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Tax Alert

An issue to consider when investing into Africa is high withholding taxes imposed by many African jurisdictions.

An example in point is Kenya where the domestic rate of withholding tax is 20% on many payments made from Kenya. Such payments would include royalties, software and licensing fees, management fees, service fees, commissions, technical fees, and the like. The withholding tax on interest is 15% and that on dividends is 10%.

Double Taxation Agreements (DTA) are international agreements concluded between two jurisdictions to allocate taxing rights between two countries that have negotiated the particular DTA in question. The object of this is that such a DTA should avoid double taxation in the two jurisdictions.

Kenya has a fairly extensive DTA network. In terms of section 41 of Kenya's domestic tax legislation, **an exemption, exclusion or reduction** in the rate of Kenyan tax under a DTA is not available to a person, who, for the purposes of a DTA, is a resident in the other contracting state unless:

- more than 50% of the underlying ownership of that person is held by an individual or individuals who are residents of that other contracting state; or
- the resident of the other contracting state is a company listed on a stock exchange in that other contracting state.

It is clear that section 41 limits any potential relief in terms of Kenya's DTA's unless one of the two requirements above is met. Taxpayers investing in Kenya should therefore not automatically assume that they will qualify for DTA relief, including reduction of the withholding tax rates for the various types of payments.

A point of consideration is whether this restriction (introduced by the Finance Act, 2014) is contrary to Article 2(6) of the Constitution of Kenya, which specifies that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the

Constitution. However, it may be unwise to rely upon this interpretation until the matter has been properly determined by the Kenyan courts since tax penalties may be substantial in Kenya.

Every African jurisdiction has its particular quirks or challenges and advice should be sought before making investment decisions and deciding how best to extract profits from a particular jurisdiction. Hogan Lovells South Africa has a trusted network in Africa where we manage such issues from South Africa on behalf of our multi-national client base.

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