wts global

# WTS Africa Quarterly Newsletter

April 2024 | 2nd Edition

# WTS Africa Quarterly Newsletter

Dear Madam/Sir,

We hope you may find interesting our second edition of the WTS Africa Regional Quarterly Newsletter for 2024, where we collate and present taxation related news from eight 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 Consulting LLP
- Mauritius – WTS Tax Consulting (Mauritius) Ltd.
- Nigeria – WTS Blackwoodstone
- Senegal – FACE Africa Tax & Legal
- South Africa – WTS Renmere
- Zambia – WTS Tax Matrix
- Zimbabwe – WTS Tax Matrix

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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## 1 Ghana: Suspension of VAT on Electricity Tariff

In line with Section 35 and 37 and the First Schedule (9) of Value Added Tax (VAT) Act, 2013 (ACT 870) which implementation has stalled since the passage of the bill in 2013, the Government of Ghana through the Ministry of Finance decided to implement these provisions in Act 870 effective January 1, 2024.

The implementation of this tax policy constituted a crucial element of Ghana's post-COVID-19 Program for Economic Recovery from the IMF and was set to be implemented in the first quarter of the year.

Following agitations and calls for withdrawal of the policy by most stakeholders, the Ministry of Finance officially announced the withdrawal of the implementation of the 15 per cent Value Added Tax (VAT) on electricity tariffs for residential consumers above maximum consumption level specified for block charges for lifeline units on February,7 2024.

According to the ministry, the suspension is pending further engagements with key stakeholders in hopes of birthing more innovative, robust, and inclusive approaches that will bridge the existing fiscal gap, while bolstering economic resilience.

The International Monetary Fund (IMF) has also indicated its willingness to consider alternative measures to tackle Ghana's revenue shortfall following the suspension of the Value-Added Tax (VAT) on electricity considering the concerns raised by the public.

If you wish to discuss these topics, please contact: **WTS Nobisfields**

## 2 Kenya: Evolving Tax Landscape for PE and VC Funds

Recent tax determinations taken by the Tax Appeals Tribunal (TAT/Tribunal) have caused some disquiet within the PE and VC sector in Kenya. In particular, the TAT, **in ECP Kenya Limited v Kenya Revenue Authority, Tax Appeal No.335 of 2022** made determinations that are quite concerning for stakeholders in the sector. We highlight some of the implications of the judgment, below.

### a. Gains made by Funds are subject to Corporate Income Tax (CIT) rather than Capital Gains Tax (CGT)

The Tribunal in the ECP case agreed with the Kenya Revenue Authority's (KRA) assessment and found that the gains made by ECP (a PE Fund structured out of Mauritius) on its exit from Java House Mauritius Ltd (Java House Mauritius Ltd has its operating companies in Kenya) were subject to CIT for each year of income rather than CGT. Essentially, this means that the activities of PE Funds such as ECP would be viewed as trading activities subject to CIT rather than investment activities subject to CGT.

### b. Determination of Residency or Permanent Establishment

In its evaluation, the TAT determined that the ECP Fund in question had established a permanent establishment in Kenya and was therefore subject to CIT in Kenya on its worldwide trading/business income. In reaching its decision the Tribunal made an error of fact that the ECP Fund Manager carried on business in Kenya through its local advisor ECP Kenya Limited.

The Tribunal was of the view that the pre and post deal services provided by ECP Kenya Limited to the ECP Fund Manager were sufficient to reach a finding that the ECP Fund Manager had a permanent establishment in Kenya. To link the outcome on the Fund Manager to the Fund, the Tribunal found that the ECP Fund Manager exercised discretionary control over the Fund.

Consequently, the TAT found that by virtue of the Fund Manager exercising discretionary control over the Fund and such control being exercised out of Kenya through the local advisory team, this had created a presence for the Fund Manager in Kenya. Hence, a portion of the sale proceeds from the Java transaction should have been taxed in Kenya. ECP Fund Manager's income accruing from Kenya would thus be subjected to CIT for each year of income.

**Conclusion**

This case and the interpretation accorded by the TAT puts into question many of the structures currently adopted by the PE and VC sector in Kenya, as the ring-fencing between the Fund, the Fund Manager and the local advisor is ordinarily informed by legal, financing, and commercial necessities based on international best practice.

We understand that this matter is being appealed in the High Court of Kenya.

If you wish to discuss these topics, please contact: **Viva Africa Consulting LLP (WTS Kenya)**

## 3 Mauritius: Transfer Pricing in Mauritius

Mauritius does not currently have any specific transfer pricing legislation in place. Nonetheless, Section 75 of the Income Tax Act 1995 ("ITA") provides for the application of the arm's length principle in assessing the reasonableness of commercial and financial terms in related party transactions.

