

WTS Africa Quarterly Newsletter

Editorial

Recent tax developments in Africa

Dear Madam/Sir,

We hope you may find interesting our first edition of the WTS Africa Regional Quarterly Newsletter where we collate and present taxation related news from six countries on the continent.

The following participants in the WTS Global network have contributed with a diverse range of international tax topics. These contributors are from the following countries:

- > Ghana – WTS Nobisfields
- > Kenya – Viva Africa LLP
- > Mozambique - Vieira de Almeida (VdA)
- > Nigeria - WTS Blackwoodstone
- > Senegal - FACE Africa Tax & Legal
- > South Africa - WTS Renmere

Our experts will be happy to answer any questions you may have.

We thank you for your interest.

Yours sincerely,

WTS Africa Team

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Please find the complete list of contacts at the end of the newsletter.

Ghana



Recent developments in tax

Increase in VAT Rate

The **Value Added Tax (Amendment) (No.2) Act, 2022** (Act 1087) has increased the standard VAT rate from 12.5% to 15%. The VAT will still be charged with the NHI, Covid health Recovery and GETFund Levies.

Decrease in E-levy rate

Electronic Transfer Levy (Amendment) Act, 2022 has reduced Electronic Transfer Levy (E-Levy) from 1.5% to 1%.

Constitution of the Independent Tax Appeals Board (ITAB)

The Minister of Finance inaugurated the 11-member Independent Tax Appeals Board (ITAB) in January 2023 to hear and determine appeals against tax decisions of Ghana's Commissioner-General (CG). An appeal against the decisions of the ITAB will lie at the High Court.

Newly Approved Tax Amendment Bills

On March 31, 2023, Parliament passed the 3 amended bills under certificate of urgency. The bills are Income Tax (Amendment) (No.2) Bill, 2022, the Exercise Duty and Exercise Stamp (Amendment) Bill, 2022 and the Growth and Sustainability Levy Bill, 2022. The newly approved bills by Parliament of Ghana will not have legal effect until assented by the President.

- a) Income Tax (Amendment) (No.2) Bill, 2022
 - › Tax of 5% on Minimum Chargeable Income

An introduction of minimum chargeable income of 5% of total income for companies that have recorded losses for first years.

- › Tax Band

An additional income bracket with a tax rate of 35% on monthly chargeable income above GHS 50,000;

The bill also provides for the chargeable income of a company and income from goods and services provided to the domestic market by a free zone enterprise after the concessionary period other than a company principally engaged in the hotel industry to be taxed at a rate of 25%.

Excise Duty and Excise Stamp

This bill revises the excise tax rates for cigarettes and other tobacco products to conform with the Economic Community of West African States (ECOWAS) Protocols. It imposes a 20% tax on cigarettes and e-smoking devices, as well as sweetened beverages, spirits and wines.

Growth and Sustainability Levy

A special levy known as the Growth and Sustainability Levy on profit before tax has been introduced. The rates are as follows

- › 5% on companies in the financial sector, breweries, telecommunication, mining and
- › Oil and gas services, OMC's, BDC's, shipping lines, maritime and airport terminals operators;

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- > 1% on gross production in the case of mining, and upstream oil and gas companies and 2.5% on other business entities.

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Kenya



Recent developments in value added tax (VAT) on exported taxable services in Kenya

A married couple resident in Switzerland, which was subject to limited tax liability in In March 2023, the High Court (HC) delivered a judgment which allowed refunds of input VAT on exported services. Coca Cola Africa (CCA) was party to a service agreement with Coca Cola Export Corporation (CCEC), an American company, for the provision of marketing services. In 2017, CCA applied for an input VAT refund. The Kenya Revenue Authority (KRA) audited the Applicant's VAT returns for 2014-2016 (wherein CCA had run adverts in local dialects through various media, based on their contract with CCEC), and disallowed part of the refund claim citing undeclared tax on locally consumed services.

