax disputes capable of adjudication by a court, tribunal or body independent of the tax authority, and how long should a taxpayer expect such proceedings to take?

Tax disputes are adjudicated by the Tax Appeals Tribunal and further appeals may be pursued at the High Court or Court of Appeal and in certain circumstances at the Supreme Court. Even though the Tax Appeals Tribunal Act provides at Section 13 that the Tribunal shall hear and determine an appeal within ninety days from the date the appeal is filed with the Tribunal, this timeline has not always been adhered to due to administrative and other challenges. The time taken varies widely but would be anything between 6 months to 3 years at each stage of appeal. The Courts are not bound to hear and determine the tax cases within any specific timelines. Determination of disputes before the court are dependent on many factors such as the availability of judicial officers, court’s diary, backlog and preparedness of the parties to prosecute the matter. Important to note also is that there is now an option to resolve tax disputes through the Alternative Dispute Resolution process which operates within the revenue authority through the KRA Alternative Dispute Framework. As per section 55 of the Tax Procedures Act, tax disputes referred to out of tribunal or court settlement or alternative dispute resolution mechanisms must be resolved within ninety days, failure of which the dispute shall be referred back to Court or Tribunal. The doctrine of exhaustion of local remedies is key in determination of disputes that can be considered by the courts other than appeals arising from the Tax Appeals Tribunal. The judicial precedence have shown that the jurisdiction of the court other than appellate jurisdiction should be invoked as the last resort unless there are exceptional circumstances such as questions of constitutional violation under the constitution or exercise of judicial review powers (in which case leave of court may be sought under section 9 of the Fair Administrative Actions Act for existence of exceptional circumstance).

5. Are there set dates for payment of tax, provisionally or in arrears, and what happens with amounts of tax in dispute with the regulatory authority?

There are set dates for payment of final and provisional taxes. Of the major taxes, VAT, residential rental income tax, excise duty and withholding taxes are payable on or before the 20th day of the following month; payroll tax (employee tax) is payable on or before the 9th day following the payroll month whereas annual income taxes are payable by instalments during the 4th, 6th, 9th and 12th month of the tax year in question, with any balance payable by the end of the 4th month following the end of the tax year in question.

Where tax amounts are in dispute, the taxpayer must file an objection within 30 days of receiving an assessment or a decision from the revenue authority, and further to the objection decision, the taxpayer may appeal to the Tax Appeals Tribunal if not satisfied with
6. Is taxpayer data recognised as highly confidential and adequately safeguarded against disclosure to third parties, including other parts of the Government? Is it a signatory (or does it propose to become a signatory) to the Common Reporting Standard? And/or does it maintain (or intend to maintain) a public Register of beneficial ownership?

Yes. Taxpayer data is recognised as highly confidential and the law requires revenue authority officers to treat taxpayer information as confidential. Section 6 of the Tax Procedures Act requires the tax Commissioner or authorized persons in relation to administration of tax law to protect the confidentiality of the documents or information obtained in the course of administration of the tax law. Disclosure is only permitted in circumstances and to persons set out in the proviso to the said section. The said provision is worded in a manner which allows taxpayer data to be freely disclosed (i) to the tribunal or court for purposes of proceedings under the law, (ii) to Kenya National Bureau of Statistics for statistical purposes, (iii) to the Auditor General, (iv) to foreign governments or international organisations under mutual assistance arrangements, (v) to agencies mandated to investigate corruption, and (vi) to any other institution of the government of Kenya for purposes of performance of the duties of that institution. A similar provision relating to confidentiality of taxpayer information is found in Section 36 of the Tax Appeals Tribunal which criminalises disclosure of any confidential information other than in a manner provided for in law. Even though under Section 29(8) of the Tax Appeals Tribunal Act, all decisions of the Tribunal and all evidence received by it, including a transcript of the report of the hearings, are public records open to inspection of the public, the Tribunal is enjoined to ensure that in releasing, or allowing access to, information under Section 29(8), measures are taken to prevent the disclosure of trade secrets or other confidential information. More recently, the Data Protection Act 2019 was enacted into law which provides for additional safeguards to taxpayer’s personal data. The Act defines personal data as any information relating to an identified or identifiable natural person and breach to personal data includes unauthorized disclosure of the data to third parties. The Act also lists a number of information that is classified as sensitive data which may be held by the data processor. KRA being the custodian of huge portions of taxpayers’ information is a data processor and processing such information falls within the provision of the Data Protection Act. The Act establishes specific principles for processing personal data, the rights of data subjects and remedies in case of breach of personal data by the data processor. It is expected that in the coming days KRA will have to put in place measures to comply with this new legislation.

