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Newsletter

MBAYA AND ASSOCIATES

December 2020 | Issue 066 | Volume 6

Introduction

Warm greetings from all us at M&A!

We hope you and your families have been well. We still remind you to continue keeping safe during unprecedented times.

We are pleased with the fruitful engagements that we have had throughout the year. Being the last edition of the tax newsletter in 2020, we take the opportunity to thank you for taking the journey with us. We take this time to wish you and your loved ones a Merry Christmas and a happy festive season.

On the right column of the newsletter you will find contact details for the senior members of our team who can help answer any questions you may have about the issues highlighted in this newsletter or any other matter.

We are interested in your feedback on the items covered and what topics you would like covered in the future.

Please provide any feedback at tax@mbaya.co.ke

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» From the **TaxDesk** »

Return of Pre-Covid 19 Tax Rates

Through a press statement dated Friday 4th December 2020, the treasury has announced that it will move to parliament to cease some of the tax relieves that were put in place to cushion taxpayers from the adverse effects of Covid 19. They propose that the measures will come to an end on 31st December 2020. Some of these measures are:

- The corporate tax rates will revert to 30% from the current 25%
- The Individual tax rates will revert to 30% from the current 25%
- The Value Added Tax rate will revert to 16% from the current 14%

The rates above will be effective from 1st January 2021: All the other tax rates remain the same including exempting all low income earners of Kshs. 24,000 and below.

Costs on Solar Energy

Solar power is usable energy generated from the sun in the form of electric or thermal energy. Solar energy is a clean, relatively inexpensive, renewable power source that can be harnessed throughout the country.

The cost of harnessing and using solar energy has fallen substantially in the last few years due to an increase in solar panel efficiency. Additionally, the cost is further reduced depending on different countries and different tax regimes. Several tax regimes offer various rebates or incentives for solar power lowering the cost of solar energy even further.

In Kenya, the Value Added Tax Act No 35 of 2013 stipulates that specialized equipment for the development and generation of solar and wind energy, including deep cycle batteries which use or store solar power are exempted from VAT.

However, with effect from 7th November 2019, The Finance Act 2019 made it a requirement that a recommendation be sought from the cabinet secretary responsible for energy matters before such exemption is processed. This is a key measure to ensure such exemption is not subject to misuse.

Consequently, due to the above restriction, it is likely that the suppliers of the above products will pass the VAT element to the final consumer hence increasing the cost of the solar energy equipment.

Tax Refund

A tax refund is a reimbursement of excess tax paid or tax paid in error in a given period. It arises when the tax liability is less than the tax paid.

There are different types of refunds include:

- Value Added Tax (VAT)
- Income Tax,
- Excise duty
- Stamp duty

However, **Income Tax** and **Value Added Tax (VAT)** are the two main refunds most common with many taxpayers. In this issue, we discuss the income tax refund for individuals and VAT refunds for organizations.

Income Tax Refund

Tax refund requests are unusual for individuals, ordinarily for people in employment the employer usually deducts PAYE at source and for self-employed people the tax is paid after self-assessment.

An Income Tax refund arises in case an employer fails to grant relief to an employee who has an **insurance policy** or a **mortgage on owner occupied property**.

- Relief on insurance policies is only considered where it arises from the employee's education and life policies.
- For an individual with a mortgage to qualify for a tax relief, the mortgage should be from specific financial institutions as listed on the 4th schedule on Income Tax Act.

An income tax refund can also arise where a taxpayer has not been granted a personal relief during the year. Additionally, a tax refund arises where tax deducted at source is in excess of the final liability.

The claim for tax refund is applied online. The documents required include tax a deduction card (Form P9) for claims relating to excess PAYE deductions, insurance policy certificates for claims relating to insurance relief, mortgage certificate from a financial institution for claims relating to interest on mortgage and withholding tax certificates for claims relating to tax deducted at source.

A refund claim should ordinarily be made immediately after filing a tax return for the respective year.

Upon approval or rejection of a claim, the taxpayer automatically receives an approval order or rejection order respectively via email.

Where a claim is fully supported in all aspects, it is processed within 90 days from the time of lodgement.

VAT Refund

Cases that result in VAT refunds include tax paid in error on any supply, bad debt, excess input tax resulting from zero rated supplies and overpayments or credits resulting from Withholding VAT.

- In the case of tax paid in error, the claim should be lodged within 12 months from the date the tax was paid.
- In the case of a bad debt, a tax refund is paid to a VAT registered business person who has accounted and paid tax on a supply but has not received any payment after a period of three years from the date of that supply.