CCA successfully appealed against KRA's decision at the Tax Appeals Tribunal, arguing that the services were exported to CCEC and thus zero-rated. KRA appealed this outcome at the HC, arguing that the marketing services were consumed by locals who were the target group of the ads. Dismissing KRA's appeal, the HC found that despite locals being the target of the ads, CCEC was the beneficiary of the marketing services, since they were identified as the customer in the contract.

Hitherto the enactment of the Finance Act 2021, the exportation of taxable services was zero-rated- before its transformation to VAT-exempt status. Therefore, the position advanced by this judgment is only applicable to taxable services which were exported prior to 1 July 2021, when the amendment took effect.

Regarding the current law in force, July 2022 saw the Finance Act 2022 amend the law further and reclassify exported services as standard-rated, thus attracting VAT at 16%, save for Business Process Outsourcing (BPO). To contest this, Our Firm along with other parties filed a petition at the HC in September 2022, since it adversely affected the merchantability of Kenya's exported services. Unexpectedly, the court dismissed all petitions pertaining to the Finance Act 2022 through its judgment in January 2023. We have since lodged an appeal at the Court of Appeal (CoA) seeking to overturn the HC's contentious decision.

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Nevertheless, there is optimism (further heightened by a presidential announcement on 30 March 2023 at the AmCham Business Summit in Nairobi) that the Finance Bill 2023 may remedy this and reclassify exported taxable services under either exempt status or zero-rated status. Customarily, Finance Bills in Kenya are introduced prior to the end of a fiscal year to ensure their enforcement is synced with the beginning of the new fiscal year. It remains to be seen whether this will materialize, with the current fiscal year still ongoing.

In the meantime, the Finance Act 2022 amendments on the levying of VAT on exported taxable services (except for BPO) will remain in force until such time as they are repealed by an Act of Parliament or declared unconstitutional by a court of competent jurisdiction.

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Mozambique



Key topics for investing in Mozambique

Mozambique has become more attractive to foreign investment in the last few years. There are, however, some key points foreign investors should have in mind before investing in the country. Investors with registered seat or effective management in Mozambique are subject to 32% Corporate Income Tax (CIT) on profits obtained on a worldwide basis, while non-resident investors with a PE therein are only subject to CIT on the profits attributable to such PE. Non-resident investors without a PE in Mozambique are subject to CIT on Mozambican sourced income. Indirect taxes, including VAT (16% rate, levied on the supply of goods and services), stamp duty, customs duties, and excise duties are also relevant within the Mozambican tax framework.

We highlight below some key points:

Business vehicle

The most common vehicles are the private limited liability companies and the public limited liability companies. There are other legal forms or entities for cooperation between companies that may be used (e.g., JV or consortium).

Application of DTT

Payments of all types of income made to non-resident entities are, generally, subject to 20% withholding tax, which is the final tax liability of the non-resident beneficiary in the country. In case a DTT applies, the investor may benefit from reduced rates or tax exemptions. Currently, Mozambique has DTT in force with Portugal, South Africa, Mauritius, Italy, Macao, United Arab Emirates, Vietnam, Botswana, and India. To apply any DTT it is necessary to comply with formal requirements and no payment can be made to an offshore company without obtaining a tax clearance certificate.

Submitting an investment project:

Foreign investors are allowed to invest in Mozambique in the same terms and

conditions as nationals, however, to obtain the guarantees and incentives offered by the Mozambican Government, foreign investors should submit an investment project, under the investment law and complementary legislation.

Tax Benefits

The Tax Benefits Code foresees several customs benefits potentially applicable to companies carrying out investments in Mozambique. The following tax incentives are automatically granted to holders of investment projects for the initial 5 years of implementation of the project: (i) exemption from customs duties and VAT applicable to specific goods (and provided such goods are not produced in the country); (ii) tax credits for investment; (iii) Accelerated amortizations and depreciations; (iv) Deductibility of relevant investment on specialized equipment and new technologies; (v) Deductibility of training programs for Mozambican employees up to a certain percentage from the CIT taxable basis; (vi) Deductibility of expenses incurred in works considered of public utility by the competent authorities (e.g., construction and rehabilitation of roads, airports, schools). Additional and specific benefits may also apply depending on the features and type of the investment project.