Kenya is a signatory to the Common Reporting Standard. Recently, the Registrar of Companies has announced the operationalization of the Beneficial Ownership e-Register with effect from 13th October, 2020.

7. What are the tests for residence of the main business structures (including transparent entities)?
The main tests for business structures are incorporation and management and control. Beneficial ownership is considered in relation to foreign entities seeking to benefit from treaty provisions.

8. **Have you found the policing of cross border transactions within an international group to be a target of the tax authorities’ attention and in what ways?**

Yes. There is a focus on transfer pricing on cross border transactions within a multi-national corporation. Transfer pricing rules are in place requiring that taxpayers dealing with related parties maintain documentation to demonstrate compliance with arm’s length principle. Transfer pricing audits are a major focus area during tax audits. Other specific provisions targeting cross border related party transactions include interest restriction (thin cap regime) and deemed interest provisions on foreign loans from related parties.

Withholding taxes are also levied on profit repatriation.

From a customs perspective, there is also frequent review of import values declared on related party imports.

9. **Is there a CFC or Thin Cap regime? Is there a transfer pricing regime and is it possible to obtain an advance pricing agreement?**

There is currently no CFC regime.

There is a thin cap regime which imposes restriction on the deductibility of interest and foreign exchange losses of companies that are foreign controlled with debt: equity threshold of 3:1 (2:1 for upstream petroleum companies).

There is a transfer pricing regime in line with OECD transfer pricing guidelines under the Income Tax (Transfer Pricing) Rules 2006. However there is currently no mechanism for obtaining an advance pricing arrangement. However, a taxpayer may seek non-binding opinion on administration of tax provision.

10. **Is there a general anti-avoidance rule (GAAR) and, if so, in your experience, how would you describe its application by the tax authority? Eg is the enforcement of the GAAR commonly litigated, is it raised by tax authorities in negotiations only etc?**

There is a general anti-avoidance rule which empowers the tax authority to adjust/disregard transactions whose motive is the reduction of tax liability. The authority has applied it in a number of cases but these have been challenged due to the difficulty of demonstrating the tax avoidance motive. However, the provision continues to be invoked and the taxpayers are left with the burden of demonstrating the commercial substance and business rationale justifying the arrangements in question. Due to the difficulty in applying the GAAR, other specific anti-
avoidance measures have been legislated. Specifically, section 23 of the Income Tax Act is the general anti avoidance provision where transaction is intended to avoid or reduce the liability to tax. The Commissioner has discretionary powers to direct adjustment in respect of tax liability as he considers appropriate to counteract avoidance or reduction of tax liability which could otherwise be effected by the transaction. The Tax Procedures Act also penalises any avoidance schemes by the taxpayer. Section 85 of the Act provides that if the Commissioner has applied a tax avoidance provision in assessing a taxpayer, the taxpayer is liable for a tax avoidance penalty equal to double the amount of the tax that would have been avoided but for the application of the tax avoidance provision. Additionally, Section 92 provides that a tax agent shall have committed an offence where he assists a taxpayer to create a tax avoidance scheme, or abets or aides a taxpayer to evade tax.

11. **Have any of the OECD BEPs recommendations been implemented or are any planned to be implemented and if so, which ones?**

Kenya has signed the MLI. There is also a plan to implement Country by Country reporting. A unilateral digital services tax has also been introduced. Kenya has also implemented Action Plan 14 of the OECD’s BEPs initiative which relates to increasing effectiveness of dispute resolution mechanisms by adopting and developing an ADR framework for tax disputes. The Income Tax Bill proposes implementation of a number of the recommendations namely, providing for treaty anti-abuse rules in renegotiated treaties and new treaties and expanding the definition of permanent establishment to counter artificial avoidance of PE status.

12. **In your view, how has BEPS impacted on the government’s tax policies?**

The Kenya government has become more focused on updating tax laws that address tax avoidance especially by multinationals. It has also targeted the digital economy to generate additional taxes. New tax treaties being signed reflect some of the tax treaty related measures.

13. **Does the tax system broadly follow the recognised OECD Model? Does it have taxation of; a) business profits, b) employment income and pensions, c) VAT (or other indirect tax), d) savings income and royalties, e) income from land, f) capital gains, g) stamp and/or capital duties. If so, what are the current rates and are they flat or graduated?**

Yes. The tax system broadly follows OECD. There is tax on business income, employment and pensions, VAT, tax on income from savings (interest and dividends) and royalties, tax on rental income, capital gains and stamp duties. There are also excise taxes, import duties (including import VAT) and other levies on specific products/transactions.

