Setting up your Business in Kenya
Issues to consider

Kenya's economy is market-based with a few state-owned infrastructure enterprises and maintains a liberalised external trade system. With a population of approximately 46.1 million, Kenya is one of the economic leaders in Sub-Saharan Africa. The solid and conducive economic performance is experienced due to good agricultural performance, supportive monetary policy, good infrastructure investments and also creation of an EPZ. The country is generally the Eastern and Central Africa's hub for financial, communication and transportation services. Major industries include: agriculture, forestry and fishing, mining and minerals, industrial manufacturing, energy, tourism and financial services. Kenya is also a good investment destination due to its strengths in excellent connectivity to major worldwide hubs, skilled workforce, and liberalized economy with no restriction for residents and non-residents and memberships including COMESA, WTO and EAC. In addition, Kenya has a number of tax treaties and investment promotions and protection to foreign direct investment.

However, there are a number of issues which you must consider when you are looking to set up your business in Kenya. This document takes you through some of the common questions we come across and gives you practical information about the issues you need to consider.

What type of Business Structure should we use?

There are advantages and disadvantages to all of them, and there is no one correct answer, it's all dependent on your specific business circumstances and needs. A brief overview of the main structures is below:

Establishment (a branch of your overseas business)

- Not a separate legal entity but an extension of the overseas parent company
- No limited liability or ring-fencing of the Kenya operations
- If have a permanent establishment in Kenya then profits are liable to Kenyan Corporation tax
- Must file **parent company accounts**, prepared under Kenya Company Law, at the Companies Registry for public inspection, even if these are not made publically available overseas

Limited Company:

- Provides limited liability and ring-fencing to Kenya operations as stipulated in Companies Act 2015.
- Gives a perception of a local business, with longevity.
- Corporation tax to be paid on resident company profits at a rate of 30% while non-resident companies are taxable at the rate of 37.5%.
- All companies are required to file annual returns with Registrar of Companies.
- All companies are required to prepare accounts for the determination of corporation taxes payable. This is laid out in the Companies Act 2015. The accounts must comprise of a balance sheet, profit & loss account, a cashflow statement, a statement

of changes in equity, and notes to the financial statements. These compulsory statements must comply with the International Financial Reporting Standards (IFRS) and International Standards on Auditing (IAS). Other important requirements include:

- ✓ The accounts to be signed by two directors of the company (balance sheet and the statement of directors' responsibilities).
- ✓ An audit opinion, by an auditor registered with the Registration of Accountants Board (RAB), which meets the requirements laid out by the Institute of Certified Public Accountants of Kenya (ICPAK).
- ✓ After preparation of the financial statements, income is declared to Kenya Revenue Authority through the iTax platform.

Limited Liability Partnership:

- Members (partners) have limited liability and operate under a partnership deed.
- Profits and losses are shared amongst the members as per their capital contribution.
- The tax residence of the member, and where the profits in the LLP originated will determine in what jurisdiction and how these profits are taxed.

How much Corporation Tax will the business pay?

Current Corporation Tax rates in Kenya are:

Tax rate (%)		**Taxable profit (Cur)**
Resident Companies	30%	on taxable income
Non-Resident Companies	37.5%	on taxable income

(NB: rates are for the tax year to 31/12/2017)

What if we use Kenya to set up our holding company?

Kenya Corporation Income Tax is tax collected from companies based on net income obtained while doing business. This is collected by the Kenya Revenue Authority as Government revenue. This is governed by the Income Tax Act (CAP 470), laws of Kenya. For resident companies the rate used is 30% while non-residents are charged 37.5%.

Treatment of dividends paid and received including the impact of withholding tax.

The general rate for withholding tax on dividends for both residents and non-residents is 10%. For a Kenyan resident corporate holding more than 12.5% of the shares, there is no withholding tax deductible on the payment of the dividends. The payer of the income mentioned is responsible for deducting and remitting the tax to the Commissioner of Income Tax on or before the 20th day of the following month.

What if we make cross-border transactions between group companies?

Kenya Transfer Pricing (TP) is regulated by the Income Tax Act Cap 470, the Income TP Rules and the OECD guideline. All these are internationally recognized **Transfer Pricing** (TP) rules where cross-border trading and financial transactions between affiliated entities have to be conducted on an arm's length basis. The price and terms should be the same as if the transactions had been between completely independent parties.

TP rules and regulations are only applicable to non-resident entities. The accepted methods for transfer pricing include: the comparable uncontrolled price method; the resale price method; the cost plus method; the profit split method (contribution analysis or residual analysis); and the transactional net margin method.