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Nigeria



Taxation: Recent Key Developments in Nigeria

We discuss some of the key updates in Tax laws in Nigeria as follows:

Introduction of Carbon Tax Policy

On 13 February 2023, Nigeria announced its plans to unveil a Carbon Tax Policy and Budgetary System in line with the provisions of the Climate Change Act 2021 (the "Act") aiming to reduce gas flaring. Notably, the Act provides a framework for achieving low Greenhouse Gas (GHG) emissions and including climate change actions into national programs. The Act also establishes the National Council on Climate Change to make policies and decisions on all matters relating to climate change in Nigeria and collaborate with the Federal Inland Revenue Service (FIRS) to develop a mechanism for carbon tax and carbon trading in Nigeria. The policy is aimed at increasing government revenue and encouraging consumers to adopt environmentally friendly fuels, new technologies and reduce emissions.

The Business Facilitation (Miscellaneous Provisions) Act 2023 (the "BFA 2023")

The BFA 2023 was assented to as part of the Government's drive to foster an enabling environment for businesses in Nigeria. The BFA 2023 makes provisions for the automation of all company registration processes at the Corporate Affairs Commission. It also provides that government Ministries, Departments and Agencies which provides products and services including tax filing and payment publish the complete requirement for obtaining those services on their websites. It also establishes a single window platform to enable parties involved in trade to interface with the relevant agencies for purposes of fulfilling all relevant

regulatory obligations.

Notably, it also amends the Companies and Allied Matters Act, Nigerian Export Promotion Act, Customs and Excise Management Act, Export (Prohibition) Act, Foreign Exchange (Monitoring and Miscellaneous) Act, Immigration Act, Industrial Training Fund Act, Investment and Securities Act, National Housing Fund Act, National Office for Technology Acquisition and Promotion Act amongst others.

Memorandum of Understanding between the FIRS and the Lagos State Internal Revenue Service (LIRS)

The FIRS and LIRS signed an MoU to increase the revenue collection quota for both tax authorities and allow both agencies to carry out joint audit and investigation, exchange of information and gather data for ease of tax administration. The MOU establishes that a framework for the implementation of a Presumptive Income Tax Assessment regime for personal income tax (PIT) and ground rent (GR) will be developed by the FIRS and the Ministry of Finance for the administration and collection of PIT and GR in Lagos State.

The Decision of the Tax Appeal Tribunal (TAT) in New Skies Satellites BV v. FIRS

The TAT ruled that a non-resident company can be said to have a permanent establishment in Nigeria if the services provided on its behalf by an unrelated party in Nigeria are integral to delivering its contract in Nigeria.

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Senegal



Senegal: After joining Multilateral Convention (MLI) a step forward in the fight against tax evasion & avoidance

More than 5 years after the signature of the Multilateral Instrument (MLI) on June 7th, 2017, Senegal deposited its instrument of ratification of the Multilateral Convention on May 10th, 2022. Overall, the ratification now covers 1,820 bilateral tax treaties around the world and 18 for Senegal.

With the ratification of this Multilateral Convention, which will enter into force on September 1st, 2022, the block of tax conventions of Senegal will be modified to integrate the recommended provisions of the Convention.

The ratification of the Multilateral Convention by Senegal is, after all, the confirmation of a strong political will to support and apply the anti-BEPS measures. As a result, Senegal's tax arsenal has been strengthened for possible revenue optimization.

To know the real impacts of the ratification of the Multilateral Convention on the bilateral Conventions against double taxation (DTC) signed by Senegal, it is necessary for a given bilateral convention, to make a concordance analysis of the reservations and notifications of each of the two signatory States.