Income taxes for individuals are charged on a graduated scale (current rates from 10% to 25%) (note: due to the Covid-19 pandemic only employees earning K.Sh. 24,000 and more are charged employee tax (PAYE)); income tax for companies currently at 25% and 37.5% for
resident and non-resident companies respectively. The 25% rate for individuals and resident companies was introduced as a temporary relief in relation to Covid-19 and may be reversed to the previous rate of 30%.

VAT rate is currently 14% (reduced from 16% as a mitigation for Covid-19). Some essential products and services are exempt or zero-rated.

Capital gains is chargeable at 5%. Excise and import duties vary for different products.

14. **Is the charge to business tax levied on, broadly, the revenue profits of a business as computed according to the principles of commercial accountancy?**

Yes, except for specific modifications regarding non-allowable (or allowable) deductions and for specific businesses where special rules exist such as taxation of insurance companies and for businesses subject to the turnover tax regime.

Kenya has recently introduced a minimum tax regime at 1% of gross turnover which will be payable if a company’s normal tax is less than the minimum tax. This will affect companies with low margins and loss making entities.

15. **Are different vehicles for carrying on business, such as companies, partnerships, trusts, etc, recognised as taxable entities? What entities are transparent for tax purposes and why are they used?**

Yes. All legal vehicles for carrying on business are recognised as taxable entities but partnerships and trusts are transparent for tax purposes. Transparent entities may be used due to regulatory requirements (such as professions).

16. **Is liability to business taxation based upon a concepts of fiscal residence or registration? Is so what are the tests?**

Yes. The tests for residence in the case of entities involve local incorporation/registration and management and control whereas in the case of individuals, the tests involve presence in-country for a specified period (183 day rule for those without a permanent home). Non-resident entities with a taxable presence (permanent establishment) would also be taxable.

17. **Are there any special taxation regimes, such as enterprise zones or favourable tax regimes for financial services or co-ordination centres, etc?**

There are limited special taxation regimes. Export processing zones/special economic zones enjoy exemption from tax for a specific period.

There is a general move to reduce incentives.
Other special tax regimes include taxation of upstream petroleum companies; turnover tax for small enterprises and residential rental income tax.

18. Are there any particular tax regimes applicable to intellectual property, such as patent box?

No. The only closest incentive would be that the Income Tax Act makes provision for expenditure of a capital or revenue nature incurred in scientific research for the purposes of business carried on to be fully deducted in a year of income. A proposed new income tax law (in Bill form) makes provision for technology related capital allowances.

19. Is fiscal consolidation employed or a recognition of groups of corporates for tax purposes and are there any jurisdictional limitations on what can constitute a group for tax purposes? Is a group contribution system employed or how can losses be relieved across group companies otherwise?

There is no fiscal consolidation and no utilisation of losses across group companies.

20. Are there any withholding taxes?

Withholding taxes apply on specified payments made by taxable persons in Kenya to both resident and non-resident persons. Specified payments include royalties, interest, dividends, management and professional fees (including technical, consultancy fees), pensions and rent. Rates of withholding tax for payments to resident persons vary from 3% up to 15% whereas rates for non-residents range from 10% to 30%. In the case of non-residents the withholding tax is a final tax and may be reduced where a tax treaty exists. In the case of residents, the withholding tax is an advance tax in most cases which is available as a credit against final tax on income.

21. Are there any recognised environmental taxes payable by businesses?

None.

22. Is dividend income received from resident and/or non-resident companies exempt from tax? If not how is it taxed?

Dividend income received from resident companies is taxed through withholding tax (5% if paid to a resident person or East African citizen and 15% if paid to a non-resident person). However, where the recipient is a resident company holding at least 12.5% of the paying company, the dividends are exempt from tax. Dividend income from foreign companies are generally exempt from tax.

23. If you were advising an international group seeking to re-locate activities from the
UK in anticipation of Brexit, what are the advantages and disadvantages offered by your jurisdiction?

Kenya has limited (but growing) number of tax treaties. There are no exchange controls and there is a large pool of qualified workforce. The legal system is largely based on the British/Commonwealth system.

The main disadvantages are lack of tax incentives for some sectors such as services; tax policy is not stable and generally cost of doing business is high due to inefficiencies in certain aspects such as importation/logistics.