The arm's length provisions under Section 75 of the ITA applies to any business or other income earning activity carried on in or from Mauritius:

a. which is controlled by a non-resident; or
b. by a non-resident company or by a company in which more than 50% of the shares are held by or on behalf of a non-resident; or
c. where the person controlling that business or activity is not, in the opinion of the Director General of the Mauritius Revenue Authority ("MRA"), at arm's length with any other person, either by reason of his relationship or otherwise, with respect to any commercial or financial transaction.

If it appears to the MRA that the business or income earning activity of a company carried out in or from Mauritius produces no net income or less than the net income expected to be derived in the opinion of the Director General of the MRA, then, in the context of an examination of tax returns, the net income may be adjusted to be the amount which the Director-General determines would have been derived by the company, had all its commercial and financial transactions been wholly at arm's length.

While Section 75 of the ITA is not new, during the recent years, we have witnessed an increasing number of assessments being raised in respect of related party transactions, more particularly related-party loan transactions. For instance, in a recent Supreme Court Judgement delivered with respect to Section 75 of the ITA, the first judgement in a transfer pricing case in Mauritius, it was held that interest-free loans provided by a parent to its wholly owned subsidiary were not at arm's length. Accordingly, the Supreme Court held that the MRA was right to challenge such loans under Section 75, impute a deemed interest on such loans and tax same at the level of the parent company.

Interestingly, the judgement did not take into consideration the repayment capacity of the subsidiary, its inability to secure a loan from a third party given it had no assets and was in financial difficulties, or even whether such loans should, in the first place, be considered as loans on a substance-over-form basis.

In view of the above, Mauritius-resident companies having related party transactions should ensure that appropriate transfer pricing policy documentation is put in place and such documentation should be adequately supported by scientifically performed benchmarking exercises to demonstrate the arm's length nature of such related party transactions.

If you wish to discuss these topics, please contact: **WTS Tax Consulting (Mauritius) Ltd.**

## 4 Nigeria: Nigerian Tax Updates

As times are changing, so is the Nigerian tax landscape. In this article, we highlight some of the recent tax updates in Nigeria in the first quarter of 2024.

### 1. The Expatriate Employment Levy

In February 2024, the Nigerian Federal Government introduced an Expatriate Employment Handbook (the Handbook) which introduced an Expatriate Employment Levy which mandates all Nigerian entities engaging resident Expatriates, to pay a defined levy for Expatriates who are directors and other categories of expatriates, annually. The Handbook introduces an obligation to maintain a comprehensive record of expatriate employees and promptly provide up-to-date information to government agencies amongst others. Also, it imposes a fine for non-compliance or breach of the provisions of the levy within stipulated timeframes. Significantly, the implementation of the Levy was subsequently suspended to allow for further consultation.

### 2. The Oil and Gas Companies (Tax Incentives, Exemption, Remission, etc.,) Order 2024

By an Executive Order, the Nigerian President introduced notable tax credits, incentives, and allowances for stakeholders in the Nigerian Oil and Gas sector. Of note, the Order introduced tax credit incentives for non-associated gas greenfield developments. It also makes provisions to grant an investment allowance – of **25% of the actual expenditure incurred** – on gas utilization on qualifying expenditure on plant and equipment incurred in respect of projects in the midstream oil and gas industry.

### 3. Publication of Guidelines for Tax Compliance by Approved Enterprises Operating in Nigeria Export Processing Zone

Furthermore, the Nigerian Export Processing Zone Authority and the Federal Inland Revenue Service issued a joint guideline for tax compliance by approved enterprises operating in Nigeria Export Processing Zones (EPZ) ("The Guidelines") to provide information and guidance to relevant stakeholders, especially Approved Enterprises operating in the EPZs of their tax obligations in Nigeria. Notably, the Guidelines reiterates that Approved Enterprises are exempt from taxes, levies, and rates for activities carried out in the relevant EPZ. However, where such Approved enterprises provide services to persons who are unapproved enterprise (such as Approved Enterprises whose licences have been invalidated) the Approved enterprise is to include, collect and remit VAT. Also, where an Approved Enterprises makes payment to an unapproved enterprise or to non-resident entities, they are to deduct WHT, where applicable. It also introduces the obligation to file WHT and VAT returns in line with the WHT Regulations and the VAT Act respectively, amongst others.