In this contribution, our approach is to have an overview of the various reservations made by Senegal. Indeed, Senegal has formulated some reservations notified to the OECD. These reservations concern 7 of the 39 articles of the MLI:

- › One (01) full reservation on Article 3 applicable to all covered conventions signed by Senegal.
- › Three (03) reservations on provisions that Senegal considers already integrated in its signed conventions, namely: article 6.1.a, article 7.1.4 and article 9.1.a of the multilateral convention.
- › One (01) reservation regarding the right not to apply the second sentence of Article 16.2 to its covered tax treaties under certain conditions.
- › One (01) reservation of the right not to apply Article 17 to its Covered Tax Treaties, considering the reservation in Article 16.5. c. ii, on the basis that it intends to adopt, through bilateral negotiations, a treaty provision along the lines of Article 17.1 and the Contracting Jurisdictions reach agreement on that provision and on Article 16.5.c.ii
- › One (01) reservation regarding the right not to apply Article 35.4 to its Covered Tax Treaties.

These reservations are motivated by the desire to give the maximum geographic scope to the MLI and to target the clauses that constitute real progress towards the objectives of the BEPS project.

The reservations are also motivated by the desire to ensure consistency and homogeneity in the application of international taxation in accordance with the famous saying "level playing field". From this point of view, Senegal has decided not only to apply the Multilateral Convention extensively but also to replace the current clauses of its conventions with those of the MLI, which will facilitate the work of consolidating bilateral tax treaties.

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South Africa



Recent Key Developments in South Africa

Cross border streaming transactions

Streaming is becoming more popular as a funding mechanism for mining companies. Although some variation exists, a streaming transaction typically entails the conclusion of a mineral purchase agreement which entitles one party ('the funder') to purchase minerals from a mining company ('the mine') for delivery at future dates by making an upfront payment, accompanied by additional payments upon each delivery.

Whilst onshore streams could result in complex tax considerations, even more complexity arises when introducing international elements. We briefly address the pertinent tax consequences that may be considered when contemplating stream funding:

Nature of the upfront payment

Depending on the specific facts, the upfront payment received by a mine could either be considered a deposit (prepayment) or debt. The legal nature of the

upfront payment impacts inter alia when such payment is taxed in the hands of the mine. If a mine is not required to repay the capital advanced (i.e. only obliged to deliver metals in future at pre-agreed prices) the streaming transaction should not give rise to debt, but rather a deposit or a prepayment for the future delivery of minerals.

Streaming transactions giving rise to debt may result in complexities in respect of inter alia interest withholding taxes, due to the loan being repaid 'in kind' (i.e. by way of delivery of minerals).

Taxation of the upfront payment

Most countries tend to follow the general principle that income is taxed on the earlier of receipt or accrual whilst expenditure is deductible when it is actually incurred.

Barring a specific rule that overrides this general principle, the upfront payment is typically taxed once the mine becomes unconditionally entitled thereto. Any expenses incurred to produce the minerals to be delivered to the funder in future may typically only be deducted once they are actually incurred. From a commercial perspective, streaming transactions may become unfeasible in situations where the upfront payment is taxed in the year of receipt or accrual without any allowance for future expenditure.

To regulate the taxation of income received in advance (as upfront payments are commonly classified), certain countries may provide specific legislative provisions which deviate from the general tax principles. Such specific provisions are often complex and cumbersome to comply with.

Other considerations

Other relevant considerations may include transfer pricing and exchange control regulations (which are still common in African countries). Furthermore, streaming transactions are subject to a measure of scrutiny by the OECD in light of BEPS considerations.

Conclusion

Given that stream funding is far from being a commonplace funding mechanism, we recommend that tax advice be obtained prior to implementing such arrangements. To manage potential risks, and where possible, specific tax rulings may be obtained from revenue authorities.

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About WTS Global

With a representation in over 100 countries, WTS Global is one of the leading global tax practices offering the full range of tax services without the constraints of a global audit firm. WTS Global deliberately refrains from conducting annual audits in order to avoid any conflicts of interest and to be the long-term trusted advisor for its international clients. Clients of WTS Global include multinational companies, international mid-size companies as well as private clients and family offices.

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