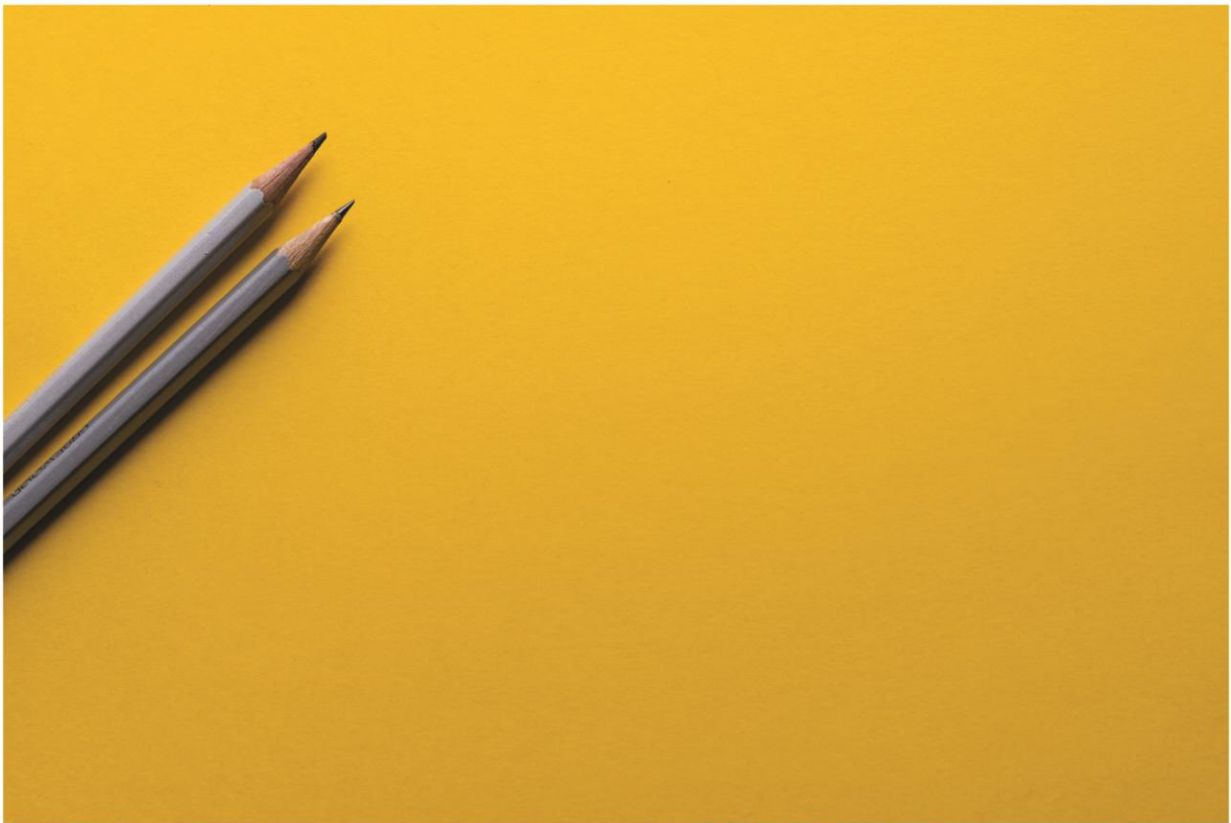




OVER 40 YEARS OF ACCOUNTING EXCELLENCE



Amnesty on Voluntary Tax Disclosure



Taxation of Subsidiaries and Branches .3



Disclosure of Company Beneficial Ownership in Kenya .4



Tax Due Dates .5



Newsletter

MBAYA AND ASSOCIATES

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Introduction

Warm greetings from all us at M&A!

We hope you and your families are keeping safe during these Covid times. We are pleased by the fruitful engagements that we have had in our previous editions of our newsletter.

We now release our eleventh edition of the year 2020 tax newsletter. The newsletter covers recent developments in tax and secretarial regimes in Kenya which aims to keep you current and updated.