The question of the legality or otherwise of the provisions of the Guidelines has arisen especially considering the tax exemption that Approved Enterprises in the EPZ enjoy. In the meantime, Approved Entities are to comply pending a nullification or otherwise of the Guidelines by a court of competent jurisdiction.

If you wish to discuss these topics, please contact: **WTS Blackwoodstone**

## 5 Senegal: The Concept of Permanent Establishment in Senegal's Extractive Sector

In African economies, the extractive industries play a pivotal role. These sectors are heavily regulated by public authorities, aiming to maximize tax revenue, highlighting the need for a well-defined notion of "Permanent Establishment" (PE) for tax purposes, especially in Senegal's growing extractive industry.

The term "permanent establishment" (PE) is crucial for determining the tax obligations of foreign companies operating in a state where they are not resident. Yet, Senegal's current legislation does not offer a clear definition, largely depending on bilateral and multilateral tax conventions for guidance.

A significant development is Senegal's collaborative project with Mauritania on the Grand Tortue Ahmeyim (GTA) gas field, which introduces a specific approach to defining PE within the extractive sector. Law 2019-07 of 27 February 2019 broadens the definition to include, among the usual conditions for PE consideration, the following criteria:

› Apparatus or structures on the seabed or land used in field exploitation;
› Installations for extracting, receiving, processing, converting, or liquefying natural gas, including storage and loading for export;
› Platforms, structures, installations, or equipment for natural gas treatment before dispatch;
› Construction sites, assembly or installation projects, or related supervision activities lasting more than 183 days;
› Service provision by a company, including consultancy, for the same or a related project over 183 days.

Comparing Senegal's stance with international practices, it's evident that some resource-rich countries have already adopted more nuanced definitions of PE in their tax treaties, particularly regarding offshore activities. These precedents offer valuable lessons for Senegal, suggesting a strategic renegotiation of existing conventions and a potential redefinition of PE to better suit the extractive sector's unique demands.

Moreover, the rise of the digital economy introduces new challenges and opportunities for defining PE. Remote operations and the increasing role of technology companies necessitate an adaptation of taxation models to keep pace with these evolving practices.

The OECD-G20 initiative's inclusive framework aims to address tax challenges posed by the digitalization of the economy, proposing a reevaluation of what constitutes a PE. This includes recommending specific provisions in tax treaties related to the extractive sector, envisioning a future where taxation rights are securely anchored amidst technological advancements.

Navigating these changes, the redefined concept of PE remains central to equitable taxation in the extractive sector. For Senegal and other resource-rich African countries, adjusting tax laws and international agreements in line with the sector's complexities and the nuances of digital economy will be critical for securing a fair share of revenue from invaluable natural resources.

If you wish to discuss these topics, please contact: **Face Africa Tax & Legal**

## 6 South Africa: Practice Note 31 – still of interest… for now

Interest expenditure incurred by a South African resident taxpayer may only be deducted in terms of section 24J(2) of the Income Tax Act, No. 58 of 1962 **('ITA')** – from the income which is derived from carrying on any trade; and only if such interest expenditure was incurred in the production of the income.

Failure to meet the above requirements will result in the inability to deduct interest expenditure for tax purposes. Given that passive holding companies arguably do not carry on a trade, no interest expenditure may be deducted by such companies in terms of the letter of the law.

The South African Revenue Service **('SARS')** has, however, granted a long-standing concession to taxpayers that accrue interest income (without carrying on a trade) by enabling them to claim a deduction in respect of expenditure incurred in production of the interest income, to the extent that it does not exceed such interest income (i.e. a loss may not be created). This concession is contained in Practice Note 31 **('PN 31')**.

On 16 November 2022, SARS issued a notice of its intention to withdraw PN31 with effect from 1 March 2023, with such withdrawal applying in respect of tax years commencing on or after that date. The purpose of the proposed withdrawal, according to SARS, is to prevent certain alleged abuses, to prevent instances where debt funding is ultimately used to fund non-income producing assets, and to protect the fiscus by prohibiting the deduction of expenditure by a taxpayer that does not carry on a trade.

In light of the proposed withdrawal of PN31, National Treasury proposed in the Draft Taxation Law Amendment Bill of 31 July 2023 that a new provision, section 11G, be inserted in the ITA. The initial iteration of section 11G that National Treasury proposed would have significantly limited the scope of interest deductions outside the ambit of section 24J and, hence, the draft provision was strongly criticised by stakeholders at large.

Following consultation between National Treasury and stakeholders, the provisions of section 11G were (in our view favourably) revised to allow as a deduction from the income of any person, interest incurred by that person to the extent that the interest – is incurred in the production of interest income that is included in the income of that person; and is not incurred in carrying on a trade.

