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# Newsletter

MBAYA AND ASSOCIATES

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## Introduction

Warm greetings from all of us at M&A

We hope you and your families had a nice Easter break and are keeping safe during this partial lockdown. We are pleased with the lively and fruitful engagements we had in the previous editions of our newsletter. We now release our fourth edition for the year 2021 tax newsletter.

*The newsletter covers recent updates on minimum tax payable by entities that have a December year end, withholding taxes on management or professional fees between Kenya and South Africa entities, and an important article on believing in yourself during this uncertain and difficult time associated with Covid-19.*

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 any topics you would like to see featured in upcoming issues of the newsletter.

Please provide any feedback at [tax@mbaya.co.ke](mailto:tax@mbaya.co.ke)

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## » From the **TaxDesk** »

### *Approaching Deadline for Payment of First Minimum Tax Installment*

Minimum Tax is a new tax that was introduced by the Finance Act 2020 and came into effect on 1<sup>st</sup> January 2021. It is a base tax, meaning that it is payable regardless of whether or not a company is making profits.

An alternative to Installment Tax, Minimum Tax is only payable where the Minimum Tax payable is higher than the Installment Tax amount. Both taxes have the same due dates and are paid in installments by the 20<sup>th</sup> day of the 4<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> month after the year end.

*For companies with a December year end, the first Minimum Tax Installment falls due this month on 20<sup>th</sup> April. It shall be calculated as 1% of a company's gross turnover for the months of January, February and March.*

The Kenya Revenue Authority (KRA) cited expansion of the tax base as one reason for introduction of Minimum Tax. The Covid-19 pandemic has hit all sectors of the economy hard and the government is no exception. Despite expressions of displeasure from both the private and public sector, the KRA has proceeded to fully implement Minimum Tax. With the KRA actively trying to increase their revenue collection, we would like to urge all our readers to pay their Minimum Tax on time in a bid to be compliant and avoid any penalties that might be imposed for late or non-payment. It is good to note that the Kenya Association of Manufacturers (KAM) have taken the minimum tax matter to court to appeal this section of the law. We will keep a close eye on the developments of the case and we will inform our client the next step of action.

### *Kenya Withholding Tax on Professional Fees not Payable if Charged to South Africa Entities*

Kenya entered into a Double Tax Treaty (DTT) with South Africa in 2010. The treaty was ratified and has been in force from 1<sup>st</sup> January 2015.

The Double Tax Treaty consists of various persons and taxes as captured under section 3(a) & (b) of the treaty. One of the covered taxes under the treaty is withholding taxes which were agreed at 10% across both countries.

In a case filed at the Tax Appeals Tribunal (TAT), a taxpayer, McKinsey and Company Inc. Africa Proprietary Limited, challenged an assessment raised by the KRA demanding withholding taxes on professional fees. KRA had concluded that withholding taxes on professional fees had been captured under Article 22 of the Kenya South Africa DTT. Article 22 of the treaty covers "Other Income" and it is this argument that the taxpayer challenged that KRA misinterpreted the DTT agreement.

In determination of the case, the TAT acknowledged the fact the Kenya-South Africa treaty did not have a specific article dealing with the taxation of management or professional fees. The TAT therefore noted that KRA failed to consider the provisions of Paragraph 77 of the OECD Commentary on Article 7 which provides for income by way of

management or professional fees to be taxed under business profits in the absence of a specific article dealing with the taxation of management or professional fees in the DTT.

In delivering its ruling, the TAT therefore relied on the guidelines as stated above and established that the fees paid to the South African entity fall within the ambit of business profits and were therefore not subject to withholding tax in Kenya.

Going with the above determination, the services constitute a business and Article 7 (i.e. Business Profits) of the DTT is the appropriate Article to determine whether Kenya or South Africa has the taxing right of such income. In this case, it was held that South Africa had the right to tax the professional fees, not Kenya.

The implication of this ruling is that it will put to rest the most unconventional interpretation of DTTs adopted by KRA. It sets precedence even on the other DTTs which do not have specific articles on specific taxes. This also enlightens taxpayers who have unknowingly continued to withhold taxes on such fees.

With time, it will be known whether the taxpayers who have been withheld such taxes before are eligible to apply for refunds on the wrongly withheld taxes.

It is not very clear if KRA will appeal the case to the High Court. We will keep a close eye on this issue and will keep updating our clients.



## Believe in Yourself

To succeed, you need a good attitude, a big dose of confidence, simplicity, flexibility, elegance and lots of positive things.

In his book, *Attitude 101*, John C. Maxwell says that a bad attitude compounds faster than a good attitude. He further notes that a bad attitude is more contagious than a good one. Maxwell further notes that people always project on the outside how they feel on the inside.

As a team leader, you require a team of talented people. However, talent is not an end in and of itself; talent must be accompanied by the right attitude if you want to succeed as a team.

Jack Canfield, in his book *'The Success Principles: How to Get from Where You Are to Where You Want to Be'* reminds us that what others think about you is none of your business. He quotes Venus Williams, Olympic gold medalist and professional tennis champion; you have to believe in yourself when no one else does. That's what makes you a winner. Canfield further notes that if having others believing in you and your dream was a requirement for success, most of us would never accomplish anything.

You need to base your decisions about what you want to do, on your goals and desires – not on the goals, desires, opinions and judgement of your parents, friends, spouse, children, co-workers etc. Michelle Obama said, "Never make decisions based on fear. Make decisions based on hope and possibility."



Canfield further says that most of the time, nobody is thinking about you at all. They are too busy worrying about their own lives, and if they are thinking about you at all, they are wondering what you are thinking about them.

A lot of time is wasted worrying about what other people think about your ideas, your goals, your clothes, your hair and your home. This time could be better spent on thinking about and doing the things that will achieve your goals.

Quit worrying what other people think about you and follow your heart.

**Note:** In our next issue, we will share some notes on **Capital Allowances**. Should you have any tax matter related to the topic that you would like to be addressed, please pass the question through [tax@mbaya.co.ke](mailto:tax@mbaya.co.ke) with a copy to [info@mbaya.co.ke](mailto:info@mbaya.co.ke)

## Tax Due Dates

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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 | 21<sup>st</sup> day of February 2020

Deadline date for disclosure of company beneficial ownership | 31<sup>st</sup> day of July 2021

### Digital Service Tax (DST)

20th day of the following month

### Minimum Tax

Applicable where minimum tax is higher than instalment tax payable

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

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