Claims for refund for bad debt should be made within five years after which it becomes time barred.

However, if the person recovers the tax from the recipient of the supply after receiving the refund, the tax should be paid within 30 days after the recovery date.

Currently, processing of tax refunds is taking longer due to the numerous claims lodged by the taxpayers as well as the verification process.

Tax Alert

High Court Ruling on VAT on Exported Services

In our February 2019, we highlighted a ruling by the high court delivered a judgment on 21 December 2018 where the court ruled in favor of the appellant. Following the same precedent, the high court has ruled on another case between KRA and CCCEWA, a judgement delivered on 23rd November 2020.

Background of the case

The Value Added Tax Appeals Tribunal ("the Tribunal") ruled that marketing services provided by Coca Cola Central East and West Africa Ltd ("CCCEWA" or "the Appellant") to a foreign affiliate did not qualify as services exported out of Kenya. The Tribunal therefore declared the Appellant's services subject to Value Added Tax (VAT) at the applicable standard rate (16%).

Summary of facts of the case

CCCEWA is an affiliate of the Coca Cola Group and its principal activity is the provision of marketing, advertising, and support services in respect of the Coca Cola brands in Kenya and a number of other African countries.

CCCEWA provided the said services on behalf of and under a contract with Coca Cola Export Corporation (based in USA). CCCEWA considered its services as exported (provided for use or consumption outside Kenya) and therefore zero-rated under Kenyan VAT law.

The Kenya Revenue Authority ("KRA" or "the Respondent"), following an audit of the Appellant, sought to assess additional VAT of KES 516 million on grounds that the Appellant's services do not qualify as services exported out of Kenya and should attract VAT at the general rate.

The main issue for determination before the Tribunal was whether the Appellant's services qualified as exports and therefore zero-rated. Both the Appellant and the Respondent relied on the provisions of the VAT law, the organization for Economic Co-operation and Development (OECD) Guidelines on International Goods and Services Tax (GST)/VAT and applicable regulations. Both parties also adduced various case laws to support their submissions.

The VAT Appeals Tribunal ruled in favor of the Respondent, holding that the services provided by CCCEWA were used or consumed locally and should therefore attract VAT at 16%. The Tribunal was of the view that it was the viewers, readers, or listeners of the media advertisement in Kenya who qualified as users or consumers of the Appellant's services.

Aggrieved by the Tribunal's findings, CCCEWA appealed at the High Court.

The High Court's ruling

The High Court ruled in favor of the Appellant that the services it provides qualify as exported and therefore zero-rated for VAT purposes in Kenya. The High Court relied on the OECD Guidelines on International GST/VAT to overturn the Tribunal's decision.

Our view

It is in our view that the High Court's determination on this matter aligns with international best practice and provides the much-needed clarity for multinational entities that have established service in Kenya. The ruling is also in line with another ruling of the same nature of services delivered in December 2018 between the respondent (KRA) and the airfreight company.

From the ruling, it is clear that that the location where services are provided does not determine the question of whether the services are exported or not. Rather the intended beneficiary of the services matters. Since the consumption of the services is outside Kenya, therefore the services are zero-rated under Kenyan VAT law.

The position taken by the KRA on "export of services" has often led to disputes with taxpayers and we hope that this determination sets a precedent on the VAT treatment of internationally traded services for taxpayers using similar models. It is hoped that the various disputes that have arisen between taxpayers and the KRA on the VAT treatment of services will be resolved in line with the ruling, and that pending VAT refund claims that the KRA had halted processing pending determination of the Coca Cola case will also be dealt with expeditiously.

Tax Due Dates

Withholding Tax | 20th Day of the following month
Pay as You Earn | 9th Day of the following month
VAT | 20th Day of the following month
Balance of Tax on Self-Assessment | 4th Month after year end
Monthly Rental Income | 20th Day of the following month



Instalment Tax

1st Instalment | 20th day of the 4th month after year end
2nd Instalment | 20th day of the 6th month after year end
3rd Instalment | 20th day of the 9th month after year end
4th Instalment | 20th day of the 12th month after year end
Kindly note that all the returns must be filed on I tax while the payments e-slips must be generated from the I-Tax platform.

Disclosure of Company Beneficial Ownership

Earliest date to be entered in the register of BOs | 21st day of February 2020
Deadline date for disclosure of company beneficial ownership | 31st day of January 2021

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