Section 11G comes into effect on 1 January 2025 in respect of years of assessments commencing on or after that date. In the interim, PN 31 will remain in effect until this newly proposed effective date.

Taxpayers relying on PN31 to secure interest deductions are urged to consider the impact of the withdrawal thereof and the introduction of section 11G on their funding arrangements so as to ready themselves for this new regime.

If you wish to discuss these topics, please contact: **WTS Renmere**

## 7 Zambia: Expanding on Zambian Tax Updates

Zambia's journey towards a more efficient, inclusive, and digitally advanced tax system is marked by significant legislative changes and policy introductions. At the heart of these reforms is the introduction of an Electronic Invoicing System mandated for recording sales for income tax purposes. This innovative move aims to enhance transparency and efficiency in tax administration, reflecting Zambia's commitment to aligning with the global shift towards digitalization. The system not only streamlines the process of tax collection but also provides for flexibility. The Commissioner-General is empowered to approve alternative systems or exempt certain businesses based on their capabilities and needs, ensuring that the system accommodates various business landscapes.

In a significant stride towards alleviating the financial burden on consumers, Zambia has also exempted mains water and sewerage services from VAT. This exemption lowers the cost of these essential services, making necessities more accessible to the general populace. The move is a testament to the government's dedication to improving living standards and addressing the direct needs of its citizens, highlighting a prioritization of welfare in fiscal policies.

Further bolstering its commitment to education and the digital economy, Zambia has suspended excise duty on internet services supplied to registered public higher education institutions. This policy is designed to break down barriers to digital access in education, allowing students and academic institutions to leverage online resources for learning and research more affordably.

Addressing the fairness in taxation, the Zambian government has streamlined the procedure for the refund of overpaid Pay As You Earn. This systematic approach enables taxpayers to reclaim any excess amounts paid, ensuring individuals are not excessively burdened by taxation errors. Such measures reinforce the government's commitment to equitable taxation and safeguard against undue financial strains on its citizens.

Lastly, Zambia is fostering an inclusive workforce through the administration of disability credits and deductions for employers who hire persons with disabilities. This policy not only encourages the employment of disabled individuals but also offers tangible benefits to businesses that support this cause. It's a clear signal of Zambia's dedication to enhancing workforce diversity and promoting an inclusive society.

If you wish to discuss these topics, please contact: **WTS Tax Matrix**

# 8 Zimbabwe: Intensifying Domestic Resource Mobilisation

Zimbabwe has embarked on a significant reform of its fiscal policies concerning the mining sector, introducing amendments to the Finance Act effective January 1, 2024. These changes, focusing on the collection of mining royalties and the imposition of a special capital gains tax on mining titles, signify a pivotal shift in the country's approach to harnessing its mineral resources for national development.

The amendment to the Finance Act introduces a mechanism for collecting mining royalties, emphasizing the timely remittance of these royalties to the Zimbabwe Revenue Authority. Notably, the amendments entail the accrual of interest on late payments and the authorization of specific agents, including the Minerals Marketing Corporation of Zimbabwe and the Reserve Bank of Zimbabwe, to collect and safeguard mineral royalties. This new framework aims to enhance the efficiency and security of royalty collection, ensuring that the benefits of Zimbabwe's mineral wealth are accurately captured and contribute to the national treasury.

Parallelly, the introduction of a special capital gains tax on the acquisition or transfer of mining titles presents a targeted effort to leverage the economic potential of the mining sector. This tax, applicable to entities with an international element, is calculated on the transaction value rather than the gain, marking a significant departure from traditional capital gains tax structures. The special capital gains tax, set at a standard rate of 20% with a reduced rate of 5% for approved transfers, aims to ensure that a fair share of the profits from high-value mining assets benefits the country. The tax's retrospective application, covering transactions within the ten years preceding its implementation, introduces administrative challenges but underscores the government's commitment to recouping benefits from mining activities.

For mining companies and other entities involved in the mining sector, these legislative changes introduce a landscape of increased regulatory obligations and potential financial implications. The need for careful strategic planning and compliance is paramount, as the government seeks to balance revenue generation with the attraction of investment into the sector. Entities must navigate these changes with a clear understanding of their liabilities and the operational impact of both the revised mining royalty's framework and the special capital gains tax.

In essence, Zimbabwe's legislative reforms in the mining sector reflect a strategic move towards a more regulated, transparent, and beneficial exploitation of its mineral resources. As Zimbabwe continues to position its mining sector as a cornerstone of economic development, these reforms mark a critical step in ensuring that the nation capitalizes on its natural resources in a sustainable and equitable manner.

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