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

In this issue



From the Tax Desk

Amnesty on Voluntary Tax Disclosure » 1

Taxation of Subsidiaries and Branches » 2

Disclosure of Company Beneficial Ownership in Kenya » 3

Tax Due Dates » 5

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» From the **TaxDesk** »

Amnesty on Voluntary Tax Disclosure

The Tax Procedures Act (TPA) 2015 has been amended by inserting a new section (37D) known as Voluntary Tax Disclosure Programme, which shall be for a period of three years with effect from 1st January 2021.

This is a programme where a person discloses tax liabilities to the Commissioner for the purpose of being granted relief of penalties and interests on the tax disclosed.

A person with tax liability will apply to the Commissioner for relief in the prescribed form with respect to tax liabilities accrued within a period of 5 years prior to 1st July 2020 (i.e. 1st July 2015 to 30th June 2020)

A person granted relief by the Commissioner under this section shall not be prosecuted in respect to the tax liability disclosed, and where the disclosure is made and tax liability paid in the:

- a. First year of the programme, a full remission of interest and penalties is granted.
- b. Second year of the programme, 50% remission of interest and penalties is granted.
- c. Third year/ Final year of the programme, 25% remission of interest and penalties is granted.

The application shall be voluntary and all material facts are disclosed. Where the Commissioner is satisfied with the facts disclosed in the application, he shall grant the relief applied for provided the relief shall not result in payment of a refund to the applicant.

Where the relief is granted, the Commissioner shall enter into an agreement with the person setting out the terms of payment of the tax liability and the period within which the payment shall be made which shall not exceed one year from the date of the agreement.

Where a person fails to meet the terms of the agreement, that person shall be liable to the full interest and penalty that had been remitted under the agreement.

A beneficiary of the relief shall not seek any other remedy including the right to appeal with respect to the taxes, penalties and interest remitted under this section by the Commissioner.

Where, before the expiry of the agreement between the Commissioner and the person, the Commissioner establishes that the person failed to disclose a material fact in respect of the relief granted, the Commissioner may:

- a. Withdraw any relief granted.
- b. Assess and collect any balance of the tax liability, or
- c. Commence prosecution.

A person aggrieved by any of the decision of the Commissioner as highlighted above, may appeal against the decision.

The amnesty on Voluntary Disclosure Programme is not applicable to:

- a. A person who is under audit, investigation or is a party to ongoing litigation in respect of the tax liability or any matter relating to the tax liability.
- b. A person who has been notified of a pending audit or investigation by the Commissioner.

The disclosure of a tax liability under this section shall be confidential.

Taxation of Subsidiaries and Branches

According to the Companies Act, 2015 a subsidiary is a company of which another company is its holding / parent company. A holding (parent) company is that which:

- a. Controls the composition of that other company's board of directors;
- b. Controls more than half of the voting rights in that other company;
- c. Holds more than half of that other company's issued share capital; or
- d. Is a holding company to that which is another company's holding company.

A subsidiary is a separate legal entity that runs independently from the parent company. Subsidiaries are therefore taxed according to the tax laws governing the country in which they are incorporated.

The rate for Corporate Income Tax (CIT) for subsidiaries is 25% currently regardless of whether the holding company is local or foreign. However, the tax rate above can change if there will be a change in the tax law to effect the change in the future.

A branch on the other hand is a secondary establishment of the parent company. The parent has 100% ownership interest in the branch. Branches are therefore dependent on the parent and do not have a separate legal personality. As such, branches are taxed at either 25% or 37.5% depending on whether the parent company is local or foreign, respectively. Branches of non-resident companies are taxable on all their incomes derived from or accrued in Kenya. In determining the profits of a branch, royalties, interest or management and professional fees paid to the head office are not tax deductible. These payments are also not subject to withholding tax (WHT).

Below is a brief summary of the above:

Tax treatment	Subsidiary	Branch
Legal personality	Separate & distinct from parent	An extension of the parent
Corporation income tax	Tax rate of 25%	Tax rate of 25% (if the parent is resident) or 37.5% (if the parent is foreign)
Income subject to tax	All business income	Income derived in Kenya
Withholding tax on payments made to parent company	Subject to WHT	Not subject to WHT but if parent is foreign, its subject to WHT at 20% or at a rate indicated in the DTT between Kenya and the foreign country
Tax deductibility of payments to parent company	Are tax deductible, subject to applicable rules such as transfer pricing, thin capitalization, etc.	Not tax deductible.