Typical transactions between affiliated entities that are covered by TP regulations are:

- Sale and purchase of goods
- Provision of management services
- Property rental charges
- Transfer of intangible assets e.g. trademarks, patents
- Sharing of knowledge, expertise, business contacts etc.
- Provision of financial support e.g. inter-group loans and charging a "market" interest on loans

A business will need to prepare a Transfer Pricing Report proving the arm's length basis of transactions. The report will include a functional and risk analysis, analysis of the adopted pricing model and benchmarking of the arm's length basis.

The requirements for transfer pricing include:

1. The selection of the transfer pricing method and the reasons for the selection
2. The application of the method, including the calculations made and price adjustment factors considered
3. The global organization structure of the enterprise
4. The details of the transaction under consideration
5. The assumptions, strategies and policies applied in selecting the method
6. Other background information regarding the transaction

However even if an entity is exempt from the Kenya transfer pricing regime it may fall under the scrutiny of the other international tax jurisdictions where it transacts. There may also be other tax regulations which ensure transactions are undertaken at a commercial value.

What Employment Taxes and Social Security will need to be paid?

If an individual is resident in Kenya then they are subject to Kenya tax laws. To an individual, residence means - that the person has a permanent home in Kenya and was present in Kenya for any period in a particular year of income under consideration; or that he has no permanent home in Kenya but - was present in Kenya for a period or periods amounting in the aggregate to 183 days or more in that year of income; or was present in Kenya in that year of income and in each of the two preceding years of income for periods averaging more than 122 days in each year of income.

To a body of persons, means - that the body is a company incorporated under a law of Kenya; or that the management and control of the affairs of the body was exercised in Kenya in a particular year of income under consideration; or that the body has been declared by the Minister, by notice in the Gazette, to be resident in Kenya for any year of income.

We would advise any new entrant to Kenya or person who spends time working in Kenya to take professional advice to determine whether they are Kenya tax resident.

Current Personal Income Tax rates in Kenya are:

Band of income (Kshs)	Tax rate (%)
On the first Kshs134,164	10%
On the next Kshs126,403	15%
On the next Kshs126,403	20%
On the next Kshs126,403	25%
On all income over Kshs513,373	30%

(NB: rates are for the tax year to 31/12/2017)

Employers and employees also have to pay Kenya social security, which is called National Social Security Fund (NSSF). The employer and employees contribute Kshs. 200 each. There is however a new proposed amendment proposing payment of 6% of gross income by employee and employer contributing the same with a maximum of Kshs. 1,700 per month.

NB: (rates are for the tax year to 31/12/2017)

It is the employers' legal responsibility to pay over employee's tax and social security deductions to the Kenya tax authorities. It is the responsibility of the employer to deduct and pay the contributions to KRA and NSSF respectively.

What is Value Added Tax (VAT) and should the business be registered?

VAT is a "goods and services tax" on supplies made, the standard rate of which is 16%. All businesses must be registered for VAT with the KRA Personal Identificación Numbers (PIN).

VAT is charged on a taxable supply made by a registered person in Kenya; the importation of taxable goods; and a supply of imported taxable services.

The rate of tax applicable in the case of a zero-rated supply, is zero percent; or in any other case, sixteen percent of the taxable value of the taxable supply, the value of imported taxable goods or the value of a supply of imported taxable services.

There are three types of supply

- Taxable – must charge VAT on supplies, can reclaim input VAT
- Exempt – cannot charge VAT nor reclaim input VAT
- Outside the scope – not in the Kenya VAT system

The supply of most types of goods and services in Kenya would be classed as Taxable supplies. However when these supplies are made to companies which are outside of Kenya advice needs to be sought as to what rate of VAT, if any, to use.

Can we provide Share option plans to our staff?

Many companies see Share Option plans as being an important way of attracting, motivating and retaining key staff.

Kenya has a number of "approved" share option plans which give tax benefits to employees and employers alike and it is often possible to adapt an overseas stock option plan to fit into one of these "approved" plans.

However this is a very technically complex area and careful planning needs to be undertaken as soon as share option plans are being considered for implementation in Kenya.

How else can we compensate our employees?

Kenya has a very comprehensive range of compensation and benefit options available for companies to offer their employees.

Pensions, private medical insurance, life and disability cover are now commonplace benefits provided by many Kenya businesses to their workforce.

Flexible benefit packages are also gaining in popularity, giving employees options on how they wish to "spend" their benefits allowance; which can range from "purchasing" additional holiday entitlement to obtaining full family medical cover.

To discuss your requirements please contact the International Office on +44 (0) 1245 449266 or email us directly.

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