Disclosure of Company Beneficial Ownership in Kenya

Kenyan companies are now required to submit details of their beneficial owners (BO) to the Registrar of Companies (ROC). In 2019, the Companies Act, 2015 was amended to introduce a requirement for every company to maintain a register of its beneficial owners and to submit a copy of this register to the Registrar. In February 2020, Companies (Beneficial Ownership Information) Regulation 2020 was published and the submission of the register with the ROC became operational from 13 October 2020.

Beneficial Owner

The Companies Act 2015 defines a Beneficial Owner to mean the natural person who **ultimately owns** or **controls** a legal person or legal arrangement or the natural person **on whose behalf** a transaction is conducted, and includes those persons who exercise **ultimate effective control** over a legal person or legal arrangement.

The BO regulations set out four criteria below for the identification of a BO:

- Holds at least 10% of the **issued shares** in a company either directly or indirectly.
- Exercises at least 10% of the voting rights in the company either directly or indirectly.
- Holds a right, directly or indirectly, to **appoint** or **remove a director** of the company.
- Exercises **significant influence** or **control**, directly or indirectly, over the company.

Reportable BOs

To establish the chain of control within a Kenyan company, the BO particulars of the following Local/Foreign persons would require to be established and only the particulars of individuals are to be entered in the register of BOs:

- Companies limited by shares
- Limited partnerships
- Companies limited by guarantee
- Trusts
- State owned enterprises
- Individuals
- Limited liability partnerships

Information required

The register of beneficial owners should contain particulars of each beneficial owner as follows:

- Full Name
- Birth certificate number, ID / Passport number
- Nationality
- Date of birth
- Postal, business and residential address
- Telephone No & email address

- Occupation / Profession
- PIN Certificate
- Passport Photo
- Nature of ownership or control
- Date when the natural person became a beneficial owner of the company
- The date on which any person ceased to be a beneficial owner
- Any other relevant detail the registrar may require from time to time

Register of Beneficial Owners

Every company in Kenya, where ownership or control in a company is exercised through direct or indirect chain will have to prepare and maintain a **register of beneficial owners**. All companies are required to submit a copy of their beneficial ownership register within 30 days of its preparation on to the E-Register of ROC.

It is now also compulsory for new companies to provide these details at the time of incorporation.

The company should take reasonable steps to ensure that the register of BO is prepared in good time and kept up-to-date.

Any changes in the register of BOs should be filed with the registrar within 14 days of the change by filing an 'amended register of beneficial owners'.

Implications

If a company fails to comply, the company, and each officer of the company who is in default, commit an offence and on conviction are each liable to a fine not exceeding Kenya Shillings five hundred thousand (KES 500,000) for a first offence and an additional fine of KES 50,000 per day for continuing non-compliance.

Failure by the beneficial owner to provide the required details within 14 days of the company's request will result in the company restricting the shares' voting rights and board rights of the non-compliant beneficial owner.

If not complied with, the company has the authority, under the Regulations, to serve a warning notice to the beneficial owner requesting them to comply with the notice within 14 days, or the interest of the beneficial owner in the Company will be restricted.

Disclosure & Access to BO particulars

The register of BO particulars should only be accessed by the officers of the company and competent authorities upon submitting a written application for the same.

The Company shall not disclose the information except for the purposes of communicating with the Beneficial Owner and for the purposes of complying with the Regulations or to comply with a court order.

The Registrar of Companies is also obligated to keep the information confidential and shall only make the information available to a competent authority upon written request.

Effective date and Deadline

The earliest date to be entered in the register of BOs is 21st February 2020 – the date the regulation came into effect. While the current compliance cutoff date is 31st January 2021.

Actions required

Companies should now begin identifying the natural persons that constitute beneficial owners of the company and consider the basis of classification.

The required particulars under the Regulations must include a statement of the nature of the interest

We at Mbaya & Associates are more than willing to assist in fulfilling this compliance requirement. You can kindly contact our company secretaries' team for any further clarification and assistance in preparing the registers and submission to the company registry.

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

DISCLAIMER: This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, Mbaya & Associates, its members, employees and agents do not accept or assume any liability, responsibility or duty of care for any consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.